No. 14508

Supreme Court of Illinois

Michigan Cent. R. R.

vs.

Keohane

71641

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division

No. 27

Mich. Cent. R. R. Co. vs. Kerfoot

1863

14588

Printed by Jameson & Morse, 14 La Salle, St. Chicago.

SUPREME COURT,

THIRD GRAND DIVISION.

THE MICHIGAN CENTRAL RAILROAD CO.,
GARNISHEE OF JOSEPH W. LEIGHTON,
Plaintiff in Error,
vs.
PHILIP H. KEOHANE, *Defendant in Error.*

Error to Cook County Circuit Court.

POINTS AND AUTHORITIES OF THE PLAINTIFF IN ERROR.

This record shows that on the fourth day of March, 1857, judgment was entered in the Circuit Court of Cook County against the plaintiff in error, as garnishee of Joseph W. Leighton, and in favor of the defendant in error, for the sum of one hundred and thirty-six $\frac{66}{100}$ dollars.

To reverse this judgment, the cause has been brought to this Court by writ of error.

The error complained of is, that the Court below had no jurisdiction over the defendant, and therefore had no authority to render this judgment.

There was no appearance on the part of the Company in the Court below; and if the Court had jurisdiction at all, it was acquired by the issuing, service, and return of the *garnishee process* and writ of *scire facias*, mentioned in the record.

That both these writs were duly issued out of the said Circuit Court, under the seal thereof, and that they were in due form, is conceded. The only point made is, as to the sufficiency of their service and return.

The plaintiff in error is a corporation, and the only mode of acquiring jurisdiction, aside from the provisions of the statute subsequently men-

tioned, is by a service upon its President or chief officer. That was not done in the present case.

The provisions of the statute by virtue of which jurisdiction was sought to be acquired in this case, are as follows:

"In all cases where suit has been or may hereafter be brought against any incorporated company, process shall be served upon the President of such company, if he shall reside in the county in which suit is brought; and *if such President shall be absent from the county, or does not reside in the county*, then summons shall be served by the proper officer by leaving a copy thereof with any clerk, cashier, secretary, engineer, conductor, or any agent of such company found in the county."

Scates' Statutes, page 243, *sec.* 1.

By the provisions of this statute, the process must be served,

First, on the President, if he resides in the county;—and this service must be in the ordinary way, by reading it to him;—any other service, or service upon any other agent of the company, would be simply void, if the President reside and was in the county at the date of service.

To authorize service by copy, or upon any other agent of the company, therefore, it must be shown that the facts are such as to authorize it, to wit: That the President either does not reside in the county, or that he was absent from the county at the time of service. And the fact that the President does not reside in the county must appear of record. It is a jurisdictional fact, and cannot be presumed.

The returns of the officer endorsed on both the garnishee process and the *scire facias*, as appears from the record, show that service in a very imperfect manner was attempted to be made by leaving a copy with George Williams, agent. It was not served on the President, nor does it appear why not. For all that appears in this record, the President both resided in the county and was within it at the date of the alleged service. And if this be so, the officer had no more authority to serve it on one George Williams, than upon any other person.

The law required the officer to execute the writ in the manner prescribed by the statute, and that was,

First. To search for the President, and determine whether he resided in the county; and if he did, and was within the county, to serve the writ upon him by reading it to him.

Second. If he should ascertain that the President did not reside in the county, then to serve it by leaving a copy with an agent.

It being indispensable, then, that the sheriff should have done both of these things, in order to constitute a service of the writ, it becomes equally important that the facts should have been returned by him; otherwise there is no proof that they have been done as the statute requires.

If it appeared from the record that there had been no service whatever, or attempt at service, certainly the judgment could not stand. But unless these writs have been served on the right party, there has been, in fact, no service upon the defendant. Inasmuch, therefore, as it does not appear from the record that they have been served on the President, nor that he did not reside in the county at the time of the service; and as there is and can be no presumption that he did not, from anything appearing of record, we conclude that the service upon the alleged agent was without authority of law, and that the judgment against the plaintiff in error was void for want of jurisdiction, and ought to be reversed and set aside.

WALKER, VAN ARMAN & DEXTER,
Counsel for Plaintiff in Error.

~~54 92 145~~ 27

Mich Cent R.R. Co

vs

P. H. Seehorn

Plffs Points

Filed Apr 18. 1861

A. Edgerton

Clerk

F. A. Pierce & Co., Printers, 120 Lake Street, Chicago.

SUPREME COURT.

THIRD GRAND DIVISION.

APRIL TERM, 1863.

THE MICHIGAN CENTRAL RAIL ROAD COMPANY,
Garnishee of Joseph W. Leighton,
Plaintiff in Error,
vs.
PHILIP H. KEOHANE,
Defendant in Error.

} *Error to Cook County Circuit Court.*

ABSTRACT OF ADDITIONAL RECORD.

1 Leave given to Sheriff to amend his returns to Writs of Summons and *Scire Facias.*

2 Writ with amended return endorsed thereon as follows:

STATE OF ILLINOIS, } ss.
Cook County.

Served upon the within named Michigan Central Rail Road Company by delivering copies of the within Writ to George Williams, Agent, and A. D. Spaulding, Depot Master of said Company, the President of said Company not being a resident of and not being found in my county this 26th day of January, A. D. 1857.

JOHN L. WILSON, *Sheriff,*
By George Anderson, *Deputy.*

Writ of *Scire Facias* with amended return endorsed thereon, substantially the same as the amended return on Summons.

Printed by Jameson & Morse, 14 La Salle, St. Chicago.

SUPREME COURT,

THIRD GRAND DIVISION.

THE MICHIGAN CENTRAL RAILROAD CO.,
GARNISHEES OF JOSEPH W. LEIGHTON,
Plaintiffs in Error,
vs.
PHILIP H. KEOHANE, *Defendant in Error.*

Error to Cook County Circuit Court.

ABSTRACT OF RECORD.

1 On the 6th day of September, A. D. 1856, the defendant in error brought his action of assumpsit against Joseph W. Leighton, claiming damages $200.

2 & 3 On the 17th day of October, A. D. 1856, the plaintiff filed his declaration, containing common counts, and also a special count on a note for $86.96.

On the 16th day of November, A. D. 1856, alias summons was returned into Court, duly served on the 5th November, A. D. 1856.

4 On the 19th day of November, of the same year, the default of the defendant was entered for want of appearance, and the plaintiff's damages assessed thereon by the Court at the sum of $108.26; and thereupon, on the same day, judgment was entered in favor of the plaintiff, and against the defendant, for that sum.

5 On the 19th of December, execution was issued on said judgment, and on the 26th of the same month returned, endorsed as follows:

1st. The recovery of said judgment.

2d. The issuing and return of said execution.

3d. That the said defendant in the Court below in said cause had no property, within the knowledge of the plaintiff, in his possession liable to execution.

4. That the affiant had reason to believe, and did believe, that the Michigan Central Railroad Company was indebted to the said defendant, Joseph W. Leighton.

3 On the 20th day of January, 1857, a garnishee process was issued out of said Court, in said cause, against the plaintiff in error, and on the 26th day of the same month was returned into said Circuit Court, endorsed as follows, to wit:

7 "Served by reading to the within named *M'hg Central R. R.* "*Compy to* their agent *Gerg* Williams and A. N. Spaldin *Deopt* master "and delivering a copy to them, the 26 day of January, 1857. Fees 2, "service 1,00. 2 copy 1.00 2 mile 10—1 return 10 $2.20 pd by plff's "atty John L. Wilson Sheriff by Georg Anderson deputy."

8 On the 4th day of March, A. D. 1857, the default of the plaintiff in error was entered, and a conditional judgment entered against said plaintiff in error, and in favor of said Joseph W. Leighton, for the sum of $136.66, and the Court orders a *scire facias* to issue.

9 On the 20th March, 1857, a writ of *scire facias* was issued out of said Court, and on the 31st of the same month was returned into said Court, endorsed as follows:

"Served by summoning the Michigan Central Rail —— Comp'y this 31st day of March, 1857, and leaving copy with George Williams, Agent. 1 service 50, 1 copy 50—1 mile 5—return 10—$1.15. Pd by plffs atty. John L. Wilson Sheriff by George Anderson depty."

10 & 11 On the 15th of April, 1857, said Company not appearing, nor any one for it, the said conditional judgment above mentioned was made final and conclusive by said Court, and it was ordered that execution issue thereon for the damages and the costs.

92 57 ~~145~~ 27

Mich. Cent. R.R. Co. Ass

vs

O. H. Neiheart

Abstract

Filed Apr. 18. 1861

L. Leland

Clerk

In the Supreme Court of Illinois
Third Grand Division
April Term A.D. 1863

The Michigan Central Railroad Company
by service of Summons on J. M. Leighton
Deft in Error
vs
Philip H. Eastman
Deft in Error
} Error to Cook

State of Illinois
La Salle County } ss.

John H. Thompson being first duly sworn says that he is one of the attorneys of the defendant in Error in the above entitled cause and makes this affidavit for and in behalf of said defendant in Error;

And this affiant further says that at the April Term A.D. 1862 of the Circuit Court of Cook County an order was made and entered of record giving leave to the Sheriff to amend his returns to the writs of Summons and Scire Facias in said cause and that amended returns

were made and endorsed as fair writs in pursuance of said order.

And this affiant further says that the said order and amended returns do not appear in the transcript ~~filed by~~ made out for and filed by the Plaintiff in Error in said cause and suggests a diminution of the Record and prays for a writ of certiorari.

John H. Thompson

Subscribed and sworn to
this 23rd day of April 1863
before me L. Leland Clerk
by J. B. Rice Deputy

27

Supreme Court of Illinois

The Mich. Cent. R.R. Co.
Garnishee &c

Philip H. Kohaus
Aff. &c
for
Certiorari

Filed April 28th 1873
L. Leland
Clerk

Demetts

delivered the opinion of the Court:

Mr. Justice Wallace. This record presents two questions for determination. The first is Whether the Sheriff's return to the execution, is sufficient to authorise a proceeding by garnishee process. And the second, is whether a final judgment can be rendered against the garnishee, without first filing interrogatories. The Sheriff's return to the execution is this, "I have demanded property of the within named defendant Joseph W Eighmie, and he says he has no property to turn out to satisfy said execution. I therefore return said execution, no part satisfied, by order of the plaintiff's attorney hereon indorsed." The order for the return of the execution, is indorsed on the execution, and signed by the attorney.

The thirty eighth section of the Chapter, entitled "judgments and executions" R.S. 307, provides, that when a judgment has been rendered by a court of record, or a justice of the peace, in this State, and an execution against the defendant, shall be returned by the proper officer, "no property found", on the

affidavit of the plaintiff, or other credible person being filed, showing that the defendant has no property within the knowledge of affiant liable to execution, and that affiant has just reason to believe that another person is indebted to defendant, or has effects, ~~property~~, or estate of such defendant in his hands, the court, or justice of the peace, is required to cause such person forthwith to appear before such court or justice of the peace, as a garnishee. And the court or justice of the peace, is required to examine, and proceed against the garnishee, in the same manner, as is required by law, against garnishees in original attachment suits.

A party seeking the benefits of this provision, must bring himself, substantially, within its provisions. Until a judgment is rendered, this proceeding is unauthorized. And an execution must have been issued and returned by the proper officer, "no property found", to warrant the issuing of garnishee process under this section. These ~~decisions~~ acts are

indispensible, to maintain the proceeding. This is a statutory mode of obtaining execution after the means provided to the common law, have been employed and failed. But it can only be resorted to after the requirements of the statute have been complied with, as conditions to issuing the process.

In this case there is not a return of "no property found". The return states, that the Sheriff had demanded property of the defendant, who said he had none to turn out to satisfy the execution. For aught that appears from this return, he may have had an abundance, liable to levy and sale, to fully satisfy the executions, and the Sheriff may have been apprised of the fact. He no where states that he had made any search for property, or that he was unable to find any, as he was required to do before he returned the writ. Unless the return in terms, or in substance states that "no property is found" it is insufficient, and this return fails to show that fact.

Again when the proper steps have been taken, the proceeding is required to proceed in the same manner, that is, provided for in cases of original attachments. The sixteenth section of the attachment law, R.S. 67, requires, in case the garnishee shall fail to appear, and make discovery, to enter a conditional judgment, and to issue a scire facias, against the garnished, returnable to the next term of the court, to show cause why the judgment should not be made final. And if he fails to appear and make discovery upon oath or affirmation, in the mode prescribed by the act, the court is required to confirm the judgment, and award execution, for the plaintiff's entire debt, and costs.

The eighteenth section of the same act, requires the plaintiff, during the return term, to exhibit and file, allegations and interrogatories in writing, upon which he may be desirous to obtain and compel, the answer of the garnishee touching his indebtedness to the defendant, or as to property, effects and credits of

the defendant, in the hands of the garnishee. This is obviously the discovery required by the sixteenth section of the act, and is the mode of obtaining it, as required by the chapter. These provisions required the defendant in error, to file his interrogatories, and the plaintiff in error, had a right to have the opportunity of answering them, before a final judgment was rendered and ~~execution~~ execution, was awarded. The statute has secured this right, and the auditor cannot deprive him of it. Until interrogatories are filed, and the opportunity is afforded to answer them, the garnishee is not in default. Until the ~~plaintiff in the court below~~ auditor has filed interrogatories, he was not in a position to demand an answer. The entry of the final judgment, before interrogatories were filed, was not authorized by the statute, and the judgment of the court below, must be reversed and the cause remanded.

~~In this opinion the whole Court concurred.~~

Judgment reversed.

Michigan Cent. R.R.

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Pt SE¼ Sec 4

Spencerburg
Walter J.

Recorded B. 12 P. 127

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable George Manierre Judge of the Seventh Judicial Circuit of the State of Illinois, and sole presiding Judge of the Circuit Court of Cook County, in the State aforesaid, and at a term thereof begun and held at the Court House in the City of Chicago, in said County, on the second Monday, (being the Fourteenth day) of April in the year of our Lord One Thousand Eight Hundred and Eighty two and of the Independence of the said United States the Eighty sixth

Present, Honorable George Manierre Judge of the 7th Judicial Circuit of the State of Illinois.

Carlos Kaven States Attorney.

Anthony B. Hesing Sheriff of Cook County.

Attest, Wm J Church Clerk.

Be it remembered that heretofore to-wit at the April Term of said Court to-wit on the 3d day of May in the year aforesaid the following proceedings among others were had and entered of record. To-wit

Phillip Keohane

vs

Michigan Central Rail Road Co Garnishee of Joseph W Leighton

} Motion

On motion of Kehn and Clark of Counsel for said plaintiff no objection being made thereto it is ordered that John E Wilson late Sheriff of Cook County have leave to amend his return on the writ of summons and scire facias issued against the Garnishees in this Cause

SUMMONS—CIRCUIT COURT OF COOK COUNTY.

State of Illinois, } ss.
COOK COUNTY,

The People of the State of Illinois, to the Sheriff of said County—Greeting:

We command you that you SUMMON The Michigan Central Rail Road Company as garnishee of Joseph N Leighton if he shall be found in your county, personally to be and appear before the Circuit Court of Cook County, on the first day of the next term thereof, to be holden at the Court House, in Chicago, in said County of Cook, on the First Monday of March next, to answer unto Philip Rehans what may be objected against it

~~in a plea of~~ ~~said Plaintiff~~ ~~as is said, in the sum of~~ ~~to the damage of the~~ ~~Dollars.~~

And have you there this writ, with an endorsement thereon, in what manner you shall have executed the same.

Witness, WILLIAM L. CHURCH, Clerk of our said Court, and the seal thereof, at Chicago aforesaid, this Twentieth day of January A. D. 1867

Wm L Church Clerk.

Seal

G. D. No. 7228

...t Court of Cook County.

March Term 1867

Phil. H. McKeehane

vs.

The Michigan Central Rail Road Company as garnishee of J. Naughton

SUMMONS.

Filed, ... 1867

..... Clerk.

Served by reading to the within named Mich. Central R.R. Company to their agent George W. Williams — A. W. Spaulding Dep. Master — delivering a copy to them

the 7th day of March 1867

FEES: 2 Service, ... Ad. by Sheff. 1,00
2 Mile, ... " " 1,00
1 Return, ... " " 10
$ 2,20

John D. Wilson Sheriff.
by George Anderson Dep.
J. P. Charles Attorney.

(Return on within writ as amended by Court-at-April Term 1867)

Served upon the within named Michigan Central Rail Road Company by delivering copies of the within writ to George W. Williams agent and A. W. Spaulding Dep. Master of said Company. The President of said Company not having been found in my County this 26th day of January A.D. 1867

John D. Wilson Sheriff
by George Anderson Dep.

Fee 2 Service 1,00
2 Copies 1,00
2 Mile 10
Return 10
$ 2,20

State of Illinois
Cook County

State of Illinois, COOK COUNTY, } ss. **The People of the State of Illinois to the Sheriff of Cook County, GREETING:**

WHEREAS, at the March Vacation term of the Circuit Court of the County of Cook, in the year one thousand eight hundred and fifty-seven a judgment was rendered in and by said Court against Michigan Central Rail Road Company garnishee of Joseph W. Leighton defendant, in favor of Phillip H. Keepane for the sum of One hundred and Eight ——— Dollars, and Twenty-six — Cents; And The said Michigan Central Rail Road Company — — — — having been duly summoned as garnishee of the said defendant and it having failed to appear and discover on oath or affirmation what lands, tenements, goods, chattels, moneys, credits and effects of the said defendant were in ~~his~~ its custody, charge or possession, or under its control, or what moneys or property were by it owing to said defendant as is required by law, a conditional judgment for the above named amount was by said Court rendered against said garnishee and this writ ordered to be issued.

NOW THEREFORE, we command you that you summon the said Michigan Central Rail Road Company — garnishee as aforesaid personally to be and appear before the said Circuit Court on the first day of the next term thereof to be holden at Chicago in said County on the Second Monday of April next, then and there to show cause, if any he have or can show, why final judgment should not be entered against it upon the due execution and return of this writ. And have you then and there this writ, with an endorsement hereon in what manner you shall have executed the same.

WITNESS, ~~LOUIS D. HOARD~~, Clerk of said Circuit Court and the seal thereof, at Chicago, this thirtieth day of March A. D. 1857

Wm. L. Church

Seal

Wm. L. Church *Clerk.*

(Return as amended by leave of Court at April Term of the Circuit Court of Cook County. A.D. 1862)

State of Illinois, Cook County } ss. Served upon the within named Michigan Central Rail Road Company the 31st day of March 1857 by delivering a copy of the within writ to George Williams agent of said Company at the office of said Company. the President of said Company not being a resident of and not being found in my County.

John S. Wilson sheriff

By George Anderson Deputy

Fees Service $ 0.50
1 Copy .10
1 Mile .05
1 Return .10
pd by pltff atty $ 1.15

No 7228

CIRCUIT COURT,

April Term, 1857

Replevin

vs.

SCI. FA. v. GARNISHEE.

Served by summons the Michigan Central Rail Road Company by delivering to Mr. Morris and delivering a copy to him at the office of the within named Michigan Central Rail Road Company this 31 day of March 1857

Pd by pltff's atty
1 Service 50
1 Copy 50
1 Mile 5
1 Return 10
$ 1.15

John S. Wilson sheriff
By George Anderson Deputy
P. Pelham Atty.

I, WILLIAM L. CHURCH, Clerk of the Circuit Court of Cook County, in the State aforesaid, do hereby certify the above and foregoing, to be a true, perfect and complete copy of All proceedings Entered of record since Jan 1st 1868 + the Summons + Fieri Facias with the return + amended return of the Sheriff thereon in a certain cause lately pending in said Court, on the Common side thereof, wherein Phillip Le Roharne was plaintiff and Michigan Central R.R. Co garnishee of J. McLaughlin Defendant

In Witness Whereof, I have hereunto set my hand, and affixed the Seal of said Court, at Chicago, this Fourteenth day of April A. D. 1868

Wm L Church Clerk.

Fee for Copy $1.00
Paid by Sheriff's Office
Wm L Church Clk

92 27

The Mich. Cent R R Co. 27

Philip H. Keehaur

Additional Record

Filed Apl 24. 1863

S Lecount Clk

Supreme Court of Illinois
Third Grand Division.
April Term 1863.

Ill. Mich. Cent. R.R. Co.
Garnishee &c
vs
Philips & Keokuk

The Plaintiff in Error seeks to reverse this judgment on the ground that the returns to the writs of Summons and Scire facias are insufficient.

At the April Term of the Cook Circuit Court in which the proceedings were had in this case, leave was given to the Ex Sheriff to amend his returns and the returns were accordingly amended and as amended the error complained of no longer exists.

The only questions which can arise now are.

1 Had the Court below authority to authorize the Ex Sheriff to amend his returns.

This Court has repeatedly decided that the Court below had such authority.

In Morris v. Trustees of Schools 15 Ill 266 the subject of amendments of returns to process was very fully considered. In this case leave was granted the Sheriff to amend after his term of office had expired and without notice to the appellant and after the case had been appealed to the Supreme Court.

It was held that notice of the application to amend need not be given, that no reasons need be made to the application and the cases there cited so there either on the point seem to settle this point beyond question.

11 Costs. It may be urged that the costs in the Supreme Court should be imposed on the defendant in error inasmuch as the amended returns were made after the case was brought to this Court.

The statute however sec 19 Chapter XXVI Rev. St. is peremptory and provides that when the judgment is affirmed the defendant in error shall recover his costs.

The Plaintiff in Error knew very well the fact - that the President of the Co. was not a resident of the County and that the process of the Sheriff was amendable and he cannot complain if he has to pay costs incurred by him in suing out the writ of Error under such circumstances.

In Irvine v. Scobee 5 Littell 70 this point was decided.

Submitted in behalf of Defts. in Error.

Thompson & Burch
Counsel for Defts.

92 27 92

Supreme Court
The Mich. Cent. R.R. Co.
vs
Philip H. Keirhaus

Argument for
Deft. in Error.

Filed Apl. 27. 1863.
S. Ueland
Clk.

Thompson & Richards
Attys for Deft. in Error

State of Illinois } ss.
Sangamon County } Of the April Term
Lasalle County ss. A.D. 1862.

The Michigan Central Railroad Company
vs
Philip H Roberts

I Cyrus McMillen of the County of Cook and State of Illinois being duly sworn says that he is Counsel for the above named plaintiff in the above entitled cause and that he has caused two writs of Scire facias to be issued in said cause to the Sheriff of Cook County, both of which have been returned non est inventus by the said Sheriff. That he has caused diligent search & enquiry to be made for said defendant and that he cannot be found and affiant is informed that the said defendant has departed the State of Illinois and does not now reside in said State.

Subscribed & Sworn to before me this 24th day of April A.D. 1862

J. M. Dotter

H. Leland Clk.

92 Cro J 4 27

Middleton

v.

Phelps & Peabody

Appeal of
Non residents

Filed Apl. 24. 1862
L. Leland
Clk.

Supreme Court of Illinois
Third Grand Division
April Term A.D. 1863

The Mich. Cent. Railroad Co.
Garnishee of Jos. M. Lughlin
Pltff in Error
vs
Philip H. Keehane
Dfft in Error
} Error to Cook

And now comes the said Philip H. Keehane, defendant in Error, and the additional Record being filed, says that there is no Error in said Record or in the record of said cause and prays that the judgment herein may be affirmed.

Thompson & Bishop
Attys for Dfft in Error

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The Mich. Cent. R.R. Co.

vs.

Phillip H. Keehan

Joinder in Error

Filed Apl 24. 1863

L. Leland Clk

Thompson & Parkinson

Attys for Defts in Error

Supreme Court of Illinois
April Term A.D. 1863

Ill. Cent. R.R. Co.
Garnishee &c
vs
Philip H. Keehan

} Error to Cook

And now comes the said defendant in Error by Thompson & Bishop his attorneys and moves that a writ of certiorari issue in the above entitled cause on the affidavit filed herein.

Thompson & Bishop
Att'ys for Def't in Error.

It appears by the affidavit filed in this cause that since the Record has been brought to this Court an order has been made in the Court below authorizing the Sheriff to amend his returns.

The only grounds on which the Plaintiff in Error seeks to reverse the judgment are the insufficiency of the returns.

That the Court may give such leave is decided in the affirmative.

bearing cases among others:

Turney vs Bryan 16. Ired 43

In Moore v. Purple 3 Giles 149

the Court say "Amendments by sheriffs to their returns of process are of course. No resistance could have been made to the application to amend."

Quoted & approved in

Morris v. Trustees of Schools

15 Ired 266.

In Irvine v. Scober 5 Littell 70

it was held that such amendments might be made after cause was taken to the Supreme Court

In 15 Ired 266 amendment was made after case was docketed.

In James State v. Hughlett 2 Scam 361

certiorari allowed in case similar to this.

Submitted on behalf of motion

Thompson & Winston

For Defendants.

27

Supreme Court

The Mich. Cent. R.R. Co.

vs

Philip H. Ketchum

Motion for
Writ of Certiorari
& authorities

Filed April 23. 1873

L. Leland Clk
by [illegible]

Mint allowed

Thompson & Bishop
Attys for Def'n
Error

UNITED STATES OF AMERICA,

STATE OF ILLINOIS, COUNTY OF COOK, SS.

Pleas, before the Honorable George Manierre Judge of the Seventh Judicial Circuit of the State of Illinois, and Sole Presiding Judge of the Circuit Court of Cook County, in the State aforesaid, and at a term thereof begun and held at the Court House in the City of Chicago, in said County, on the Third Monday, (being the Eleventh day) of November in the year of our Lord one thousand eight hundred and Fifty-Six and of the Independence of the said United States the Eighty-First

Present, Honorable George Manierre Judge of the 7th Judicial Circuit of the State of Illinois.

Daniel McCleary States Attorney.

James H. Black Coroner, and acting Sheriff of Cook County.

Attest, William H. Church Clerk.

Be it remembered, that heretofore, to-wit, on the sixth day of September in the year of Our Lord Eighteen hundred and fifty six, there was filed in the office of the clerk of said Court, a certain praecipe, in the words and figures following, to-wit:

"In the Circuit Court of Cook County

Philip H. Rokund }

Joseph W. Leighton }

The clerk will please issue a summons in this cause, directed to Sheriff of Cook County and returnable to the October Term of this Court. in an action of Assumpsit. Damages $ 200.

Harvey & Clarkson

Pltf's Attys

And afterwards, to-wit; on the same day and year last aforesaid, there was issued out of said Court, and under the seal thereof, the Peoples writ of Summons, directed to the, Coroner, acting Sheriff, to Execute in the words and figures following, to-wit;

"State of Illinois } ss
County of Cook }

The People of the State of Illinois to the Coroner, acting Sheriff, of said County, Greeting,

We Command you that you Summon Joseph W Leighton if he shall be found in your County, personally to be and appear before the Circuit Court of Cook 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 fourth Monday of October next, to answer unto Philip H. Rohland in a plea of Trespass on the case upon promises, to the damage of the said plaintiff, as is said in the sum of Two Hundred dollars.

And have you then and there this writ, with an Endorsement thereon, in what manner you shall have Executed the same,

Witness, Louis O. Howard Clerk of our said Court, and the seal thereof at the City of Chicago aforesaid, this first day of September A.D. 1856

L. O. Howard. Clerk

Seal

And afterwards, to=wit: on the seventeenth day of October, in the year last aforesaid, said Plaintiff, by J. P. Clarkson his attorney, filed in said Court his certain declaration, in the words and figures following, to=wit:

"In the Cook County Circuit Court
Of the October vacation Term A.D. 1885
Cook County, ss.

Philip H. Keehan, plaintiff in this suit by J. P. Clarkson his attorney, complains of Joseph W. Bigelow defendant in this suit, in a plea of trespass on the case upon promises, for that whereas the said defendant heretofore to=wit: on the seventh day of July in the year One thousand Eight hundred and Eighty six. at Chicago to=wit: in the County of Cook aforesaid, made his certain Promissory note in writing, bearing date the day and year last aforesaid, and then and there delivered the said note to the plaintiff - by which said note the said defendant promised to pay to the said plaintiff or order Eighty six dollars, ninety six Cents, on the third day of August after the date thereof, which period had Elapsed before the commencement of this suit, for value received. By reason whereof and by force of the Statute in such case made & provided, the said defendant became liable to pay to the said plaintiff the said sum of money in the said note specified, according to the tenor and effect of said note; And being so liable, the said defendant, in consideration thereof,

afterwards, to-wit: on the same day and year, and at the place aforesaid, undertook and faithfully promised the said plaintiff, well and truly to pay to the said plaintiff, the said sum of money in the said note specified, according to the tenor and Effect of the said note; And whereas also, the said defendant afterwards, to-wit on the first day of September in the year One thousand Eight hundred and fifty-six, at the place aforesaid, was indebted to the plaintiff in the sum of Two hundred dollars lawful money of United States of America, for divers goods, wares and merchandise by the said plaintiff to the said defendant before that time sold and delivered at the special instance and request of the said defendant; and for money before that time lent and advanced by the said plaintiff to the said defendant and at the special instance and 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 at the like request of the said defendant; And for other money by the said defendant had and received to and for the use of the said plaintiff; And for other money found due and owing from the said defendant to the said plaintiff, upon an account then and there stated between the said plaintiff and the said defendant; and being so indebted the said defendant in consideration thereof, afterwards, to-wit on the same day and year last aforesaid, and at the place aforesaid ~~Then and There~~ undertook and then and there faithfully promised the said plaintiff, well and truly to pay unto

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the said plaintiff, the said sum of money in this count mentioned, when the said defendant should thereunto afterwards requested. Nevertheless the said defendant (although often requested &c) hath not yet paid the said 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 altogether refused and still doth refuse, to the damage of the said plaintiff of Two Hundred dollars, and therefore the said plaintiff brings suit &c

J. P. Clarkson. plaintiffs Attorney.

#56 96/100

Chicago July 7. 1856

On the third day of August. after date I the subscriber of the County of Cook, State of Illinois, promise to pay to Philip H. Graham or order Eighty six 96/100 dollars. for value received

(Signed) Joseph W. Leighton

To Goods wares & merchandise Dolls.
To Money lent & advanced Dolls.
To Money had & received Dolls.
To Money due upon account stated Dolls.

And afterwards, to=wit; on the Twenty fourth day of October in the year last aforesaid said writ of summons was returned into the court aforesaid by said Coroner acting Sheriff, Endorsed as follows, to=wit: "

The within named Joseph W Leighton not found in my County the 22nd day of Oct. 1856 Fees. Return 10ct pd by pepp atty. James L Beach Coroner & acting Sheriff

(* See last 2 lines of page) (* for order that telegraphers By John Mc. Clark. deputy

And afterwards, to=wit; on the 4th day of November in the year last aforesaid, there was issued out of, and under the seal of, said Court, the Rapleu writ of alias summons, directed to the Coroner acting Sheriff of said County to Execute, in the words and figures following, to=wit:

State of Illinois } ss
County of Cook }

The People of the State of Illinois to the Coroner acting Sheriff of said County, Greeting. We Command you, as we have before, that you Summon Joseph W Leighton, if he shall be found in your County personally to be and appear, before the Circuit Court of Cook County, on the first day of the next June thereof to be holden at the Court House in the City of Chicago in said County, on the third Monday of Nov, next, to answer unto Philip Mc Roland, in a plea of trespass on the case on promises, to the damage of the

said plaintiff as is said in the sum of Two hundred dollars and have you then and there this writ, with an Endorsement thereon, in what manner you shall have Executed the same

Witness Louis D. Howard clerk of our said Court, and the seal thereof at Chicago aforesaid this 4th day of November. A.D. 1856.

L. D. Howard. clerk

And afterwards, to-wit; on the 5th day of November in the year last aforesaid, said alias writ was returned in said Court by said Coroner acting Sheriff. Endorsed as follows, to-wit;

"I hereby depute and appoint John T Bemis a special deputy to Execute the within Summons Nov 5th 1856. J. B. Beach. Coroner Acting Sheriff—

Served by reading to the within named Joseph W Brighton. defendant the 6th day of November 1856. Fees. Service 50, mile 05. return 10, 65 paid pepp ally

James B Beech. Coroner Acting Sheriff—

By John T Bemis. deputy

And afterwards, to-wit; at the October vacation Term of said Court, to-wit; on the 29th day of October in the year last aforesaid, the following, among other proceedings among others, were had and Entered of Record, to-wit;

"Philip D. Peckham. v. Joseph W Brighton

On Motion. Ordered that the above Entitled

Cause. Plaud Continued with alias to next term.

And afterwards, to=wit: at the Nov Ember Term of said Court. to=wit: on the Nineteenth day of November. in the year last aforesaid, the following. among other proceedings. were had and Entered of Record. to=wit:

Philip H. Lohane
Joseph W. Leighton } Assumpsit

This day come the plaintiffs by Dorsey and Clarke on their attorneys, and due personal service of process of Summons. having been had on the said defendant; and he being three times solemnly called in open Court, comes not nor does any person for him, but herein makes default, which on motion of the plaintiff by his attorneys, is ordered to be and now is ordered to be taken and Entered of record; Whereupon the said plaintiff ought to have and recover of the defendant his damages herein sustained by occasion of the premises, and the court after hearing the allegations and proofs submitted on the part of the plaintiff, assesses his damages at the sum of One hundred and Eight dollars and twenty-six cents.

Therefore it is considered by the Court that the plaintiff have and recover of the defendant his damages of one hundred and eight dollars and twenty-six cents. in form aforesaid assessed by the Court. together with his costs in this behalf Expended and have Execution therefor—

And afterwards, to-wit: on the 19th day of December, in the year last aforesaid, there was issued out of the office of the Clerk of said Court, and under the seal thereof the People's writ of Execution, directed to the Sheriff of said County to Execute, in the words and figures following to-wit:

State of Illinois } ss
County of Lewis }

The People of the State of Illinois to the Sheriff of said County: Greeting—

We command you, that of the lands and tenements, goods and chattels of Joseph N Leighton defendant in your County, you cause to be made the sum of One hundred and Eight Dollars and twenty-six cents, which Philip H McKane plaintiff, lately in the Circuit Court of Lewis County, at a term thereof begun and held at Chicago in said County on the third Monday of November last past, recovered against the said defendant, and which by the said Court was adjudged to the said plaintiff for his damages; And also the further sum of Four Dollars and Ten cents, which was adjudged to the said plaintiff for his costs and charges in that behalf expended whereof the said defendant is convicted as appears to us of Record; And have you the same money ready to render to the said plaintiff for his damages and costs aforesaid, and make return of this writ with an endorsement thereon in what manner you shall have executed the same in ninety days from the date hereof

Seal

Witness. William L. Church Clerk of Our said Court and the Seal thereof at Chicago in said County this 19th day of December A.D. 1856

Wm. L. Church Clerk

And afterwards, to-wit: on the Seventh day of December in the year last aforesaid, said writ of Fi Fa Execution was returned into said Court by the Sheriff aforesaid. Endorsed as follows. to-wit:

"I have demanded property of the within named Joseph W Leighton and he says he has no property to turn out to satisfy the said Execution. I therefore return said Execution. No part satisfied by order of Plaintiffs Attorneys hereon Endorsed 26 Dec 1856. Return rec'd & fd by Pff atty.

James Wilson Sheriff
By Thos J. Hoak deputy

"The Sheriff will return this writ Chicago Dec 26, 1856. S. P. Clarkson Pff atty

And afterwards, to-wit: on the Seventeenth day of January in the year of Our Lord One thousand Eight hundred and fifty seven, said plaintiff by his attorney filed in said Court his certain affidavit for Garnishee process in said cause in the words and figures following to-wit

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State of Illinois } ss
Cook County }

Cook County Circuit Court

Philip De Kohane
v
Joseph W. Brighton

Assumpsit

Philip De Kohane plaintiff in the above Entitled suit, being duly sworn maketh oath and saith: That he, this deponent, heretofore to-wit on the 19th day of November A.D. 1856 recovered a judgment in said suit in the Cook County Circuit Court against the said Joseph W Brighton the above named defendant for the sum of One hundred and thirty six dollars and thirty six Cents; And that an Execution afterwards to-wit on the Nineteenth day of December A.D. 1856 issued on said judgment, and was placed in the hands of the Sheriff of said County, which said Execution has been returned by the said Sheriff "No property found, that the said Joseph W Brighton has no property within the Knowledge of this deponent in his possession liable to Execution; That this deponent has just reason to believe and does believe that the Michigan Central Rail Road Company are indebted to the said Joseph W Brighton, and therefore prays that a Summons may issue against the said Michigan Central Rail Road Company as Garnishee

Subscribed & sworn to before me this 21st day of January A.D. 1857.

Philip De Kohane

Wm Schuchleck

And afterwards, to=wit; on the same day and year last aforesaid, there was issued out of said Court and under the seal thereof, the Peoples writ of Garnishee summons, directed to the Sheriff of said County to Execute, in the words and figures following to=wit;

State of Illinois } ss
County of Cook }

The People of the State of Illinois to the Sheriff of said County, Greeting

We Command you that you summon The Michigan Central Rail Road Company as garnishee of Joseph W Leighton, if it shall be found in your County, personally to be and appear before the Circuit Court of Cook County, on the first day of the next term thereof, to be holden at the Court House in Chicago, in said County, on the first Monday of March next, to answer unto Philip H Cochane what may be objected against it; And have you then and there this writ with an Endorsement thereon in what manner you shall have Executed the same

Witness, William H Church, Clerk of our said Court, and the Seal thereof at Chicago aforesaid this Seventeenth day of January A.D. 1857

Seal

Wm H. Church Clerk

And afterwards. to=wit: on the same day and year last aforesaid. said plaintiff by his Attorneys. filed in said Court, this Interrogatories to garnishee. in the words and figures following. to=wit:

"Cook County Circuit Court
Of the Nov Term. A.D. 1856

Philip H Meehan
vs
Joseph W. Leighton

Interrogatories to be administered to the Michigan Central Rail Road Company. Garnishee of Joseph W Leighton. the above named defendant.

Interrogatory. 1st

Are you now, or were you at the time process in this cause was served upon you, or have you been at any time since up to the time of filing your answer herein, in any manner indebted to Joseph W Leighton the above named defendant; If yea in what sum are you or were you so indebted

Interrogatory. 2d

Are you now, or were you at the time process in this cause was served upon you, or have you been at any time since up to the time of filing your answer herein, indebted to the said defendant, in any sum which is not yet due and payable; if yea state to what amount you are so indebted, and when the same became due and payable

Interrogatory 3d

Have you now, or had you at the time process in this cause was served upon you, or at any time since up to the time of filing your answer herein, any monies, property, Effects, Chose in action or credits in your possession belonging to the said defendant. If yea state the same fully —

Interrogatory 4th.

" Is the said defendant now, or was he at the time process in this cause was served upon you, or has he been at any time since, up to the time of filing your answer herein in your employ. If yea state what wages or salary he receives from you and the times for the payment of the same

J. P. Clarke
Pepp Atty

And afterwards, to-wit: on the Twenty Sixth day of January in the year last aforesaid, said garnishee summons, was returned into the Court aforesaid by said Sheriff. Endorsed as follows, to-wit:

" Served by reading to the within named M. Ky. Central R R Compy. to their agent Geo. Williams + A. M Spaulding deputy Master by delivering a Copy to them, the 26 day of Jany 1859 Fee & Servic 1,00 2 Copy 1,00 2. mile 10. 1 Return 10. $2.20 paid Pepp Atty

Johns Wilson. Sheriff by Geo Wilson deputy

And afterwards. to=wit: at the March term of said Court. to=wit: on the Fourth day of March in the year last aforesaid, the following, among other proceedings, were had and Entered of Record. to=wit

Philip. H. Mohane

Michigan Central Rail Road Company and Illinois Central Rail Road Company, Garnishees of Joseph W. Leighton

Garnishment

This day comes the said plaintiff by Clarkson his attorney, and it appearing to the Court that the Michigan Central Rail Road Company, has been duly served with personal service of process of summons issued out of said Court in this cause, according to the Statute in such case made and provided, as garnishee of the said Joseph W Leighton against whom, as appears by the records of this Court, the said plaintiff did on the 19th day of November A.D. 1856 recover a judgment for the sum of One hundred and thirty six dollars and thirty six cents; and the said Michigan Central Rail Road Company having failed to appear and discover on Oath (or affirmation) what money, property, Effects, rights or credits of the said Joseph W Leighton it had in its possession or under its Control or in what sum or sums it was indebted to him at the time of the service of the said summons upon it, and now being three times solemnly called in open Court, comes not, but

makes default. Wherefore said Joseph W Leighton ought to have and recover of the said Michigan Central Rail Road Company for the use and benefit of the said plaintiff the said sum of One hundred and thirty six dollars and thirty six Cents, in satisfaction of the Judgment aforesaid.

Therefore it is considered that the said Joseph W Leighton do have and recover of the said Michigan Central Rail Road Company for the use and benefit of the said plaintiff, the sum of One hundred and thirty six dollars and thirty six Cents together with the costs and charges by the said plaintiff in this behalf expended, Whereon condition that the said Michigan Central Rail Road Company does not on or before the first day of the next Term, appear and show cause to the contrary; and it is further ordered that a writ of Scire facias issue to the said Rail Road Company Accordingly —

And afterwards, to=wit on the Thirtieth day of March in the year last aforesaid there was issued out of said Court and under the seal thereof, the People writ of Scire facias, directed to the Sheriff of said County to Execute, in the words and figures following, to=wit;

"State of Illinois } ss
Lee County }

The People of the State of Illinois

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To the Sheriff of said County Greeting

Whereas at the March vacation Term of said Court the Circuit Court of Cook County in the year One thousand Eight hundred and fifty seven a judgment was rendered in said Court against Michigan Central Rail Road Company, garnishee of Joseph W Leighton defendant in favor of Philip H Keelane for the sum of One hundred and Eight dollars and twenty-six cents and the said Michigan Central Rail Road Company having been duly summoned as garnishee of the said defendant, and it having failed to appear and discover on oath and affirmation what lands tenements goods Chattels, moneys Credits and Effects of the said defendant were in its custody, charge or possession or under its control, or what moneys or property were then owing to said defendant, as is required by law, a conditional judgment for the above named Amount was by said Court rendered against said garnishee and this writ ordered to be issued—

Now therefore we command you that you summon the said Michigan Central Rail Road Company, Garnishee as aforesaid, personally to be and appear before the said Circuit Court on the first day of the next Term thereof to be holden at Chicago in said County on the second Monday of April next. Then and there to show cause if any he have or can show, why final judgment should not be entered against it upon the said Execution and return of this writ. And have you then

and there this writ, with an Endorsement thereon, in what manner you shall have Executed the same,

Witness Wm S Church Clerk of our said Circuit, and the Seal thereof at Chicago this thirtieth day of March AD 1857

Wm S Church Clerk

Seal

And afterwards, to-wit: on the thirty first day of March in the year last aforesaid, said writ was returned into the Court aforesaid by said Sheriff. Endorsed as follows, to-wit:

"Served by summoning the Michigan Central Rail Road Company by their Agt. George Williams and delivering a copy to him, at the Office of the within named Michigan Central Road Company, this 31st day of March 1857. 1 service 50, 1 copy 50, 1 mile 5. 1 Return 10. $1,15 Pd by pltff atty.

John S Wilson. Sheriff
by George Anderson deply

And afterwards, to-wit: at the April Term of said Court to-wit: on the fifteenth day of April in the year last aforesaid, the following, among other proceedings, were had and Entered of record, to-wit:

"Philip B. Keehan

vs

The Michigan Central Rail Road Company. } Garnishee.
garnishee of Joseph W Leighton.

This day comes the said

plaintiff by J. P. Clarkson his attorney, and it appearing to the court from the record in this cause, that a conditional judgment was taken and entered of record, at the last March Term thereof. (to-wit: on the 4th day of March last past) for the sum of $136.36 the original judgment against Leighton, at last November Term of this court with the costs, against the Michigan Central Rail Road Company as garnishee of Joseph N Leighton for the use of the said plaintiff, and that a writ of scire facias thereupon issued to the said garnishee, returnable to the next April Term thereof, and said writ of scire facias having been returned duly executed by reading to the said Garnishee, and it being three times solemnly demanded in open court come not nor does any person for it, but herein failing to answer to said writ of scire facias: Wherefore on motion it is ordered by the court, that the conditional judgment aforesaid be, and it is hereby made final and conclusive, and that Execution issue thereon for the amount of said judgment, together with the costs of this proceeding.

And afterwards, to-wit: on the fourth day of June, in the year last aforesaid, there was issued out of the Office of the Clerk of the Court aforesaid, and under the Seal thereof, the people's writ of Execution directed to the Sheriff of said County to Execute, in the words and figures following, to-wit:

State of Illinois } ss
County of Cook }

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

We command you, that of the lands and tenements goods and chattels of the Michigan Central Rail Road Company, as garnishee of Joseph W Leighton, defendant in your County, you cause to be made the sum of one hundred and thirty six dollars and thirty six cents, which Philip Meehan plaintiff, lately in the Circuit Court of Cook County, at a term thereof begun and held at Chicago in said County, on the second Monday of April last past, recovered against the said defendant, and which, by the said Court, were adjudged to the said plaintiff for his damages; And also the further sum of Nine dollars and sixty four cents, which were adjudged to the said plaintiff for his costs and charges in that behalf expended, whereof the said defendant is convicted as appears to us of record.

And have you these moneys ready to render to the said plaintiff, for his damages and costs aforesaid, and make return of this writ with an Endorsement thereon, in what manner you shall have Executed the same, in ninety days from the date hereof.

Witness William B Church Clerk of our said Court and the Seal thereof at Chicago in said County this Ninth day of June A D 1857.

Wm B Church
Clerk

And afterwards, to=wit: on the Seventh day of September, in the year last aforesaid, said writ of Execution was returned into the Court aforesaid, by said Sheriff, Endorsed as follows, to=wit

"This Execution returned no property found, by agreement of Attorneys for both Plaintiff & defendant this 4th day of September 1857

John L. Wilson Sheriff
by George Anderson deputy

I, WILLIAM L. CHURCH, Clerk of the Circuit Court of Cook County, in the State aforesaid, do hereby certify the above and foregoing, to be a true, perfect and complete copy of All papers and proceedings Entered of Record in a certain cause lately pending in said Court on the Common Side thereof, wherein Philip Rohame was plaintiff and Joseph W. Seighton defendant and the P. Michigan Central R.R. Co. garnishee of Joseph W. Seighton Defendant.

Philip Rohame was plaintiff

In Witness Whereof, I have hereunto set my hand, and affixed the Seal of said Court at Chicago, this Twenty Eighth day of September A. D. 18 57

W. L. Church Clerk.

Supreme Court
Third Grand Division

Michigan Central Rail
Road Company - Garnishee
of Joseph N. Leighton
Plaintiff in error
vs.
Philip H. Keehane
Defendant in error

} Writ of Error.

And the said Michigan Central Railroad Company by Walker Van Arman & Dexter its Attorneys comes and says that in the record and proceedings aforesaid there is manifest error in this to wit:-

First the said Circuit Court erred in deciding that it had any jurisdiction of the said Plaintiff in error -

Second That the said Circuit Court erred in holding that the service of the Garnishee process upon the plaintiff in error was sufficient in law -

Third the said Circuit Court erred in holding the service of the writ of Scire facias upon the said plaintiff in error was good and sufficient in law -

Fourth The Court below erred in rendering judgment in favor of the said Joseph N. Leighton in the Court below

Fifth The said Circuit Court erred in rendering judgment in favor of said Joseph N. Leighton and against the said Company Whereas by the law of the land no judgment ought to have been rendered against said Company - And the said plaintiff in Error prays that the judgment aforesaid for the Errors aforesaid and other Errors in the record and proceedings aforesaid may be reversed annulled and altogether held for naught and that the said Company may be restored to all things which it hath lost by means of the said judgment &c.

Walker Van Arman & Dexter
Attys for the plaintiff in Error

92 145 27

Supreme Court.
Third Grand Division

The Michigan Central
RR Co. Garnishee &c
Plff in Error
vs
Philip N Keohane
Deft in Error
Record & Errors

Filed March 25th 1861
L. Leland
Clerk

Walker Van A & D.
Attys for Plff