

No. 12871

Supreme Court of Illinois

McDonnell

vs.

Harter, for use

71641  7

18
vs

Pyrex Heater for use

1859

12871

United States of America
State of Illinois
Cook County } SS

Pleas before the Honorable John
M Wilson Judge of the Cook County Court
of Common Pleas, within and for the
County of Cook and State aforesaid
at a regular Term of the Cook County
Court of Common Pleas begun and
holden at the Court House in the City
of Chicago in the County of Cook and
State of Illinois, on the second Monday be-
ing the thirteenth day of September in the
year of our Lord one thousand eight
hundred and fifty eight and of the
Independence of the United States of
America the Eighty Third

Present John M Wilson Judge
Carlos Haven Prosecuting Attorney
John T. Wilson Sheriff
Attest Walter Kimball Clerk

Be it remembered that heretofore, to wit on
the fourth day of August in the year of
our Lord one thousand eight hundred
and fifty eight, there issued out of the
office of the Clerk of the Cook County Court
of Common Pleas in and for the County of

Cook State of Illinois a certain writ of summons which with the Sheriff's return thereon endorsed is in the words and figures as follows to wit,

State of Illinois)
County of Cook } ss

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

We command you that you summon Charles M Donald if he shall be found in your County personally to be and appear before the Cook County Court of Common Pleas of said County on the first day of the next term thereof to be holden at the Court House in the City of Chicago in said County on the Second Monday of September next to answer unto William Horter who sues for use of Mary Susquah Horter in a plea of Trespass on the Case on promises to the damage of said plaintiff as he says in the sum of One thousand Dollars. And have you then and there this writ with an endorsement thereon in what manner you shall have executed the same

Witness Walter Kimball

Clerk of our said Court and the seal
thereof at the City of
Chicago in said County
this 2^d day of August
AD 1858
Walter Kimball Clerk

"Sheriff Return"

Served by reading to the within named
Charles McDonald the 7th day of August
1858.

John S. Wilson Sheriff
By John A. Dart Deputy

And afterwards to wit on the same day
and year aforesaid William Horte who
sues for the use of Mary Susannah Horte
Plaintiff by J. W. Chickering his Attorney
filed in the office of the Clerk of said Court
his certain declaration in the words and
figures as follows to wit

State of Illinois
Cook County ss

In Cook County Court
of Common Pleas Term of
September AD 1858

William Horte who in this behalves
for the use of Mary Susannah Horte

Plaintiff in this suit by J. W. Chickering
his Attorney complains of Charles Mc
Donald Defendant in this suit summoned
in of a Plea of Trespass on the Case upon
promises. For that Whereas the said defend-
ant on the second day of August in the
year of our Lord one thousand eight
hundred and fifty eight at Chicago to-
wit at the County aforesaid was indebted
to the said plaintiff in the sum of Six
hundred dollars Lawful money of the
United States of America for dyer goods
wares and merchandises by the said plain-
tiff before that time sold and delivered
to the said defendant. and at the special
request of the said defendant and being
indebted to the said plaintiff the said
defendant in consideration thereof after-
wards to wit on the same day and year
and at the place aforesaid undertook
and then and there faithfully promised
the said plaintiff well and truly to pay
unto the said plaintiff the said sum
of money last mentioned when the
said defendant should be thereunto
afterwards requested. And whereas
also the said defendant afterwards
to wit on the same day and year and

at the place aforesaid in consideration
that the said plaintiff had before that
time at the like special instance and
request of the said defendant sold and
delivered to the said defendant divers
other goods wares and merchandises of
the said plaintiff the said defendant
then and there undertook and faithfully
promised the said plaintiff that the said
defendant would well and truly pay
to the said plaintiff so much money as
the last aforesaid goods wares and
merchandises at the time of the sale and
delivery thereof were reasonably worth
when the said defendant should be
thereunto afterwards requested. and the
said plaintiff avers that the said goods
wares and merchandises last mention-
ed at the time of the sale and delivery
thereof were reasonably worth the further
sum of Six Hundred dollars of like
lawful money aforesaid to wit at the
place aforesaid whereof the said defend-
ant afterwards on the same day and
year and at the place aforesaid had
notice. And whereas also the said defend-
ant afterwards on the same day and
year and at the place aforesaid was

debted to the said plaintiff in the
further sum of Six hundred dollars
of like lawful money as aforesaid for
money before that time lent and advanc-
ed by the said plaintiff to the said defend-
ant and at the like request of the said
defendant And for other money by
the said plaintiff before that time paid
laid out and expended for the said
defendant and at the like request of
the said defendant. And for other money
by the said defendant before that time
had and received to and for the use
of the said plaintiff. And being so in-
debted the said defendant in considera-
tion thereof afterwards to wit on the same
day and year and at the place aforesaid
undertook and then and there faithfully
promised the said plaintiff well and
truly to pay unto the said plaintiff the
said several sums of money in the count
mentioned when the said defendant
should be thereunto afterwards requested.

And whereas also the said defendant
afterwards to wit on the same day and
year and at the place aforesaid accounted
together with the said plaintiff of and
concerning divers other sums of money

before that time due and owing from
the said defendant to the said plaintiff
and then and there being in arrear and
unpaid and upon such accounting the
said defendant then and there was found
to be in arrear and indebted to the said
plaintiff in the further sum of Six
hundred dollars of like lawful money
as aforesaid. And being so found in
arrear and indebted to the said plaintiff
the said defendant in consideration
thereof afterwards to wit on the same day
of the year and at the place aforesaid
undertook and then and there faithfully
promised the said plaintiff well and
truly to pay unto the said plaintiff the
said sum of money last mentioned
when the said defendant should be
thereunto afterwards requested.

Nevertheless the said defendant (although
often requested &c) hath not yet paid the
the several sums of money above mentioned
or any or either of them or any part thereof to
the said plaintiff but to pay the same or
any part thereof to the said plaintiff the
said defendant hath hitherto ^{refused} refused and
till doth refuse to the damage of the
said plaintiff one thousand dollars

and therefore the said plaintiff brings
out &c

J^r W^m Chichester Jeffsally

Charles M Donald

Dr

1858 To W^m Horter

Aug 2, for a draft for \$100 rec by you upon
my account.

\$500

" Cash rec by you on my account

500

" Cash paid to you for my acct

500

" Ballance due me from you on a/c

500

" a draft or acceptance for one
hundred pounds sterling delivered
you upon my account

500

And afterwards to wit on the Eighteenth
day of September in the year of our Lord
one thousand eight hundred and
fifty eight paid day being one of the days
of the September Term of said Court the
following among other proceedings were
had in said Court and entered of Record
to wit.

William Horter

use of Mary S Horter

Charles M Donald

} Assumpsit

This day comes the said plaintiff by J W
Chickering his Attorney and the said de-
fendant by T Dent his Attorney also comes
and submits his motion to stay proceedings
in this cause for want of authority upon
the part of said plaintiffs attorney to institute
this suit, and thereupon said plaintiffs
attorney files his authority for commencing
this suit, which appearing satisfactory to
the Court, said defendants motion is over-
ruled, and by admission of the said de-
fendant, appearing in his affidavit to his
motion file in this cause, and upon motion
of said plaintiffs attorney it is ordered by
the Court that judgment be entered in this
cause in favor of the said plaintiff and
against said defendant for use of Mary
D Storley for said plaintiffs damages to
the sum of Four hundred and fifty
eight dollars

Therefore it is considered said plaintiff
do have and recover of the said defendant
use and benefit of Mary Storley her dam-
ages of Four hundred and fifty eight dollars
in form aforesaid by the Court assessed
and also her costs and charges in this
half expended and have execution
therefor instant

And afterwards to wit on the Sixteenth day of
October in the year aforesaid said day
being still ^{one} of the days of the September
Term of said Court the following among
other proceedings were had in said Court
and entered of Record to wit

William Porter
vs
use of Mary S Porter

Assumpsit Motion to set
aside Judgment
Charles McDonald
And now again comes the parties to the
cause by their Attorneys aforesaid and
the said defendant submits his motion
on affidavit filed herein to set aside the
Judgment heretofore entered herein against
him, and counsel being heard on said
motion and the premises fully under-
stood, the Court now here overrules said
motion, to which said ruling of the Court
the said defendant enters his exceptions

And afterwards to wit on the Eighteenth
day of October in the year last aforesaid
said day being still of the September term
of said Court the following among other
proceedings were had in said Court and
entered of Record to wit

William Horter
use of Mary Horter

Charles McDonald

Asst appeal prayed

And now comes the said defendant and prays an appeal in this cause to the Supreme Court of the State of Illinois which is allowed to him upon condition that he file his appeal Bond in the sum of six hundred dollars, with security to be approved by Judge of this Court

And afterwards to wit on the twenty first day of October in the year aforesaid said Defendant Charles McDonald filed in the office of the Clerk of said Court in the words and figures as follows to wit

Know all men by these presents, that we Charles McDonald and John O'Neill of the City of Chicago, County of Cook and State of Illinois are held and firmly bound unto William Horter for the use of Mary Susana Horter in the penal sum of Six Hundred dollars for the payment which well and truly to be made we bind ourselves our heirs executors and

Administrators jointly ^{and} severally, firmly by
these Presents. Witness our hands and seals
this eighteenth day of October A D 1858

The condition of the above obligation
is such that whereas the said William
Horter for the use of Mary Susana Horter
heretofore to wit on the 18th day of Septem-
ber A D 1838 recovered a judgment against
said Charles M'Donnell in the Cook
County Court of Common Pleas of Cook
County in the State of Illinois for the sum
of Four Hundred and fifty eight dollars
damages besides costs of suit from which
judgment the said Charles M'Donnell
has prayed an appeal to the Supreme
Court of the State of Illinois which has
been allowed.

Now therefore, the condition of the
above obligation is such that if the
said Charles M'Donnell his heirs executors
or administrators shall well and truly pay
the Judgment, costs, interest and damages
in case the Judgment shall be affirmed
and if the said Charles M'Donnell
shall duly prosecute said appeal then
this obligation shall be void, otherwise it
shall remain in full force.

C. M'Donnell

presence of } John O'Neill Esq

appeared by me
M Wilson Judge of
Cook Co Ct of C Pleas

And afterwards to wit on the twenty third
day of Mch in the year of our Lord
one thousand eight hundred and
fifty nine said defendant filed in
the office of the Clerk of said Court his
Bill of Exceptions in the words and
figures as follows to wit

State of Illinois }
Cook County } ss

In the Cook County
Court of Common Pleas

September Term AD 1858

William Porter for the
use of Mary Susana Porter }

vs
Charles McDermott

In Assumpsit

Be it remembered that
heretofore to wit on the 14th day of Sep-
tember AD 1858 the defendant filed
this cause his plea of the general issue
together with an affidavit which

affidavit is in the words and figures
following to wit

William Porter for the } Cook County
use of Mary Susana Porter } Court of Com-
mon Pleas
Charles McDonald }

Sept Term A.D. 1838

And now comes the said defend-
ant by Thomas Dent his Attorney and
defends the wrong and injury when
xc. and says Acto non because he says
that he did not undertake or promise
in manner and form as the said
Plaintiff hath above thereof complain-
ed against him and of this he puts
himself upon the country xc

T Dent Pls Atty

State of Illinois
Cook County ss

Charles McDonnell the defend-
ant aforesaid being duly sworn says
on oath that he believes that he has
a good defense to said suit on the
merits except as to \$458 of the plaintiff's
demand. And said defendant
moves the Court to stay all proceedings

in this case for the reason that he the
said defendant hath reason to believe
and doth believe that the said suit
was commenced and is prosecuted
without the authority of the said
William Norton who hath been as
defendant is informed and believes
absent ~~in~~ England since in or about
the month of April last, and who
he believes has not authorized the com-
mencement of said suit, wherefore
and for other reasons the defendant
thinks that said suit ought not to be
prosecuted against the defendant
xc

Subscribed & sworn } C M McDonnell
before me this 14 day
of September A D 1838
Allen Kimball Clerk

Recd also remembered that afterwards
at this term to wit on the 15th day of
September A D 1838, the attorney on the
part of the plaintiff came into Court
and asked for judgment against
the defendant, and that thereupon
on the day last aforesaid the Court
did render judgment herein by de-

fault against the defendant for want
of any affidavit of merits as to four
hundred and fifty eight dollars of
the plaintiffs demand and the Court
did thereupon ~~at the~~ at the same time
assess the plaintiffs damages at the sum
of four hundred and fifty eight dollars
for and upon which assessment the
Court took and received the affidavit
first aforesaid as evidence, and there
was no other evidence of or concerning
or in any way relating to said damages
and said affidavit was the sole and
only evidence used to prove any claim
of the plaintiff against the defendant
therein, and all the evidence upon
which assessment, and the Court
thereupon, on said, evidence rendered
judgment herein against said defend-
ant for said sum of four hundred
and fifty eight dollars

It is also remembered that
upwards at the same term, to wit, on
the 16th day of October A D 1838 the parties
appearing by their respective attorneys
and the defendant having filed his
motion to set aside the judgment
and assessment as aforesaid, and

said motion having been considered
the Court did then and there overrule
said motion to set aside said judg-
ment and assessment, and the defend-
ant by his counsel did then and there
except to the decision and order of the
Court overruling said motion at the
time of the making the same, and
prayed that his Bill of Exceptions in
this behalf might be signed, sealed
and made a part of the record which
was accordingly done

John W Wilson Seal

State of Illinois }
Cook County } ss

D. Walter Kimball CLK
of the Cook County Court of Common Pleas in and
for said County & State do hereby Certify that the
 foregoing is a full true & correct Transcript
of the Records & papers filed in said Court
in the Case of William Haster for use of Mary
Susan Haster Plaintiffs against Charles Mc
Connell Defendant

Certified under my Hand and
the Seal of said Court at Chicago
this 13th day of April A.D. 1889
Walter Kimball
CLK

Richard H. H. H.
a
Charles McDonald

Certified Copy
of Record

D. H. H. H.
cert 450
dept atty

And now comes the said Charles M^cDonnell and says that in the record and proceedings aforesaid there is error in this, to wit:

1. The said ~~Circuit~~ ^{Common Pleas} Court erred in assessing the damages.—
2. The said ~~Circuit~~ ^{Common Pleas} Court erred in assessing said damages without the intervention of a jury —

3. The said Court erred in rendering judgment for immediate execution.

4. That said judgment was given in favor of the said William Horter when by the laws of the land it ought to have been given in favor of the said Charles M^cDonnell.

5. Said Court erred in refusing to set aside the assessment & judgment.
Said Court erred in receiving testimony from said assessment.
Therefore the said Charles

McDonnell prays that a citation
may issue, and that the said judg-
ment may be reversed and that
he may be restored to all things
which he has lost by reason thereof.

By Thomas Dent

his attorney

And now comes the defendant
Mr. Morand says that there is
no more in said record and
proceedings and prays that said

judgment may be affirmed
with Costs &c

J. W. Chickering
+ Thomas Morand Warts & Son
attys for deft in
Error

12-12-1889
Dent
porter, who
was for use of
Mary Susan Warner.

Record

Appeal from above
Court Com Pleas

Filed April 24 1889

Leahland

Tele. R.

Supreme court - 3rd Grand Division
April term 1859.

Charles McDowell
vs
William Hexter for the
use of Mary S. Hexter

} Appeal from Court
county court of common pleas.
}

Points for appellant -

This was an action of assumpsit commenced by appellee against appellant. The declaration contained the common counts only - A plea of the general issue was filed in apt time with an affidavit of merits as to the whole suit "except \$458 of plaintiffs demand". The court, without striking the plea from the files, because there was not ~~a~~ sufficient affidavit of merits, rendered a judgment against appellant for \$458 without the intervention of a jury or without having the case submitted to the court for trial - and the only evidence introduced on the assessment of damages was the affidavit aforesaid -

Appellant insists that said judgment ought to be reversed because

There was a plea on file

denying the whole action - This was not an action upon a contract; and the appellant submits that it is not a case within the 3rd sec of the act of 1853 regulating the practice in that court -

Again - The plea remained on the record - If the appellees had desired to take judgment by default & the affidavit was insufficient, it was still their duty to move the court to strike the plea from the files - Not having done so, ~~it~~ was error to render judgment by default over the plea -

II. The affidavit was sufficient, and the appellant was entitled to a trial on his plea -

III. The bill of exceptions shows that the affidavit was the only evidence offered or given on the assessment of damages - That is not a confession that \$458 was due the plaintiff - Appellant swore in that affidavit that he had a good defence to all "except \$458 of plaintiff's demand" - Was that an acknowledgment of indebtedness to that extent? And even if the court

had power, without the intervention of a jury, to assess the damages in such a case - still the evidence in this case was entirely insufficient to warrant the finding of the court. There was no note no acct - no evidence whatever except the affidavit & I respectfully ~~submit~~ ^{submit} that the court had no power to adjudge the affidavit insufficient for the support of the plea and yet torture it into a confession of indebtedness. If courts are to be permitted to act in this way, then instead of being a means of enforcing and protecting legal rights, they degenerate into a mere snare or trap for the unwary.

It is no answer to say that plaintiff only took judgment for the \$450. There was no legal evidence of a single cent of indebtedness & in the state of the proof as shown by the bill of exceptions, the judgment should have been for the defendant below.

W H Wallace
Counsel for appellant.

252-128

Charles McDoull
vs
Wm Porter &c

Argument of
W H Wallace
for appellant

Filed May 12. 1889
L. L. Mum
Clerk

Refused

SUPREME COURT OF ILLINOIS,

Third Division—April Term, 1859.

CHARLES McDONNELL, *Appellant,*

vs.

WILLIAM HARTER, for the use of
MARY SUSANA HARTER, *Appellee.*

} *Appeal from Cook
County Court Common
Pleas.*

ABSTRACT OF RECORD.

- 2 Summons issued Aug. 4, 1858, returnable 2d Monday, Sept. 1858, in
favor of appellee vs. appellant, in assumpsit.
- 3 Served August 7th, 1858.
- 4 Declaration—Counts.
- 1st count; Indebitatus account for goods sold and delivered.
- 2d count; Quantum valebat for goods sold.
- 3d count; common, for money lent, money had and received, &c.
- 4th count; money due on account stated.
- 14 Plea, general issue.
- 14 15 Affidavit of defendant, that he had good defence on merits, except as
to \$458 of plaintiff's demand; also showing cause for stay of proceedings
for want of authority from plaintiff to sue. Affidavit concludes as follows:
"Wherefore and for other reasons, the defendant insists that said suit
ought not to be prosecuted against him, &c."

15 BILL OF EXCEPTIONS.

- Showing that court received the above mentioned affidavit of defendant
as evidence on the assessment; that no other evidence was offered, and
that judgment was rendered on that alone, and that the court refused to
set aside the assessment, and that defendant excepted.
- 8 9 Judgment, showing that it was upon the aforesaid affidavit of defendant
and assessment made by the court, and immediate execution rendered;
said judgment rendered 18th Sept. 1858, for \$458 damages, with costs.
- 10 Record entry showing motion to set aside assessment, and order overrul-
ing it.
- 11 Record entry showing appeal allowed.
- 11 Appeal bond.

POINTS.

- 1st. The court had no power to assess the damages. The plea was to
the whole declaration and was not stricken from the files.
- 2d. The court had no power to assess damages without the intervention
of a jury.
- 3d. The court had no power to order immediate execution.
- 4th. The court should have set aside the assessment and judgment on
motion.

W. H. L. WALLACE,
For Appellant.

2152 - 1280

McDonnell

no

Horton & al

Abstract

Filed May 11, 1839

Shelburne
Club