

No. 14461

Supreme Court of Illinois

Johnson

vs.

People

157

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

No. 94461

PEOPLE'S CAUSES.

Reported 31st page

Johnson vs People

339863

1866

14461

Supreme Court of the State of Illinois
April Term AD, 1863

James C. Johnson }
vs }
The People vs } Error to Jo Daviess

And now comes the said
Defts in error by D P Jones, States
Attorney & suggest a discontinuance
of the record in the above
subdtd case and move the
court for a writ of certiorari herein
directing the clerk of said Jo.
Daviess County Circuit Court to
certify and transmit to this
court ~~the order of said~~ transcripts
of the order of said Jo Daviess county
circuit court sustaining the
demurrer to the 3^d & 4th pleas
in the above ~~case~~

Suggestions

The transcript filed in this
court does not contain the
order sustaining the demurrer
to the 3^d & 4th pleas. That such
order was made is apparent

from the bill of exceptions (page
19) where it is stated that the
demurrer was sustained by
the court

D. S. Jones
States Attorney

James L. Johnson
supl d & c

vs

The People vs

Motion for
Certiorari

11
State of Illinois
Jo Daviess County
Fourteenth Judicial Circuit

p 1

Pleas in the Circuit Court
began and held within and for the
County of Jo Daviess aforesaid on the second
Monday in the month of March A.D. 1865,
before the Honorable Benjamin R. Sheldon,
sole judge of the said Fourteenth Judicial
Circuit of the State of Illinois.
R. W. McClellan, Prosecuting Attorney pro cur.
W. Rowley, Clerk
John C. Hawkins Sheriff.

The People of the State of Illinois
vs
Charles M. McClellan &
James C. Johnston
Forfeited
Recognizances.

As it is remembered
that heretofore to wit: on the 3rd day of
October A.D. 1865, the State Attorney
filed in the Office of the Clerk of our said
Circuit Court a Recognizance ^{and Proffer} which said
Recognizance is in the words and figures
following to wit:

State of Illinois
Jo Daviess County
Personally came before
the undersigned Henry
C. Parke, one of the Justices of the Peace

within and for said County, Charles McClellan
 & James C. Johnston and jointly and severally
 acknowledge themselves to owe and to be indebted
 to the people of the State of Illinois in the sum
 of three hundred and fifty dollars; for the
 payment whereof, they bind themselves, their
 heirs, executors and administrators, as also their
 goods and chattels, lands and tenements;
 Signed and Sealed this ninth day of June
 A. D. 1861.

The conditions of the foregoing recognizance
 is such, that whereas the above bounden Charles
 McClellan was on the 5th day of June brought
 before said Justice on a charge of Larceny,
 and the said McClellan, having an exam-
 ination and was required to give bail for
 his appearance on the first day of the next
 Circuit Court to be holden within and for
 the said County of Jo Davies, in the State
 of Illinois at the Court House in said
 County, in the sum of three hundred and
 fifty dollars.

Now if the said Charles McClellan
 shall personally be and appear at the
 said Court House, on the said first day
 of the said term, to answer said complaint
 and whatever may then and there be ob-
 jected against him and shall abide the
 order of the Court and not depart without
 leave, then this recognizance shall be void,
 otherwise to remain in full force and
 virtue.

Taken, acknowledged and approved
 of by me this 9th day of June A.D. 1861.
 Henry C. Parke, J.P.

C. C. Ellman
 James C. Johnston
 (Seal) (Seal)

Endorsed

Filed Oct 3rd 1861.

Jm Rowley clerk
 by H. B. Newhall Deputy.

The Proceps filed in this cause is in
 the words and figures following to wit:

State of Illinois vs. In Circuit Court
 of Daviess County To Oct Term 1861.

The People of the State of Illinois
 vs
 Charles M^cCallan and
 James C. Johnston

Let it please
 issue scire facias in this case vs
 R. H. M^cCallan.
 States atty.

Endorsed

Filed Oct 3rd 1861.

Jm Rowley clerk
 by H. B. Newhall Deputy.

Upon the filing of which said proceps
 and Recognizance, there issued from the
 office of the clerk of the Circuit Court of
 said County, a Scire facias, which said
 Scire facias is in the words and figures

following to wit:

State of Illinois
Jo Daviess County The People of the State
of Illinois to the Sheriff
of said County

Whereas, heretofore, to
wit: on the 9th day of June A.D. 1861. Charles
McClellan and James C. Johnston did before
Henry C. Parks Esq. a Justice of the Peace of
said County of Jo Daviess enter jointly and
severally into a Recognizance to the People
of the State of Illinois, the said Charles
McClellan as principal and James C.
Johnston as security, in the sum of three hun-
dred and fifty dollars, which said
Recognizance is in the words and figures
following to wit:

State of Illinois
Jo Daviess County Personally came before
the undersigned Henry
C. Parks one of the Justices of the Peace within
and for said County, Charles McClellan
and James C. Johnston, and jointly and
severally acknowledged themselves to owe and
to be indebted to the People of the State of
Illinois in the sum of three hundred
and fifty dollars, for the payment whereof
they hereby bind themselves, their heirs,
executors and administrators, as also their
goods and chattels, lands and tenements,

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Signed and sealed this ninth day of June,
A. D. 1861.

The condition of the foregoing recognizance is
such, that whereas the above bounden Charles
McClellan was on the 5th day of June brought
before said Justice on a charge of Larceny,
and the said McClellan waiving an exam-
ination, and was required to give bail for
his appearance on the first day of the next
Circuit Court, to be holden within and for
the said County of Jo Daviess in the State
of Illinois, at the Court House in said
County, in the sum of three hundred and
fifty dollars. Now if the said Charles
McClellan shall personally be and appear
at the said Court House, on the said first
day of the said term, to answer said complaint,
and whatever may then and there be ob-
jected against him and shall abide the
order of the Court and not depart with-
out leave, then this recognizance shall be
void; otherwise to remain in full force and
virtue.

Taken, acknowledged and approved
by me this 9th day of June A. D. 1861.
Henry C. Parker, P.

C. C. Eckman

James C. Johnston



Endorsed

Filed Aug 23rd 1861.

W. Rowley etc

And said People of the State of Illinois
are that the said Charles McClellan

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signed and executed the said Bonds by writing
therein as, and for his name and signature
the following to wit: C. C. Ellman; that said
signature is a mere scrawl and utterly
illegible and cannot be made to read as any
word or name, but was written by said
Charles M. Callan as and for his signature
to said Bonds; and the said People of the
State of Illinois aver that the said Henry
C. Parks, Justice of the Peace as aforesaid on
the said 9th day of June A.D. 1861. took and
approved said Recognizance, and the said
People further aver that the said Henry C.
Parks before whom the said Recognizance was
taken, executed and approved as aforesaid,
was at the time of taking and approving said
Recognizance, an acting Justice of the Peace,
in and for said County of Jo Daviess in the
State of Illinois, and had full power
and authority as such Justice of the Peace
as aforesaid, to take, accept and approve of
said recognizance, and it is further averred,
that afterwards, to wit: on the 25th day of
August 1861. the said recognizance was returned
into the Circuit Court for Jo Daviess County,
and filed of records in the Clerk's Office
of said Court, and it is further averred that
a Bill of Indictment was found and
returned by the Grand Jury of said County,
at the August Term A.D. 1861 of said
Circuit Court, to wit: on the 21st day of
August A.D. 1861. against the said

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Charles M^c Clellan for the crime of Larceny,
under and upon the complaint upon which
said Recognizance was so taken and return-
ed, as aforesaid, and it ^{is} further averred that
afterwards, to wit: on the 26th day of August
A. D. 1861. as yet of the August Term A. D. 1861,
of said Circuit Court, for said Jo Daviess
County, at the Court House in Galena,
came the People by their Attorney, and at
his instance the said Charles M^c Clellan hav-
ing been three times solemnly called to come
into Court according to the tenor of his said recog-
nizance, came not, but made default, and the
said James C. Johnston the Cognizor of the
said Charles M^c Clellan in the Recognizance
aforesaid, having also been three times
three times solemnly called to bring into Court
the said Charles M^c Clellan, according to
the tenor and effect of said Recognizance,
brought him not, but made default, where-
upon it was then and there ordered by the
said Court that the said Recognizance be
forfeited and judgment of forfeiture was
jointly and severally entered against the
said Charles M^c Clellan and James C.
Johnston for the amount for which they
were bound by said Recognizance.

And whereas, also, heretofore, to wit: on
the 9th day of June A. D. 1861. Charles M^c
Clellan and James C. Johnston did before
Henry C. Parker, Esq. as Justice of the Peace
of said County of Jo Daviess enter jointly
and severally into another Recognizance

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to the People of the State of Illinois, the said
Charles M^cClellan as principal and James
C. Johnston as security in the sum of three
hundred and fifty dollars, which said
recognizance is in the words and figures
following to wit:

State of Illinois
Jo Daviess County Personally came before
the undersigned Henry
C. Parks, one of the Justices of the Peace within
and for said County Charles M^cClellan
and James C. Johnston and jointly and
severally acknowledge themselves to owe and
to be indebted to the People of the State of
Illinois in the sum of three hundred and
fifty dollars; for the payment whereof
they hereby bind themselves, their heirs,
executors and administrators, as also their
goods and chattels, lands and tenements.
Signed and Sealed, this 9th day of June
A. D. 1861. The conditions of the foregoing
recognizance is such, that whereas the
above bounden Charles M^cClellan was:
on the 5th day of June brought before said
Justice on a charge of Larceny, and the
said M^cClellan waiving an examination
and was required to give bail for his ap-
pearance on the first day of the next
circuit court to be holden within and for
the said County of Jo Daviess in the State
of Illinois at the Court House in said

County, in the sum of three hundred and fifty dollars. Now if the said Charles McClellan shall personally be and appear at the said Court House, on the said first day of the said term to answer said complaint, and whatever may then and there be objected against him, and shall abide the order of the Court and not depart without leave, then this recognizance shall be void, otherwise to remain in full force and virtue

Taken, acknowledged & approved } C. C. Clellan
 of me this 9th day of June A.D. 1861. } James C. Johnston
 Henry E. Parks, J. P. }



Endorsed

Filed Aug 22nd 1861.

M. Rowley C. C.

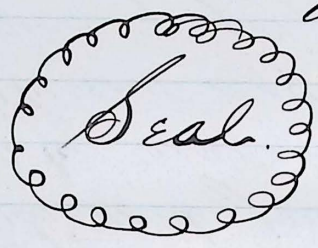
And the said People of the State of Illinois aver, that said Charles M^c Clellan signed and executed the said Bond by the names of C. C. O. M^c Clellan that said Charles M^c Clellan was known and called Charles M^c Clellan as well as Charles O. M^c Clellan and was known and called by both names. And the said People of the State of Illinois aver that the said Henry E. Parks Justice of the Peace as aforesaid on the said 9th day of June A.D. 1861 took and approved said Recognizance and the said People further aver that the said Henry E. Parks before whom the said Recognizance was taken, executed

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and approved as aforesaid, was at
the time of taking and approving of said
Recognizances, an acting Justice of the Peace,
in and for said County of Jo Daviess in the
State of Illinois, and had full power
and authority as such Justice of the Peace
as aforesaid, to take, accept and approve
of said Recognizances. And it is further
averred, that afterwards, to wit, on the 23rd
day of August 1861. The said Recognizances
were returned into the Circuit Court for
Jo Daviess County, and filed of records in
the Clerk's office of said Court, and it is
further averred that a Bill of Indictment
was found and returned by the Grand
Jury of said County at the August Term
A. D. 1861. of said Circuit Court, to wit:
on the 21st day of August A. D. 1861. against
the said Charles M. Cellaue, for the crime
of Larceny under and upon the complaint
upon which said Recognizances were so
taken and returned as aforesaid, and
it is further averred, that afterwards, to
wit: on the 26th day of August A. D. 1861.
as yet of the August Term A. D. 1861.
of said Circuit Court for said Jo Daviess
County, at the Court House in Salina,
came the People by their attorney, and
at his instance, the said Charles M. Cellaue
having been these times solemnly called
to come into Court according to the tenor
of his said Recognizances, came not, but

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made default, and the said James C. Johnston, the Cognizor of the said Charles McCallan in the Recognizances aforesaid, having also been there and there three times solemnly called to bring into Court the said Charles McCallan according to the tenor and effect of said Recognizances brought him not, but made default. Whereupon it was there and there ordered by the said Court that the said Recognizances be forfeited, and judgment of forfeiture was jointly and severally entered against the said Charles McCallan, and James C. Johnston for the amount for which they were bound by said Recognizances.

We therefore command you to summon Charles McCallan and James C. Johnston if they shall be found in your County, personally to be and appear before the Circuit Court of Jo. Daviess County in the State of Illinois, on the first day of the next term thereof, to be holden at the Court House in Charlestown, on the third Monday of October inst. to show cause if any they have why the said judgment of forfeiture ought not to be made absolute and execution issue thereon against them for the said sum of money for which they are bound, according to the force, form and effect of the said Recognizances, and further to do and recover whatever our said Court shall there and there consider and

adjudge against them in that behalf,
and herof make returns as the law direct
and have you them and them this writ.



Witness W^m Rowley clerk of
the Circuit Court of Jo Daviess
County, Illinois, and the Seal
thereof at Galena, this 3rd day
of October A. D. 1863.
Attest W^m Rowley clerk
by H. B. Newhall deputy.

Which said scire facias was returned by the
Sheriff with the following return endorsed
thereon to wit:

Executed this writ by reading
the same to the within named James C.
Johnson, Charles McClellan not found in
my County this the 8th day of October A. D.
1863.

S. W. Meier Sheriff.

Endorsed

Filed Oct 30th 1863

W^m Rowley clerk
by J. W. Bird deputy.

The Defendants pleas filed in this
case, are in the words and figures
following, to wit:

In the Circuit Court of Jo Daviess County, Illinois
Of the October Term thereof A. D. 1863.

James C. Johnston and
 Charles W. McClellan
 ats
 The People of the State of Illinois

Of vs pleas.

1. And the said James C. Johnston, one of the above named Defendants, by C. W. Small his attorney comes and defends the wrong and injury to him and says that the said recognizance in the first count of said writ of scire facias mentioned, is not his deed in manner and form as the said plaintiffs have above in that behalf alleged; and of this he puts himself upon the Country

And the said plaintiffs do the like
 R. W. McClellan
 States atty

2. And for a further plea in this behalf, the said Defendant says actus non, because he says that the said recognizance in the second count of the said plaintiffs writ of scire facias mentioned is not his deed in manner and form as the said plaintiffs have in that behalf alleged; and of this he puts himself upon the Country;

And the said plaintiffs do the like
 R. W. McClellan
 States atty

And for a further plea in this behalf, the said Defendant says actus non, because he says that the said supposed

3.

recognizance in the first count of the said plaintiffs writ of scire facias mentioned, is in operative and void in this that it appears to have been executed by this Defendant, and the said Charles M^c Clellan, and approved by the Justice of the Peace whose name is subscribed thereto, on the 9th day of June A.D. 1861. The said 9th day of June A.D. 1861. having been Sunday, and this the said defendant is ready to verify, wherefore he prays judgment of the said plaintiffs ought to have execution adjudged to them against this defendant, according to the force and effect of the aforesaid recognizance &c.

4.

And for a further plea in this behalf the said Defendant says actus non, because he says that the said supposed recognizance in the second count of the said Plaintiffs writ of scire facias mentioned appears to have been executed by the said Charles M^c Clellan and this defendant, and approved by the Justice of the Peace whose name appears subscribed thereto, on the 9th day of June A.D. 1861; said 9th day of June A.D. 1861 having been Sunday, and this the said defendant is ready to verify, wherefore he prays judgment of the said plaintiffs ought to have execution adjudged against them the said defendant, according to the force and effect of said recognizance

E. A. Small
Atty for Dft Johnston.

Endorsed

Filed October 31st 1862

M. Rowley clerk
By J. R. Pind deputy.

The Plaintiff's Demurrer to Defendant's
pleas, is in the words and figures follow-
ing, to wit:

State of Illinois vs. J. R. Pind
In Barren County of Oct. Term 1862.

The People of the State of Illinois
vs
Charles M^c Clallow &
James C. Johnston

And the said
plaintiffs by R. H. M^c Clallow States attorney
come & say that the third plea of said
defendant Johnston is not sufficient in
law, & do demur to said plea & for cause of
demurrer show:

1st.
Said plea presents no defence to this
action, said Recognizance is not void by the
Laws of this State by reason of being ex-
ecuted on Sunday by said defendants,
& being approved by said Justice of the
peace on Sunday.

This action is on a Record & said Recognizance did not become a Record till filed in this Court, & it is not averred in said plea that it was so filed in this Court on Sunday, Wherefore said plaintiffs pray judgement &c.

R. W. McClellan
States Attorney.

And said plaintiffs by R. W. McClellan States Attorney come and do demur to the said fourth plea of said defendant Johnson & say that the same is not sufficient in Law & for causes of demurrer to said 4th plea said plaintiffs show:

1st said plea presents no defence to this action, said Recognizance is not void by the Laws of this State by reason of being executed by said defendants & approved by said Justice of the Peace on Sunday.

This action is upon a Record and said Recognizances did not become a Record till filed in this Court, & it is not averred in said 4th plea that it was so filed in this Court on Sunday, Wherefore said plaintiffs pray judgement &c.

R. W. McClellan
States atty.

Endorsed

Filed October 24th 1862.

W R Rowley clerk
by J R Bird deputy.

And afterwards, to wit: on the 17th day of
March A. D. 1863, as yet of the March Term
A. D. 1863 of said Jo Daviess County Circuit
Court, in the records of the proceedings there-
of in the above entitled cause, appears the
following entry, to wit:

The People of the	}	Forfeited
State of Illinois		
vs	}	Recognizance.
Charles M ^c Claw and		
James C. Johnston.	}	

Now at this day
comes the States Attorney for the People and
also comes the defendant James C. Johnston
by C. A. Small Esq. his atty, and upon issue
joined they waive the intervention of a
jury and for trial put themselves upon the
Court, and the Court after hearing the
evidence in the cause and the arguments
of counsel, takes the same under advisement.

And afterwards to wit: on the 18th day of
March A. D. 1863, as yet of the March Term
A. D. 1863 of said Jo Daviess County Circuit
Court, in the records of the proceedings thereof
in the above entitled cause, appears the
following entry to wit:

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The People of the
State of Illinois
vs
Charles McClellan and
James C. Johnston
Forfeited
Recognizances.

The Court being fully
advised upon this cause finds the issues for
the plaintiffs, and orders that execution be
awarded in favor of the plaintiffs and
against the defendant James C. Johnston
upon the recognizance upon which this
action was brought. It is thereupon consid-
ered by the Court that the people of the State
of Illinois have and recover of the said
James C. Johnston the sum of three hundred
and fifty dollars, it being the amount in
which said recognizance was given, together
with their costs by them in this behalf
expended, and that they have execution there-
for against the said defendant. To which
 rendition of judgment the said defendant
by his attorney then and there excepts.

And afterwards to wit: on the 19th day
of March, A. D. 1863, as yet of the March
Term A. D. 1863, of said Jo Daviess County
Circuit Court, in the records of the proceeding
thereof in the above entitled cause, appears
the following entry to wit:

The People of the
State of Illinois

Forfeited
Recognizances.

Charles M^cClallan and
James C. Johnston

The Defendant James C. Johnston by C. A. Small Esq, his attorney at this day comes and files his bill of exceptions in this cause, which is certified by the Court.

The Bill of Exceptions referred to in the above recited entry, is in the words and figures following, to wit:

State of Illinois vs. In the Circuit Court of Jo
Jo Daviess County Daviess County Illinois, of
The March Term A.D. 1863.

The People
vs
James C. Johnston & Charles M^cClallan

Bill of Exceptions.

Now this day came on to be heard the above entitled cause, upon the pleadings therein as follows viz:

1st Scire facias (heretofore copied in this transcript)
3rd Def^t pleas (" " " " ")
In which 3rd & 4th pleas of the Defendant Johnston, the counsel for the people filed the following demurrer (heretofore copied) which upon argument was sustained by the Court and the decision of the Court excepted to by Defendant's counsel.

Upon trial of said cause hereafter the Plaintiff introduced the Court Records of

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above Court showing that the recognizance
/hereinafter objected to by Defendants counsel/
was duly filed of records in said Court and
that the defendants above were afterwards
called & made default & their said recognizance
forfeited as follows:

The Records entries referred to in the above
recited entry are in the words and figures
following to wit:

1st Entry of date of August 31st 1861. as follows:

The People }
vs }
Charles McClellan } Indictment for Sarceny,
a True Bill.

2nd Entry of date of August 26th 1861. as follows:

The People }
vs }
Charles McClellan } Indictment for Sarceny.
Now at this day came
the States attorney for the
People and the defendant being three times
solemnly called came not, but made default
And James C. Johnston, Cognizor of the said
Charles McClellan being three times solemnly
called to come into Court and produce the body
of the said Charles McClellan comes not but
makes default. It is thereupon considered by
the Court that this Recognizance be forfeited
and that a scire facias issue against said
parties to show cause why judgment should
not be entered against them for the amount

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" required to enter his recognizance in the sum
" of three hundred and fifty dollars which
" he neglected to give, was accordingly commit-
" ted to jail. On June 9th he recognized in
" the sum of \$350 and was discharged; -
Said recognizance was then offered in
evidence by the Peoples Council and objected
to by counsel for Defendant because said
recognizance appeared to have been executed
on Sunday and was consequently void,
which objection was overruled by the Court
and defendant Johnston's counsel then & there
excepted. And afterwards upon argument
of said cause and before judgment, the defen-
dant's counsel objected further to said
recognizance because it appeared to have
been entered into before one Justice of the
Peace instead of two as required by law, which
objection was overruled by the Court - although
no objection was made by the Peoples Council
that this point was raised too late - and
defendant Johnston's Counsel then & there
excepted.

Peoples Council then offered in evidence
the indictment against Charles McDellaw
and the same was read without objection.

The Indictment referred to is in the words
and figures following to wit:

State of Illinois vs. Of the August Term
County of Jo Daviess of the Jo Daviess County

Circuit Court in the year
of our Lords one thousand eight hundred and
sixty one, -

The Grand Jurors chosen, selected & sworn
in & for the County of Jo Daviess, in the name
& by the authority of the People of the State of
Illinois upon their oaths present: That
Charles M^cClallaw late of said County on the
first day of August in the year of our Lords
one thousand eight hundred & sixty, at &
within the said County Jo Daviess one horse
of the value of fifty dollars of the personal
goods & chattels of Philip Drum, then &
then being found, feloniously did steal,
take & carry away, contrary to the form of
the Statute in such case made & provided
and against the peace & dignity of the same
people of the State of Illinois.

R. W. M^cClallaw State Attorney
pro teus in & for the 14th Judicial Circuit.

Endorsed

A true Bill

Richard Harvey

Foreman of Grand Jury.

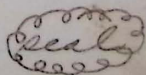
Endorsed

Filed Aug 31st 1861.

W. Rowley cler.

Upon which the Court rendered judgment
against the said Defendant James C. Johnston
to which the counsel for the latter then & there
excepted.

Jury: R. S. Sheldon



Endorsed

Filed March 19th 1863.

W. Rowley clerk.

By J. R. Pind deputy.

State of Illinois J. S. Wm Rowley, Clerk
 of the Circuit Court in and
 for said County, hereby cer-
 tify the foregoing to be a full, true and correct
 copy transcript of the Records and proceedings
 of the said Circuit Court, together with the
 Bill of Exceptions as certified to by the Court
 in the above entitled cause of the People
 vs Charles Mc Cellan et al as the same
 appears of records in my office.

In Testimony whereof I have
 hereunto set my name and
 affixed the Seal of said Court
 at my Office in Salem, this
 28th day of March A. D. 1863.

Attest Wm Rowley clerk
 By J. B. Newhall Deputy



Court Costs.
 Transcript \$5.75
 Certificate & Seal. 35

Supreme Court of the State of Illinois
April Term A D 1863

James B Johnson

Markus McCallum

vs
The People &c

Appointments of Errors

And now comes the Plaintiff in error by Seland & Blanchard & E. A. Small his attys and says that there is manifest error in the record proceedings in this case in this to wit

1st The Court erred in not overruling the demurrers to the third & fourth pleas of the defendants below also in ~~not~~ sustaining said demurrers

2^d The Court erred in trying the case without having previously made some disposition of the demurrers to the third & fourth pleas

3^d The Court should have found for the defendants below & not for the People, the finding being against the law & the evidence, and therefore erroneous, void & of none effect.

Seland & Blanchard
and E. A. Small for plff
vs Errors

Supreme Court of the State of Illinois
April Term A.D., 1863

James B. Johnson }
vs. } Error to J. Davis
The People of the }
State of Illinois }

And now come
the said people of the state of Illinois
by D. V. Jones states attorney and say
that in the record and proceedings
aforesaid and in the rendition of the
judgement aforesaid, there is no
error wherefore they pray judgement
etc

David V. Jones states
Attorney

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James B. Johnson

The People

David V. Jones

Filed April 11. 1863.

L. Deland
Clk.

Supreme Court of the State of Illinois
April Term AD 1863

James C Johnson
vs
The People &c

Points & Authorities for
Defts. in error -

The ser. facias alleges
that the justice of the peace
had full power, and authority
as such, to take accept and
approve the recognizance -

The bill of exceptions does
not purport to set forth all
the evidence in the case, and
the court will therefore
presume that the evidence
sustained the allegations in
the ser. fa -

The plea of non est factum
only operates as a denial of the
execution of the instrument -

in point of fact - and the
Defendant cannot deny its
validity in point of law -

5 Co 119a Stephens Pl - 16-8
1 Mod 58 1 Saund Pl & EV 312-658 & 69
2 Saund 154 & 58 note 3

Where an instrument is void
by statute or at common law
as in cases of usury, gaming &c
that defense must be pleaded
specially - and cannot be set
up under the plea of non est
factum - 1 Saund Pl & EV - 904

The defense that the recognizance
was entered into on Sunday
comes within this rule -

The Demurrer to the pleas
was well taken

~~It~~ Sunday begins and ends
with the rising and setting of
the sun - ^{strobb,}

4 ~~Stat~~ & B. 493

2 Com - 541-1 Book 98 & 1445

34 Maine 391

The plea does not alledge
that the recognizance was entered
into during the continuance
of the Solar Day -

The taking of the recognizance
was not such a judicial act
as might not be done on
Sunday - ~~5 Term 22 170~~
5 Term R. 170

The Statute excepts works of
necessity & charity. It is true
that it was not absolutely
necessary that the defendant
should have been released from
jail on Sunday - he might
have remained until the following
day - But an absolute necessity
is not required - a moral fitness
or propriety of the labor done
is within the meaning of the
statute - 6 Mass. 46-18 do-354
4 Cush. 244

D. J. Jones
Attorney at Law

9. P. 3
Jul. 6. Johnson

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vsr

The People

Depts Brief

Filed May 12 1863
L. Leland
Clerk

Supreme Court of the State of Illinois
April Term A.D. 1863

James C. Johnson
vs.
The People &c

Points & Authorities for Defts-
in Error. —

The seire facias alleges that the Justice of the Peace had full power and Authority, as such, to take accept and approve the recognizances. The bill exceptions does not purport to set forth all the evidence in the case, and the Court will therefore presume that the evidence sustained the allegations in the seire facias

The plea of non est factum only operates as a denial of the execution of the instrument, in point of fact & the Defendant

cannot deny its ^{validity} in point of law

5- Co. 119 a

Stephens Pl. 158

1 Mod 58

1 Saund. Pl. & Co- 312. 658, 869

2 Saund 154 & 5-9 note 3.

by Statute or Where an instrument is void
at common law as in case of
A. marry, gaming &c, that defense must
be pleaded specially & cannot be
set up under the plea of non est factum
1 Saund. Pl. & Co- 904.

The defense that the recognizance
was entered into on Sunday comes
within this rule

The term of the pleas was well
~~not~~ ^{not} Sunday begins and ends with
the rising and setting of the sun
to ~~Stobh~~ ^{Stobh} S R. 493.

2 Com 541 - 1 Root 98 & 145-

34 Marie 391

The plea does not allege that the recognizance was entered into during the continuance of the solar day

The taking of the recognizance was not such a judicial act as might not be done on Sunday

~~5 Term R 170~~

5 Term R 170

The Statute except work of necessity & ~~Chapin~~ ~~it is~~ ~~Chas.~~

It is true that it was not absolutely necessary that the defendant should have been released from jail on Sunday - he might have remained until the following day - but in absolute necessity is not required a moral fitness or propriety of the labor done is within the meaning of the statute

6 Mass. 76. 13 Do. 354

4 ~~Case~~ 244

D P Jones
States Atty

9 P.O. ~~1863~~ 1864
Jas C. Johnson

by
The People

Depts Brief

Filed May 12 1863
L. Leland
Clerk

An examination of the English cases will establish the general proposition that any labor, public or private, on the Lord's day having been prohibited by Statute, all contracts on that day are void.

Fennell vs. Ridlen, 11 Eng. Com. law, 517.

Smith vs. Sparrow, 13 Eng. Com. law, 351

Whether the labor must have been within "ones ordinary calling" is of no moment here, as these words are not in our Statute.

Gillett vs. Mawmun, 1 Taunt., 136.

In Indiana, under a Statute to the effect that if any person shall be found at common labor on Sunday he shall be fined, &c. A note and a Replevin Bond executed on Sunday were held void. 4 Ind., 621. 7 Blackford, 479.

Similar in principle are the decisions in Alabama, under a Statute substantially like that in Indiana.

13 Ala., on p. 403.

So also in New York. 19 Barb., 581.

So in Vermont. 18 Vermont, 379.

So in Maine. 26 Maine, 464.

So in Michigan. 2 Douglass, 73.

In Massachusetts, under a similar Statute, it was once held, that a note was valid though executed on Sunday—10 Mass., 312—but that is a State where there are a great many unitarians, and where wholesome puritanical orthodoxy does not prevail much. The attorney in that case, (Lincoln,) who was probably rather too liberal in his religious notions, seemed to be ashamed to press the matter much, and would have not made the point at all if his client had not lost a debt which was due him from some of the blue people down in Connecticut by taking a note on Sunday from some one whose regard for the Sabbath would not allow him to pay it. And thus Massachusetts for a while was heretical, afterwards, however, she renounced her errors and came back to the fold. 13 Metcalf, 284.

The Statutes to which we have heretofore alluded are generally against those who labor on the Lord's day. Ours is against those who knowingly disturb the peace and good order of society by labor, &c. Works of necessity and charity are excepted in all the Statutes. It is manifest that by the words "disturb the peace and good order of society" it was not intended to punish labor of a noisy character only, because there is another Section for that. (Sec. 146.) And it also appears by the exceptions in Section 145, that in the opinion of the legislature all common labor disturbed the good order of a christian community, except that of boatmen landing passengers and loading and unloading their freight, and ferrymen carrying travelers and movers and their plunder across streams. Any work therefore, which was not entirely secret, and which the guilty party knew that others knew, must be within the Statute, no matter how quiet the labor was performed. Our ancestors meant that the people of this State should labor six days and do all their work and rest on the seventh as enjoined by Holy Writ. The only case which we have found that is exactly applicable under our Statute, is that of Varney vs. French, 19 New Hampshire, 233, made under a Statute against labor on the Lord's day to the disturbance of others. This N. H. Statute, it seems to us, might not be violated where ours would. The good order of society might be injuriously affected when others were not really disturbed. Some persons, on account of their irreligious and profane habits of thought, would never allow themselves to be disturbed by those things which really disturb the good order of society. The violation of the N. H. Statute was by giving a note for a horse, at the payees house, in a very quiet way, no one being present but the payees wife engaged in reading a newspaper, and one witness who went along with the maker of the note; and that act was held to be a disturbance of others, and the reasoning of Judge Gilchrist to show it so in his moral, religious and logical opinion, is unanswerable.

We leave the Statutory question to enter upon the field of the common law.

Aside from the question heretofore discussed, the execution of the recognizance by the parties, and the taking and approving the same by the Justice would be valid unless the transaction is a judicial act. If the act of entering into a recognizance is committed upon Judicial compulsion, and if it is not a mere voluntary ministerial act, the recognizance is void. This part of the subject is disposed of by a reference to Baxter vs. the People, 3 Gil., 384. That the entering into a recognizance is not a voluntary act but that it is done upon judicial compulsion seems to our mind self evident. It appears hardly necessary to reflect a great while in order to answer negatively the quere of Judge Williams in Darling vs. Hubbell, on page 355 of the 9th of Conn.: "is a bond given under penalty of imprisonment on non-compliance a voluntary bond?" Nor does it require much thought to determine whether the compulsion is Judicial or Ministerial. Our court has decided, and all other courts hold the same way, that a *Scire facias* on a recognizance must show the jurisdiction or authority of the officer taking the same.

13 Ill., 13. 14 Ill., 312. 4 Gil., 433, and cases there cited.

This jurisdiction to require it to be entered into is, as well as the enquiry into the facts the proof of which render it proper to exercise the compulsion, clearly a Judicial and not a Ministerial act. A man may acknowledge a deed before a Justice or go elsewhere to another officer. He must enter into a recognizance or go to Jail. If the court desires to look at authority to determine this, the following may be found to bear upon the question in this case.

State vs. Sahar, 33 Maine, 539.

Mory vs. Elliott, 8 Cowen, 27.

Chapman vs. the State, 5 Blackf., 111.

Pearce vs. Atwood, 13 Mass., 324.

Commonwealth vs. Little, 1 A. K. Marshall, 566.

“ vs. Mason, 3 A. K. Marshall, 456.

“ vs. Edwards, 1 J. J. Marshall, 352.

Todd & Means vs. the State, 1 Missouri, 403.

That the taking a recognizance is a judicial act is so clearly settled in our own reports, and if so that it is void if done on Sunday, that further authority or comment is unnecessary.

E. A. SMALL, and

LELAND & BLANCHARD,

for Plff. in Error.

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James C. Johnston
implies
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The People

Abstracts &
Briefs

Filed At 21. 1863

J. L. Lane
clerk

delivered the opinion of the Court:

Mr. Justice Brewer

This is a scire facias upon a recognizance taken before a Justice of the Peace, and duly certified to the Circuit Court of St. Davids County. When so certified, it became a record of that Court, consequently, the plea of non est factum was not a proper plea to the action.

It does not appear from the recognizance, that the prisoner had been committed by two Justices of the Peace. ~~However~~ The condition recites that the prisoner was brought before the Justice of the Peace who took the recognizance, on the fifth day of June 1887, on a charge of Larceny. This gave the Justice jurisdiction to hear the charge and admit the party to bail.

It is objected, however, that the recognizance is void, having been taken and acknowledged on Sunday, and therefore not binding on the Surety.

It is said, that ~~it~~ ^{entering into a recognized,} is a judicial act ~~and~~ which, ~~expressly~~, by the common law ~~is~~ performed on Sunday under the act void.

Usually, judicial acts cannot be performed on Sunday, yet verdicts of juries, have been ~~passed~~ ^{returned} on that day, and held valid. Rough trading, 10 Victoria,

p. 473
sig. 30

15 Johns. 119; Barton 117. The people, 3 Wilm. 368

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X

~~But~~ he does not consider the act of entering into a recognized to be such a judicial act, as to render its execution void because it was entered into on Sunday. It has none of the elements of a judicial proceedings except that it is taken and acknowledged before a judicial officer, and is not, therefore, void by the common law.

It is said, however, that it is ~~but~~ a labor a violation of ~~the~~ Section 144 of the criminal code, and therefore void.

That Section imposes a fine not exceeding five dollars upon any person who shall knowingly disturb the peace and good order of society by labor on Anniversary or Sunday, works of impiety

and charity accepted.

(reads here)

Any work or labor which is

What are works of necessity and charity?
As was said in the case of Flagg #47.

The inhabitants of Millbury, of August 244

are not to understand, ^{by the word "necessity"} a physical

and absolute necessity, but a moral fitness

a propriety of the work done under the

circumstances of each particular case.

Any work, therefore, necessary to be done

to secure the public safety, ~~must~~

~~come within the true meaning of the~~

~~exception in the statute~~ by the safe keeping

of a felon, or detaining him to bail,

must come within the true meaning

of the exception in the statute. Neither

the peace or good order of Society

is disturbed by such a proceeding

which may be both secretly and

silently conducted. And besides, it

might be possible, a jailer could

not secure the attendance of his

Servant on the next day, the consequence

of which would be that he would have

to be committed to jail. It ^{would be} ~~was~~ ^{then} a

charitable act under such circumstances,

to take a recognizance. We are therefore

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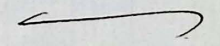
of opinion that both at common law, and in the ~~cases~~ exception of our statute, the ~~recognition~~ taken on Sunday was valid and binding. The judgment of the circuit court is therefore affirmed.

Judgment affirmed.

19. Cr. Debt - 157

Johnson
vs

The People



opinion by

Thayer J.

CR.

Recorded 12 187

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