

No. 12861

Supreme Court of Illinois

McVicker et al

vs.

Wright

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1869

12861

United States of America }
State of Illinois }
County of Cook } J.S.

Pleas before the Honorable John M. Wilson Judge of the Cook County Court of Common Pleas within and for the County of Cook and State of Illinois at a regular term of said Cook County Court of Common Pleas begun and holden at the Court house in the City of Chicago in said County in the first Monday being the first day of February in the year of our Lord one thousand eight hundred and fifty eight and of the Independence of the United States the Eighty Second

Present the Hon John M Wilson Judge
Charles Haven Prosecuting Atty
John S. Wilson Sheriff
Walter Kimball Clerk

Attest

Be it remembered that heretofore to wit on the thirtieth day of January in the year of Our Lord one thousand eight hundred and fifty eight J. Augustus Wright by Root & Young his Attorneys filed in the Office of the Clerk of said Court a certain Precept for summons, and a declaration in which said precept and declaration are in words

and figures as follows to wit
Cook County Court of Common Pleas
{ Augustus Wright }

{ J H McVicker }
{ Chauncey Lewis }
{ William R Gormis }
} { Appraisit Dcs \$ 500.

Clerk

Please issue summons
in the above entitled cause returnable to the next
February term of this Court

Root & Young
Atts for Plff

Cook County Court of Common Pleas
Of the February Term AD 1858
State of Illinois }
County of Cook } S S

J Augustus Wright Plaintiff
in this suit by Root & Young his Attorney, complains
of J H McVicker Chauncey Lewis & William R
Gormis Defendants who are summoned &c
in a plea of trespass on the case on promises.
For that whereas the said defendants heretofore
to wit, on the twenty sixth day of October in
the year of our Lord one thousand eight hun-
dred and fifty seven at Chicago to wit at said
County of Cook made their certain Promis-

long note in writing bearing date the day &
 year aforesaid and then and there delivered
 the same to John Bush in and by which said
 note said Defendants by ^{the} name, style and
 description of J H McVickin Lewis & Sonnis (surety)
 promised to pay to the order of the said John
 Bush three hundred & seventy five dollars with
 interest at ten per cent sixty days after the date
 thereof for value received. And the said John
 Bush (by name of J Bush) to whom or to whose
 order said note was payable, afterwards to wit
 on the day and year aforesaid at Chicago that
 is to say at the County of Cook aforesaid endorsed
 said note in writing by which said endorsement
 the said John Bush then and there ordered &
 appointed the said sum of money in said
 note mentioned to be paid to said Plaintiff
 by name of J A Wright and then and there
 delivered said note so indorsed to the said
 Plaintiff. By means whereof and by force
 of the statute in such case made and pro-
 vided the said Defendants became liable
 to pay said Plaintiff said sum of money
 mentioned in said note and being so lia-
 ble in consideration thereof then and thereunder
 took and promised to pay the same to the
 said Plaintiff according to the tenor and effect
 of said note and of the indorsement aforesaid

to wit at the place aforesaid. And for that
whereas also heretofore to wit on the 26th day
of October 1857 the said Defendants at Chicago
to wit in said County made their certain writing
and signed the name in the words and figures
following to wit:

#375

Chicago Oct 26, 57

" Sixty days after date for value received we
" promise to pay John Bush or order three hundred
" and seventy five dollars with interest at ten
per ct.

J H McKee
Lewis & Soomis Surty."

And then and there delivered said writing
to said John Bush (by the name of J. Bush)
to whom or whose order said was ^{to be} pay able after-
wards to wit on the day and year aforesaid. at
Chicago to wit in said County. indorsed said
writing above set forth by which said endorse-
ment the said John Bush then and there by
the name of J. Bush appointed the said sum
of money in said writing mentioned to be
paid to said Plaintiff by the name of J H Wright
and then and there delivered the said writing
so endorsed to the said Plaintiff by means
whereof and by ~~the~~ force of the statute in such
case made and provided the said Defendants

became liable to pay said Plaintiff said sum of money mentioned in said writing above set forth and being so liable in consideration thereof then and there undertook and promised to pay the same to the said Plaintiff according to the tenor and effect of the said writing and of the indorsement aforesaid to wit at the place aforesaid. And whereas also the said Defendant afterwards to wit on the 26th day of January in the year of Our Lord one thousand eight hundred & fifty eight to wit at said County became and is indebted unto the Plaintiff in a large sum of money to wit Five Hundred dollars for money before that time lent and advanced to said Defendants by said Plaintiff at said Defendants request and also in the like sum for money before that time paid, laid out, and expended for said Defendants by the said Plaintiff, at the like special request of said Defendants and in the like sum for money before that time had and received by said Defendants to and for the use of said Plaintiff, and also in the like sum for goods wares and merchandise before that time sold and delivered by said Plaintiff to said Defendants at the like special instance and request, and also in the like sum for the labor care and diligence of said

Plaintiff before that time done and performed by said Plaintiff for said Defendants and at the like instance and request of said Defendants, and also in the like sum then and there found to be due and owing to said Plaintiff on account stated between them, and being so indebted said Defendants in consideration thereof then and there undertook and promised to pay said Plaintiff said several sums of money above mentioned when thereunto afterwards requested. Yet the said Defendants not regarding their said promises and undertakings, but contriving &c although often requested so to do have not paid said Plaintiff either of said sums of money above mentioned or any part thereof but so to do have hitherto wholly neglected and refused and still do neglect and refuse to the damage of said Plaintiff of Five Hundred Dollars and therefore he brings suit &c

Root & Young

Plaintiffs Attorneys

"Copy of Instrument & account said on"

375.

Chicago Oct 26, 57

Sixty days after date for value recd we promise to pay John Bush or order Three hundred & Seventy five dollars with interest at ten per ct.

J. H. McFicker
Lewis & Loomis Surty

(Endorsed on the back of said note as follows)
 "Pay J A Wright or order"
 "J. Bush"

J H McKicker Lewis & Loomis	Dr	
Do J A Wright		
Do money lent and advanced		\$ 500.
Do money paid laid out and expended		\$ 500.
Do money had and received to and for use of ^{said Plaintiff}		\$ 500.
Do goods wares and merchandise sold and delivered		\$ 500.
Do labor and services		\$ 500.
Do balance due on account stated		\$ 500.

And afterwards to wit on the same day
 there was entered in the common rule book
 of said court a rule in the words and figures
 following to wit

J Augustus Wright	} January 30 th 1888
J H McKicker	
Chauncy Lewis &	
William R Loomis	

On reading and filing the
 plaintiffs declaration in this cause, and
 on motion of Root & Young plaintiffs Attorneys
 it is ordered that said defendant plead to
 said ^{Plaintiff} declaration within fifteen days after
 service of a copy thereof and a copy of

this rule on them or in default thereof default
will be entered for want of a plea and judg-
ment be entered against said defendants
on the expiration of said rule to plead

Root & Young

Plaintiffs Attorneys

And afterwards to wit on the same day
there issued out of said court a people's
writ of summons which said writ of
summons with the Sheriffs return endorsed
thereon are in the words and figures as
follows to wit

State of Illinois }
County of Cook } ³⁵

The People of the State of Illinois
To the Sheriff of said County
Greeting-

We command you that you summon
J. H. McVicker, Chauncey Lewis & William
R. Loomis if they shall be found in your
county personally to be and appear before the
Cook County Court of Common Pleas of said
County on the first day of the next term thereof
to be holden at the Court House in the City of
Chicago in said County on the first Monday
of February next to answer unto Augustus L.
Wright in a plea of Trespass on the Case on promises
to the damage of the said plaintiff as he says
in the sum of Five hundred Dollars. And
have you then and there this writ with an

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endorsement thereon in what manner you
shall have executed the same.

Seal

Witness Walter Kimball clerk
of our said Court and the seal
thereof at the City of Chicago in said
County this 30th day of January
A.D. 1858

Walter Kimball clerk
Served by reading to the within named
defendant this 30th day of January 1858

John L. Wilson Shff
By George Anderson dpty

And afterwards to wit on the 20th day of
February in the year last aforesaid Augustus
Wright Plaintiff filed in the office of the clerk
of said court a copy of a rule on said defendants
together with notice and affidavit in words
and figures as follows to wit

Cook County Court of Common Pleas

January 30th 1858

Augustus Wright

vs
A. M. Vicker
Chauncey Lewis
William A. Dornis

On reading and filing
the Plaintiffs declaration in this cause and on

motion of Root & Young Plaintiffs Attorneys it is ordered that said Defendant plead to said Plaintiffs declaration within fifteen days after service of a copy thereof and a copy of this rule on them or in default thereof default will be entered for want of plea and judgment be entered against said Defendants on the expiration of said rule to plead.

Root & Young
Plaintiffs Attorneys

The above named Defendants take notice that on the filing of the declaration in the above cause of which the within is a true copy a rule of which the above is a true copy was upon motion entered in said cause requiring said Defendants to plead to said declaration within fifteen days from the service of this copy.

Respectfully Yours &c

Root & Young Plaintiffs Attorneys

State of Illinois }
County } 55

being duly sworn says that on the thirtieth day of January 1838 this affiant delivered a copy of the within declaration and above rule and notice to William R. Loomis the within named Defendants and also on second day of February 1838 this affiant delivered a copy of the within declaration and above rule and

notice to Chauncey Lewis one of the within
named defendants, and also on the third
day of February 1838 affiant delivered a copy
of said declaration and rule & notice to J. H.
McVicker one of said defendants.

Subscribed & Sworn to
before me this 20th day
of Feb'y AD 1838

F. W. Young

Walter Kimball clerk

And afterwards to wit on the 20th day of
February in the year aforesaid it being one
of the days of the February Term of said Cook
County court of Common Pleas, the following
among other proceedings were had in said court
to wit

J. Augustus Wright

J. H. McVicker
William R. Loomis
Chauncey Lewis

This day comes the plaintiff by his Attorneys
Root & Young, and due proof of personal service
of process of summons issued in this cause, and
a copy of said plaintiffs declaration together
with a copy of the Rule taken on said defendants
to plead within fifteen days after service thereof
of having been made and it now appearing

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to the satisfaction of the court, that fifteen days have elapsed since the service on said defendants of a copy of said declaration and rule and they having failed to plead or demur to said declaration. It is on motion of plaintiff ordered default be entered of record for want of plea. It is therefore said plaintiff ought to have and recover his damages, sustained by reason of the premises, but because these damages are not certainly known, the action being founded on an instrument of writing for payment of money only it is submitted to the court to assess the same and the court on reading the affidavit of one of the attorneys of said plaintiff setting forth that the claim and demand upon which this action is brought is bona-fide, due and that there are no just demands or set-offs thereto and upon examination of the proofs submitted by said Plaintiff and being fully advised now assess said damages to the sum of Three hundred and eighty nine dollars and thirty four cents

Therefore it is considered that said plaintiff do have and recover of said defendants his damages of Three hundred and eighty nine dollars and thirty four cents so as aforesaid assessed, together with his costs and charges in this behalf expended

and have execution therefor

And afterwards to wit on the twenty third day of February in the year aforesaid the defendants by Clarkson & Tree their Attorneys filed in the office of the Clerk of said court a motion to set aside & judgment in words and figures as follows to wit

Cook County Court of Common Pleas

J. H. McVicker
Chauncey Lewis &
William R. Toomis

ads

J. Augustus Wright

And now comes the said defendants by Clarkson & Tree their Attorneys and move the Court that the judgment entered in this cause be set aside and vacated and the cause continued to the next term of this court

1. Because the suit is commenced to a Regular trial term of this court, and the summons was served upon said defendants, and the declaration in said cause filed less than 10 days prior to the first day of said term.

2. Because the entry of judgment in said cause during the regular term of said court is irregular, Service not having been had 10 days before the first day of said term, and the declaration not having been filed in said

cause 10 days before the first day of said term
 & Because the judgement entered in said cause
 is irregular, and contrary to the form and
 intent of the statute

Clarkson & Tree

Defendants Attys

And afterwards to wit on the same day and
 year last aforesaid the following among
 other proceedings were had in said court

to wit

Augustus Wright

And now again at this day come
 the parties to this cause by their attorneys as
 aforesaid, and the defendants submit motion
 to set aside the judgement entered under the
 Rule to plead in this cause, and the court
 having heard counsel in support as well
 as opposition thereto, and being fully
 advised overruled said motion

And thereupon the said defendants
 by Clarkson & Tree their attorneys enter
 their exceptions to such ruling on said
 motion by the court

And afterwards to wit on the
 fourth day of March of the year
 aforesaid J. H. McKicker Esq. Amcey
 Lewis & William R. Loomis filed in

the office of the clerk of said Court their
appeal Bond in the words and figures
following to wit:

Know all men by these presents
that we ^{James} H McVicker William R
Loomis and Chauncey Lewis of the city
of Chicago in the County of Cook and
State of Illinois are held and firmly bound
unto J Augustus Wright in the penal sum
of Five hundred Dollars lawful money
of the United States for the payment of which
well and truly to be made we bind ourselves
our and each of our heirs Executors and admin-
istrators jointly and severally firmly by these
presents Witness our hand and seals at
Chicago aforesaid the 4th day of March
A.D. 1858

The conditions of the above obligation is
such, that whereas the said J Augustus
Wright did on the 22nd day of February A.D.
1858 recover a judgment in the Cook County
Court of Common Pleas in and for the
County of Cook aforesaid, recover a
judgment against the above bounden
James H McVicker, William R Loomis
and Chauncey Lewis* have taken an
appeal to the Supreme Court of the
State of Illinois. Now if the said James

* for the sum of Three hundred eighty nine dollars
and thirty four cents and costs of suit for which
said judgment was paid James H McVicker William
R Loomis and Chauncey Lewis

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~~James~~ & McVicker William R Loomis
& Chauncy Lewis shall prosecute their
said appeal with effect, and shall pay
the judgment, together with all costs, interest
and damages thereon, in case the said
judgment shall be affirmed in said
Supreme Court, then the above obligation
to be void, otherwise to remain in full force
and effect

Approved by me in open } J H McVicker (seal)
Court this 4th day of March } W R Loomis (seal)
AD 1838 } Chauncy Lewis (seal)

Approved
John M Wilson Judge
of the Cook County Ct of C Pleas

C C Parks Jr (seal)
Philip Wadsworth (seal)

And afterwards to wit on the same day
and year last aforesaid, the defendants
James & McVicker W R Loomis & Chauncy
Lewis by their Attorneys Belakson & Price filed
in the office of the clerk of said court their
Bill of Exceptions in the words and figures
following to wit

Cook County Court of Common Pleas
February Term AD 1838

James & McVicker
William R Loomis &
Chauncy Lewis

add } Augustus Wright } Assumpsit
Be it remembered

that in the February Term A.D. 1838 on the
 Twenty third day of February in said year
 that being a regular day of said term, of the
 Cook County Court of Common Pleas in and
 for the County of Cook and State of Illinois
 came the above named defendants by
 Messrs Clarkson & Free their Attorneys before
 the Honorable John M. Wilson Judge of
 the said court in open Court and made
 and filed their certain motion in writing
 in said cause which is as follows to wit

And now comes the said defen-
 dants by Clarkson & Free their Attorneys
 and move the Court that the judgment
 entered in this cause be set aside and
 vacated and the cause continued to
 the next Term of this Court

1st Because the said is commenced to a
 Regular trial Term of this Court and
 the summons was served upon said
 defendants and the declaration in
 said cause filed less than 10 days prior
 to the first day of said term

2^d Because the entry of judgment in said
 cause during the Regular Term of said
 Court is irregular, service not hav-
 ing been had 10 day before the first

day of said Term, and the declaration not having been filed in said cause 10. days before the first day of said Term

3. Because the judgment entered in said cause is irregular, and contrary to the form and intent of the statute
- Lelarkson & Price
Sgt Attys

And the said counsel for the said defendants, upon said motion, and for the reasons and causes therein assigned did then and there before the said Court in open Court contend & insist in behalf of the said defendants that the said motion should and ought to be allowed and that the said judgment entered in said cause should then and there be vacated and set aside, and the said cause continued to the next Term of said Court. But the said Judge of said Court did then and there overrule the said motion, and refuse to vacate and set aside the said judgment, and continue the said cause upon said motion.

whereupon the said counsel for the said defendants did then and there in the behalf of the said defendants except to the aforesaid ruling of the said Court. And because the said exceptions so offered and made to the said ruling of the said Judge of said Court doth not appear upon the Record in said cause thereupon, on the prayer of the said defendants by their said Counsel the said Judge hath to this their Bill of Exceptions put his hand and seal according to the statute in such cases made and provided, this fourth day of March AD 1858

John M Wilson Seal

State of Illinois }
County of Cook } ss

I Walter Kimball Clerk of the Cook County Court of Common Pleas in and for the County of Cook and State of Illinois do hereby certify that the above and foregoing is a full and true transcript of all the papers on file in my office and of all the proceedings entered of record ^{in said Court} in the case wherein J Augustus Wright is Plaintiff and J A McKicker

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William R Loomis and Chauncey
Lewis Defendants



In testimony whereof I have
hereunto set my hand and
the seal of said Court at the
City of Chicago in said
County this 20th day of March
A.D. 1888. Walter Kimball

Clerk

J. H. Mcicker, Chauncey Loomis
and William R. Loomis } Appellants

J. Augustus Knight Appellee

Of the April Term A. D. 1858

Afterwards, to wit at the said Term of said Court before
the Judges thereof. Came the said J. H. Mcicker,
William R. Loomis and Chauncey Loomis by
Clerken & Son their Attorneys, and say that in the
Record and proceedings aforesaid and also in giving the
judgment aforesaid there is manifest error in them
to wit,

1. The Court erred in refusing to set aside and vacate
the said judgment and to Continue the said Cause
to the next term of said Court
2. The appellants not having been served with
process ten days before the return day of the
Summons in said Cause, the Court below erred in
rendering a judgment thereon, and in refusing
to Continue the said Cause to the next term of
said Court.
3. The declaration in said Cause not having been
filed therein ten days before the Commencement
of said Term, the Court erred in rendering
a judgment and in refusing to Continue said
Cause to the next term of said Court.

Recd

Recd

Recd

Recd

J. H. Mcicker

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It. The judgment entered in said cause is irregular, and contrary to the form and intent of the Statute.

And the said J. H. McKicker, Chauncy Lewis and William R. Loomis pray that the judgment aforesaid, for the error aforesaid, and other in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing and that they may be restored to all things that they have lost by occasion thereof.

Clarkson & Lee
Attorneys for Appellants

And the said J. Augustus Knight by Root & Hornes. His Attorney Comes here into Court and says that there is no error in the Record and proceedings aforesaid, or in giving the judgment aforesaid, and he prays that the said Court before the justice thereof may here may proceed to examine ^{carefully} the record and proceedings aforesaid as the matter aforesaid appeared for error and that the judgment aforesaid, in form aforesaid given, may in all things be affirmed.

Root & Hornes
Attys for J. A. Wright

~~IN THE SUPREME COURT.~~

J. H. McVicker, William R. Loomis,
and Chauncey Lewis, Appellants,

vs.

J. Augustus Wright, Appellee.

} *Appeal from Cook.*

ABSTRACT OF RECORD.

ing The ~~following~~ facts appear upon the record in this case, *are* ~~in~~: That on the 30th day of January last, the appellee, Wright, commenced an action of assumpsit against the appellants in the Cook County Court of Common Pleas, upon a ~~certain~~ promissory note, filing a declaration at the same time with the præcipe, and entering a rule in the common rule book of said Court, ordering the appellants to plead to said declaration within fifteen days after service of a copy thereof, and a copy of said rule to plead, or that in default thereof, a judgment would be entered against them on the expiration of ~~said~~ rule to plead. A summons was issued in the suit returnable to the first Monday in February, that being the first day of the February term of said court. And the appellants were served with process on said 30th day of January; and on the 20th day of February last, the appellee filed with the clerk of said Court a copy of the above-mentioned rule to plead, together with a notice to the appellants to plead, and an affidavit sworn to by one F. W. Young, and setting forth that on the 30th of January, 1858, he delivered a copy of the ~~said~~ declaration, rule to plead and notice, to the appellant, William R. Loomis; and also on the 2d day of February, 1858, that he delivered a copy of the same to the appellant, Chauncey Lewis; and also that on the 3d day of February, 1858, he delivered a copy of the same on the appellant, J. H. McVicker.

That on the said 20th day of February, on the appellee's attorney filing an affidavit in said cause, setting forth that the claim upon which the action was brought was *bona fide* due, and that there were no just demands or set-offs thereto, and upon examination of the proofs submitted, the ~~said~~ Court rendered a judgment against the ~~said~~ appellant for want of a plea, and assessed the plaintiffs damages at \$389 34.

That on the 23d of February, the appellant filed a motion in ~~said~~ court to set aside and vacate the judgment entered in ~~said~~ cause, and to continue the cause to the next term of the ~~said~~ court upon the following grounds:

1. Because the suit was commenced at a regular trial term of the ~~said~~ Court, and the summons was served upon the appellants, and the declaration in ~~said~~ cause filed less than ten days prior to the first day of ~~said~~ term. *the*

2. Because the entry of judgment in ^{the} said cause during the regular term of said Court is irregular, service not having been had ten days before the first day of said term; and the declaration not having been filed in said cause ten days before the first day of said term.

3. Because the judgment entered in ^{the} said cause is irregular, and contrary to the form and intent of the statute.

~~The~~ The said Court having overruled the motion to vacate the judgment, and continue the cause to the next term, the appellants excepted to the ruling, and assign the following errors:

1. That the Court below improperly refused to set aside and vacate the said judgment and continue the cause.

2. That the appellants not having been served with process ten days before the return day of the summons, the Court below erred in rendering a judgment, and in refusing to continue the cause.

3. That the declaration in the case not having been filed ten days before the commencement of the term, the Court below erred in rendering a judgment, and refusing to continue the cause.

4. The judgment entered in ^{the} said cause is irregular, and contrary to the form and intent of the statute.

~~CLARKSON & TREE,~~

~~Attorneys for Appellant.~~

Press Notice. ~~Shoreline is an error by the appellant~~
~~the defendant is in error in its statement.~~ It is contended
by the appellees that the proceedings ^{in this case} are in strict conformity with the act of Feb. 14. 1857 (Scater Comp. 274)
~~The eighth section of that act.~~ He claiming does not
claim that they conform in any particular, to
the act of 1845, Ch. 83 §5 (Scater Comp. 253) and
acted by that act, they are admitted to be erroneous.

The act of 1857 Section 8 provides, that judgment
may be entered in vacation in the said Circuit Court
of Cook County and Cook County Court of Common
Pleas, in all suits brought on any instrument of writing
for the payment of money only, when the defendant shall
make default, after being served with process, and a copy
of the declaration and rule to plead, not less than fifteen days
before the entry thereof, when the defendant is a resident of
^{said} the County, or twenty days when he resides without the County.

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The said Court shall be considered as always open
for the entry of such judgments by default or judg-
ment by confession, and judgment so entered shall
have like force and effect as if entered in term
time. Provided that before the entry of such judgment
by default, the plaintiff shall file with the clerk,
an affidavit by himself or agent, that the
debt is a bona fide one, and that there are no
just defenses or set off thereto.

The appellee contended that ~~as all of the defen-~~
~~dents were served fifteen days before the~~
~~with a copy of the declaration and rule to plead~~
~~that although a term of the Court was then being held~~
~~when the rule to plead expired although there~~
was a regular term of the Court then being held, when
the fifteen days expired the Court was really in vaca-
tion so far as this case is concerned, and that
by the provisions of this act, the Court is always open
for the entry of such judgments - that ^{the} in the 6th section,
the term "vacation term" is used, while in the 8th
section the word term is omitted and "vacation"
^{used simply} ~~and that~~ meaning, when there is no term, ^{and that} the
act, providing that the Court shall always be open
for the entry of such judgments, ~~therefore~~ ^{therefore} for the
purposes of this case ^{the} Court was in vacation,
and the fact that the Court happened to be holding
a regular term when the rule to plead expired,
was no reason for continuing the case - that if the
defendants had a defense, they could have
made it within the rule day - The design of the
statute ^{being} ~~to~~ to give a speedy remedy in actions on
instruments of writing for the payment of money only,
and if the term of the Court at which the judgment

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was obtained had continued three months, the plaintiff could have had no judgment until the next term, and on the other hand, if in three days from its commencement, the term had ended, and then had been a vacation of three months before the next term no judgment could have been obtained until the next regular term, and thus the object of the law would be defeated.

This ^{case on the argument} presents the question, Can a judgment be rendered in term time under this statute in a suit commenced less than ten days prior to the first day of such term?

The appellants ⁱⁿ contending that it does not, present ~~these~~ ^{the} ~~following~~ points - 1, That the technical terms Term time and vacation have certain well known legal significations not simply different, but absolutely contradictory; and that no sentence or form of words can have more than one sense - that the eighth section has reference to a proceeding in vacation, and none other the sole purpose and object of the law being and in the ~~the~~ first words of the section "No judgments may be entered in vacation" and its last declaring that "judgments so entered, shall have the force and effect as if entered in term time", - and that therefore the act does not authorize the entry of any judgment under its provisions in Term time, since the ~~and~~ vacation is ^{a word and term} clearly distinguished from the word Term time and can have but one meaning, and that meaning is, contradistinguished from term time - vacation.

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And the appellants further insist, that the
phrase in that section, "said Court shall
be considered as always open for the entry
of such judgments by default, or judgments by
confession," do not impart any different
signification - the phrase "always open"
though indicating perpetually, ^{time} cannot
be extended to any non-judicial
day, nor to improper and inconvenient
hours - Nor can it be extended to term
time, for that would be an absurdity - term
time denoting an open court, and nothing
else, and that this is strengthened by the
last member of the sentence, as that de-
clares in so many words that "judgments
so entered, shall have the like force and
effect as if entered in term time." That if
this act be construed as applicable to term
time it must operate as a partial repeal
of the general practice act of 1845, for the
latter provides a continuance without cost,
in cases when the writ is returned within ten
days of a regular term of court, whilst
the former act of '57, provides for the unde-
rmin of a judgment fifteen days after the service
of process - That the power conferred by
the act of '57 is a new and extraordinary
one - a special judicial proceeding, and

Must therefore not only be strictly followed, but the powers conferred must be carried in the exact mode pointed out, or the whole proceeding will be coram non jure and void. That this judgment having been rendered in term time, and not in vacation, is a ~~substantive~~ irrevocable judgment.

We are satisfied, from a careful examination of section eight of the act of 1857, that it does not authorize the rendering a judgment in term time, in a suit commenced less than ten days prior to the first day of the Term, but by application alone to proceedings which are begun and carried on and terminated in vacation. Now Terms in vacation and Term time, are the opposite of each other. There can be no vacation when the Court is sitting.

Terms of Court say Blackstone 3 Com. 276 are supposed by Mr. Selden, to have been instituted by William the Conqueror, but Sir Henry Spelman hath clearly and learnedly shown, that they were gradually formed from the Canonical Constitutions of the Church; being indeed, no other than those prime seasons of the year which were not occupied by the great festivals or fasts, or which were not liable to the

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general avocations of rural business. Through-
out all Christendom, in very early times, the whole
year was one continual term for hearing and
deciding cases. Afterward when the
legal constitution of ~~some~~ England came
to be settled, the commencement and duration
of their law term, was appointed with
an eye to these Canonical prohibitions,
and so extraordinary was afterwards the
regard paid to these holy times, that though
the Author of the Mirror (Speculum) mentions
only one vacation of any considerable
length ~~including~~ embracing the months
of August and September, yet Britton
is express, that in the Reign of Edw 1st
his Secular plea could be held, nor
any man sworn on the evangelists
in the times of Advent, ^{Lent,} ~~but~~ Pentecost,
Rogation and vintage the days of great
fasts and all solemn festivities.

~~it 276~~ The portions of time not included
within these prohibited seasons fell natu-
rally into a four fold division, and
from some festival day that immediately
preceded their commencement, were designa-
tated the terms of St Hilary, Easter &

The time not included in these
terms, was, vacation. it. 277. So that

one is the opposite of the other.

And this distinction is observable, though not all our legislation and ⁱⁿ the decisions of our courts.

Since then, no sentence or form of words can have more than one sense, term time cannot mean vacation, nor vice versa, and as the ^{8th} Latin ~~act~~ requires the proceedings then authorized to be had in vacation, it follows, necessarily, that they cannot be had in term time. For say the phrase, "said Court shall be considered as always open for the entry of such judgments by default or judgments by confession," in that any ~~the~~ different signification. "Always open" does not mean nor can it be extended to comprehend, Sundays, or late and inconvenient hours and of course not to term time - to times when the Court is actually in session.

It can not appear from the act of 37, that it was intended to repeal any part of the Practice act of 1845, which, on the construction intended for by opposing, it would certainly do. It did command, as this ~~way~~ ^{and to regular trial terms} the day before the Commencement of the term, would be continued of

Course. By the Constitution claimed by the
act of '57, a judgment can be taken at
the term.

We do not think these statutes are
in conflict, and they are not, on the con-
stitution we give to the act of '57 - that
it relates entirely to proceedings, as we
have before said, commenced, claimed
and terminated in vacation. The
act of 1845 relates ~~also~~ to the commencement
and conduct of suit at a regular or
official term of a court and ~~both acts~~ ^{acts can} is this
case, and both acts can have effect.

The special statute under which
the judgment was entered ~~under a special statute~~
was adopted to favor a particular locality, ^{this} in
recognition of the common and general rule of
^{law} governing all other parts of the state, ^{and} while its
provisions permit its purpose to be felt to the
extremities of the state, by parties doing business
in that locality, such a law is not to be strained
and distorted, for the purpose of bringing
cases within its provisions, which are not so
by its terms.

~~This act of 1857 applying to~~
~~proceedings in vacation, does not authorize~~
The judgment is ~~therefore~~ ^{reversed} is
irregular, and must be reversed,
and the cause undecided.

276-168
~~224-44~~

McKer et al

vs

L. A. Wright

Opinion by

Green J.

Filed May 26. 1839
L. Leland
Clerk

Supreme Court

E. Augustus Wright
Appellee

ads
J. H. W. Vickar
Chancey Lewis &
Wm R. Loomis
Appellants

The Appellee in the above cause relies on the statute of 1857 page 10. The proceedings in the Court below were in strict conformity with that act. - all of the defendants were served fifteen days before default with copy of Declaration and rule to plead - This act repeals the practice Act so far as they are inconsistent with each other - The law of 1857 provides that the Court shall always be ^{equidistant} open for the entry of such defaults; and was therefore in vacation so far as this case was concerned - By the 6. sec the term "vacation term" is used while in the 8th sec. the word "term" is left out, and "vacation" simply, means when there is no term - but it also provides that the Court shall always be open for the entry of such judgments; therefore so far as this case was concerned the Court was in vacation.

And the fact that the Court happened to be holding a regular term when the rule to plead expired - the fifteen days - can be no good reason for continuing the cause - suppose the Court was in session all the time - one term running into another - the object of the statute would be entirely defeated if the proposition assumed by the appellants be true - There would then be no vacation, and the law would be good for nothing - If the defendants had had a defence they could have interposed it within the rule day - The design of the statute was to give parties a more speedy remedy - Suppose the term of the Court below at which the judgment was obtained had continued three months - the plaintiff could have had no remedy until the next term - On the other hand suppose three days from its commencement the term had ended and there had been a vacation of three months before the next term - in either case the judgment could not have been obtained until the next regular term. In such case the design of the law is defeated. This action was on an instrument for the payment of money - and is clearly within the statute. We cite no authorities other than the statute - as the whole question

turns out statutory construction—
Root & Young
for Appellee—

286 — 108

McVickar

vs
Wright

appellee's
affidavits
Argument

Filed April 30, 1838

L. Selind
Clerk

To be kept open
in copy in
writing

Ottawa —

SUPREME COURT.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1858.

J. H. McVicker, William R. Loomis,
and Chauncey Lewis, Appellants,

vs.

J. Augustus Wright, Appellee.

} Appeal from Cook County Court
of Common Pleas.

CLARKSON & TREE AND ARRINGTON, *Counsel for Appellants.*
ROOT & YOUNG, *Counsel for Appellee.*

POINTS MADE & AUTHORITIES CITED BY COUNSEL FOR APPELLANTS.

It is contended by the appellants that the Court below erred in refusing to continue the said cause, upon motion, to the next term of said Court, and that the judgment entered in said cause, as appears by the Record, was irregular, and contrary to the form and intent of the statute.

1. Under the Practice Act, approved March 3d, 1845, the judgment rendered by the Court below was clearly erroneous, for the following reasons:

1. The process was not served upon the appellants, or any of them, ten days before the return day thereof, and they were entitled to a continuance of the cause, and not obliged to plead before the next succeeding term of said Court,

Revised Statutes, 1845, Chap. 83, Sec. V.

Purple's Statutes, Vol. II., page 821, Sec. V.

2. The declaration was not filed ten days before the Court at which the summons was made returnable.

3. The suit was commenced within ten days before the sitting of said Court, and therefore the suit should have been continued, of course, without motion and without costs, the parties not agreeing to have a trial.

Revised Statutes, 1845, Chap. 83, Sec. VIII.

Purple's Stat., Vol. II., page 821 and 822, Sec. VIII.

The judgment cannot therefore be supported under this act, but must be, if at all, by the authority of a later and different act, if any such there be.

2. There is but one law of the State of Illinois having any reference to the subject, and that is the act of the General Assembly of said State entitled "An act to change the time of holding Courts in the Seventh and Thirteenth Judicial Circuits, and to regulate the practice therein, and in the Cook County Court of Common Pleas," approved January 14, 1857.

If it be contended that the judgment entered by the court below for the appellee be by authority of the latter named act, it must be under the provisions of the 8th section of that act, which is as follows:

"Sec. 8. That judgment may be entered in vacation in the said Circuit Court of Cook County, and Cook County Court of Common Pleas, in all suits brought on any instrument of writing for the payment of money only where the defendant shall make default, after being served with process, and a copy of the declaration and rule to plead not less than fifteen days before the entry thereof, when the defendant is a resident of said county, or twenty days where he resides without the county, and said Courts shall be considered as always open for the entry of such judgments by default, or judgments by confession, and judgment so entered shall have like force and effect as if entered in term time: *Provided*, That before the entry of such judgment by default, the plaintiff shall file with the clerk an affidavit by himself or agent, that the debt is a bona fide one, and that there are no just discounts or set offs thereto."

Session Laws of 1857, p. 10.

Scates, Treat & Blackwell, Statutes of Illinois.

Part II, Civil Procedure, p. 274.

Inasmuch as the proceedings in the cause below seem to have been taken with reference to the requirements of the section, it is presumed that the appellee desires to support his judgment by its authority.

The only question for examination, if this section is to be relied on, is, whether it authorizes the rendition of a judgment in term time, in a suit commenced less than ten days prior to the first day of such term.

The appellants contend that it does not, and in support of the position they present the following points:

1. The two technical legal names, *Term time* and *Vacation*, have legal significations, not simply different, but absolutely contradictory; the one being positive, the other negative.

3 Blackstone's Com., p. 276.

Comyn's Digest, Temps, C. 1—7.

The same distinction existed in the Roman Civil Law under the names of *dies fasti et nefasti*.

Calv. Lex. 285.

1 Mackeld Civil Law, 24 Sec. 35 note.

So by the English Common Law.

Wharton's Lex. Voc. Holiday.

3 Chitty's Gen. Prac., pp. 104, 107.

Crabb's Hist. Eng. Law, p. 35.

Comyn's Dig. Voc. Temps, c. 1—6.

This distinction between *Term time* and *Vacation* is not only recognized, but broadly marked and extended in the constitution and laws of the State of Illinois.

Sec. 8, Art. V, of the Constitution, provides for the holding of *terms* of the Circuit Court, &c.

The same distinction runs throughout the Statutes, and is maintained in the decisions of Supreme Court in almost every volume.

Galusha vs. Butterfield, 2 Scam. 227.

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All of which distinctly announce the distinction between *Term time* and *Vacation*—judges *per se* and courts; (that is, judges in their official capacity.)

2. No sentence or form of words can have more than one sense.

This position scarcely needs argument.

A term may be ambiguous; that is, it may be doubtful which of two conceptions the writer or speaker intends to express; but it is an impossibility that it can have at the same time two distinct meanings.

3. The 8th section of the act before referred to, approved January 14, 1857, signifies a proceeding to be had *in vacation*, and none other.

The sole purpose and subject matter of the law as announced in its first words is, "*That judgments may be entered in vacation*," &c., and it closes by declaring that "*judgments so entered, shall have like force and effect as if entered in term time*."

4. The act referred to therefore does not authorize the entry of any judgment under its provisions in *Term time*, for the word *Vacation* is clearly distinguished from the word *Term time*—it has, and can have but the one meaning—*Vacation*.

5. Nor does the phrase in said section—"said courts shall be considered as *always open* for the entry of such judgments by default, or judgments by confession"—import any different signification.

The phrase "*always open*," though *per se* it indicates perpetual time, can not possibly be extended to any *dies non juridicus* for instance, nor to impossible and inconvenient hours.

Co. Litt. 135, a. Com. Dig.

Voc. Temp. D E & F.

Nor can it be extended to *Term time*, for it would be a libel on the wisdom of the legislature, and simply a tautological absurdity to say that *a court shall be open in Term time*—term time denoting an open court and nothing else.

Besides, the last member of the above sentence shows that it can not mean *Term time*, as it declares explicitly "*and judgments so entered shall have like force and effect as if entered in term time*."

And this is decisive. The judgment so entered is not *in term time*, but only *as if in term time*.

6. If this act can be construed as applicable to term time, it must operate as a partial repeal of the general practice act first referred to. For the latter prescribes a continuance without costs in cases where the suit is commenced within ten days of a regular term of court, whilst the former provides for the rendition of judgment fifteen days after service of process.

By the old practice act, the cause would have been continued *of course*. By the act in question a judgment was obtained at the first term of the court.

Hence there is an irreconcilable conflict between the two rules of practice if the act in question has reference to proceedings in *term time*.

However, it is a well settled principle of construction, that a statute is never repealed

by mere implication, unless it be so repugnant to a later statute as to be susceptible of no rational adjustment.

Dr. Foster's Case, 11 Rep. 63.

King *vs.* The Justices, &c., 15 East, 377.

So, "courts are bound to uphold the prior law if the two acts may well subsist together."

Bowen *vs.* Lease, 5 Hill, 121.

Street *vs.* Commonwealth, 6 M. & S. 209.

Williams *vs.* Potter, 2 Barb. N. Y. S. C., 316.

6 Cushing, 465.

Can these acts be construed so that both of them and every part of each may be equally valid and operative?

Unquestionably they may. The seeming inconsistency vanishes if the one be regarded as applicable to practice in *Term time*, and the latter to practice in *Vacation*.

And upon no other construction can they be reconciled.

And this was manifestly the intention of the framers and enactors of the statute, and not the repeal in whole or part of the old practice act.

7. The power conferred by the act in question is a new and extraordinary one—a special judicial proceeding—and it must therefore not only be strictly construed, but the powers conferred must be exercised in the exact mode pointed out, or the entire transaction will be *coram non judice*, and utterly void.

Davison *vs.* Gill, 1 East, 64.

Bloom *vs.* Burdick, 1 Hill, 130.

Atkins *vs.* Kinnan, 20 Wendell, 241.

Bigelow *vs.* Stearns, 19 J. R. 39.

Davis *vs.* Marshall, 14 Barb. 96.

Burgis *vs.* The State, 4 Ind. 126.

Thus, when a particular authority is given to a Judge to be exerted in vacation, it has been expressly decided that such authority can not be exerted when the court is in session.

Mare *vs.* McIntosh, 18 Wend. 529.

"Expressio unius est exclusio alterius."

8. The judgment in this case was rendered in *Term time* and not in *Vacation*, as the statute directs. The legal form is not followed, and therefore the nullity of the act must be inferred "*non observata forma, infertur annullatio actus.*"

To illustrate this position:

When more than a term intervenes between the teste and return of original process, the writ is absolutely void.

Calhoun *vs.* Webster, 2 Scam. 222.

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So a writ returnable on the fourth day of the term instead of the first is a nullity.

Rattan *vs.* Stone, 3 Scam. 540.

So where a statute requires a summons to be served by reading it to the defendant and delivering him a copy, a service by delivering the summons itself personally to the defendant is irregular, and gives the court no sort of jurisdiction.

Campar vs. Fairbanks, 1 Mich. 151.

The reason of these and similar cases we think is obvious.

An act which is done without authority of law, can not be adjudged by the law effectual for any legal purpose.

The judgment in the present instance is, therefore, we submit, altogether irregular and void under the statute.

CLARKSON, & TREE and ARRINGTON,

Counsel for Appellants.

Superior Court
276. 108
Third Grand Juror

J. H. M'Vicker
Chauncy Lewis &
William R. Loomis
Appellants

vs
J. Augustus Knight
appellee

Appeal from Cook County
Court of Common Pleas

Brief & Argument
for Appellants

Clarkson & Free
and Arnington
Counsel for Appellants

Supreme Court of the State of Illinois

Third Grand Division

J. Augustus Wright

Def't in Error

vs

J. H. Wickar

Chauncey Lewis &

William R. Loomis

Plffs in Error.

April Term

1858

We hereby enter ^{our} ~~appearance~~ appearance for the
Defendant in Error in the above entitled
Cause -

[281-22]

April 14. 1858.

Root & Young
Attys for Def't in Error

276 - 188
J Augustus Wright
Deputy in Charge

ad
J H McVicker
Et al -

Filed May 5. 1888
Leland
Clerk

SUPREME COURT.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1858.

J. H. McVicker, William R. Loomis,
and Chauncey Lewis, Appellants,

vs.

J. Augustus Wright, Appellee.

} Appeal from Cook County Court
of Common Pleas.

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ROOT & YOUNG, *Counsel for Appellee.*

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1. Under the Practice Act, approved March 3d, 1845, the judgment rendered by the Court below was clearly erroneous, for the following reasons:

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2. The declaration was not filed ten days before the Court at which the summons was made returnable.

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If it be contended that the judgment entered by the court below for the appellee be by authority of the latter named act, it must be under the provisions of the 8th section of that act, which is as follows:

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The phrase "*always open*," though *per se* it indicates perpetual time, can not possibly be extended to any *dies non juridicus* for instance, nor to impossible and inconvenient hours.

X
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An act which is done without authority of law, can not be adjudged by the law effectual for any legal purpose.

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CLARKSON & TREE and ARRINGTON,
Counsel for Appellants.

21-96
Supreme Court —
Third Grand Division
276 108

J. H. McKicker
Chauncey Lewis &
William R. Loomis
vs Appellants

J. Augustus Wright
appellee

Appeal from Cook County
Court of Common Pleas

Brief & Argument
for Appellants

Filed May 7, 1858.
L. Ireland Clk

Clarkson & Loe
and Arrington
Counsel for Appellants