

14367

No. _____

Supreme Court of Illinois

Worsley

vs.

White.

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STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

14367

No. 265.

Worsley
vs
White

1862

Supreme Court of the State of Illinois, THIRD GRAND DIVISION.

APRIL TERM, A. D. 1862.

TIMOTHY WORSLEY impleaded with }
THOMAS MIDDLETON, Appellant, }
vs. } APPEAL FROM KANE COUNTY.
MARCUS WHITE, Appellee. }

Points and Brief of Counsel for Appellant.

The Judgment in this case was entered by the Clerk of the Kane County Circuit Court in vacation. At the October Term of said Court, which was the next thereafter, the defendants made their motion to stay the execution issued on said Judgment, and to open the Judgment and allow the defendants to plead in the case. The Court ordered a stay of execution until a further order of Court.

At the February Term thereafter of said Court, the defendant's motion to vacate the judgment was overruled and the order staying execution set aside.

The defendant Worsley excepted and prayed an appeal. It is insisted that the Court erred in overruling the motion to set aside said Judgment and refusing to vacate the same; and in setting aside the order staying said execution for the reasons:—

First, That the Clerk of said Court had no right or authority to enter judgment against a party in vacation and had no right to issue an execution on the same for,

1st. The rendition of a judgment is a judicial act and can be done by the Court only, Daveis 581; (10 U. S. Dig. 279); 2 Murph. 181.

2d. The clerk cannot, under our Constitution, exercise any judicial power, Const. Article 5: 24 Ill. 598.

3d. But doubtless this judgment was entered by virtue of the authority conferred by an act of the legislature of this State, passed at the session of 1857, entitled "an act to regulate the practice in the thirteenth judicial circuit." (Scates Comp. 638,) It is provided in that act that judgments by confession may be entered at any time in vacation before the Clerk, and such judgment shall have the same effect as if rendered in term time. But without stopping to inquire as to the constitutionality of an act authorizing the Clerk to render a judgment which shall have the same force and effect as if rendered at a term of Court, we proceed to observe that after the passage of this act and before the entrance of this judgment by the Clerk, Kane County ceased to be a part of the *thirteenth* judicial circuit, but became a part of the *twenty eighth* circuit, and there having been no such authority conferred upon the Clerks of the twenty-eighth circuit, it follows that there is no authority for this act of the Clerk; for it cannot be contended that the Clerk carried with him, from the thirteenth circuit to the twenty-eighth the power received as a Clerk of a Court in the thirteenth circuit and which power and practice was specially conferred upon that circuit as a circuit. With as much propriety might it be claimed that if special power had been conferred upon the Clerk of the various towns of Kane County, that on a separation of one of these towns from the County and its formation, together with other towns into a new County, the clerk of the town separated would still possess the same power and special privilege conferred upon the town clerks of Kane county specifically.

This act was to regulate the practice in the *thirteenth circuit*, it applied to *that* circuit, no more, no less, and the extent of the practice would at all times depend upon the size of the circuit. If it were otherwise, and a county once in the circuit on leaving, should be held to take the power with it, the effect would be by

thus taking in and setting off counties, to extend throughout the State, a practice designed for a specific circuit only.

Second, But if it should be held that a Clerk in the twenty-eighth Circuit has authority to enter judgment in vacation, yet we insist that he had no authority to enter judgment in this case for the reason that the power of attorney did not warrant or authorize judgment to be confessed before the Clerk, but the makers of the power authorized an attorney to appear "in any Court of Record" and confess judgment. Now then, with no propriety can the Clerk of a Court be called the Court, in which the attorney is authorized to appear for the defendants below. It is true the power says that the attorney may appear in "Term time or Vacation," but while the *time* of his appearance is thus specified, the *place* of his appearance is unqualifiedly mentioned as *in a Court of Record*. The form of this warrant of attorney was undoubtedly taken from those in use in places where the peculiar practice of holding vacation terms of Court, so to speak, in which the Court renders judgment by default and confession, &c., at times intervening the regular Term time. And this word "vacation" as used in this warrant of attorney, has reference to just such a practice, and could not have referred to an appearance before the Clerk, for the reason that it specially designates that the attorney shall "appear in Court."

Third. But if it should be held that the Clerk had authority to enter up this judgment, then we say according to the authority in the 5 Hill, this power of attorney being more than a year and a day old at the time of the entry of this judgment, there should have been an affidavit that the debt was still due and the party still alive. 5 Hill 97 and authorities there cited.

Fourth. The note had not been properly endorsed to the plaintiff below. The endorsement is written upon the back of the warrant of attorney and not upon the note, as required by statute, R. S. chap. 73, Sec. 4.

Fifth. It is held in Ohio that the power under the warrant of attorney cannot be exercised in favor of the assignee of the Note. On the assignment of the Note the power becomes invalid and no power can be exercised in favor of the assignee who holds the note, as if no such power ever attached to it, 19 Ohio Rep. page —

For these reasons, we contend the judgment was improperly rendered, and the Court should have set the same aside, and should not have vacated its previous order staying the execution issued in this case.

PLATO & SMITH,
Atty's for Defendant in Error.

Appellant

United States of America } ss.
State of Illinois }
Kane County }

Plea before the Honorable Isaac
G. Wilson Judge of the 28th Judicial Circuit of the State of
Illinois, and presiding Judge of the Circuit Court of Kane County,
in the State aforesaid, at a regular term of said Court begun and
held at the Court House in Geneva in said County on the third
day of February in the Year of our Lord, one thousand eight hundred
and sixty two, and of the independence of the United States the eighty
fifth.

Present

Honorable Isaac G. Wilson Judge
Charles J. Metzger State Attorney
Del Marcus Clark Sheriff

Attest

D. C. Moore
Clerk

Be it remembered that heretofore, to wit: on the
25th day of July A. D. 1861 the following paper was filed
in the office of the Clerk of said Court.

State of Illinois, ss. Kane County Circuit Court
Kane County.) In Vacation of the May term of
the said Kane County Circuit Court for 1861. Marcus
White plaintiff in this suit by J. W. Mayborn his attorney

Complain of Thomas Middleton and Timothy Worsley defendants of a plea of Trespass on the case upon promises: For that whereas the said Defendants heretofore, to wit: on the 12th day of March in the year of our Lord one thousand eight hundred and Sixty at Geneva to wit: at the County of Kane and State of Illinois, made three certain note in writing, commonly called a Promisory Note, bearing date a certain day and year therein mentioned, to wit: the day and year last aforesaid, and then and there delivered the said Note, to West & Moore, (meaning as the plaintiffs avers) William B. West & Alexander B. Moore. By which said Note, the said Defendants then and there promised to pay to said West & Moore or order under the name and stile of West & Moore (or order) two hundred and Seventy two and $\frac{5}{100}$ dollars at the Office of the said West & Moore Ninety days after - for value Received with ten per cent. Interest after due, which period has now elapsed. And the said West & Moore afterwards to wit: on the day & year aforesaid to wit: at Geneva in Kane County in the State of Illinois endorsed said Note in writing by which endorsement the said West & Moore then and there ordered and appointed the said sum of money in the said Note mentioned to be paid to said plaintiff & then & there delivered said Note so endorsed to said Plaintiff. By Reason whereof, and by force of the statute in such case made and provided, the said Defendants 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 the said Note; and being so liable, the said Defendants in consideration 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 pay unto the said Plaintiff the said sum of money in said note specified, according to the tenor and effect of the said Note, & said endorsement.

And whereas, also, the said Defendants afterwards, to wit: on the 15th day of July A. D. 1861, at Geneva in the County of Kane & State of Illinois were indebted to the said Plaintiff in the sum of five hundred Dollars for goods then and there sold by the Plaintiff to the said Defendants at

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their request; and in the sum of five hundred Dollars for work then and there done, and materials for the same, provided by the Plaintiff for the said Defendants at their request; and in the sum of five hundred Dollars, for money then and there lent by the Plaintiff, to the said Defendants at their request; and in the sum of five hundred Dollars for money then and there paid by the Plaintiff for the use of the said Defendants at their request; (and in the sum of five hundred Dollars for money then and there received by the Defendants for the use of the Plaintiff;) and in the sum of five hundred Dollars for interest then due from said Defendants to said Plaintiff for the loan and forbearance of larger sums of money before then by the said Plaintiff loaned and advanced to the said defendants at their request; and in the sum of five hundred dollars for money found to be due from the said defendants to the said Plaintiff upon account then and there stated between them. And in consideration of said indebtedness the defendants then and there promised the Plaintiff to pay him the several moneys aforesaid upon request.

Nevertheless, the said defendant (although often requested, &c., to wit: on the day when the said Note became due and payable, according to the tenor and effect thereof, and after-
times since, to wit: at the place last aforesaid,) have not yet paid 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 defendants have hitherto altogether refused, and still does refuse, to the damage of the said plaintiff of five hundred dollars, and therefore the said Plaintiff - bring suit &c. by J. H. Mayborn his attorney.

Copy of Note sued on.

" \$272.59/100

General All, March 12th 1860.

" Ninety days after date we promise to pay to West & Moore or order Two hundred and seventy two & 59/100 Dollars at the office of West & Moore for value Received with

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their request; and in the sum of five hundred Dollars for work then and there done, and materials for the same, provided by the Plaintiff for the said Defendants at their request; and in the sum of five hundred Dollars, for money then and there lent by the Plaintiff, to the said Defendants at their request; and in the sum of five hundred Dollars for money then and there paid by the Plaintiff for the use of the said Defendants at their request; (and in the sum of five hundred Dollars for money then and there received by the Defendants for the use of the Plaintiff;) and in the sum of five hundred Dollars for interest then due from said Defendants to said Plaintiff for the loan and forbearance of larger sums of money before then by the said Plaintiff loaned and advanced to the said defendants at their request; and in the sum of five hundred dollars for money found to be due from the said defendants to the said Plaintiff upon account then and there stated between them. And in consideration of said indebtedness the defendants then and there promised the Plaintiff to pay him the several moneys aforesaid upon request.

Nevertheless, the said defendant (although often requested, &c., to wit: on the day when the said Note became due and payable, according to the tenor and effect thereof, and after-
times since, to wit: at the place last aforesaid,) have not yet paid 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 defendants have hitherto altogether refused, and still does refuse, to the damage of the said plaintiff of five hundred dollars, and therefore the said Plaintiff - bring suit &c. by J. H. Mayborn his attorney.

Copy of Note sued on.

" \$272.59/100

General All, March 12th 1860.

" Ninety days after date we promise to pay to West & Moore or order Two hundred and seventy two & 59/100 Dollars at the office of West & Moore for value Received with

ten per cent interest after due.

" Tho. Middleton
" T. Horsley Secy.

On which was the following endorsement. Filed July 25th
1861

J. C. Moore
Clerk.

And afterwards to wit: on the same day and year the following paper was filed in the office of the clerk of said Court, to wit:

Kane Co. Circuit Court Thomas Middleton and Timothy Horsley ad Marcus White	}	In Vacation after the May Term of said Court for 1861
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And the said Defendants by W. D. Barry their attorney comes and defends the wrongs and injuries when so and says that they cannot deny the actions aforesaid of the said plaintiff thereof against them nor but that they undertook & promised in manner and form as the said plaintiff hath above thereof complained against them, nor but that the said plaintiff hath sustained damages by occasion thereof over and above his costs & charges by him laid out & expended in and about this suit to the amount of three hundred & twenty three Dollars & twenty one cents besides attorney fees for entering up judgment of twenty five dollars, therefore they do confess judgment in favor of the said plaintiff to the amount of three hundred and forty eight dollars and twenty one cents, and also consent to immediate issuing of Execution on the said judgment and waive all errors in entering up said judgment.

\$348.21

W. D. Barry.
Atty. for Defs.

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On which was the following endorsement to wit: Filed July
25th 1861

J. L. Moore
Clerk.

And afterwards to wit; on the same day and
year the following papers were filed in the office of the clerk
of said Court, to wit:

2572. 59/100

Genava, Ill. March 12th 1860

Fifty days after date, we promise to pay to
West & Moore, or order, Two Hundred Seventy Two & 59/100
Dollars at the office of West & Moore for value received, with
ten per cent, Interest, after due.

Thos Middleton
S. Honsly Surety

No. 7581

Know all Men by these presents, That whereas the
Subscriber are justly indebted to West & Moore, upon a certain
Promissory Note, bearing even date herewith, for the sum of Two
Hundred & Seventy Two & 59/100 Dollars, made payable to the
said West & Moore, or Order, and due fifty days after date.

Now, Therefore, we do make, constitute, and appoint
J. L. Mayborne, or any Attorney of any Court of Record,
to be our true and lawful Attorney, for us and in our name
place and stead, to appear in any Court of Record, in Term time
or Vacation, in any of the States and Territories of the United
States, at any time after the said Note may have become due,
or before the same becomes due, if the said West & Moore, or their
assigns, shall believe there is danger of losing the said sum secured
by said Note, waive service of process and confess a judgment
in favor of said West & Moore, or their assignee or assignees

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upon said Note, for the above sum, with interest, ^{and in addition} thereto ten per cent, on the amount due, as liquidated damages for delay, if said Note is not paid on the day it becomes due, together with all costs; also, the sum of Twenty Five Dollars, as Attorney's Fees, to be added to the amount due on entering up Judgment; and also to consent to immediate execution upon such Judgment; hereby waiving all errors in entering up such Judgment, and ratifying all that our said Attorney may do by virtue hereof. we also consent to the extension of said note from time to time at the option of the legal holder thereof

Witness our hand and Seal, this Twelfth day of March
A. D. 1860.

In Presence of }

Thos Middleton
T. Worsley



State of Illinois }
Kane County ss. }

Henry B. Pierce ^{being} first duly sworn doth depose and say on oath that he knows the hand writing of Thomas Middleton Timothy Worsley and from his knowledge of their hand writing & seeing them sign and write their names he verily believes that the signatures or names of the said Middleton & Worsley where the same appear on the above Note & Warrant of attorney as the makers & are in the hand writing of the said Middleton & Worsley and the same are their signatures.

Sworn and subscribed
to before me this 25th day
of July 1861.

Henry B. Pierce

D. C. Moore

clerk.

For Value Received we assign
the within Note to Marcus White without recourse on us and
order the payment of the contents of the within Note to him.

West & Moore

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On which was the following endorsement, to wit: Filed July 25th 1861

J. L. Moore
Clerk.

And afterwards, to wit: on the same day and year last aforesaid the following proceedings was had and entered of Record in said cause.

Thursday July 25th 1861.

Marcus White

Thomas Middleton
and Timothy Worsley

Assumpit; Cognovit.

This day comes the plaintiff by J. L. Mayhorne his attorney, and files his declaration against the defendants herein, and thereupon come the defendants by W. D. Barry their attorney in fact, by virtue of a warrant of attorney for this purpose filed herein; the execution of which, by the defendants, is duly proven, and who is a licensed attorney of this Court, waives service of process and enters the appearance of the defendants herein, says the defendants did undertake and promise in manner and form as said plaintiff in his said declaration has above thereof complained against them; and the said plaintiff has sustained damages, on occasion of the non performance, by the said defendants of the said several promises and undertaking in said declaration mentioned, over and above his costs and charges herein, to the amount of Three Hundred, and twenty three dollars and twenty one cents, besides the sum of Twenty five dollars, as attorney's fees, for entering up this judgment; Making in all, the sum of Three hundred and forty eight dollars and twenty one cents, for which sum, as well as the cost herein, the defendants, by their said attorney, confess judgment in favor of the said plaintiff. It is therefore considered by the Court, that the plaintiff recover of the defendants, the sum of Three Hundred

4882

#34821

and forty eight dollars, and twenty one cents, and also, his costs herein, and that he have execution therefor,

And afterwards, to wit: On the 4th day of October A. D. 1861, the same being one of the days of the October term of said Court, the following, among other proceedings was had and entered of Record in said Court, to wit:

4882

Marcus White
 v
 Thomas Middleton
 and Timothy Worsley

} Motion to stay Execution, and open judgment

This day comes the defendant Worsley and on motion of J. W. Eddy, his attorney, it is ordered that the execution, issued herein, be stayed until the further order of this Court.

And afterwards, to wit: On the 8th day of October A. D. 1861 the same being one of the days of the October term of said Court, the following, among other proceedings was had and entered of Record in said Court, to wit:

4882

Marcus White
 v
 Thomas Middleton
 and Timothy Worsley

} Motion to stay Execution and open judgment.

This day comes the defendants by Eddy their attorney, and file their petition and enter their motion to stay the Execution and open the judgment, and the plaintiff by Mayorne his attorney also comes; after having the petition and argument of counsel, the Court being fully advised, orders the Execution herein stayed, until the further order of this Court.

And afterwards, to wit: On the seventh day of February A. D. 1862, the same being one of the days of the Feb. term of said Court, the following, among other proceedings was had and entered of Record, in said Court, to wit:

4882

Marcus White
 v
 Thomas Middleton
 and Timothy Worsley

} Motion to stay Execution and open judgment.

This day, comes the defendant Worsley by Plato W. Smith and Eddy his attorneys and the plaintiff by Mayborne his attorney also comes, and the motion to vacate the judgment and for leave to plead herein, coming on to be heard the

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Court being fully advised, overrules ^{the same} and it is further ordered by the Court that the order made herein at the last October Term of this Court for stay of Execution, be vacated, to which ruling of the Court, the defendant Worsley by his attorney excepts. And prays and appeal herein to the Supreme Court: which is allowed on the defendant filing bond in the sum of Six hundred dollars, with Symon German as surety.

And afterwards, to wit: On the 24th day of February, the following Bond was filed in the office of the Clerk of said Court.

J. C. Moore
Clerk.

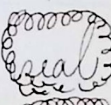
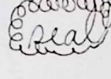
Know all men by these presents that we Timothy Worsley and Symon German of the County of Kane and State of Illinois are held and firmly bound unto Marcus White in the sum of Six Hundred Dollars to be paid unto the said White to the payment of which well and truly to be made we bind ourselves our heirs executors administrators & assigns jointly severally & firmly by these presents — Sealed with our Seal & dated this 22nd day of February A. D. 1862.

The condition of the above obligation is such that whereas the said Marcus White did on the 25th day of July A. D. 1861. obtain a judgment in the said Kane County Circuit Court in vacation against the said Worsley and one Thomas Middleton of codefendant of said Worsley which judgment was for the sum of Three Hundred and Twenty three dollars & twenty one cents, and whereas at the October Term A. D. 1861 of the Kane County Cir. Court an order was entered for the stay of execution upon said judgment until the further order of said Court, and whereas also at the February Term A. D. 1862 a motion to vacate said judgment and for leave to plead there

came on to be heard the Court ordered the same and further ordered that the stay of Execution before granted therein be vacated to which ruling of the Court the said defendant Worsley excepted & prayed an appeal to the Supreme Court which appeal was allowed by the Judge of said Court on condition that said Worsley and the said Lyman German as his surety should file their bond in the penal sum of six hundred dollars within twenty days from the said day on which said Motion was over ruled conditioned as the law directs -

Now therefore if the said Timothy Worsley shall pay the said Judgment, costs, interest + damages in case the said Judgment shall be affirmed and shall prosecute his said appeal with due diligence then this obligation to be void, otherwise to remain in full force and effect.

Signed & Sealed in
presence of
W. D. F. Smith

Timothy Worsley 
Lyman German 

Which Bond is endorsed in the words and figures following, to wit: Filed Feby. 24th 1862.

J. L. Moore
Clerk.

J. M. Orsely

Warren White

Read for 1800

and now comes the said plaintiff in error and
says that there is error in the foregoing
Recd and proceeding in this court

1. The Court erred in refusing to set
aside and vacate said judgment
2. The Court erred in vacating the
writon staying said execution

Plate & Smith
for appellant

And now comes the said defend-
dent in error by J. H. Maybourn his
attney and says that there is no error
in the foregoing record & ~~and that~~

Grandys & Co

J. H. Maybourn
attty for ~~defendant~~
appellant

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Maddleton & Wouley

"

Morris White

affidavit from 12 60

Filed April 23, 1862

L. Leland
Clerk

Plato & Ormiston
attys for appellant