No. 14442

Supreme Court of Illinois

Boyd

vs.

EH
Koeffer

71641 7

56

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division

No. 23

1863

Boyd

vs.

Rocker

Jesse C Boyce
vs
Jeremiah Locher

Supreme Court —
3d Grand Division
April Term AD 1861

Motion to Reinstate Cause

Grounds of Motion

~~fact~~ This Cause was dismiss for want of prosecution, on the ground that ~~the~~ the Abstract Errors & Points of plaintiff in Error were not filed in Compliance of the Rule of this Court. which was not true in fact

Plaintiff in Error at the April Term Entered his Motion to reinstate said Cause and assigned the following reasons in Support of his Motion

1st. Manuscript Abstracts were filed in this Cause on the day the Record was brought into this Court, to wit: the 4th day of June 1860. Also Errors were assigned & ~~Point~~ Points of plaintiff in Error made on the same day — to wit 4th of June 1861

2 The Abstract Errors & Points in Manuscript were taken from the Records on or about the 13th day of April AD 1861 for the purpose of having them printed & that the original ~~are now on file~~ were returned to the Files of this Court on the 18th day of April

AD 1861 & have been & are now on file in this Court.

3) The Motion of defendant in Error to dismiss for want of prosecution no doubt was made under a mistaken state of facts — as the Court will see by the ~~records~~ files that the Record Abstract & Errors & briefs were all filed on the same day & that at the first term ~~after~~ thereafter — on the 22 day of April AD 1861 they were printed & filed in this Court

4) The Affidavit in Support of this motion was filed April 18th 1861

W. E. Ives Atty for plff in Error

56 HO 23

Jacob Roper
vs
Fremont Weber

Motion to dismiss & Errors

Filed May 5. 1862
S. Edwards
clerk

Argument & decision

STATE OF ILLINOIS, SUPREME COURT.

THIRD DIVISION,

APRIL TERM, A. D., 1863.

JESSE C. BOYD, Plaintiff in Error.

vs.

JEREMIAH KOCHER, Defendant in Error.

BRIEF ON THE PART OF DEFENDANT IN ERROR.

This was an appeal taken by the Plaintiff in Error, who was defendant in the Court below, from a judgment rendered against him before the Justice of the Peace in Lee County, to Circuit Court in said county. The judgment was rendered before the Justice of the Peace on the 24th day of March, A. D., 1860., and the appeal was taken by plaintiff in error by filing his appeal bond with the Justice on the 28th day of March 1860.

The Justice of the Peace made out a transcript of the proceedings before him and certified to the same under date of April 7th, 1860, and lodged the same in the Clerk's office of the Lee County Circuit Court, on the 8th day of May, 1860. The Clerk of the Circuit Court did not docket the appeal until the 14th day of May, 1860, and afterwards on the same day the Court dismissed the appeal for want of prosecution.

1.

It is claimed that the appellee in the court below had no right to appear and have the appeal dismissed for want of prosecution, inasmuch as he had not been served with process from the Circuit Court.

This appeal was taken under the 60 section, chapter 59th of the Revised Statutes, Scates' Comp., P. 708, which provides as follows :

"SEC. 60

2.

The 61st section of the same chapter provides as follows :

"Or the appealing party may file his bond in the office of the Clerk of the Circuit Court of the proper county, within the time aforesaid, which bond shall be approved by the clerk;

upon the filing and approval of which bond, the clerk shall issue a *supersedeas*, enjoining the Justice and constable from proceeding any further in said suit, and suspending all proceedings in relation thereto, and shall issue a summons to the appellee, to appear at the term of the court, to which the appeal is returnable, which summons shall be served and returned as in other cases."

This section only authorizes the clerk to issue a summons to the appellee, when the appeal is taken by filing the bond in the clerk's office; and the statute no where requires the clerk to issue a summons to the appellee when the appeal is taken by filing the bond with the justice.

The 64th section provides for issuing a summons to a co-plaintiff or co-defendant when they do not join in the appeal, but it has no reference to the present case.

Keeping this distinction in view, the opinion of this Court in the case of "Hooper vs. Smith," 19th Ill. 53, will not conflict with the construction of this statute above suggested.

3.

The case of "Wells vs. Hicks," 27th Ills. 345, is an express authority upon this point. In that case the Court remarks:

"While it is admitted that the appeal was taken strictly according to the provisions of the statute, it is complained that that does not provide for giving notice of appeal, to the owner of the land. This is an objection against the statute, and unless we hold that it is void for that reason, we can afford no relief for that cause. It was his duty to take notice of, and follow the appeal."

Wells vs. Hicks 27th Ills., 345.

4.

This construction bears a perfect analogy to the practice in removing causes from the Circuit to the Supreme Court. If an appeal is taken, and a bond filed in the court below where judgment is rendered, the appellee is bound to follow the appeal and take notice of whatever proceedings are had in the court above, and no process is necessary to give the Supreme Court jurisdiction. On the other hand if the case is removed to the Supreme Court by writ of Error, and the bond filed with the Clerk of the Supreme Court, the law and the practice require that the defendant in error shall be served with process.

5.

It would seem that the Plaintiff in Error was practicing, in this case, upon this construction of the statute. He filed his appeal bond before the Justice of the Peace on the 28th day of March, and although the Justice made out the transcript and lodged it in the Circuit Clerks office, yet the appellant, took no step to procure a summons to be issued against the appellee, up to the 14th day of ~~March~~ May, 1860, at which time, the case being on the docket, the Circuit Court dismissed the appeal for want of prosecution. We respectfully submit, that to permit the appellant (Plaintiff in Error) now to complain that he did not have the appellee, in the Court below, served with summons on the appeal, would in effect allow him a premium on his own laches.

EDSALL, DEWOLF & PINKNEY, for Defendant in Error.

56
27

State of Illinois

Supreme Court

Third Grand Division

Jesse E. Boyd - Plff in Error

vs.

Jeremiah Kocher - Deft in Error.

April Term - A.D. 1863

Brief on part of Deft. in Error

Filed May 7. 1863

S. Sellard
Clk

Edsall, Delvaly & Pinkney
for Deft-in error

STATE OF ILLINOIS—SUPREME COURT,

THIRD DIVISION—APRIL TERM, 1861.

JESSE C. BOYD, Plaintiff in Error,
vs.
JEREMIAH KOEHER, Defendant in Error.

ABSTRACT OF THE RECORD.

This cause was originally brought before a Justice of the Peace, in Lee county by appellee, against appellant, and taken by appeal to the Circuit Court of said County of Lee.

p1 Shows that a summons issued from the Justice of the Peace, with a proper return of service, by Constable thereon.

2 Transcript of the Justice of the Peace.

3 Transcript filed, and suit docketed on the 14th of May, A. D. 1860, and that said 14th day of May, was the 8th day of the May Term of the Circuit Court of the County of Lee.

4 Defendant in error by his Attorney, on the said 14th day of May, (being the same day the suit was docketed,) moved the Court to dismiss the appeal for want of prosecution. The Court sustained the motion, dismissed the appeal, and awarded procedendo to Justice of the Peace.

BRIEF AND AUTHORITIES.

1 The appeal in this case was docketed on the 14th day of May, A. D. 1860, and on the same day, being the 8th day of the May Term, A. D. 1860, of the Lee County Circuit Court. Defendant in error entered his appearance, and the Court on his motion dismissed the appeal for want of prosecution, and awarded a writ of procedendo to Justice of the Peace. The plaintiff in error questions the correctness of these proceedings.

See 19th of Ill., 53.

The appellee was not served with process, neither was the appeal filed and docketed ten days before the first day of the Term.

See 19, Ill., 53.

ASSIGNMENT OF ERRORS.

1st. The Court erred in dismissing the appeal, for the reason that the appeal was not filed ten days before the first day of the Term.

2d. The appellee had not been served with process, and could not be considered in Court to receive its judgment.

3d. The Court erred in dismissing the appeal, for the reason that the appeal was filed and docketed on the 8th day of the May Term, of said Court, and the Court on the same day allowed the defendant in error to enter his appearance, and on his motion, made the same day, without the docket being called in its order for trial, dismissed the appeal for want of prosecution, and ordered a writ of procedendo.

4th. No summons was issued to bring appellee into Court to receive its judgment.

5th. The Court erred in dismissing the appeal on the same day the suit was docketed without the cause being called in its order for trial.

6th. The Court erred in dismissing the appeal without the defendant in error being in position where he could have been forced to trial.

WM. E. IVES.

GRAY, AVERY & BUSHNELL, for Plaintiff in error.

104

Jesse E. Boyd
vs
Jeremiah Boehr

Brief and Abstract

Filed April 22, 1861
L. Leland
Clerk

1

State of Illinois } ss
Lee County }

Plens in the Lee County Circuit Court in the 22 Judicial Circuit of the State of Illinois, In the matter of Jeremiah Kocher against Jesse C. Boyd on an appeal brought into said Circuit Court from a judgment Charles V Tenney Esq a Justice of the Peace in and for said Lee County

Now Know ye that the following is a correct copy of the summons issued by the Justice of the Peace in said cause, that is to say —

11

SUMMONS.—Sold by Hawley & Gilbert, Booksellers, Dixon, Ill.

STATE OF ILLINOIS, } ss. The People of the State of Illinois, to any Constable of said County, GREETING:
Lee County.

You are hereby commanded to SUMMON Jesse C Boyd to appear before me, at my office in Dixon on —— the 24th day of March A. D., 1860 at 1 o'clock, P. M., to answer the complaint of Jeremiah Kocher for a failure to pay him a certain demand, not exceeding one hundred dollars, and thereof make due return as the law directs.

Given under my hand and seal, this 12th *day of* March A. D. 1860

Chas V Tenney
Justice of the Peace (SEAL)

12

which said Summons was endorsed as follows to wit:—"

Served by reading to the within named Defendant Jesse C Boyd this 21 day of March 1860

Service " 25¢ Milage 30¢ 55

E A Snow
Constable "

And the Transcript filed in said Cause is in the words and figures as follows that is to say:-

"

Jeremiah Kocher
vs
Jesse C Boyd

1860 March 12th Summons Issued returnable March 24th at one o'clock P.M. and given to Constable E A Snow to serve Returned served by reading to and in hearing of the Defendant Jesse C Boyd March 21st fees 55 cents E A Snow Constable.

Subpoena issued for Wm Peacock Samuel Stewart J Evans Jeremiah Dudley & Sanford Returned Served by reading to and in hearing of Peacock Evans Dudley & Sanford fees 145 E A Snow Constable

March 24th Parties called Plaintiff appears Defendant does not appear Wm Peacock J Dudley & Evans called & sworn Witnesses for Plaintiff upon hearing the Evidence it is considered that the Defendant is indebted to the Plaintiff in the sum of Ninety Dollars whereupon judgment is rendered for the sum Ninety Dollars Debt and costs taxed at Four 40/100 Dollars

March 25th Defendant comes with Jesiah Evans as his Security and files his Bond for an appeal to the Circuit Court

State of Illinois } I Charles N Tenney a Justice of the peace in and for
Lee County } said County do hereby certify that the foregoing Transcript is truly copied from the files & Records of my office Lee County and I have hereto set my hand this 7th day of April AD 1860

Charles N Tenney J P

on the 8th day of the court

3

which said ~~Appeal~~ ~~Bond~~ Transcript brought into the Office of the Clerk of the Circuit Court on the 8th day of April AD 1860 was not filed or docketed until the 14th day of May AD 1860 — and is endorsed "Filed May 14th AD 1860
J. S. Boardman Clerk"

And the Appeal Bond filed in said cause is in the words and figures as follows that is to say

11

APPEAL BOND.—Chicago Democrat Print.

KNOW ALL MEN BY THESE PRESENTS, That we, Jefe C Byd & Josiah Evans of the county of Lee in the State of Illinois, are held and firmly bound unto Jeremiah Rocker in the penal sum of one Hundred & Ninety Dollars lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly, severally and firmly by these presents. Witness our hands and seals, this 28th day of March A. D. 1860

The condition of the above obligation is such, That whereas the said Jeremiah Rocker did on the Twenty fourth day of March A. D. 1860 before Charles V Tenney a Justice of the Peace for the said county of Lee recover a judgment against the above bounden Jefe C Byd for the sum of Ninety Dollars & Costs from which judgment the said Jefe C Byd has taken appeal to the Circuit Court of the county of Lee aforesaid, and State of Illinois. Now, if the said Jefe C Byd shall prosecute his appeal with effect, and shall pay whatever judgment may be rendered by the Court upon dismissal or trial of said appeal, then the above obligation to be void; otherwise to remain in full force and effect.

Approved by me at my office, this 28th day of March 1860

Charles V Tenney
Justice of the Peace.

Jefe C Byd SEAL.
Josiah Evans SEAL.

which said Appeal Bond brought over to the Office of the Clerk of this Court on the 8th day of April AD 1860 was not filed or docketed until the 14th day of May thereafter — and is endorsed "Filed May 14th AD 1860
J. S. Boardman Clerk"

And at a regular Term of the Sussex County Circuit Court, begun and holden at the Court House in the City of Wilton on the first Monday Being on the Seventh day of May in the year of our Lord One thousand Eight hundred and Sixty

Present Hon. John V Eustace Judge of said Twenty Second Judicial Circuit

Robert G Burchell State's attorney for said Circuit

Isaac S Boardman Clerk of said Sussex County Circuit Court

Curtis Harding Sheriff of Sussex County

Be it remembered that on on the regular day of said Term Being on the 14th day of May aforesaid. The following record entry appears here in this behalf that is to say

"

Jeremiah Kocher vs Jesse G Boyd appellant } Appeal

On this day comes the Plaintiff by Sheffield his attorney and on his motion this appeal is dismissed for want of prosecution It is considered and adjudged by the Court that the Plaintiff have and recover of the Defendant the sum of Nine Dollars for his Damages for delay together with his costs and charges by him in this behalf expended. and that he have

Execution thereof; and that a procedendo be awarded to the Justice of the Peace from before whom this appeal was brought.

"

And on the 18th day of May AD 1860 a Procedendo was issued to the Justice of the Peace from before whom said Appeal was brought which is in the words following to wit;

"

PROCEDENDO. Printed at the Republican & Telegraph office, Dixon.

STATE OF ILLINOIS. } SS.
Lee County.

The People of the State of Illinois,

To Chas W Penny *Esquire, a Justice of the Peace in and for the County aforesaid, GREETING:*

Although lately in a certain suit then lately instituted and depending before you, between Jeremiah Rocker plaintiff and Jesse C Boyd defendant wherein you had rendered judgment in favor of the said Jeremiah Rocker against the said Jesse C Boyd therein, for the sum of Ninety Dollars, and ~~Cents~~ beside costs, from which said judgment the said Jesse C Boyd took an Appeal to our Circuit Court for the County aforesaid, whereupon you entirely stayed all proceedings in relation thereto, yet, inasmuch as such proceedings have been had upon said appeal in our said Circuit Court that the said judgment, by you so rendered as aforesaid, remains in full force and effect in all respects as before the taking of said Appeal, and execution of said judgment remains to be done according to law as appears to us of record:

Now Therefore, we Command You, That without further delay you proceed on said judgment in such manner as the law directs, in all respects as if the said appeal had never been taken.

WITNESS I S Boardman Clerk of said Court, and the seal thereof, at Dixon in said County this 18th day of May A. D. 1860.

Isaac S. Boardman
per Joseph Bell D.C.

Clerk.

"

State of Illinois
Lee County } ss:

I, Isaac S. Boardman Clerk of the Circuit Court within & for the County of Lee in the State of Illinois, do hereby certify that the foregoing is a full true, and complete transcript of all the proceedings of record in the foregoing cause, as appears from the Books and files in my office

In witness whereof I hereunto set my hand and the seal of said Court at Dixon this 28th day of May A D 1860

Isaac S. Boardman Clerk
for Joseph Ball D. C.

Let supersedeas issue bond $250 Josiah Evans surety

J D Caton

Assignment of Errors.

~~Bill of Exceptions~~

The appeal bond in this cause was filed before the Justice of the peace on the 28th day of March AD 1860 by the plaintiff in error and on the 14th day of May AD 1860 the appeal was filed in the Circuit court of Lee County and placed upon the docket of the Court on the Eighth day of the May Term of said Court, and on the same day the defendant in error by his attorney by his attorney entered his appearance and moved the court to dismiss the appeal for want of prosecution the cause not being called in its order for trial, the court sustained the motion and dismissed the appeal and ordered a procedendi to the Justice The plaintiff in error assigns the following for error

First The Court erred in dismissing the appeal, for the reason that the appeal was not filed and placed upon the docket of said court ten days before the first day of said term Hooper v Hay

Second vs Smith 19th Ill. Page 53

The appellee had not been served with process and could not be considered in court to receive its judgment

Third The court erred in dismissing the appeal for the reason that the appeal was filed & docketed on the 8th day of the May term of said Court and the court allowed the defendant in error on the same day to enter his appearance and on his

motion made the same day without the dockets being called in its order for trial dismisses the appeal for want of prosecution and ordered a procedendo to justice of the peace

Fourthly, No summons was issued to bring appellee into Court to receive its judgment

Fifthly, The court erred in dismissing the appeal on the same day the suit was docketed - without the cause being called in its order for trial

Sixth The court erred in dismissing the appeal without the defendant in error being in a position to be forced to trial. W. E. & E. J. Jones for Plaintiff in Error

J. C. Crapp
vs
Jeremiah Kocher

Assignment of Error
Plaintiff in Error

W. E. & E. J. Jones for
Plaintiff in Error

And now comes the Appellee by DeWolf & Pinkney his attorneys & says that there is no error in the Record & proceedings aforesaid

DeWolf & Pinkney
Atty's for Appellee

56 420 ~~104~~ ~~40~~
23

Transcript

In re

Jesse C. Boyd
Plaintiff in error

vs

Jeremiah Kocher
Defendant in error

Filed June 4. 1860
S. Leland
Clk.

Fees $2.70

Petition made the same day without the docket

State of Illinois } 3rd Grand Division
Supreme Court } April Term A D
1861

Jesse B Boyd } apft in Error } No. 104 & 105
as
J Rocker } drft in Error

W B Burtnell being
sworn on oath says that manuscript
abstracts were filed in this case
on 4th day of June A D 1860. and taken
from file on or about the 13th day of
April 1861 for the purpose of having
them printed & that the original
are now on file. & the same facts are true
in number 105

W B Burtnell

Subscribed & sworn to
before me this 18th
day of Apr 1861
L. Leland Clerk
by J. B. Rice Deputy

556 23 ~~42~~

Supreme Court -
~~104~~

J. L. Boyd - Plff in Err
vs
J. Roach Deft in Err

Affidavit of W. Bushnell
in Vols 104, 105 -

Filed April 18, 1861
L. Leland
Clerk

~~Opinion~~ of the ~~Court delivered by~~

Mr. Justice Breese delivered the opinion of the Court.

~~Breese J.~~ This record shows a case originally brought before a Justice of the peace and taken by appeal to the Circuit Court, under Section 60, Chapter 59, R. S. That Section is as follows:

"The party desiring such appeal may file his bond in the office of the Justice who shall have rendered the judgment: such bond to be approved by such Justice, whose duty it shall be to suspend all proceedings in the case; and if execution shall have been issued he shall recall the same, and who shall within twenty days after receiving and approving of the appeal bond, file the same in the office of the Clerk of the Circuit Court, together with all the papers and transcripts of the judgment he had given, with a certificate, under his hand, that the said transcript and papers, contain a full and perfect statement of all the proceedings before him."

Scam. Comp. 708

It is apparent from this Section when an appeal is perfected before a Justice of the peace, no summons is necessary to either party. The party appealing is bound to follow up the appeal which he has himself taken, and so is the appellee, as in an appeal taken from the Circuit Court to this Court.

Had the appeal been taken under Section 61, a summons would have been necessary, and the case might then be likened to the case of Hooper vs. Smith, 19 Ill. 53.

If it was necessary to summon the appellee to the Circuit Court, it was a duty the plaintiff here should have performed, by securing the necessary process. He did not do so, he took no steps to bring the party into Court, and he should not be permitted

to derive an advantage from his own omission of duty, ~~or his carelessness~~ granting that that was his duty.

In cases brought to the circuit court under section 60, the parties must follow up their appeal in the same manner as in appeals from the circuit to the Supreme Court. The plaintiff in error not having so done ~~his appeal was~~ his appeal was properly dismissed. The judgment is affirmed.

~~The whole Court concurring.~~

Judgment affirmed.

23-58

Boyd
vs
Kochers

opinion by
Meem J.

Recorded B.12 P.126

State of Illinois }
Lee County }

Josiah Evans of the County of Lee and State of Illinois being duly sworn doth depose and say that he is the indendul person who signed the Bonds in the Case of Jesse C. Boyd Plantiff in Error vs. Jeremiah Kocher defendent in Error. and the same ~~Sig~~ Jesse C Boyd in Error vs. James M. Moore. Defendent in Error. - That he is a citizen of ~~Sai~~ the County of Lee in the State of Illinois That he has. One Hundred and Twelve Acres of Land in said County which is free and clear from all incumberances that he is worth over and above all his indebtedness at least Three Thousand Dollars

Josiah Evans

Subscribed and sworn to before me this 28th day of May AD 1860
Isaac S. Boardman Clerk of the Lee County Circuit Court
pr Joseph Ball D. C.

~~40~~ ~~422~~ 104
56 23

J. C. Boyd Petitioner
vs
Moores & Kocher

Affidavit &
Security

Filed June 4. 1860
S. Leland
Clk.

Lues & Lee
attys for Petitioner

STATE OF ILLINOIS—SUPREME COURT,

THIRD DIVISION—APRIL TERM, 1861.

JESSE C. BOYD, Plaintiff in Error,
vs.
JEREMIAH KOEHER, Defendant in Error.

ABSTRACT OF THE RECORD.

This cause was originally brought before a Justice of the Peace, in Lee county by appellee, against appellant, and taken by appeal to the Circuit Court of said County of Lee.

p1 Shows that a summons issued from the Justice of the Peace, with a proper return of service, by Constable thereon.

2 Transcript of the Justice of the Peace.

3 Transcript filed, and suit docketed on the 14th of May, A. D. 1860, and that said 14th day of May, was the 8th day of the May Term of the Circuit Court of the County of Lee.

4 Defendant in error by his Attorney, on the said 14th day of May, (being the same day the suit was docketed,) moved the Court to dismiss the appeal for want of prosecution. The Court sustained the motion, dismissed the appeal, and awarded procedendo to Justice of the Peace.

BRIEF AND AUTHORITIES.

1 The appeal in this case was docketed on the 14th day of May, A. D. 1860, and on the same day, being the 8th day of the May Term, A. D. 1860, of the Lee County Circuit Court. Defendant in error entered his appearance, and the Court on his motion dismissed the appeal for want of prosecution, and awarded a writ of procedendo to Justice of the Peace. The plaintiff in error questions the correctness of these proceedings.

See 19th of Ill., 53.

The appellee was not served with process, neither was the appeal filed and docketed ten days before the first day of the Term.

See 19, Ill., 53.

ASSIGNMENT OF ERRORS.

1st. The Court erred in dismissing the appeal, for the reason that the appeal was not filed ten days before the first day of the Term.

2d. The appellee had not been served with process, and could not be considered in Court to receive its judgment.

3d. The Court erred in dismissing the appeal, for the reason that the appeal was filed and docketed on the 8th day of the May Term, of said Court, and the Court on the same day allowed the defendant in error to enter his appearance, and on his motion, made the same day, without the docket being called in its order for trial, dismissed the appeal for want of prosecution, and ordered a writ of procedendo.

4th. No summons was issued to bring appellee into Court to receive its judgment.

5th. The Court erred in dismissing the appeal on the same day the suit was docketed without the cause being called in its order for trial.

6th. The Court erred in dismissing the appeal without the defendant in error being in position where he could have been forced to trial.

WM. E. IVES.

GRAY, AVERY & BUSHNELL, for Plaintiff in error.

56 124

Jesse C. Boyd
vs
Jeremiah Kocher

Brief and Abstract

Filed April 22. 1881
L. Leland
Clerk

Know all men by these presents - That we
Jesse C Boyd Josiah Evans.
are held and firmly
bound unto Jeremiah Kocher in the
sum of Two Hundred & fifty dollars lawful
money of the United States to be paid to the
said Jeremiah Kocher his executors
administrators or assigns. For which
payment well and truly to be made we
bind ourselves, our heirs executors
and administrators jointly and severally
firmly by these presents sealed with
our seals and dated this 30th day of
May AD 1846

Whereas the above bounden
Jesse C Boyd has filed his bill of
Exceptions from the decisions of
John V Eustace circuit Judge of the
22d Judicial circuit made and settled
in a cause pending in the Supreme
Court of the State of Illinois in the
third grand division - wherein the
said Jesse C Boyd is plaintiff in error and
the said Jeremiah Kocher is defendant
in error Now the condition of this obligation is such
that if the said Jesse C Boyd shall
pay all such costs & damages as shall accrue and
be adjudged against him upon such
appeal then this obligation to be void
otherwise to remain in full force and
virtue

Sealed and delivered in presence of

Jesse C. Boyd (Seal)
Josiah Evans (Seal)

40 423 104
56 23

J. C. Boyd pltff in Error
vs
J. Kocher deft in Error

Bond

Filed June 4. 1860
Leland
Clk.

Lucas & Lucas
attys for pltff in Error

STATE OF ILLINOIS, } ss. The People of the State of Illinois,
SUPREME COURT,

To the Clerk of the Circuit Court for the County of Lee 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 Lee County, before the Judge thereof, between Jeremiah Rocher

plaintiff, and Jesse C. Boyd

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

as we are informed by his complainant and we being willing that error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the first Tuesday after the third Monday in April next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this Fourth day of June in the Year of Our Lord One Thousand Eight Hundred and Sixty

L. Leland
Clerk of the Supreme Court.

By P. Leland
Dep'y

56 40 104 23

Gilbert C. Boyd

No. 1425. vs.

Jeremiah Rocker

WRIT OF ERROR.

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

L. Leland

G. S. Rice Deputy Clerk.

FILED June 4th A. D. 1860

L. Leland

Clerk.

STATE OF ILLINOIS, SUPREME COURT.

THIRD DIVISION,

APRIL TERM, A. D., 1863.

JESSE C. BOYD, Plaintiff in Error.

vs.

JEREMIAH KOCHER, Defendant in Error.

BRIEF ON THE PART OF DEFENDANT IN ERROR.

This was an appeal taken by the Plaintiff in Error, who was defendant in the Court below, from a judgment rendered against him before the Justice of the Peace in Lee County, to Circuit Court in said county. The judgment was rendered before the Justice of the Peace on the 24th day of March, A. D., 1860, and the appeal was taken by plaintiff in error by filing his appeal bond with the Justice on the 28th day of March 1860.

The Justice of the Peace made out a transcript of the proceedings before him and certified to the same under date of April 7th, 1860, and lodged the same in the Clerk's office of the Lee County Circuit Court, on the 8th day of May, 1860. The Clerk of the Circuit Court did not docket the appeal until the 14th day of May, 1860, and afterwards on the same day the Court dismissed the appeal for want of prosecution.

1.

It is claimed that the appellee in the court below had no right to appear and have the appeal dismissed for want of prosecution, inasmuch as he had not been served with process from the Circuit Court.

This appeal was taken under the 60 section, chapter 59th of the Revised Statutes, Scates' Comp., P. 708, which provides as follows:

"Sec. 60. The party desiring such appeal may file his bond in the office of the Justice who shall have rendered the judgment: such bond to be approved by such Justice, whose duty it shall be to suspend all proceedings in the case; and if execution shall have been issued he shall recall the same, and who shall within twenty days after receiving and approving of the appeal bond, file the same in the office of the Clerk of the Circuit Court, together with all the papers and transcripts of the judgment he had given, with a certificate, under his hand, that the said transcript and papers, contain a full and perfect statement of all the proceedings before him."

We submit to the Court that when an appeal is taken under this section that it is not necessary that the appellee should be served with process issuing from the Circuit Court. It is his duty to follow up the appeal without the service of process upon him, and that if the appellant fails to prosecute his appeal, the appellee may have the same dismissed.

2.

The 61st section of the same chapter provides as follows:

"Or the appealing party may file his bond in the office of the Clerk of the Circuit Court of the proper county, within the time aforesaid, which bond shall be approved by the clerk;

upon the filing and approval of which bond, the clerk shall issue a *supersedeas*, enjoining the Justice and constable from proceeding any further in said suit, and suspending all proceedings in relation thereto, and shall issue a summons to the appellee, to appear at the term of the court, to which the appeal is returnable, which summons shall be served and returned as in other cases."

This section only authorizes the clerk to issue a summons to the appellee, when the appeal is taken by filing the bond in the clerk's office; and the statute no where requires the clerk to issue a summons to the appellee when the appeal is taken by filing the bond with the justice.

The 64th section provides for issuing a summons to a co-plaintiff or co-defendant when they do not join in the appeal, but it has no reference to the present case.

Keeping this distinction in view, the opinion of this Court, in the case of "Hooper vs. Smith," 19th Ill. 53, will not conflict with the construction of this statute above suggested.

3.

The case of "Wells vs. Hicks," 27th Ills. 345, is an express authority upon this point. In that case the Court remarks:

"While it is admitted that the appeal was taken strictly according to the provisions of the statute, it is complained that that does not provide for giving notice of appeal, to the owner of the land. This is an objection against the statute, and unless we hold that it is void for that reason, we can afford no relief for that cause. It was his duty to take notice of, and follow the appeal."

Wells vs. Hicks 27th Ills., 345.

4.

This construction bears a perfect analogy to the practice in removing causes from the Circuit to the Supreme Court. If an appeal is taken, and a bond filed in the court below where judgment is rendered, the appellee is bound to follow the appeal and take notice of whatever proceedings are had in the court above, and no process is necessary to give the Supreme Court jurisdiction. On the other hand if the case is removed to the Supreme Court by writ of Error, and the bond filed with the Clerk of the Supreme Court, the law and the practice require that the defendant in error shall be served with process.

5.

It would seem that the Plaintiff in Error was practicing, in this case, upon this construction of the statute. He filed his appeal bond before the Justice of the Peace on the 28th day of March, and although the Justice made out the transcript and lodged it in the Circuit Clerks office, yet the appellant, took no step to procure a summons to be issued against the appellee, up to the 14th day of March, 1860, at which time, the case being on the docket, the Circuit Court dismissed the appeal for want of prosecution. We respectfully submit, that to permit the appellant (Plaintiff in Error) now to complain that he did not have the appellee, in the Court below, served with summons on the appeal, would in effect allow him a premium on his own laches.

EDSALL, DEWOLF & PINKNEY, for Defendant in Error.

56
23

State of Illinois

Supreme Court.

Third Grand Division

April Term A.D. 1863

Isaac C. Boyd. Plff in Error.

vs.

Lemuel Kocher. Deft in Error.

Brief on part of Deft in Error.

Filed May 7, 1863

L. Leland

Clk.

Isaac N. DeWolf & Pinkney

for Deft in Error.

Jesse C Boyd
pltff in Error
vs
Jeremiah Kocher
defendant in Error

Abstract of Record

Page 1st. Summons issued by J.P. return of officer of service

Page 2d Transcript of J.P.

Page 3d Transcript Filed and suit docketed on the 14th day of May 1860 on the 8th day of the May term of the Lee County Circuit Court.

Page 4th Defendant in Error by his atty on the 14th day of May 1860 Move the Court to dismiss the appeal for want of prosecution the Court sustained the motion and dismissed the appeal to accorded proceedings to J.P.

Brief & Authorities

1st. The appeal in this case was docketed on the 14th day of May 1860 & on the same day being the 8th day of the May term 1860 of the Lee County Circuit Court defendant in error by his Attorney

Entered his appearance to the Court on his motion dismissed the appeal for want of prosecution & awarded procedendo to J.P.

The plaintiff in Error specifies in Connection of these proceedings 19th of Ill. Page 53

2d The appellee was not served with process nor was the appeal filed & docketed ten days before the first day of the Term 19 Ill 53

J. G. Boyd Atty in Error
Geo. Walker Atty in Error

Abstract & Brief

Filed June 4. 1860
Skelton
Clk.

Geo. Turner
Atty for Defts in Error

56 420 23 Ill

STATE OF ILLINOIS, SUPREME COURT.

THIRD DIVISION,

APRIL TERM, A. D., 1863.

JESSE C. BOYD, Plaintiff in Error.

vs.

JEREMIAH KOCHER, Defendant in Error.

BRIEF ON THE PART OF DEFENDANT IN ERROR.

This was an appeal taken by the Plaintiff in Error, who was defendant in the Court below, from a judgment rendered against him before the Justice of the Peace in Lee County, to Circuit Court in said county. The judgment was rendered before the Justice of the Peace on the 24th day of March, A. D., 1860., and the appeal was taken by plaintiff in error by filing his appeal bond with the Justice on the 28th day of March 1860.

The Justice of the Peace made out a transcript of the proceedings before him and certified to the same under date of April 7th, 1860, and lodged the same in the Clerk's office of the Lee County Circuit Court, on the 8th day of May, 1860. The Clerk of the Circuit Court did not docket the appeal until the 14th day of May, 1860, and afterwards on the same day the Court dismissed the appeal for want of prosecution.

1.

It is claimed that the appellee in the court below had no right to appear and have the appeal dismissed for want of prosecution, inasmuch as he had not been served with process from the Circuit Court.

This appeal was taken under the 60 section, chapter 59th of the Revised Statutes, Scates' Comp., P. 708, which provides as follows:

"SEC. 60. The party desiring such appeal may file his bond in the office of the Justice who shall have rendered the judgment: such bond to be approved by such Justice, whose duty it shall be to suspend all proceedings in the case; and if execution shall have been issued he shall recall the same, and who shall within twenty days after receiving and approving of the appeal bond, file the same in the office of the Clerk of the Circuit Court, together with all the papers and transcripts of the judgment he had given, with a certificate, under his hand, that the said transcript and papers, contain a full and perfect statement of all the proceedings before him."

We submit to the Court that when an appeal is taken under this section that it is not necessary that the appellee should be served with process issuing from the Circuit Court. It is his duty to follow up the appeal without the service of process upon him, and that if the appellant fails to prosecute his appeal, the appellee may have the same dismissed.

2.

The 61st section of the same chapter provides as follows:

"Or the appealing party may file his bond in the office of the Clerk of the Circuit Court of the proper county, within the time aforesaid, which bond shall be approved by the clerk;

upon the filing and approval of which bond, the clerk shall issue a *supersedeas*, enjoining the Justice and constable from proceeding any further in said suit, and suspending all proceedings in relation thereto, and shall issue a summons to the appellee, to appear at the term of the court, to which the appeal is returnable, which summons shall be served and returned as in other cases."

This section only authorizes the clerk to issue a summons to the appellee, when the appeal is taken by filing the bond in the clerk's office; and the statute no where requires the clerk to issue a summons to the appellee when the appeal is taken by filing the bond with the justice.

The 64th section provides for issuing a summons to a co-plaintiff or co-defendant when they do not join in the appeal, but it has no reference to the present case.

Keeping this distinction in view, the opinion of this Court in the case of "Hooper vs. Smith," 19th Ill. 53, will not conflict with the construction of this statute above suggested.

3.

The case of "Wells vs. Hicks," 27th Ills. 345, is an express authority upon this point. In that case the Court remarks:

"While it is admitted that the appeal was taken strictly according to the provisions of the statute, it is complained that that does not provide for giving notice of appeal, to the owner of the land. This is an objection against the statute, and unless we hold that it is void for that reason, we can afford no relief for that cause. It was his duty to take notice of, and follow the appeal."

Wells vs. Hicks 27th Ills., 345.

4.

This construction bears a perfect analogy to the practice in removing causes from the Circuit to the Supreme Court. If an appeal is taken, and a bond filed in the court below where judgment is rendered, the appellee is bound to follow the appeal and take notice of whatever proceedings are had in the court above, and no process is necessary to give the Supreme Court jurisdiction. On the other hand if the case is removed to the Supreme Court by writ of Error, and the bond filed with the Clerk of the Supreme Court, the law and the practice require that the defendant in error shall be served with process.

5.

It would seem that the Plaintiff in Error was practicing, in this case, upon this construction of the statute. He filed his appeal bond before the Justice of the Peace on the 28th day of March, and although the Justice made out the transcript and lodged it in the Circuit Clerks office, yet the appellant, took no step to procure a summons to be issued against the appellee, up to the 14th day of March, 1860, at which time, the case being on the docket, the Circuit Court dismissed the appeal for want of prosecution. We respectfully submit, that to permit the appellant (Plaintiff in Error) now to complain that he did not have the appellee, in the Court below, served with summons on the appeal, would in effect allow him a premium on his own laches.

EDSALL, DEWOLF & PINKNEY, for Defendant in Error.

23

State of Illinois

Supreme Court

Third Grand Division

Jesse C. Boyd. Plt'ff in Error

vs.

Lucinda Kocher. Deft. in Error

April Term A.D. 1863

Brief on part of Deft in Error.

Filed May 7. 1863

G. Lewis Clk

Edsall, Dewolf & Pinkney
for Deft. in Error.