

No. 12978

Supreme Court of Illinois

Durham

vs.

Brown

71641  7

STATE OF ILLINOIS

SUPREME COURT

Third Grand Division

No. 65.

Durham
vs

Brown

978

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION,

APRIL TERM, 1860.

E. A. DURHAM, }
vs. } *Error to De Kulb.*
J. L. BROWN. }

THE answer to the first error assigned is, that by an act of the Legislature of this State, there was a legal term of the Court in February. Acts of 1859, p 62.

The fact that the February term was not held by the Judge, did not abolish the February term; 13 Ill., 671.

The answer to the second error is, that the record does not present the question. The judgment is one of the Circuit Court, rendered on the 14th day of June, regular in form, and the proceedings are certified by the clerk to be those of the Court. The warrant of attorney, affidavit, and note form no part of the record, and there is no bill of exceptions. 13 Ill. 397. The Court being one of general jurisdiction, everything is to be intended in favor of its authority to render the judgment, and it is to be presumed that the judgment was rendered at a term called by the Judge. The law authorizes the Judge to order a special term, and although the record may not recite that he had made such an order, this is to be presumed till the contrary appears. We think the decision of the Court in the case of *Cook vs. Skelton*, 20 Ill. 110, must have been the same in principle, though the fact of the order of the Judge having been made had been recited.

We insist also, that although the Clerk may not be a judicial officer, yet the judgment entered before him by the contract of the parties would be good. 1 Mis. 512. See, also, 4 Mis. 402, ~~when~~ the Judge who dissented in the former case delivered the opinion. 2 Eng. 399, The record in this case recites that the execution of the power of attorney was proved.

The power to confess in vacation before the Clerk will be found in Scates' Statute, p. 637, § 2.

As an answer to all the errors, we say that the defendant below having by his attorney waived them, cannot here assign them and insist upon them. He is estopped by his contract.

Whether the judgment was confessed before the date of the note expired, is not in the case; there is no bill of exceptions preserving the evidence. A note in this State may be sued the day after maturity. 14 Ill. 55.

There is no consideration apparent for the extension of time on the note, and the time of its maturity has not, therefore, been shown to have been extended.

E. S. LELAND and
E. L. MAYO,
For Defendant.

This judgment was confessed
by an attorney of this County
Dec 4. Eng. 428

not

where

65-74
C. A. Newman

J. L. Brown

Brief

~~Filed Apr 26, 1860~~

Filed Apr 26, 1860
Admiral
Clark

Lawrence & Mayo,
In Dep.

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION,

APRIL TERM, 1860.

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vs. } Error to De Kalb.
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E. S. LELAND and
E. L. MAYO,
For Defendant.

This might be confessed
by an Act of the Court
See 4 Eng 428
not

where

⁶⁵⁻
E. A. Sturham

^{or}
J. L. Brown

Keefe's Brief

Filed Apr 26, 1860

L. L. Daniel
Clerk

Shaw & Mayo
in case

STATE OF ILLINOIS, SUPREME COURT,

THIRD GRAND DIVISION,

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E. S. LELAND and
E. L. MAYO,
For Defendant.

This case was confessed by an Atty of the County See 4 Eng 428

not

where

E. A. ⁶⁵⁷Sturtevant

vs.

H. L. Brown,

deft vs Brief

Filed Apr 26, 1860

L. Leonard

clerk

L. Leonard & Mayo

for deft,

STATE OF ILLINOIS,
SUPREME COURT,

To the Clerk of the

} ss. The People of the State of Illinois,
Court for the County of De Kalb Greeting:

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of De Kalb County, before the Judge thereof, between Jeremiah L. Brown

plaintiff, and ~~Edward~~ A. Durham

defendant, it is said manifest error hath intervened, to the injury of the aforesaid defendant

as we are informed by his complaint 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. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 21st day of July in the Year of Our Lord one thousand eight hundred and fifty-nine.

L. Lelcan

Clerk of the Supreme Court.

by J. B. Rie De July



⁶⁵
Ethan A Durham
vs
Jeremiah S. Brown

Writ of error

This writ of error is made
a supersedeas and as such
must be obeyed by all
concerned -

L. Leland Clerk
by J. B. Rice Deputy

Filed July 21. 1859
L. Leland Clerk
by J. B. Rice Deputy



State of Illinois }
de Kalb County } ss.

James Merriman
doan first having
been duly sworn
on oath says

that he is and for the last ~~ten~~ ^{ten} years has been a resident of said County & State. that William R. Durham is and for ~~that length of~~ ^{that length of} ~~time~~ ^{time} has been his neighbor that the said Wm R. Durham is the owner of a good farm in this County beside a large amount of personal property notes &c. that this deponent is as well acquainted with the circumstances of said Wm R. Durham as one neighbor is, usually acquainted with the circumstances of another and this deponent has good reason to believe and truly does believe that the said William R. Durham is worth one and above all liabilities from six thousand to ten thousand dollars. and further this deponent soath not.

James Merriman

Subscribed and sworn to before me
this 20th day of July A.D. 1879.

Julius C. Chapman
Justice of the Peace

Edward A. Durham
no 65

James H. Brown
Affidavit of Justice

Filed July 20 1887
L. Leland
Clerk

United States of America
State of Illinois
County of DeKalb

after a
term of the Circuit Court of the County of De-
Kalb, began and held at the Court House in Sycamore
in said County and State on the first Monday (the
same being the fourth day) of October in the year of
our Lord one thousand eight hundred and fifty eight
and of the year of the Independence of the United States
the eighty third.

Present: the Honorable Isaac F. Wilson Judge
E. S. Joslyn States Atty
Silas J. Spear Sheriff

Attest

James W. Levenson, Clerk

Be it remembered, that on the
14th day of June 1859, the
the Clerk of the Circuit Court in Declara-
tion, which, with the endorse- thereon is
in the words and figures of law is to say:

State of Illinois
County of DeKalb
In vacation after the February
Term of the DeKalb County Cir-
cuit Court A.D. 1859

" Jeremiah L. Brown, Plaintiff, by E. Kellum his
 " Attorney complains of Ethan A. Durham, De-
 " fendant in a plea of Assumpsit.

" For that whereas the said Defendant on the
 " twelfth day of December 1858 from Los
 " Angeles County California sent to the Plaintiff
 " one thousand and six hundred and seventy
 " nine dollars and seventy cents, certain
 " promissory note bearing interest at the rate of
 " ten per cent per annum, and then and there
 " to Abram N. Kipp, and thereupon the said
 " said Abram N. Kipp, or order six hundred and seventy
 " nine and 7/10 Dollars, with interest at the rate of ten per
 " cent per annum, being for borrowed money, one
 " year after the date thereof for value received, and
 " the said Abram N. Kipp then and there endorsed the
 " same to the Plaintiff whereof the said Defendant then
 " and there had notice, and then and there in con-
 " sideration of the premises promised to pay
 " the amount of the said note to the said Plaintiff
 " according to the tenor and effect thereof

" But the said Defendant has neglected his
 " said promise, and has not paid the said mon-
 " ey nor any part thereof to the said Plaintiff
 " nor of one cent thereof, and therefore
 " he brings suit.

" E. Kellum
 " Plaintiff's Attorney

" Filed June 14, 1859. J. A. Severing, Clerk.

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And afterwards, to wit, on the said 14th day of
June, 1859, there was at the office of the
Clerk of the Circuit Court certain prom-
issory Note, with [unclear] of [unclear] up [unclear]
ment thereon, the [unclear] Note.
Letters of Attorney [unclear] are in
the words and figures following:

United States of America
State of Illinois
County of DeKalb

after a
term of the Circuit Court of the County of De-
Kalb, began and held at the Court House in Sycamore
in said County and State on the past Monday (the
same being the fourth day) of October in the year of
our Lord one thousand eight hundred and fifty eight
and of the year of the Independence of the United States
the eighty third.

Present: the Honorable Isaac H. Wilson Judge
E. S. Joslyn States Atty
Silas Juppman Sheriff

Attest

James W. Loverngr. Clerk

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14th day of June 1859, the
the Clerk of the Circuit Court in Declara-
tion, which, with the outburst, thereon is
in the words and figures of, is to say:

" State of Illinois
" County of DeKalb
In Vacation after the February
Term of the DeKalb County Cir-
cuit Court A.D. 1859

" Jeremiah L. Brown. Plaintiff. by C. Kellum his
 " Attorney complains of Ethan A. Durham. De-
 " fendant in a plea of Assumpsit.

" For that whereas the said defendant on the
 " twelfth day of December 1858 gave to the said
 " one thousand & six hundred & sixty at
 " Syracuse in the County of Madison State of New York
 " promissory note bearing date the 12th day of December
 " year last aforesaid, and then and there received the same
 " to Abram N. Kipp, and thereby caused to pay to the
 " said Abram N. Kipp, or order six hundred & seventy
 " nine & 10/100 Dollars, with interest at the rate of ten per
 " cent per annum, being for borrowed money, one
 " year after the date thereof for value received, and
 " the said Abram N. Kipp then and there endorsed the
 " same to the Plaintiff whereby the said Defendant then
 " and there has notice, and then and there in con-
 " sideration of the premises promised to pay
 " the amount of the said note to the said Plaintiff
 " according to the tenor and effect thereof

" But the said Defendant has negatived his
 " said promise, and has not paid the said sum
 " or any part thereof to the said Plaintiff
 " of one thousand & six hundred & sixty
 " he brings suit

" C. Kellum
 " Plaintiff's Attorney

" Filed June 14, A.D. 1859. J. A. Severing. Clerk.

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"\$679⁸⁰/₁₀₀"

Sy camore December 12th 1856

" One year after date, for value received, I promise
 " to pay Abram H. Kipp, or order, the sum of
 " and Seventy nine ⁸⁰/₁₀₀ Dollars with interest at the
 " rate of ten per cent annum on the principal
 " money.

" Know all men by these presents that whereas
 " I the subscriber am justly indebted unto A. H. Kipp upon
 " a certain promissory note bearing even date herewith
 " for the sum of Six hundred and Seventy nine ⁸⁰/₁₀₀
 " Dollars, made payable to said A. H. Kipp or order and
 " due one year after the date hereof with interest at ten per
 " cent per annum. Now therefore in consideration of the
 " premises And of the sum of one dollar ^{to me} in hand paid
 " the receipt whereof is hereby acknowledged I do hereby
 " make constitute and appoint A. C. Allen or any Attorney
 " of Any Court of Record to be my true and lawful
 " Attorney irrevocably for me and in my name place
 " and stead, to enter my appearance in any justice
 " of the Peace or in any Court of Record in any of the
 " States or territories of the United States or elsewhere
 " either in Term or in vacation at any time
 " from and after the date of the execution of the
 " said A. H. Kipp his appearance and A. H. Kipp
 " upon the said note with interest thereon at the rate
 " aforesaid and Twenty five Dollars Attorneys fees.
 " And my said Attorney is also Authorized in my behalf

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" to file a Cognovit for the amount that may be so
" due. with an agreement therein that no writ of error
" or appeal shall be prosecuted nor any bill in
" Equity filed to interfere in any manner with the
" Operation of any judgments that may be entered
" by virtue hereof and also that no errors that
" may intervene in the entry of any judgments
" or issuing execution thereon shall be a ground for
" ratifying and confirming any such judgment
" said Attorney may do by virtue of and for the consid-
" eration above mentioned I do hereby further stipulate
" and agree that all right Interest or benefit accruing
" to me by virtue of an Act of the General Assembly of the
" State of Illinois Entitled. "Act to exempt homesteads from
" sale on execution" Approved February 11th A.D. 1857 is
" hereby waived and released. And any property
" which I now hold. or may hereafter acquire.
" which would be exempt from levy and sale
" on execution by virtue of said Act is hereby made
" subject to such levy and sale by virtue of this Agreement
" the same as though such Act had not passed
" Witness my hand and seal this 12th day of Dec. A.D. 1856
" In presence of
" A. K. Stiles
" Without recour to me
" Rec^d on the within amount up to this date
" December 12th 1857 and extended from the date there-
" = off Dec 12th 1857

6 " Payment of this date is extended till the Twelfth
" day of June 1859

" Filed of
" of the County of DeKalb
" Clerk "

And afterwards on the 24th day of June
AD 1859, there was filed in the Clerk of the Court
of the said DeKalb County Circuit Court, a cer-
tain "Cognovit" or Confession of Judgment, which
said Cognovit is in the words and figures fol-
lowing to wit:

" DeKalb County Circuit Court "

" State of Illinois } Low Vacation after
" DeKalb County } February Term AD 1859.

" Ethan A. Durham }

" ats } Cognovit
" Jeremiah L. Brown }

" And } ~~Exhibits~~
" Ethan A. Durham } before the Court when his

" Attorney comes, } and says

" when so, and when so, and says

" that he cannot deny the said Plaintiff, nor

" the said Plaintiff, nor the said De-

" fendant did undertake and promise, in

" manner and form as the said Plaintiff

" hath above thereof declared against him

"nor but that the said Plaintiff has sustained
"damages by reason of the non-performance
"of the said several promises and undertakings
"aforesaid including the sum of Twenty
"five dollars for his and his Attorney's
"fees for entering up the said Judgment
"Amount of Eight hundred and
"Twenty three dollars and a Charge
"by the said Plaintiff in and for the
"to be taxed. And the said Defendant
"to immediate Execution being given on the judg-
"ment herein rendered, and release all errors in
"these proceedings, and agrees that no appeal shall
"be prosecuted on the judgment entered by virtue here-
"of, nor any Bill in Equity filed to interfere in
"any manner with the operation of said judgment.
"C. S. Webster, Atty for Def't

Filed June 14, 1859. J. H. Beveney CWS

And afterwards, to wit, on said 14th day of June
A.D. 1859, aforesaid, the following proceeding, among
others, was had in said Circuit Court, in and for
the County of L. W. and S. is aforesaid
and entered of record, the substance of which
is in the words following, to wit, that
is to say: -

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June 14th A.D. 1834

Jeremiah L Brown

14

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Stephen A. Latham

And now at the day the said Plaintiff
 by Charles Kellum his attorney and files his Dec-
 laration in said action of trespass on the case on
 promissaries, against the said defendant, and files also
 a warrant of attorney, signed and sealed by the said
 defendant, the execution of which is duly proven, an-
 thomizing any attorney of any court of record to appear
 in this court waive notice of process and confess
 judgment in favor of the said plaintiff and against
 the said defendant for the amount due upon a
 certain promissory note annexed to said warrant
 of attorney, also for the sum of twenty five dollars at-
 torneys fees besides the costs of this suit. Thereupon
 came also O.S. Webster an attorney of this Court, in
 behalf of said defendant and on oath, he
 which he waives service of process and fees and
 consents that judgment be entered in favor of
 the said plaintiff against the said defendant
 for the sum eight hundred and twenty three cents and
 twenty three cents, it being the sum due upon
 said note including attorney fees, and the said
 attorney releases all errors in entering up this judgment,
 (either in law or equity) or in issuing execution there-
 on, and consents to the issuing of immediate ex-

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" execution on the same. It is therefore upon con-
 " sideration and order by the Court that the
 " said plaintiff have and recover of the said
 " defendant his damages to the said sum of eight-
 " hundred and seven dollars and twenty-three
 " cents, so as aforesaid, together with
 " his costs and charges by him in this suit
 " in this behalf expended and that he have
 " execution for the same.

State of Illinois

DeKalb County

I, James H. Beveridge, Clerk of the
 Circuit Court in and for said County
 State aforesaid do hereby certify that the above and
 foregoing is a true and full copy of all the papers
 now on file in my office pertaining to a certain
 Cause in said Court (No. 3653) wherein Jeremiah
 L. Brown is Plaintiff and Ethan A. Durham, De-
 fendant. Also a full and true transcript of the
 Record of the proceedings had in said Court in
 said Cause.



I, James H. Beveridge,
 Clerk of said Court, do hereby
 certify that the above and
 foregoing is a true and full
 copy of all the papers now
 on file in my office pertaining
 to a certain Cause in said
 Court (No. 3653) wherein
 Jeremiah L. Brown is Plaintiff
 and Ethan A. Durham, De-
 fendant. Also a full and true
 transcript of the Record of the
 proceedings had in said Court
 in said Cause.

James H. Beveridge
 Clerk

DeKalb Co. Ga.

J. L. Brown
as. { transcript

Ethan A. Duncan

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Ethan A. Durham Plaintiff in Error }
vs. }
Jeremiah L. Brown Defendant in Error }

Error to Circuit Court De Kalb Co.

In Supreme Court }
State of Illinois }

And now comes the
said Plaintiff in Error by Atty. General
his Attorney & says that in the Record
Proceedings now on file & of Record in
the said Circuit Court of De Kalb County
there is manifest material error &
this &c &c

Atty. General
for Plff in Error

And for assignment of Error in said
Record Proceedings the said Plff in
Error sets forth & shows according to
the Statute the following

1. That the said Declaration &c in said
Cause are Entitled of Vacation after March
any Term AD 1859. When in truth the
fact there was no such Term by the Law of
the Land.

2. Because there is no sufficient proof

of the Execution of said Warrant of
Attorney, nor does there appear among
the Records & papers in the Cause, any
proof whatever of the same, to authorize
said Judgment as Entered by said
Clerk in Vacation.

3. Nor other errors appear in said Record

Wm. H. Smith
Plff. atty.

Let a supersedeas issue bond \$1800
William R. Durham surety

J. D. Carson

And now Comes the defendant in error
by Seland & Mayo his attys & says that in
the record & proceedings in this Cause there is
no such error as is above specified. He then
prays an affirmance of the Judgment

Seland & Mayo
Defendants attys

¹⁵
In Pub Court

E. A. Denham
Errors
all approved

J. L. Brown
Record and
Assignment
of Errors,

Filed July 26 1839
L. L. Brown