

13944

No. _____

Supreme Court of Illinois

Peak

vs.

Shasted

71641  7

Peak v. Shastet

SUPREME COURT.

OF

ILLINOIS.

SECOND GRAND DIVISION.

67

Geo O Grant

vs

James S Shastet
of the appts

7295

73944

Sackramente Chamber 17th 1858.

Wm. A. Tenny, Essex Springfield

Dear Sir - Last night I returned from the circuit of Scott (Special Term) when I collected for Bills in the - as by enclosed check & endorsement - & so if you please you will bal. you for Bills.

I enclose you hand for costs in an error case in which the Defendant resides in Piatt (record from Macon) & in which the clk of cir. ct of Macon is delaying me sadly & shamefully in not forwarding me record. If admissible docket case & open sec. fa. ad. and. to the sheriff of Piatt sending him his fees which I will pay you at sight - & saying to him some forthwith & return to you - that the Defendant lives some 12 miles South West of Macon.

In re Smucker vs. Larimer instituted in your court in May last. Has sec. fa. been issued? If not send me one so that it may be served to prevent continuance of case.

Yours
D. A. Smith

The foregoing has reference to Bond filed in the case of George C. Peak, Plaintiff Error
James S. Shastet Defendant
Essex Macon

67

Geo. C. Peck

or

Jas. S. Shasteb

Filed Dec 18th 58

Wm. Turner

3
P. S.

SUPREME COURT OF ILLINOIS.

JANUARY TERM, 1859.

GEORGE C. PEAK, PLAINTIFF,
vs.
JAMES S. SHASTED, DEFENDANT. } *In Error to Macon.*

R. 3 4 At the July Term, 1858, of Macon Circuit Court, Shasted as Assignee of, etc., obtained a judgment, by default, *vs.* Peak, for, etc., on note dated 28th March, 1858.

R. 6, 7, 8 At the November Term, 1858, Peak filed affidavit of his father, showing that the said George C. Peak was born on fourth November, 1837, with notice to Shasted of copy of affidavit and time of motion—and by his attorneys entered a motion to reverse, withdraw, annul and for nothing hold said judgment by default. The parties appeared by their respective attorneys, and on argument (the facts of the affidavit not being denied) the motion was denied and overruled, and the counsel of the said Peak excepted.

The error assigned is the improper refusal of the Court below to allow the motion of the Plaintiff to reverse, withdraw, annul and for nothing hold the said judgment by default.

See 6 Wend. 327. 7 Peters, 147. 1 Scam. 439. 3 Id., 213.

D. A. & T. W. SMITH, Attorneys P. Q.

2. Was the proper practice adapted in this case
The fact of infancy is to be tried by a jury
& cannot be resorted to as a motion—held
by writ Coram vobis

Not found until death had been of age
two days or more—but no objections
made in the trial of the motion held that the
parties went to hearing without objection

State of Illinois, }
SUPREME COURT. } ss.

The People of the State of Illinois,
To the Sheriff of *Piatt* 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 *Mason*
County, before the judge thereof, between *George C. Peak*
and

James S. Shasteb

defendant, it is said that manifest error hath intervened to the injury of said *George C. Peak*
as we are informed by *his* 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
Springfield, 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 *James S. Shasteb*

that he be and appear before the Justices of our said Supreme Court, at the next term of
said Court, to be holden at Springfield, in said State, on the *first Tuesday* after *first Monday* in
January next, to hear the records and proceedings aforesaid, and the errors as-
signed, 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 *James S. Shasteb* notice together with
this writ.

Witness, the Hon. *John D. Catron* Chief

Justice of our said Court, and the seal thereof, at Spring-
field, this *Eighteenth* day *December*
in the year of our Lord, one thousand eight hundred and
fifty eight.

Wm. J. Turney

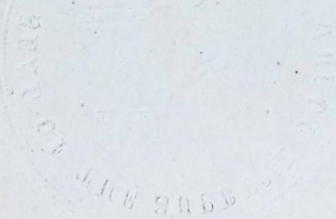
Clerk of the Supreme Court.

December 28th 1858

Served the within process
upon James S. Shastead by Reading

J. H. Hull S. P. C.

per L. B. Betts Deputy



67

Supreme Court.

Geo. C. Lentz

Plaintiff in error,

vs.

James S. Shastead

Defendant in error,

Scire Facias.

Filed. Dec 27/58

Wm. H. Thomas
[Signature]

de.

At Decatur this 29th day of June A.D. 1858 & the Seal
of said Court being here affixed

Jo. D. Orr Clerk
By Thos W. Greer, Dep. "

Said summons above recited is endorsed as
follows, to wit:

" I have served the within summons by reaching
to the said George C. Peake on the 5th day of July 1858
Annual Meram Sheriff
per J. M. Burns Deputy Sheriff

And on the 9th day of July 1858 a Declaration
was filed in the office of the Clerk of the Circuit Court
of said County, in words & figures following to wit:

" State of Illinois of Meram County, Circuit Court
Meram County } July Term 1858
James S. Shustat

v } Assumpsit

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George C. Peake Damages \$500.00

James S. Shustat the said Plaintiff by
Thos W. Greer complains of George C. Peake who has
been summoned to answer the said Plaintiff in an
action of assumpsit

For that whereas the said
Defendant on the 28th day of March 1858 made his
promissory note in writing and then delivered the
same to Mr. & Shustat and thereby promised
to pay to the said Mr. & Shustat or bearer, three
hundred & fifty dollars for value received with ten
percent interest from date, ninety days after
the date thereof which period had elapsed before
the commencement of this suit and the said
Mr. & Shustat then endorsed the same to the
Plaintiff, whereof the defendant then had notice
and then in consideration of the premises promised to

(Endorsement)

(Declaration)

pay the amount of the said note to the Plaintiff according to the tenor and effect thereof. Yet the defendant hath disregarded his promise and hath not paid the said sum of money or any part thereof. So the Plaintiff damaged of \$500.00 and therefore he brings his suit &c
Thorp & Supper self atty"

And at the same time was filed a note in words & figures following to wit

" Decatur March 25th 1858. ninety days after date I promise to pay to Wm & Shastid or bearer Three Hundred & fifty dollars for value received with ten per cent interest from date

(signed) George C Peake"

Endorsed as follows to wit;

"I hereby assign the benefit and interest of the within note to James S Shastid

May 3rd 1858

Wm & Shastid"

And at the July Term of the Mason Circuit Court 1858 the following order was entered of Record in said cause to wit

" In the Mason Circuit Court July Term July 17th 1858

In the matter of

James S Shastid

vs

George C Peake

} Comproit

This day comes the said Plaintiff by Thorp & Supper his attorneys, and the said defendant being three times solemnly called comes not nor comes any one for him, but makes default herein.

It is therefore considered and ordered by the Court that the Plaintiff have judgment by default against

(note)

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The said defendant for his damages herein, and it appearing to the Court that this suit is brought upon an instrument of writing for the payment of money only, and that the damages of said Plaintiff in this case rests in computation it is therefore ordered by the Court, that the clerk assess compute, and report the said damages. — Whereupon the clerk proceeded to make the assessment and computation of aforesaid, and reported to the Court the sum of Three Hundred & sixty Three 50/100 Dollars as the amount of the Plaintiff's damages herein, which assessment & computation upon examination by the Court, appearing to be just and correct is by the Court approved and allowed. — It is therefore considered and ordered by the Court that the said Plaintiff have and receive of the said defendant, the said sum of Three Hundred & sixty Three 50/100 Dollars, being the amount of the damages assessed and computed as aforesaid, together with his costs and charges herein expended, and that he have execution therefor against the Defendant!"

And at the December Term 1858, Saturday November 20 — being the 6th day of said Term the following proceedings were had to wit

James S. Shastid

vs Judgment by default.

George C. Peake

Now on this day came the said defendant by his next friend, Bird Peake and moves the Court to vacate and set aside the judgment rendered by default in said case at the July Term 1858 of this Court of the error in fact of said Court rendering judgment by default against said George C. Peake

The said defendant for his damages herein, and it appearing to the Court that this suit is brought upon an instrument of writing for the payment of money only, and that the damages of said Plaintiff in this case rests in computation it is therefore ordered by the Court, that the clerk assess compute, and report the said damages. — Whereupon the clerk proceeded to make the assessment and computation of aforesaid, and reported to the Court the sum of Three Hundred & sixty Three 50/100 Dollars as the amount of the Plaintiff's damages herein, which assessment & computation upon examination by the Court, appearing to be just and correct is by the Court approved and allowed. — It is therefore considered and ordered by the Court that the said Plaintiff have and receive of the said defendant, the said sum of Three Hundred & sixty Three 50/100 Dollars, being the amount of the damages assessed and computed as aforesaid, together with his costs and charges herein expended, and that he have execution therefor against the Defendant!"

And at the December Term 1858, Saturday November 20 — being the 6th day of said Term the following proceedings were had to wit

James S. Shastid

vs Judgment by default.

George C. Peake

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without appointing a guardian ad litem for said Peak, he being at the time of the rendition of said judgment an infant under 21 years of age and said Court having heard counsel for and against said Motion, takes the same under advisement: And it having been made to appear to said Court that execution on said judgment had issued & had been levied by the Sheriff of Scott County Illinois on personal property of defendant, and had advised him the same for sale on the 23^d inst: on Motion it is ordered that said Sheriff stay further proceedings under said levy till the further order of this Court."

And afterwards to wit on the 10th day of said Term of said Court, the additional order was entered in words & figures following to wit:

" James S Shastid

vs $\frac{1}{2}$ Judgment by default

vs George C Peake

And again on this day, this cause having been called in its regular order. It is further ordered that by the Court that the motion of the defendant to vacate the judgment therein entered be denied, - Whereupon the defendant by his Attorney D. A. Smith Drags an appeal, which is allowed by the Court - And it is further ordered by the Court that the defendant enter into an appeal bond with Bird Peak ^{or a legal bond} as security in the sum of seven hundred dollars - and that the said bond be filed within thirty days from this ^{entry} ~~rendition~~ of this Court."

Done at the said Term of said Court to wit on the 26th day of November 1858. a Bill of exceptions was filed in said cause, in words & figures as follows to wit:

In the Circuit Court of Mason County State
of Illinois November Term 1858.

James S Shurtell - Plaintiff

vs } In Assumpsit
George C Peak - Defendant

Be it remembered that on the 4th day
of the Present Term of this Court the defendant by
his attorney filed the following Affidavit,

" In the Circuit Court of Mason County State of Illinois
James S Shurtell, Plaintiff

vs } In Assumpsit
George C Peak - Defendant

6 Judgment by default at the July Term
1858 of said Court, to wit on the 12th of August 1858
for Three hundred and sixty Three dollars & fifty cents
(\$363.5000) damages & costs besides besides that have
been taxed at the sum of Eight \$8.00 dollars on which
fi- fa was issued by the clerk of said Court & the
sheriff of Scott County said State on the 23rd of August
1858 which has been levied upon a certain mare as
for the property of said defendant;

This day appeared before the undersigned George
G Lerry clerk of the Circuit Court of Scott County
State of Illinois, Bird Peak of said County who
made oath in due form of Law, that the foregoing is
a just, full, true abstract of Record of certain judg-
ment & other proceedings of the said James S ~~Peak~~
Shurtell vs, the said George C Peak that the said
defendant is the son of said affiant; that said
defendant is an infant; that said defendant was
born on the 1th day of November 1837 as fully and at
large appears by record of his age & Birth made by
affiant, about the time of the Birth of said son
in the family Bible of affiant

George C Peak

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I have read & subscribed before me as above &
(Seal) certified under my hand & seal of office at my
office in Vincennes this 5th day of October 1858
George S. Terry Clerk"

" Vincennes October the 5th 1858. The said
James S. Shuster will take notice that on the 11th
day of the next term of the Circuit Court of Macon
County, State of Illinois, to be holden at Decatur on the
15th day of next month, or as soon thereafter as
the ~~case~~ he can be heard, the said defendant by
his counsel will file the foregoing affidavit & move
the said Court to reverse, withdraw & annul for
nothing hold the said judgment by default &
subsequent proceedings, because of the error in
fact of rendering said judgment by default
against said defendant while he was an infant,
where where said Plaintiff may if he sees
fit, appear resist said motion

George C. Peak defendant
by his father next friend
Orin Peak"

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" State of Illinois
Macon County. This day appeared before
the undersigned Clerk of the Circuit Court of
said County George C. Peak - who made oath
in due form of law, that on the 16th day of
November 1858, he served the aforementioned James
S. Shuster with a just full & true copy of
the foregoing affidavit & notice,
George C. Peak"

I have read & subscribed before me as above at
my office in Decatur this 17th day of November
1858

J. A. Clark Clerk"

" & entered a motion to reverse withdraw annul

for nothing save the judgment by default
that was obtained in this case against the defendant
at the last term of this Court. The Plaintiff by his
attorneys, Sharp & Tupper appeared and resisted
said motion, which being then argued by the counsel
for the parties, was taken under advisement by the
Court. And now on this 26th day of November
1838 the Court being duly advised in the premises,
said motion is denied & overruled by the Court. - to
the denial & overruling of which motion the said
defendant by his counsel at the time excepted -
except - prays that this his bill of exceptions be
signed, sealed & made a part of the record, which is
accordingly done. - The defendant prayed an
appeal to the next term of the Supreme Court of this
State and Grand Division to be holden in &c at &c
which is allowed on condition that he enter into bond
in the penalty of \$700.00 conditional as the Law requires
in thirty days from this date with David Peck or
Abraham Peck as security. The Plaintiff by his
counsel in open court consenting to accept of either
of said sureties.

Signed sealed &c This 26th of November

1838

Chas Emerson Judge of
the County of Illinois 3d
District of said County do hereby certify
that the foregoing is a true, full, & complete copy of all
the records & files in the cause therein named.

In witness whereof I have hereunto
set my hand & official seal this
21st day of December A.D. 1838
J. W. Allen Clerk



by
 George C. Peck
 vs? Error to Illacaw
 James S. Shastid -

Chs fees in transcript
 \$ 3,855
 Postage - 15
 Remitted \$ 4.00 by
 mail to J. L. A. P. Dec
 ch Dec. 2nd 1858
 W. A. Smith a ty.
 for Geo C. Peck.

Filed June 16/59
 W. A. Smith
 atty

Supreme Court of Illinois January Term 1859,
 George C. Peck Plaintiff
 vs? In Error to Illacaw
 James S. Shastid Defendant.

And now comes the said Plaintiff by
 his attorneys W. A. & J. W. Smith & says that in
 the Record above recited as aforesaid is the following
 error for which the aforesaid Judgment by
 default should be reversed to wit

That the court below improperly refused
 to allow the motion of said Plaintiff to
 reverse, withdraw, annul & for nothing hold the
 said Judgment by default whereupon he
 W. A. & J. W. Smith
 attys P. L.,