No. 14316

Supreme Court of Illinois

People

vs.

Harlow

71641 7

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

No. 225

14316

Pagle
vs
Hartman

Reversed

State of Illinois } Third Grand Division
Supreme Court } April Term 1862

The People of the State of Illinois
on the relation of William
Don Maus
vs
George H Harlow

The undersigned William D. Maus a resident of Tazewell County Illinois would respectfully show unto the Honorable Judges of the Supreme Court of the State of Illinois that on the 11th day of April AD 1862 one George H Harlow being the Clerk of the Circuit Court of Tazewell County Illinois and professing and aspiring to perform the duties of said office and on said day and during the usual business hours of said day and the said George H Harlow being then and there at the office of the Clerk of the said Circuit Court where said business is transacted. And your Petitioner being desirous of bringing a suit to the June Term 1862 of the said Circuit Court presented to said Clerk in person a praecipe in the words and figures following towit:

"State of Illinois } Circuit Court
"Tazewell County } June Term AD 1862

" William D. Maus
" vs } Assumpsit
" Smith Mosher Jr. } Damages $200.00
"
" You will please issue sum-
" mons to Sheriff of Tazewell County Illinois
" returnable as above and oblige
M. Don. Maus pro se

" To George H Harlow Esq
" Clerk of the Circuit Court
" of Tazewell Co Ills "

with a verbal re-
quest to file the same and docket the
Suit and make out a writ of
Summons in due form of law
and deliver the same to the Sheriff
of said Tazewell County to execute.
whereupon said Harlow acting in
his capacity as Clerk of said Circuit
Court filed said "praecipe" and docketed
said Suit and made out under the
Seal of said Court. a writ in the words
and figures following: to wit:

CIRCUIT COURT SUMMONS.—Culver, Page & Hoyne, Stationers, 128 and 130 Lake Street, Chicago.

STATE OF ILLINOIS, }
TAZEWELL COUNTY. } ss.

The People of the State of Illinois,

To the Sheriff of said County,—GREETING:

We Command You that you summon Smith D Mosher Jr if he shall be found in your County, personally to be and appear before the Circuit Court of said Tazewell County, on the first day of the next term thereof, to be holden at the Court House in Pekin, in said Tazewell County, on the first Monday of June 1862, to answer unto William D Mann in a plea of Assumpsit

to the damage of said Plaintiff as he says in the sum of Two Thousand Dollars.

And you have then and there this Writ, with an indorsement thereon, in what manner you shall have executed the same.

Witness, GEORGE H. HARLOW, Clerk of our said Court, and the seal thereof, at Pekin aforesaid, this 11th day of April A. D. 1862

Seal

Geo H Harlow Clerk.
per A P Grimes Deputy

Whereupon said Clerk made out a bill of Costs against your Petitioner for said Services in the words and figures following towit,

Pekin April 11th 1862

" Wm. Doz. Maus
" To Geo. H. Harlow Dr
" To filing praecipe in case of Maus vs Mosher .05
" Docketing Suit .10
" Issuing Summons .35
" .50 ¢

and requested the payment of the same which your Petitioner positively declined to pay and again requested said Clerk to deliver the said Writ so made out to said Sheriff to be served but said George H. Harlow positively refused to deliver said Writ to said Sheriff or to allow the same to be taken out of his office until said bill above presented was paid and still refuses to deliver the same or allow the same to be taken out of his office unless your Petitioner will pay said bill of Costs which your Petitioner declines to do

Wherefore your Petitioner asks for a Mandamus against said Harlow to deliver said Writ or shew cause why he does

not do so.
Roberts & Cohrs & Maus
attys for relator

W. Don. Maus

State of Illinois
Tazewell County

W. Don Maus being first duly sworn according to law on oath states, that the facts set forth in the foregoing Petition are true.

Subscribed & sworn to before me this 12th day of April 1862.
Geo H Harlow
Clerk

W. Don. Maus

State of Illinois
~~Tazewell County~~
Supreme Court

Third Grand Division
April Term 1862.

The People of the State of Illinois on the relation of William Don Maus

George H. Harlow

George H. Harlow

The Respondent named in the foregoing Petition hereby waives service of notice of said application and admits that the facts stated in the Petition are true and waives the issuing of an alternative

Mandamus and if respondent is bound to deliver said Writ, under the Circumstances named in said Petition. Said Respondent agrees that the Court shall award a peremptory mandamus but if not that the same shall be refused.

Geo H Earlow
Clerk

22 225.

The People on the relation
of W. Don. Mans
vs.

George H. Harlow

Petition for Mandamus

Filed Apl. 23. 1862
L. Leland
Clk.

State of Illinois, } In Third Grand Division,
SUPREME COURT, } APRIL TERM, A. D. 1862.

THE PEOPLE, ON THE RELATION OF W. DON MAUS,
vs.
GEORGE H. HARLOW, CLERK, &C.

Abstract of Record.

This was a motion for a mandamus to George H. Harlow, clerk of the circuit clerk of Tazewell county, Illinois, to compel him to issue a writ, &c.

The petition states that the relator, on the 11th of April, 1862, the respondent being then and there clerk of the circuit court of Tazewell county, Illinois, presented a precipe for a summons against one Smith Mosher, jr.; that the clerk filed the precipe and docketed the suit, and made out a writ in due form of law, and then presented the relator with a bill of costs amounting to fifty cents, which the relator refused to pay; and thereupon the clerk refused to deliver the writ, or to allow the same to be taken out of his office, unless the relator would pay the bill.

The clerk admits the truth of the petition, and waives an alternative mandamus, and agrees that if he was bound, under these circumstances, to deliver the summons, a peremptory mandamus shall issue; otherwise to be refused.

Brief for Relator.

The first section of the act in regard to costs provides for security for costs in suits upon office bonds, and in suits by non-residents, &c. Purple Statutes, page 275.

By the 2d section, the plaintiff or officers of the court may apply to the court to compel parties who are unable to pay costs to give security. Purple Statutes, 275.

By the 3d section, the court may allow parties, who are poor, to prosecute without payment of costs. Purple, 276.

By the 22d section of the same act, the clerk is required to tax and subscribe all bills of costs. Purple Stat., 278.

And by the 24th section, in all cases where either party shall be adjudged to pay costs before final judgment, by reason of setting aside a non suit, default or *nol pros.*, or the granting of a continuance or new trial, or otherwise; and in all cases where there is security for costs, attorney liable for costs, or an action brought to the use of another, and the plaintiff shall be adjudged to pay the costs, it shall be lawful for the clerk to make out and tax a bill of costs, and deliver the same to the sheriff; and if the same is not paid in 30 days, the sheriff has a right to levy as on a writ of *fieri facias.*

By the 26th section of the act of 1845, in regard to Fees and Salaries, no fees are payable until a bill of the same has been presented; and the 27th section provides for a penalty against officers who take or demand fees, when the services have not been actually performed. Purple Statutes, page 562.

And by the 28th section of the same act, he is to make and set down in a book a fee bill in each case, which shall be a public record, and provides for collecting the same by issuing a certified copy under seal, &c.

By the 40th section of the Practice Act, Purple's Statutes, 826, the clerk is required to keep a fee book, in which shall be clearly and distinctly set down in items, under the proper titles, costs of each suit, &c.; and by the 41st section, it is provided, that if the clerk issues a fee bill without first entering the same on the fee book, the same shall be void, and the person paying the same may recover it back.

These sections of the law show clearly that the clerk, in performing acts of his official duty, has no right to demand, as a condition precedent to the performance of that duty, that he shall be paid; but the law throws every protection around him, and it is his duty to perform the acts required of him by law, and at the end of each term he is to make up the costs in each case that have accrued since the last previous term, and enter them on his fee book, and after that he can demand them, and not before. Were it otherwise, the clerk might stop the wheels of court, by refusing to enter an order overruling a demurrer, unless his costs were paid.

The law protects him in every way. He need do but little services before he can call upon the court to compel the party to give security for costs; and had it been that such was the intention, the section allowing a court to compel a party to give security for costs, would never have been passed.

COHRS, MAUS & ROBERTS,
For Relator.

225

People on relation
of Wm Dow Mans
vs

George H. Marlow

Abstract &
Brief

Filed Apr. 24, 1872
L Leland
Clerk

STATE OF ILLINOIS, } In Third Grand Division,
Supreme Court. APRIL TERM, A. D. 1862.

THE PEOPLE ON THE RELATION OF W. DON MAUS
VS.
GEORGE H. HARLOW, CLERK, &c.

APPLICATION FOR A MANDAMUS.

Brief and Argument of the Defense in said Cause:

1. To the relation. This cause having been submitted to Court to settle the question: whether the clerk of the Circuit court is entitled to have his fees, as his labor is performed.

In order to determine this question, we have to enquire how far the Statute of this State provides in regulating and securing to the Clerks their fees, and how far they are controlled by it.

At common law, there was no fees recovered by a defendent, (See Tidd's Practice, Vol. 2d, page 889.) The Revised Statutes of 1845, page 127, and at the head of Costs, the several sections provides that the costs follow the judgement, for or against plaintiff or defendant, thus altering the common law.

The 26th section, Revised Statutes, page 249, under the head of Fees, Although it provides that none of the fees charged shall be payable until the person chargable with the same, stating the particulars by bill, and signed by the officer to whom the same is payable, or a fee bill had been issued by the Clerk &c. That section is a requirement of the officer seeking to recover his fees, and no authority to them to receive, unless he gives the defendant a bill of such fees; and this only applies to fees already due or accrued; and the 28th section Revised Statute, 1845, also requires the Clerk to keep a Fee Book, and is bound (when required by any officer of the Court interested in the same) to make out a copy, and deliver it to the Sheriff; and although required to issue a fee bill, even the person to whom the costs are coming, has no right to control the process See Reddeck vs. Cloud's adms., 2d Gillman, page 676.

Although the Revised Statute provides that the plaintiff, when they are insolvent, or unable to pay cost; the opposite party has a right to have security for costs; but suppose an irresponsible plaintiff brings suit against twenty individuals, or any number, and at the appearance of the court, it turns up that the plaintiff is unable to give security for costs, the suit is dismissed. I would ask what security the Clerk has for his fees? not the lawyer, certainly, who brings the suit, as in the case of non-residents.

The law requiring the Clerks to make fee bills, is one of the means, or remedies, by which the clerks are enabled to collect their fees accrued.

Clerks are not required by law to perform, or give their services to the State, on credit. (See People vs. Rockwoll, 2d Scammon; how much less every irresponsible person, who may think proper to sue. The law presumes the fees are paid, as the case progresses, (see Morgan vs. Griffen, 1st Gillman, page 560.

The present form of a judgement, is that the plaintiff recover, from the defendant, his damages and cost, and charges by him expended. Now the plaintiff recovers his costs by by him expended, a payment to the plaintiff in execution by the defendant, is satisfaction of such payment. The only remedy the Clerk has in such case, is to bring his action against such plaintiff for his fees, recovered by said judgement. The clerk only stands as any other creditor who gets his labor without his consent, and of dubious compensation.

I think in the absence of any rule of practice of the Court, the Clerk is not bound to let his labor go without compensation, as a strict matter of right.

SAMUEL P. BAILY,
Att'y for
Defendant.

22 225

People ex. rel
Mace
vs
Harlow

Dft's brief

Filed Apr 24 1872
L Leland
Clerk

STATE OF ILLINOIS, } In Third Grand Division,
Supreme Court. } APRIL TERM, A. D. 1862.

THE PEOPLE ON THE RELATION OF W. DON MAUS
VS.
GEORGE H. HALLOW, CLERK, &c.

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Although the Revised Statute provides that the plaintiff, when they are insolvent, or unable to pay cost; the opposite party has a right to have security for costs; but suppose an irresponsible plaintiff brings suit against twenty individuals, or any number, and at the appearance of the court, it turns up that the plaintiff is unable to give security for costs, the suit is dismissed. I would ask what security the Clerk has for his fees? not the lawyer, certainly, who brings the suit, as in the case of non-residents.

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SAMUEL P. BAILY,
Att'y for
Defendant.

22

225

People &c. ex rel.
Mans
vs
Harlow

Defts. brief

Filed Apr 24, 1862
S Leland
Clerk

STATE OF ILLINOIS, } In Third Grand Division,
Supreme Court. } APRIL TERM, A. D. 1862.

THE PEOPLE ON THE RELATION OF W. DON MAUS
VS.
GEORGE H. HARLOW, CLERK, &c.

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SAMUEL P. BAILY,
Att'y for
Defendant.

22 225

People Ex. rel
Mans
vs
Marlow

Defts brief

Filed Apr 24. 1862
G Lelande
clerk

STATE OF ILLINOIS, } In Third Grand Division,
Supreme Court. } APRIL TERM, A. D. 1862.

THE PEOPLE ON THE RELATION OF W. DON MAUS
VS.
GEORGE H. HARLOW, CLERK, &c.

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SAMUEL P. BAILY,
Att'y for
Defendant.

225

People et al
Mans
vs
Harlow

Deft's brief

225

People et al
Mans
vs
Harlow

Deft's brief

Filed Apl 24 1862
S Selden
clerk

STATE OF ILLINOIS, } In Third Grand Division,
Supreme Court. } APRIL TERM, A. D. 1862.

THE PEOPLE ON THE RELATION OF W. DON MAUS
VS.
GEORGE H. HARLOW, CLERK, &c.

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SAMUEL P. BAILY,
Att'y for
Defendant.

225

People ex. rel.
Mans
vs
Harlow

Defts. brief

Filed Apl 24, 1842
S Selucke
Clerk

State of Illinois, } In Third Grand Division,
SUPREME COURT, } APRIL TERM, A. D. 1862.

THE PEOPLE, ON THE RELATION OF W. DON MAUS,
vs.
GEORGE H. HARLOW, CLERK, &C.

Abstract of Record.

This was a motion for a mandamus to George H. Harlow, clerk of the circuit clerk of Tazewell county, Illinois, to compel him to issue a writ, &c.

The petition states that the relator, on the 11th of April, 1862, the respondent being then and there clerk of the circuit court of Tazewell county, Illinois, presented a precipe for a summons against one Smith Mosher, jr.; that the clerk filed the precipe and docketed the suit, and made out a writ in due form of law, and then presented the relator with a bill of costs amounting to fifty cents, which the relator refused to pay; and thereupon the clerk refused to deliver the writ, or to allow the same to be taken out of his office, unless the relator would pay the bill.

The clerk admits the truth of the petition, and waives an alternative mandamus, and agrees that if he was bound, under these circumstances, to deliver the summons, a peremptory mandamus shall issue; otherwise to be refused.

Brief for Relator.

The first section of the act in regard to costs provides for security for costs in suits upon office bonds, and in suits by non-residents, &c. Purple Statutes, page 275.

By the 2d section, the plaintiff or officers of the court may apply to the court to compel parties who are unable to pay costs to give security. Purple Statutes, 275.

By the 3d section, the court may allow parties, who are poor, to prosecute without payment of costs. Purple, 276.

By the 22d section of the same act, the clerk is required to tax and subscribe all bills of costs. Purple Stat., 278.

And by the 24th section, in all cases where either party shall be adjudged to pay costs before final judgment, by reason of setting aside a non suit, default or *nol pros.*, or the granting of a continuance or new trial, or otherwise; and in all cases where there is security for costs, attorney liable for costs, or an action brought to the use of another, and the plaintiff shall be adjudged to pay the costs, it shall be lawful for the clerk to make out and tax a bill of costs, and deliver the same to the sheriff; and if the same is not paid in 30 days, the sheriff has a right to levy as on a writ of *fieri facias.*

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And by the 28th section of the same act, he is to make and set down in a book a fee bill in each case, which shall be a public record, and provides for collecting the same by issuing a certified copy under seal, &c.

By the 40th section of the Practice Act, Purple's Statutes, 826, the clerk is required to keep a fee book, in which shall be clearly and distinctly set down in items, under the proper titles, costs of each suit, &c.; and by the 41st section, it is provided, that if the clerk issues a fee bill without first entering the same on the fee book, the same shall be void, and the person paying the same may recover it back.

These sections of the law show clearly that the clerk, in performing acts of his official duty, has no right to demand, as a condition precedent to the performance of that duty, that he shall be paid; but the law throws every protection around him, and it is his duty to perform the acts required of him by law, and at the end of each term he is to make up the costs in each case that have accrued since the last previous term, and enter them on his fee book, and after that he can demand them, and not before. Were it otherwise, the clerk might stop the wheels of court, by refusing to enter an order overruling a demurrer, unless his costs were paid.

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COHRS, MAUS & ROBERTS,
For Relator.

And by the 28th section of the same act, he is to make and set down in a book a fee bill in each case, which shall be a public record, and provides for collecting the same by issuing a certified copy under seal, &c.

By the 4th section of the Practice Act, Purple's Stat. 520, the clerk is required to keep a fee book, in which shall be clearly and distinctly set down in items, under the proper titles, costs of each suit, &c. And by the 41st section it is provided, that if the clerk issues a fee bill without first entering the same on the fee-book, the same shall be void, and the person paying the same may recover it back.

These sections of the law show clearly that the clerk in performing acts of his official duty, has no right to demand, as a condition precedent to the performance of that duty, that he shall be paid; but the law throws every protection around him, and it is his duty to perform the acts required of him by law, and at the end of each term he is to make up the costs in each case that have accrued since the last previous term, and enter them on his fee book, and after that he can demand them, and not before. Were it otherwise, the clerk might stop the wheels of court, by refusing to enter an order overruling a demurrer, unless his costs were paid.

The law protects him in every way. He need do but little services before he can call upon the court to compel the party to give security for costs; and had it been that such was the intention, the section allowing a court to compel a party to give security for costs, would never have been passed.

COURS, MAUS & ROBERTS,
For Relator.

Mr Purple in the
matter of Motion.
Mand. &c.

Filed Apl 24 1862
C. C. Lemmel
Clk

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State of Illinois, SUPREME COURT, } **In Third Grand Division,** APRIL TERM, A. D. 1862.

THE PEOPLE, ON THE RELATION OF W. DON MAUS,
vs.
GEORGE H. HARLOW, CLERK, &C.

Abstract of Record.

This was a motion for a mandamus to George H. Harlow, clerk of the circuit clerk of Tazewell county, Illinois, to compel him to issue a writ, &c.

The petition states that the relator, on the 11th of April, 1862, the respondent being then and there clerk of the circuit court of Tazewell county, Illinois, presented a precipe for a summons against one Smith Mosher, jr.; that the clerk filed the precipe and docketed the suit, and made out a writ in due form of law, and then presented the relator with a bill of costs amounting to fifty cents, which the relator refused to pay; and thereupon the clerk refused to deliver the writ, or to allow the same to be taken out of his office, unless the relator would pay the bill.

The clerk admits the truth of the petition, and waives an alternative mandamus, and agrees that if he was bound, under these circumstances, to deliver the summons, a peremptory mandamus shall issue; otherwise to be refused.

Brief for Relator.

The first section of the act in regard to costs provides for security for costs in suits upon office bonds, and in suits by non-residents, &c. Purple Statutes, page 275.

By the 2d section, the plaintiff or officers of the court may apply to the court to compel parties who are unable to pay costs to give security. Purple Statutes, 275.

By the 3d section, the court may allow parties, who are poor, to prosecute without payment of costs. Purple, 276.

By the 22d section of the same act, the clerk is required to tax and subscribe all bills of costs. Purple Stat., 278.

And by the 24th section, in all cases where either party shall be adjudged to pay costs before final judgment, by reason of setting aside a non suit, default or *nol pros.*, or the granting of a continuance or new trial, or otherwise; and in all cases where there is security for costs, attorney liable for costs, or an action brought to the use of another, and the plaintiff shall be adjudged to pay the costs, it shall be lawful for the clerk to make out and tax a bill of costs, and deliver the same to the sheriff; and if the same is not paid in 30 days, the sheriff has a right to levy as on a writ of *fieri facias.*

By the 26th section of the act of 1845, in regard to Fees and Salaries, no fees are payable until a bill of the same has been presented; and the 27th section provides for a penalty against officers who take or demand fees, when the services have not been actually performed. Purple Statutes, page 562.

And by the 28th section of the same act, he is to make and set down in a book a fee bill in each case, which shall be a public record, and provides for collecting the same by issuing a certified copy under seal, &c.

By the 40th section of the Practice Act, Purple's Statutes, 826, the clerk is required to keep a fee book, in which shall be clearly and distinctly set down in items, under the proper titles, costs of each suit, &c.; and by the 41st section, it is provided, that if the clerk issues a fee bill without first entering the same on the fee book, the same shall be void, and the person paying the same may recover it back.

These sections of the law show clearly that the clerk, in performing acts of his official duty, has no right to demand, as a condition precedent to the performance of that duty, that he shall be paid; but the law throws every protection around him, and it is his duty to perform the acts required of him by law, and at the end of each term he is to make up the costs in each case that have accrued since the last previous term, and enter them on his fee book, and after that he can demand them, and not before. Were it otherwise, the clerk might stop the wheels of court, by refusing to enter an order overruling a demurrer, unless his costs were paid.

The law protects him in every way. He need do but little services before he can call upon the court to compel the party to give security for costs; and had it been that such was the intention, the section allowing a court to compel a party to give security for costs, would never have been passed.

COHRS, MAUS & ROBERTS,
For Relator.

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People on the relation
of W. Van Horn
vs.
George H. Harlow

Abstract Brief

Filed Apl 24, 1862
L. Leland
Clerk