

No. 11956

Supreme Court of Illinois

McCumber, et al.

vs.

Gilman.

71641  7

Pleas before the Honorable Thomas C.
Browne, one of the judges of the Supreme
Court of the State of Illinois, and Judge
of the sixth judicial circuit of
said State, at a term of the circuit
court begun and held at the Court
House in Peoria on the fourth
Monday in the month of April
in the year of our Lord one thousand
eight hundred and forty six, and
of the independence of the United
States of America the twentieth
Present the Hon. Thomas C. Browne Judge
Thomas J. Turner State Atty
Jas Florida Sheriff.

Attest Seth S. Whitman
Clerk

Be it remembered that hereupon
to wit on the sixteenth day of April in the
year of our Lord one thousand eight hun-
dred and forty six came William H. Gil-
man in his own person and filed ~~the~~ in the
clerk's office of this court the following instu-
ment of Writing to wit -

" State of Illinois }
Brown county } circuit court
William H. Gilman Plff.
vs

William Smith Administra-
tor upon the estate of Calvin McCumber

(deceased) Jane McCumber wife of said
Calvin McCumber & James McCumber &
Dallas McCumber infant heirs of said
Calvin McCumber. Lefts -

Phase used a writ of Scire facias
in the above entitled cause returnable on
the first day of next term of said circuit
court

Wm H. Gilman
To S.S. Whitman Clerk

And that afterwards on the sixteenth
day of April in the year last aforesaid a
writ of scire facias was issued out of said
office in the words & figures following to wit

"State of Illinois

Brown County

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

William H. Gilman having com-
plained unto us that Calvin McCumber
(now deceased) and Jane his wife did on or
about the thirty first day of August A.D. 1844
make execute and deliver unto the said
William H. Gilman a certain indenture
of mortgage bearing date the day and year
aforesaid of and upon certain lands and
premises situated in said county and de-
scribed in said indenture of Mortgage here-
inafter set forth to secure the said William
H. Gilman the payment of the sum of six
hundred dollars in Illinois internal im-
provement or rail road scrip on or before
the first day of June A.D. 1845 with interest
thereon which said Mortgage is in Words &

figures following to wit

*and my
wife John
C Mc

Know all men that I Calvin Mc-
Cumber # of the Town of Belvidere Boone county
State of Illinois in consideration of six hundred
dollars to us in hand paid by William H. Gil-
man of the same place, receipt whereof is here-
by acknowledged have granted bargained and
sold and by these presents hereby do grant
bargain sell and convey unto said Gilman
his heirs and assigns Lot number two (2)
in block number seven in first addition
addition to Belvidere with all the improve-
ments thereon made, and all our right and
title thereto, to have and to hold the same unto
said Gilman his heirs and assigns forever
and said McCumber against the claims of
all persons the same with forever Warrant &
assured.

Provided always these presents are
upon this express condition that if the said
McCumber or his legal representatives shall on
or before the first day of June one thousand
eight hundred and forty five pay or cause to
be paid to the said Gilman or his legal repre-
sentatives the sum of six hundred dollars in
Illinois internal improvement (or rail road)
scrip bearing interest thereon from the twelfth
day of July one thousand eight hundred and
forty (being for scrip of similar description loaned
to said McCumber) together with the additional
sum of three per cent per annum for the use thereof
until paid, according to the tenor and effect
of a certain promissory note or obligation even
date with this instrument and executed by

7
said Gilman McCumber to said Gilman
that then their presents shall cease and be void
any thing herein contained to the contrary
notwithstanding but otherwise to be in full
force in law and equity.

In testimony whereof we have here-
unto set our hands and seals this thirty first
day of August one thousand eight hundred
and forty four at Philadelphia aforesaid.

In presence of Calvin McCumber ^{ESQ}
Joel Walker & Sam McCumber ^{ESQ}

8
And afterwards to wit. on the 31st of August
A.D. 1844. the said Calvin McCumber and Sam
his wife personally appeared before Joel Walker
Esquire, then a probate justice of the peace in &
for said county, and acknowledged that they ex-
ecuted the said instrument of Mortgage as their
free act and deed for the uses & purposes therein
expressed, as by the certificate of the said justice
in and on said instrument of Mortgage more fully
appears in the words and figures following to wit

State of Illinois

9
Brown county, Sp. J. Joel Walker Probate
justice of the peace in and for said county hereby
certify that Calvin McCumber and Sam his
wife whose signatures appear to the foregoing deed
of Mortgage and who are personally known to me
and whose names are subscribed to said deed
as having executed the same. this day appeared
before me and acknowledged that they had
signed sealed and delivered the same as their free
act and deed for the uses & purposes therein ex-
pressed. And Sam wife of said Calvin having
been by me made acquainted with the contents

5

of said deed, and being by me examined separately and apart from her said husband acknowledged that she had executed the same, and relinquished her right of dower in and to said premises voluntarily, freely and without compulsion of her said husband. In testimony whereof I have hereunto

10

subscribed my name and affixed my
and seal at Philadelphia this 31st day of
August 1844. Joel Walker

Private Justice of the Peace

And that afterwards to wit on the third day of September A.D. 1844. the said instrument of Mortgage is acknowledged and the certificate thereof indorsed thereon as aforesaid was filed in the Records Office in and for said county, and afterwards to wit on the 4th day of October A.D. 1844. recorded by said Recorder in Book B. of Mortgages on page 165. as by the certificate of the said recorder indorsed thereon more fully and at large appears. And that payment of the money secured to be paid by the said instrument of Mortgage has not been made to the said William H. Gilman according to the tenor and effect thereof and the whole amount having become due and payable, and the said William H. Gilman having prayed us to provide him with a proper remedy in this behalf.

✓

We therefore command you that you make known to William Smith Admin-
istrator upon the estate of Calvin McCumber deceased
James McCumber Wife of said Calvin McCumber
and James McCumber & Dallas McCumber
infant heirs of said Calvin McCumber if they
shall be found in your county personally to be

12

and appear before the circuit court in and for
said county at the next term thereof, to holden
at Tallahassee in and for said county on the
fourth Monday in April instant. to show cause
if any they have why judgment should not be
rendered in favor of the said William H.

Gibman for such sum of money as may be
due by ~~rule~~ virtue of the said instrument of
Mortgage, and further to do and receive whatsoever
the said circuit court shall then otherwise consider.

Witness with S. Whitman clerk of
our said court and his private seal
(no official seal being yet provided)
this 16th day of April A.D. 1846
S. Whitman clerk

Which said writ was afterwards returned to
file in the clerk's office aforesaid with the
return thereunto thereon endorsed as follows viz-

"Served on the within named persons
by reading to William Smith, James
McCumber James McCumber and
Dallas McCumber this 16th day of
April 1846. Just Florida Sheriff

And that afterwards and during the said
present term of this court on the 28th day of
April 1846. the following order proceedings
was had virtue of record viz-

"William H. Gibman

105.

vs

} scilicet

William Smith and others vs

This day came the said plaintiff
by his Attorney and moves the court to appoint
a guardian ad litem for the infant heirs
of Calvin McCumber

15 And that during said term of said court on the 30th day of April 1846. the following order & proceedings were had & entered of record viz -

"William H Gilman

105

vs

William Smith administrator and others heirs of Calvin McCumber deceased } Sci fa. to foreclose

This day came on to hear the motion to appoint a guardian ad litem in this cause, which is sustained - and William Smith is therefor appointed by Court guardian ad litem for James & Dallas infant heirs of Calvin McCumber deceased.

16 And that during said term of said court on the first day of May A.D. 1846 - an instrument in writing in the words & figures following was filed in said cause to wit

"We hereby stipulate that judgment shall be entered up of this term for (\$600 scrip at 40) \$240 with interest in pursuance of the note which is the cause of action -

May 1. 1846.

William Smith

Administrator
& Guardian ad litem"

And that during said term of said court the following at the 1st day of May 1846 certain proceedings were had and entered of record in said cause in the words & figures

following to wit

" William H. Gilman

105.

vs

William Smith administrator,
and others his Calvin
Mc Gumber decedent

Sci. facias
to foreclose
mortgage.

This day came the said Plaintiff
by his Attorney, and on his motion it is ordered
that judgment be entered up herein against
the said Defendants, according to a stipulation
on file herein, in the sum of two hundred
and forty dollars, with interest in pursuance
of note which is the cause of action.

18. It is therefore considered by the
court that the said Plaintiff has and recovers
of the said Defendants the sum of two hundred
and fifty three dollars, and fifty two cents
his damages aforesaid and interest aforesaid
together with his costs by him about this
in this behalf expended, and that he has
execution against the premises set forth and
described in the writ of Sci. facias issued in
this cause to wit "lot Number two (2) in
Block Number seven (7) in foot Walker
addition to Milwaukee" to make the said
damages & costs -

19. And that the assessment of damages
made by the clerk & on file in the papers in
the cause is as follows to wit -

" Scrip

\$600.

Int on scrip from 12 July '40
to 1st May 1846. Date of pay 3

208.20
808.20

Rate per cent 40

323. 28. 00

Am't of scrip at 40 p't ct. 323. 28.

Int on 600 from 31st Aug 1844.

to 1st May 1846. at 3 p't ct

Rate of judgt.

30. 00

353. 28. "

20 And that Afterward on the thirtieth
day of May in the year of our Lord one
thousand eight hundred & forty six the
said Plaintiff sent out of the Clerk's office
of said court a writ of execution in the words
following to wit -

" State of Illinois }
Brown County }

The People of the state of Illinois
to the Sheriff of said County Greeting.

21 We command you that of the following
described premises to wit " Lot Number two
(2) in Block Number seven in Fort Walker
addition to the Town of Belvidere " in said
County. you cause to be made the sum of
three hundred and fifty, three dollars and
fifty two cents Damages, and eight dollars
and forty nine cents costs which William
H Gilman lately recovered against William
Smith. administrator of Calvin McCumber
deceased, and others. heirs of said Calvin. and
have those moneys ready at the office of the
Clerk of said Circuit Court in ninety days
from date hereof. and also this writ -

Witnesses with P. Whitman Clerk
of our said Court and his private

22
That

that no official seal being yet
provided) Ordained May 30th 1846
Jetho S. Whitman Clerk

which writ is thus endorsed -
"William B. Gilman vs William
Smith and others - Execution -

Damages.	353. 52
Costs	<u>8.49 1/2</u>
	362. 01 1/2

Sub from May 1. 1846 - "

And which said writ afterwards
and on the 22^d day of September A.D. 1846
was filed in the clerk's office with a return
thence thereon endorsed as follows viz -

"Received June 3. 1846. 9 o'clock A.M.

Jetho S. Whitman Sheriff.

23
By virtue of the within execution I have
levied upon the following described
premises to wit lot number two (2)
in Block number seven in Joel
Walkers addition to the town of Ordained
in Brown county this 19th day of June
1846. Jetho S. Whitman Sheriff.

24
Plas before the Honorable Thomas
C. Brown one of the judges of the
supreme court of the state of Illinois
and judge of the district judicial circuit
of said state. at a term of the circuit
court begun and held at the Court
House in Ordained on the first Monday
in the month of September in the
year of our Lord one thousand eight

humans and forty six: And of the
independence of the United States of
America the seventy first-

Present

The Hon Thomas C. Brown Judge
S. A. Hubert States Attorney pro. tem.
Jed Florida Sheriff -
Attest Jetho P. Whitman Clerk

It is remembered that on the 9th
day of September A.D. 1846. and during said
term of said court the following proceedings
were had and entered of Record in said
cause in the words and figures following
to wit

105
William H. Gilman
vs
William Smith Adminis } Motion to
trator & others heirs of Calvin } abate
McCumber dec'd } sale

25
This day came the said
parties by their Attorneys and the said Motion
came on for hear. and the court after
hearing the arguments of the counsel of the
said parties takes the said motion under
advisement."

And that on the 11th day of September
A.D. 1846. and during said term of said court
certain proceedings were had and entered of
Record in said cause in the words and figures fol-
lowing to wit

William H. Gilman

William Smith administrator
and others heirs of Calvin Mc
Quinn deceased

Motion for

The court having taken under
advisement the motion of said defendants
heretofore made to wit that the entry of the
judgment as made by the clerk in this
cause may be set aside, and that a judg-
ment be entered up some time for the
amount agreed upon by the parties thereto
and that the execution issues in this cause
may be set aside, Overrule the said motion
to which opinion of the court the said
defendant excepts, and files his bill of exceptions.

27 And that afterwards to wit on the eleventh day of September A.D. 1846. and during said term of said court then being in session the following bill of exceptions, under the hand and seal of the judge of said court was filed in said cause which is in the words and figures following to wit

"In the Brown county circuit court.

William H. Gilman

vs

William Smith Administrator
of Calvin McCumber
and others

28 Be it remembered that on this 10th day of September and during the September Term of this court A.D. 1846. The defendants by their Attorney William T. Burges came and made the following motion to wit

"In the Brown county circuit court.

William H. Gilman

vs

William Smith Administrator
of the estate of Calvin McCumber
& Jane McCumber Widow & James
& Dallas McCumber heirs of said
Calvin who appear & defend by
William Smith their Guardian
ad Litem

29 And now come the said defendants and upon the affidavits of William T. Burges & William Smith made July 22^d A.D. 1846. move the court that the entry of the judgment as made by the clerk in this cause may be set aside and that a judgment be entered up none pro none for the amount agreed upon by the parties thereto and

that the execution issued in this cause may be
set aside -

W. Y. Burges Lefts Atty &
William Smith Guardian
ad Litem

and filed in support of the same the following
affidavits

In the Brown county circuit court.

William F. Gilman

vs

William Smith Administrator
of the estate of Calvin McCumber
deceased. + Jane McCumber Widow
+ James + Dallas McCumber heirs of
said Calvin who defend by William
Smith their Guardian ad Litem

State of Illinois
County of Brown ss

William Y. Burges of said county
being duly sworn doth depose and say that he was
retained to appear as the attorney for the defend-
ants in the above entitled cause at the last term
of said court. That he this deponent being about to
introduce a defence to said suit and put in a
plea it was agreed between said plaintiff and
this deponent as such attorney & said Smith as
such guardian ad Litem and administrator
as aforesaid, that if no defence was introduced
and a judgment allowed to be entered up of that
term. That the said Gilman would take a
judgment for two hundred and forty dollars. That
this deponent had previously understood from
said Gilman that he had loaned said Calvin
McCumber, Illinois internal improvement
bonds or scrip amounting nominally to six hun-
dred dollars, and that the mortgage entered on in
this cause was given to secure the repayment

32 of it - That at the time of the making the agreement as to the amount of the judgment in this cause as above mentioned - it was understood between the parties that said Gilman would be satisfied if he could get a judgment for what scrip was then selling for in the market and it was further understood that the then price was forty dollars on the hundred dollars of scrip - and that it was expressly understood that said Gilman would take a judgment for the amount of money which it would take at the then market prices to buy the same scrip which said Gilman had loaned - and that it was then understood that two hundred and forty dollars would buy that amount of scrip -

33 And this Deponent further states that herewith annexed is a copy of the note referred to in the mortgage upon which the Scrip facias was issued in this cause -

That for the sole purpose of carrying into effect the arrangement above set forth and with no alteration in its terms made by or to the knowledge of this Deponent the writing filed in this cause and a copy of which is herewith annexed was drawn up by S. A. Hulbut Esq: Attorney for the plaintiff and tendered to this Deponent for acceptance as such Attorney as aforesaid -

34 That this Deponent never had to his recollection or belief any communication with said Hulbut as to the terms that had been proposed and accepted as above stated - That this Deponent hastily glanced over said Writing when it was tendered to him as aforesaid - the

35
court then being in session and he then
having a matter before the court - and supposing
it to be all right told said Smith to sign it and
said Smith thereupon did so. That this depon-
ent did not then suppose that Mr Hulbert
could be guilty of any attempt to obtain a
writing which would give S. Gitman a
judgment for a larger amount than he was
entitled to under said arrangement. nor does
he now think so. but supposes it was drawn
up through misapprehension of its terms - and
that the said writing does not contain according
to the construction put upon it by the clerk of
this court or by the said plaintiff such an
agreement as was made and as was intended
to have been reduced to writing -

And this deponent further states that
said Gitman as he has been informed claimed
under said writing to have a judgment entered
up for about five hundred dollars -

36
And this deponent further states that
the clerk of said court since the rising thereof
at the last term has entered up a judgment
in said cause for three hundred dollars and
fifty three dollars and fifty two cents costs of suit
upon which judgment an execution hath been
issued and placed in the hands of the sheriff of
said county to execute - and that said sheriff has
advertised that he will expose the real estate
descended in said mortgage for sale to satisfy
the same on the fourth day of August A.D. 1846

37
Subscribed and sworn to before
me this 22nd day of July A.D. 1846 } W. J. Burgep
H. Ripley J. P. of said county

\$600.

on or before the first day of June
next value herein I promise to pay to you
H Gilman or his order six hundred dollars
in Illinois internal improvement (or Rail
Road) Scrip bearing interest from the twelfth
day of July 1840 at the rate of six per cent
per annum together with interest on said six
hundred dollars at three (3) per cent per annum
for the use thereof until paid.
Witness 31st Aug. 1844. Calvin McCumber

We hereby stipulate that judgment shall
be entered up of this term for (\$600 scrip at
40) \$240 with interest in pursuance of the
note which is the cause of action -
May 1. 1846. William Smith Administrator
& Guardian ad litem

In the Brown county circuit court.

William H Gilman

vs

William Smith administrator
of the estate of Calvin McCumber
deceased & James McCumber widow
of said Calvin & James McCumber &
Dallas McCumber heirs of said
Calvin who defend by William
Smith their Guardian ad litem

State of Illinois

County of Brown

Sp. William Smith
of said county being duly sworn doth depose &
say that at the last term of this court the said
Plaintiff & this defendant as such guardian ad
litem & administrator made an arrangement.

between them as to the settlement of the amount
to be received in ~~the~~ the same. That it was
understood between them that said Gilman
would take a judgment for the amount of
money which at the then market price would
buy the scrip which he had loaned the said
Calvin McCumber. That it was understood
between them that the market price was forty
cents on the dollar & that two hundred and
forty dollars would buy the scrip and that
that sum should be the amount of the judgment.
It was then suggested that it would be necessary
to file a stipulation in writing - and the said
Gilman requested ~~the~~ according to the best
recollection of this deponent S. A. Hulbut
Esq. his Attorney to draw up one - that there-
upon said Hulbut drew up the one which
is hereto annexed which was shown to
William F. Burges the Attorney on the part
of the defunct. That said Burges at the time
was engaged in a matter pending before the
court. took the paper looked at and returned
it to this deponent saying he supposed it was
all right and told this deponent to sign it
and this deponent accordingly did so. That
this deponent never changed or altered any
terms of the compromise or settlement which was
made with the said Gilman as aforesaid and
supposed that the writing he signed only
carried out the agreement between the parties
and that it was for the purpose of carrying
out such an arrangement only that he did sign.
Subscribed & Sworn to before me
this 22^d day of July A.D. 1846.
W. F. Burges Notary Public of said county

William Smith

And the said Plaintiff also comes by his
Attorneys Hulbut & Hollans. and moving
said motion. files the following affidavit -

William H. Gilman

vs

Smith Adam McCumber

} On motion to set
aside judgment
upon stipulation

S. A. Hulbut attorney for Plaintiff in
the above entitled cause being sworn saith -

43 That upon conference with by the direction of
his client Wm H Gilman, he drew up the stip-
ulation in this cause, wherein judgment has
been rendered upon which damages have been
assessed by the clerk. That this stipulation
was handed to Mr Smith who directed it to
be submitted to his Attorney W. J. Purgep Esq
who was the same in the letters of figures in
which it now stands on file & advised the
said Mr Smith to sign the same. Which
was done.

44 That this Deponent always considered
the intention of the stipulation to be to substi-
tute the clerk into the place of a jury & to define
the sum for which judgment should be rendered
That it certainly was the purpose of Deponent
this client that the interest called for by the
note should be secured by the stipulation: that this
was the understanding of Deponent and this Attor-
ney this Deponent infers strongly from the
fact that Wm J. Purgep Esq. repeatedly urged
upon the clerk of this court to enter judgment
for 3 per cent interest as specified in said note
until judgment was actually rendered for its
present amount never failed to refer to &

45

explain the said stipulation by the interest clause in the said note -

And this Seponant further saith that after deliberately by a written instrument submitting matters in dispute to a competent officer, after claiming under said stipulation before said officer it is now too late for the actor in this motion to come forward and attempt to set aside a judgment thus obtained -

And this Seponant submits therefor to this court that the motion aforesaid should be dismissed with costs & the sale of the property ordered under said judgment but suspended by the order of this court. be directed to be had at a short day -

46

Sworn to before me this S. A. Hulbert -
9th Sept. 1846. S. S. Whitman Clerk

And the court after hearing the argument of counsel. refuse to correct said agreement or stipulation in writing mentioned in said Affidavits and make the same correspond with the verbal agreement of the parties set forth in said affidavits and to reduce which into writing said written agreement was made -

And refuse to correct the assessment of damages made by the clerk of this court in this cause under the said stipulation in writing -

And overrule and dismiss the said motion -

To all of which opinions and

47
decisions of said court the said defendants
William Smith by his counsel excepts
& prays that this list of exceptions may be
signed and sealed by the court and it is
done accordingly and made a part of
the record in this cause

Thomas C. Brown Plat
& which said Bill of exceptions is enclosed
" Filed Sept. 11. 1846. S.S. Whitman clk

48
And that Afterwards to wit on the
twenty second day of September A.D. 1846 the
said Plaintiff sent out of said Office a Writ
of Conditional Exponas in the Words & figures
following to wit -

State of Illinois
Boone County Sp:

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

49
Whereas, we lately commanded you
that you should cause to be made of the following
lands tenements & real estate in your county
to wit Lot Number two in Block Number seven
in foot Wallrus addition to the Town of Belvidere
the sum of three hundred fifty three dollars and fifty
two cents which William H. Gilman recovers
against W^m Smith & others heirs of Calvin Mc.
Cumber deceased in our circuit Court at Belvi-
ere on the first day of May in the year of
our Lord eighteen hundred and 46 for his
damages. And the further sum of eight
dollars & 49 1/2 cents which was a bridge to for
costs and charges in that behalf expended. Whoso

50
the said William Smith Administrator & others
heirs of Calvin McCumber deceased. stood con-
victed as appeared to us of Record: and that
you should have that money ready and interest
thereon at the rate of six per cent per annum
from the time of recovering the same until
paid and make return of that sum and of
the manner in which you should receive
the same. thirty days after date. And you
having made return on that writ, that you
had taken by return thereof. Lot Number two
(2) in Block Number seven (7) in Fort Wallers
addition to the town of Belvidere in Brown
County - which remains in your hands
unsold because of an order of court to stay proce-
dings and therefore could not have that money
ready as you were thereby commanded

51
Therefore we being desirous that the said
William H. Gitman should be satisfied of his
damages and costs aforesaid. command that
you sell or cause to be sold the said property as
by you taken as aforesaid. And that you
have the money arising from such sale
ready to satisfy, as well the said damages &
costs, as also the further sum of one dollar &
ninety four cents which is likewise adjudged
to the said William H. Gitman for costs and
charges in that behalf expended. whereof the said
William Smith administrator & others heirs
of Calvin McCumber deceased stand convicted
as appears to us of record. And have those sums
of money ready and interest thereon at the rate
of six per cent. per annum, from the time of
recovering the same until paid. and make

52

return of this writ. and of the manner in which you execute the same thirty days after date.

Clad

Witness I the J. Whitman Clerk of our said circuit court. and his private seal at Peoria this 22^d day of September in the year of our Lord one thousand eight hundred and forty six (no official seal being yet provided S.B. Whitman clerk which said writ is thus endorsed.

"W^m H. Gilman

vs

William Smith Administrator & others

Creditors - Debt 353.52

Costs 10.43 1/2

363.95 1/2

Sub poena May 1. 1846. J. J. W.

And was filed in the office of said clerk ^{on the 7th day of Sept 1846} with the following return thereto endorsed. to wit

"Received September 22 1846 at right o'clock
for Florida Sheriff"

"By virtue of the within execution I have levied upon the following described village property to wit lot number ten in Block Number seven in Fort Walker addition to the town of Peoria Boone County Illinois this 22nd day of September 1846. for Florida Sheriff."

The above described land was sold on the 13th day of October 1846. to W^m H Gilman for the sum of three hundred ninety three dollars and seven cents costs are not paid
for Florida Sheriff"

State of Illinois
County of Brown } fa

I Daniel P. Olney Clerk of
the circuit court in and for said county
do hereby certify the within transcript
to be a full perfect & complete copy of
the records & proceedings in a cause
pending in the said court wherein
William H. Gilman was plaintiff and
William Smith Administrator of
Calvin McCumber deceased James Mc
Cumber Widow of said Calvin - & James
and Dallas McCumber heirs of said
Calvin McCumber are defendants -
and of the whole thereof, as appears from
the books files of papers & records now
remaining in my office -

In testimony whereof I have
hereunto affixed the seal of
said court and subscribed my
name this day of
in the year of our Lord one
thousand eight hundred & fifty two

Daniel P. Olney
Clerk

In the Supreme court
of the State of Illinois

of June Term AD 1852

James McCumber and
Dallas McCumber minors
who are by their next friends

vs
Who are impleaded with William
Smith Administrator of Calvin
McCumber deceased and Jane
McCumber Widow of said Calvin
McCumber, Plaintiffs in error

vs
William H Gilman Deft in Error

Error from
Circuit
Court.

Afterwards that is to say on the first
Monday of June AD. 1852. in the same term came
the said James McCumber & Dallas McCumber
minors who are by their next friend William
Smith - impleaded as aforesaid and
say that in the record and proceedings aforesaid and
in giving the judgment aforesaid, there is manifest
error in this that.

1st
The court below refused to correct
the agreement or stipulation in writing set out in
the bill of exceptions so as to make the same cor-
respond with the verbal agreement of the
parties as set out in the affidavits contained
of Burges & Smith contained in said Bill -

2nd
And also in this That the court below
refused

to correct the assessment of Damages made by the
clerk under such stipulation.

3^d

And also in this - that the court below
overruled and denied the motion that the entry
of the judgment as made by the clerk of the
court below be set aside and that a judgment
be entered up *non pro tunc* for the amount
agreed upon by the parties thereto & that the execu-
tion in said cause be set aside.

4th

And also there is manifest error in this
that no Profert in Curia is made of the indenture
of Mortgage upon which the writ of Scire facias
issued in this cause below.

5th

And also in this that there is no distinct
allegation in the Scire facias that letters of admin-
istration upon the goods & chattels rights & credits
which ~~was~~ of the said Calvin McCumber deceased
has ever been issued to said William Smith or
other person or persons in this State or elsewhere.

6th

And also in this that the Mortgage in
this case does not appear to have been given to
secure the payment of money.

7th

And also in this that no certain sum
of money or damages are claimed or alleged to be

due in by said Writ of Scire facias

8th

And also in this that the scire facias aforesaid and the matters therein contained are not sufficient in law for the said Gilman to have or maintain his aforesaid action thing against these said Plaintiffs in error, and the Defendants in the court below impleaded with them

9th

And also in this that no judgment final or interlocutory hath been rendered against Jane McCumber

10th -

And also in this that final judgment was rendered against Jane McCumber upon a stipulation signed by other persons & by whose act she appears in no wise to have been bound or precluded,

11th

And also in this that the guardian ad litem in the court below made and filed no answer as such for his ward in litem -

12th

And also in this that judgment has been rendered against minors upon the stipulation of their Guardian ad litem and without trial by jury or by the court -

And the said James & Dallas McCumber
who are & may be authorized to be directed
to the clerk of the circuit court of Boone county
to certify to this court the facts of the same
and it is granted to him or them and they also may
that the judgment aforesaid for the errors aforesaid
and for other errors in the said record
and proceedings being, may be reversed annulled
and altogether holden for naught - and that
they may be restored to all things which
they have lost by occasion of the said judgment &c

W. J. Burges
of counsel
James & Dallas McCumber
By their next friend
William Smith

In the Supreme court of the State of Illinois

James McCumber and Dallas
McCumber minors who are by their
next friend William Smith
in place of with William Smith
administrator of Calvin McCumber
deceased & Jane McCumber widow
of said Calvin McCumber

Plaintiffs in Error

^{vs}
William H. Gilman
Defendant in Error

Error from
Brown cir-
cuit court

I William Smith
of the county of Brown and State aforesaid do
hereby for value received acknowledge myself
bound for all costs that may accrue and
legally devolve upon said James & Dallas Mc-
Cumber in the above entitled suit. to any
and all persons who may be legally interested
in the premises

Witness my hand and seal this 29
day of Nov 1852

William Smith *(Seal)*

Boone

James T. Dallas & Co.
Circuit Court who are the
incorporated

by

James T. Gilman

Transcript

Filed April 10, 1852.
L. Veland Clerk

Prepared

W. J. Pennington
of counsel

State of Illinois,
 Supreme Court, } SS.

The People of the State of Illinois

TO THE SHERIFF OF *Boone* County.

Because in the record and proceedings, and also in the rendition of the judgment, of a plea which was in the circuit court of *Boone* county, before the Judge thereof, between *William H. Gilman* plaintiff and *William Smith* Admr. of the Estate of *Calvin M. Cumber* decd., & *Jane M. Cumber* widow & *James M. Cumber* & *Dallas M. Cumber* heirs of said Calvin who defunct by *William Smith* their Guardian ad litem

defendants it is said that manifest error hath intervened to the injury of the said *James M. Cumber* & *Dallas M. Cumber*

as we are informed by *this* complaint, the record and proceedings of which said judgment, we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the justices thereof, to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to the said *William H. Gilman*

that *he* be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the *Second* Monday in *June* next, to hear the records and proceedings aforesaid, and the errors assigned, if *he* shall think fit; and further to do and receive what the said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said *William H. Gilman* notice, together with this writ.

WITNESS, the Hon. *Samuel H. Treat*
 Chief Justice of our said Court, and the seal thereof,
 at Ottawa, this *tenth* day of *April*
 in the year of our Lord, one thousand eight hundred
 and *forty-fifty-two*.

L. Leland Clerk of the Supreme Court.
 By *P. H. Leland* Depy. Clerk.

Sends the within writ by reading
& delivering to said Gilman a
true copy thereof this 4th day
of May A.D. 1852

Served on
miles 5
Return 63 By J. E. Woodruff. Lefty

Boone County
James M. Cumber et al.
Who sue vs. impleaded vs.
vs.
William W. Gilman.
Sci. Ia.

Filed June 21st 1852.
J. E. Woodruff Clk.
By J. E. Woodruff.

TO THE SHERIFF OF
BOONE COUNTY
88

Sup. Court

McCumbe et al
vs
Gitman }

Brief on Motion to
Dismiss Writ -

Appeals or writs of error may be prosecuted by one of counsel -
Sec. 51. p. 420. R.L. -

Writ may bring of error after expiration of
five years if then of record - S. 53. p. 421 -

In cases where the rights of Adversely affected to
writ of error has ceased the writ is properly
prosecuted by those who still have the right
without making the others parties -

4 Cal 315. 12 Ill. 255. Quors vs cappe.

W. J. Burroughs
for App in Error.

Sup Court

Mc Cumbe

vs

Gilman

Brief on Motion
to dis mit -

In the Supreme Court

James & Dallas McCumber
who sue & are impleaded &c

William A Gilman

Ebenezer Peck being duly sworn
maketh oath, That James & Dallas
McCumber the said plaintiffs in error
are not residents of the State of Illinois,
nor were they residents of said state
at the time of the suing out of the
writ of error in this cause

Sworn to before me this 3
6th day of July A.D. 1852
L. Leland Clk.

E. Peck

J. D. McCombs
&c

Wm. H. Gilman

Affidavit of Debt

Filed 6th July 1854
V. Seland C.D.

In the Supreme Court of the State of Illinois
James McCumber & Dallas Mc
Cumber minors, who are by their
next Friend William Smith -
in phrase with William Smith
Administrator of Calvin Mc
Cumber & Jane McCumber his
widow -

William H. Gilman

And now comes William
Smith Administrator of said Calvin Mc
Cumber and suggests to the court now here
that he is a party defendant in the record
proceedings & judgment in the court below
in this cause - And he enters his appear
ance to the writ of error in this cause in
this court to abide such order & decree
as may by the court be made in the
premises -

And the said William Smith
also suggests to the court that since the
 rendition of the judgment in the court
below. Before bringing & securing out the
writ of error herein ~~the~~ to wit on the
1st day of January A.D. 1848. the said
Jane McCumber Widow of said Calvin
McCumber is a party defendant in
the record proceedings & judgment in the
court below.

William Smith -
by Fuller Hargess -

Sup court
McCumbe
Gilman
App. of Smith
Adm. & Supp =
estate of Jane McG
Moon.

11956

Fuller & Thompson
for Smith.

1852

State of Illinois
In the Supreme court
James McCumber &
Dallas McCumber minors
who appear & prosecute by
their next friend William
Smith & impleaded with Jane
McCumber Widow of Calvin
McCumber & William Smith
administrator of Calvin aforesaid
Plaintiffs in error

error
to
Boone

vs
William H Gilman Defen
dant in error

State of Illinois
Casalle county }
William L. Burges

of Boone county being duly sworn doth
depose & say that said James & Dallas
McCumber are now minors not yet
having attained the age of twenty one
years & that they reside in this state
one of them in the county of Boone &
the other either in DeKalb or Boone
county—

Subscribed & sworn to
upon me this day
of July A.D. 1852

Sup. Court

McCumbe

vs

Johnson

App of Burges

The Clerk of the Supreme Court will
please fill the inclosed papers and
issue a *seisin facias* ad and. Error:
to Sheriff of Brown County vs. Wm H. Gilman
enclosed to the undersigned

W. J. Burges

Perkins April 7. 1852

Filed Appl. 10, 1852
L. Iceland Ck.

State of Illinois, set.

WRIT OF ERROR—FREE TRADER PRINT.

The People of the State of Illinois,

To the Clerk of the Circuit Court for the County of *Boone* — GREETING :

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of *Boone* county, before the Judge thereof, between

William H. Gilman —

— plaintiff — and *William Smith* admin.
of the Estate of *Calvin McCumber dec.*, & *Jane McCumber*
widow, & *James McCumber & Dallas McCumber* heirs
of said *Calvin* who defend by *William Smith* their
Guardian ad litem

defendants it is said manifest error hath intervened, to the injury of the aforesaid *James McCumber & Dallas McCumber* —
as we are informed by *their* complaint, and we being willing that error, if any there be, should be corrected in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our justices aforesaid at Ottawa, in the county of La Salle, on the *second Monday in June* — next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

WITNESS, the Hon. SAMUEL H. TREAT, Chief Justice of our said Court, and the seal thereof, at Ottawa, this *tenth* —
day of *April* — in the year of our Lord one thousand eight hundred and fifty *two* .

L. Leland

Clerk of the Supreme Court.

James M^c. Guinter et al.
Who sue &c, impleaded &c.
vs,

William H. Gilman.

Writ of Error.

Filed April 10th 1852
L. Ireland Clerk
By J. H. Ireland & J. H. L.

William H. Gilman }
 add. }
 James & Dallas, M^c }
 Cumber Minors & C }
 who due by their next }
 friend W^m Smith }

Supreme Court
 June Term. 1852

Stephen A. Hullbut being
 duly sworn deposes and says, that he was the
 Counsel on the part of W^m H. Gilman in the Court
 below, that the cause then pending as appears
 by the Record on file in this Court was, a proceed-
 ing of Seis Nacia, upon Mortgage brought
 by said William H. Gilman against William
 Smith Administrator of the Estate of Calvin M. Cumber Dec^d
 Jane M. Cumber his widow the present Plaintiffs
 in Error in fact heirs. That William Smith
 was appointed Guardian ad Litem of said Infants
 and as Administrator & Guardian ad Litem signed
 the stipulation upon which Judgment below was
 rendered.

That the said William Smith is the iden-
 tical person who now prosecutes the present Suit of
 Error as next friend for said minors, and is
 also security for costs. That he now occupies the
 somewhat inconsistent positions of Plaintiff in
 Error, Defendant in Error, next friend & Guardian
 ad Litem of the Infants, and Administrator of the
 said Ancestor and of security for costs.

That the writ of Error in this Cause is
 not directed to any of the parties in said proceed-
 ing except the said William H. Gilman
 Subscribed, sworn to }
 before me this 9 July 1852 }

Stephen A. Hullbut

J. Seland Clerk }
 By P. H. Seland depy. }

appd. for Dr. Dr.