No. 14453

Supreme Court of Illinois

Jones

vs.

Waterman et al

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STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

No. 76

Jones
vs 14763
Watson

1862

Papers

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SUPREME COURT

OF ILLINOIS,

THIRD GRAND DIVISION,
APRIL TERM, A. D. 1861.

DANIEL B. WATERMAN, AND MYRON V. HALL, *Plaintiffs in Error.* vs. JOHN JONES, *Defendant in Error.*	ERROR TO THE COURT OF COMMON PLEAS OF THE CITY OF AURORA.

ABSTRACT OF RECORD.

The record in this case shows, that on the twentieth day of November, A. D. 1860, the defendant in error filed in the office of the Clerk of the Court of Common Pleas of the City of Aurora, his declaration, alleging that the defendants made and delivered to him their certain prommissory note, of which the following is a copy:

"$2027 25. AURORA, Nov. 20th, 1860.

On demand, for value received, we promise to pay John Jones or order, two thousand and twenty-seven and 25-100 dollars with interest at the rate of ten per cent. per annum.

(Signed) D. B. WATERMAN & CO."

On the same day, the note, with warrant of attorney and affidavit, were filed with the Clerk of said Court, and judgment was entered and rendered in favor of the plaintiffs therein and against the defendant for the sum of two thousand and forty-seven dollars and twenty-five cents, and execution issued thereon.

The warrant of attorney was dated the 20th day of November, 1860, and authorized any attorney of any Court of Record, to appear in any Court of Record, *at any time from and after the date thereof*, and to confess judgment, &c.

The plaintiffs in error moved to set the judgment aside. Motion was denied and exception taken, and a writ of error was sued out — the grounds of error being that the warrant of attorney did not authorize the entry of the judgment until after the day of its date.

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~~W~~

Waterman

vs

Jones

Filed Apr. 24 - 1861

L. Leland
Clerk

Supreme Court of the State of Illinois,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1862.

JOHN JONES,
Defendant in Error,
against
DANIEL B. WATERMAN
and MYRON V. HALL,
Plaintiffs in Error.

Error from the Court of Common Pleas of the City of Aurora.

Statement of Case, and Brief of Points and Authorities, and Argument of Defendant in Error:

STATEMENT OF THE CASE.

This was a judgment entered in the Court of Common Pleas of the City of Aurora, in vacation, before the Clerk, by confession, on filing of the usual papers, to wit: A declaration on plaintiffs' cause of action, the warrant of attorney with the usual proof of its execution, and a plea of confession or cognovit. The plaintiffs in error bring their writ of error to this court to set aside and vacate said judgment.

POINTS AND BRIEF.

The plaintiffs in error insist that the judgment was prematurely entered, as the warrant of attorney provides that judgment may be confessed on the note "at any time from and after the date" of warrant of attorney and note; and that therefore judgment could not have been confessed and entered properly until after the expiration of the day on which the note and power of attorney were executed:

First. The first point made by the defendant in error on this position of the plaintiffs in error is: That there is no general rule in computing time from an act or an event, whether the day is to be *inclusive* or *exclusive*, but it depends on the reason of the thing, according to circumstances, and the intention of the parties, so far as that can be ascertained, from the contract.

A. In the case of Lester vs. Garland, 15 Vesey, p. 248, it is held that "there is no general rule in computing time from an act or event; that the day is to be inclusive or exclusive, it de-

pending on the reason of the thing according to the circumstances."

To the same effect is the case of Castle vs. Burditt, 3 Term Reports, p. 623; Glassington vs. Rawlins, 3 East. p. 407.

A. In the case of Sims vs. Hampton, 1 Serg. and Rawle, Penn. Rep., p. 411, the Court say: "The adjudged cases are not reconciled, but upon a careful investigation of them it may be perceived that the day on which the act is done has been included or excluded, as the nature of the case indicated to the Court the propriety of a vigorous or a liberal construction.

A. In the case of Pugh et Wex. vs. Duke of Leeds, Cowp., p. 714, (or 2 Cowp. in Eng. Com. Law Rep., p. 714,) Lord Mansfield goes over the whole ground and all the cases, and then holds that the word "from" may mean either inclusive or exclusive, according to the context and subject matter, and in the course of his opinion he says:

"In grammatical strictness, and in the nicest propriety of speech that the English language admits of, the sense of the word "from" must always depend upon the context and subject matter, whether it shall be construed inclusive or exclusive of the terminus a quo."

And again: "To conclude, the ground of the opinion and judgment which I now deliver is, that 'from' may in vulgar use, and even in the strict propriety of language, mean either inclusive or exclusive."

A. In Parsons on Contracts, vol. 2, p. 175–176, [3d edition] the law is stated thus: "The later cases however seem to establish the principle that a computation of this kind shall always conform to the intention of the parties, so far as that can be ascertained from the contract, aided by admissible evidence."

Second. The note attached to the power of attorney in this case is payable on demand, and a note payable on demand is payable immediately. Bayley on Bills, [Boston edition, 1826,] p. 141; and imports that the debt is due and payable immediately; and an action is a sufficient demand. Byles on Bills, [3d Am. Edition,] p. 390; and as to bringing of suit being sufficient demand: *vide* New Hope Delaware Bridge Co. vs. Perry et al., 11 Ill., p. 471.

A. Therefore, on a bill or note payable on demand, the statute of limitations runs from the date of the note or instrument. Byles on Bills [3d Am. Edition] p. 141; Easton vs. McAllister, 1 Missouri, 662; Larrason vs. Lambert, 7 Halsted, 247; Newman vs. Kettle, 13 Pick., 418; Wenman vs. Mohawk Ins. Co, 13 Wend., 267; Wilks vs. Robinson, 3 Richardson, 182; Hill vs. Henry, 17 Ohio, 9.

B. And here "from the date" means as soon as the note is made; for a note payable on demand is due always, and the statute begins to run as soon as the note is made. Parsons on Contracts [3d Edition] p. 372; Little vs. Blunt, 9 Pick., p. 488; 13 Wend., p. 267; Hill vs. Henry, 17 Ohio, p. 9; Norton vs. Ellam, 2 Messrs. and Wels, 461; Codman vs. Rogers, 10 Pick., 112; Ruff vs. Bull, 7 Harr. & John., p. 14; Peaslee vs. Breed, 10 N. Hamp., p. 489; 15 Mass, p. 193.

In Little vs. Blunt, 9 Pick., 488, it is said: "In the computa-"tion of the period of limitation, the day on which the cause of "action accrued is always *included*, and the reason given is, be-"cause an action might have been commenced on that day."

The case, Presbrey vs. Williams, 15th Mass., p. 193, was as follows:

The action was on a promissory note which the defendant had admitted to be due and unpaid, on the first day of Nov., 1811.— The action was commenced on the first day of Nov., 1817, and the Court held that the statute of limitations had run and the plaintiff was a day too late.

And Jackson, Judge, in giving the opinion of the Court says: "In the construction of a promisssry note payable in a certain "number of days, the day of the date is excluded, because other-"wise a note payable in *one day* would be the same as a note pay-"able *on demand*;" and the same reason is given in the case of Henry vs. Jones, 8. Mass., p. 453.

Third. Now, the Note and warrant of attorney having been executed at the same time and in reference to the same subject matter, must be construed together, and considered as forming but one transaction. Sherman vs. Badely, 11, Ill., 622.

A. It is a rule that the whole contract should be considered, in determining the meaning of any, or all its parts. Parsons on Contracts, (3d Ed.) p. 13.

And the intent ought to be picked out of every part and *not* out of one word only. Idem. p. 13, note 2, and cases there cited.

Barton vs. Fitzgerold, 15 East., p. 541. The contract may be contained in several instruments, which if made at the same time between the same parties, and in relation to the same subject matter, constitute but one contract, and the recitals in each may be explained, or corrected by a reference to any other, in the same way as if they were only several parts of one instrument. Parsons on contracts [3d Ed.] p. 15. Sawyer vs. Hammett, 15 Maine, p. 40.

Fourth. Construing then the note and power of attorney together as *one* instrument, and explaining the one by the other, it

appears that the plaintiffs in error made a note and incurred a debt, which was due immediately, and on which the defendant in error [the payee in note] might have immediately commenced an action, and on which the statute of limitations *immediately* began to run; and the words "from and after the date hereof" in power of attorney, must be construed with reference to that fact; and thus construing those words in the light of "the context and subject matter" of the whole instrument,—according to the authories above quoted—the words "from and after" should and must be considered *inclusive* of the day of date of the note and power of attorney.

And it was the evident intention of the parties, gathered from the whole instrument, that a judgment might be entered up on the note immediately, from the fact that the note was made payable on demand—and such was the intention of the makers of note, although it does not appear—if not, the note would have been made payable one day from date or longer.

A. Justice and equity require such a construction and interpretation; for there is no reason or justice in requiring the payee of the note to wait beyond the day of making the instrument before he could enter judgment on it by confession, when he has a right to commence an action on the debt that day, and the statute of limitations begin to run against him that day.

If the day of the date is to be construed as inclusive, when it is construed against him and his right to bring an action within the period of limitation, then it ought in fairness to be construed inclusive in his favor as to his right to take judgment on that day.

Otherwise his warrant of attorney is of little avail to him; for if the makers of the note were in insolvent circumstances, the payee or his assignees would, in order to avail themselves of the right which the law gives them to bring their action immediately, have to give up their warrant of attorney entirely and commence action without it; or would have to wait on a debt already due, and on which the statute runs, a length of time before they could take judgment according to the tenor and effect of the very contract of which the note already due is a part, and which was intended to give the payee of said note a summary remedy which he would not have without it. Such a construction would be forced, unnatural and unreasonable.

B. The mere fact that the note is payable with interest does not show that the parties absolutely intended that judgment should not be entered up on the note immediately, and intended it for a continuing security—as plaintiffs in error insist.

Such an argument proves too much; for it would be just as

good an argument against taking judgment the next day after the date of the note as against taking judgment the same day that note is dated, and plaintiffs in error admit by their argument that judgment entered the second day would have been regular and good.

The provision for interest was put in evidently for the benefit of the payee, so that if he did not take judgment at once (which was optional with him) he should have his interest on the debt.

But the statute of limitations begins to run on such a note as soon as it is made, although the note be payable with interest.—Norton vs. Ellam, 2 M. &. W., p. 461.

Fifth. This Court should not set asside this judgment, if the same was entered up on the regular and proper papers filed with the Clerk, unless the law and justice and the necessary intention of the parties require it to be done.

Sixth. Costs are an incident of the judgment, and follow the judgment as a matter of course. 2 Scam., p. 49 ; 20 Ill, p. 319.

The power of attorney in this case authorizes a judgment to be entered for costs, *vide* record , and it is not absolutely and indispensably necessary that the cognovit confess a judgment for costs, and the makers of the power of attorney cannot complain if judgment for costs be entered against them as long as they have authorized it in the warrant of attorney. But if the costs were irregularly and improperly taxed on the judgment, that is no ground for setting aside the judgment, but only a ground for ordering a re-taxation of costs, or otherwise ; or the judgment for costs may be reversed and the main judgment stand affirmed.

Seventh. The plaintiffs in error in the warrant of attorney expressly waive and release all errors which may arise in entering up judgment by virtue thereof. *Vide* record page

Eighth. The warrant of attorney authorizes execution to be issued immediately, and it is not necessary that cognovit should authorize it, and issuing of execution is no part of the judgment.

For the above reasons the defendant in error thinks the said judgment of the Aurora Court of Common Pleas entered on said note and power of attorney by confession, should not be reversed but be affirmed.

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John Jones
v
Daniel B Waterman et al

Brief

Filed May 1. 1862
L Leland
Clerk

Supreme Court of the State of Illinois,

THIRD GRAND DIVISION.

DANIEL B. WATERMAN, MYRON V. HALL, *vs.* JOHN JONES.	April Term, A. D. 1862.

Additional Brief of Plaintiff's in Error.

Judgment by confession in vacation, by virtue of a warrant of Attorney. The points relied on for a reversal of the judgment are

1st. The warrant of Attorney did not authorize the confession of the judgment until after the expiration of the day on which it was executed. The day of execution must be excluded from the computation of time.

1 Pick. Rep's,	p.	497
8th Mass. "	p.	455
11 " "	p.	85

and all the authorities cited by E. S. Smith, Esq., in his Brief in this cause.

But the principal of law peculiarly appliable to this case is found in the case of Frances Cooleen et el. vs. Daniel Figgins.

	Brees' Rep. p.	3
and also	Jefferson's Rep. p.	9

Where the court held that the act of the Legislature, although it provided that the act should be in force from and after its passage, did not go into force and effect until the day after its passage, and that the day on which the act was passed must be excluded.

But it may be argued that it was the intention of the parties that the warrant of attorney should go into force and effect on the day of its execution because the note is due on demand, but that construction is rebutted by the fact that the note bears interest.

The note being on interest, it strengthens the indication that

it was intended to remain for a time unpaid and undemanded.

Parson's Mercantile Law, p. 107

Besides the warrant of attorney provides that judgment may be entered upon said note with interest to the day of the entry of such judgment. Meaning some day yet to come after the date of the warrant

2d. The judgment is erronious because the Clerk had no authority to make an order for an execution.

The Clerk under our Constitution possesses no judicial powers, he acts in a ministerial capacity in entering judgment by confession in vacation.

24th Ills. Rep. p. 598
" " " 94

Upon filing proper papers before him they become a record, from which he derives his authority to enter judgment. Cases above cited.

He has no right to enter judgment in vacation unless service of process is waived, which is not done in this case.

He has no right to make an order for an execution unless he is authorized so to do from defendant's plea or cognovit, which is not the case in this cause. He has no judicial power to make an order for an execution.

3d. He had no right to enter a judgment for cost against defendants unless authorized by the plea or cognovit of the defendants, which he is not in this case.

Defendants in this case confess a judgment for damages for $2047 25-100, but say nothing about costs, the judgment entered is for the above sum and costs. the judgment therefore is for a larger sum than authorized. The damages and costs constitute the judgment.

Page vs Louth 2 Dowl & L 108
13 Law J N S Q B. 291
Davis vs Page 8 Jur. 874.

Held also that such judgment was bad altogether and not only in reference to so much as relates to costs.

The books containing these authorities are not in the library, but they are reported in Harrison's Digest. Vol. 5 Supplement Vol. 1.

The authority to confess a judgment without process must be clear and explicit and must be strictly pursued.

5th Hill Rep. p. 497

4th. The warrant of Attorney is not sufficiently proven, it is to uncertain and insufficient as to Waterman's signature.

Chas. Wheaton was incompetent to prove the execution of the warrant of Attorney, because he is interested in the cause, and acted as Attorney for Plaintiff in entering judgment.

CHARLES J. METZNER,
Att'y for Plff. in Error.

76

Briefs for Pffs in Error.

Filed April 24th 1862
L. Leland
Clk.

Printed by Beach & Barnard, 14 S. Clark St.

SUPREME COURT

OF ILLINOIS,

THIRD GRAND DIVISION,
APRIL TERM, A. D. 1861.

DANIEL B. WATERMAN,
AND MYRON V. HALL,
Plaintiffs in Error.
vs.
JOHN JONES,
Defendant in Error.

ERROR TO THE COURT OF COMMON PLEAS OF THE CITY OF AURORA.

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The record in this case shows, that on the twentieth day of November, A. D. 1860, the defendant in error filed in the office of the Clerk of the Court of Common Pleas of the City of Aurora, his declaration, alleging that the defendants made and delivered to him their certain prommissory note, of which the following is a copy:

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On the same day, the note, with warrant of attorney and affidavit, were filed with the Clerk of said Court, and judgment was entered and rendered in favor of the plaintiffs therein and against the defendant for the sum of two thousand and forty-seven dollars and twenty-five cents, and execution issued thereon.

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The plaintiffs in error moved to set the judgment aside. Motion was denied and exception taken, and a writ of error was sued out — the grounds of error being that the warrant of attorney did not authorize the entry of the judgment until after the day of its date.

286 76

Waterman

vs

Jones

Abstract

Filed Apr. 24 - 1861

L. Leland

Clerk

Supreme Court of the State of Illinois,

IN THIKD GRAND DIVISION.

DANIEL B. WATERMAN,
MYRON V. HALL,
vs.
JOHN JONES.

April Term, A. D. 1862.

Additional Abstract of Record of Plaintiff's in Error.

Declaration in Assumpsit one special count, and all the common counts, filed in the office of the Clerk of the Court of Common Pleas of the City of Aurora, on the 20th day of November, A. D. 1860.

The same day there was filed a certain note in said office in words following to-wit: "$2027.25. Aurora, Nov. 20th, 1860. "On demand for value received, we promise to pay to John Jones "or order, two thousand, twenty-seven and 25-100 dollars with "Interest at the rate of ten per cent per annum.

D. B. WATERMAN & CO.

Also, a warrant of attorney attached to said note in words as follows, to-wit: "Know all men by these presents, that we, "D. B. Waterman & Myron V. Hall, of the firm of D. B. Waterman & Co, are justly indebted to John Jones upon a certain "promissory note, bearing even date herewith for the sum of two "thousand, twenty-seven and 25-100 dollars with interest at the "rate of ten per cent per annum and due on demand. Now "therefore, in consideration of the premises, we, or either of us "do hereby make, constitute and appoint Chas. Wheaton or any "Attorney of any Court of Record to be our true and lawful Attorney irrevocable of us and in our names, places and stead to "appear in any Court of Record in term time or vacation, or before any Justice of the Peace in any of the States or Territories of the United States at any *time from and after the date "hereof* to waive the service of process and confess a judgment in "favor of the said John Jones or his assigns or assignees upon "the said note for the above sum, or as much as appears to be "due according to the tenor and effect of said note and interest "thereon to the day of entry of such judgment, together with all "costs and twenty dollars attorney fees, and also to file a cognovit for the amount that may be so due with an agreement therein that no writ of error or appeal shall be prosecuted upon the "judgment entered by virtue hereof, nor any bill in Equity filed "to interfere in any manner with the operation of said judgment, "and to release all errors that may intervene in the entering up "of said judgment or issueing the execution thereon, and also "consent to immediate execution upon such judgment. Thereby "ratifying and confirming all that our said attorney may do by "virtue hereof. Witness our hands and seal this 20th day of "November, A. D. 1860.

M. V. HALL, [SEAL.]
D. B. WATERMAN [SEAL]
The firm of WATERMAN & CO, [SEAL.]

On the back of which said note and warrant of attorney is the following affidavit: "State of Illinois, Kane County, City of "Aurora. *ss.* Charles Wheaton of said city, being duly sworn, "deposes and says that he saw said Daniel B. Waterman, who "is known to him, sign the within power of attorney, and J. G. "Stolp being duly sworn deposes and says that he is acquainted "with the handwriting of Myron V. Hall from having seen him "write, and that the within signature purporting to be his is the "handwriting of said Hall, as he verily believes. Subscribed "and sworn to before me this 20th day of Nov. 1860,

CHAS. WHEATON, J. G. STOLP.

J. G. BARR, Clerk.

And on the same day there was filed in the Office of said Clerk a certain paper called a cognovit, in words and figures following: "State of Illinois, Kane County, City of Aurora, *ss.* "The Court of Common Pleas of the City of Aurora, in vaca-"tion after October special term 1860, Myron V. Hall and Dan-"iel B. Waterman advs. John Jones, and the said defendants by "R. G. Montony their attorney came &c., when &c., and say that "they cannot deny the action of the said plaintiff, nor that they "the said defendants did undertake and promise in manner and "form as the said plaintiff has above thereof complained against "them, nor but that the said plaintiff has sustained damages to "two thousand and forty-seven dollars and twenty-five cents, in-"cluding twenty dollars attorney fees &c.

R. G. MONTONY, Att'y for Defendent.

And afterwards, on the same day, being one of the days in vacation after the October special term, A. D, 1860 of said Court, the following proceedings were entered of record to wit: City of Aurora, November 20, A. D. 1860. John Jones vs. Myron V. Hall and Daniel B. Waterman, Confession.

"Therefore, it is ordered by the Court that the plaintiff do "have and recover of said defendants his damages of two thous-"and forty-seven dollars and twenty-five cents in form aforesaid "confessed, and also his costs and damages by him about this "suit expended and have execution therefore."

And at the December term, A. D. 1860, the said defendants, by C. J. Metzner their attorney, moved said Court to vacate said judgement and quash the execution issued thereon.

~~A. D. 186~~ motion overruled by the Court, defendants except to the ruling of the Court.

Errors assigned are, the Court erred in rendering judgment against ~~for~~ the defendants & 2d the Court erred in not granting defendants motion to vacate judgment.

C. J. Metzner
~~Atty~~ Atty for Plffs
in Error.

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Myron V. Heald etal

vs

John Jones

Amended abstract

Filed April 2/62

L. Lelana

Clerk.

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DANIEL B. WATERMAN,
MYRON V. HALL,
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JOHN JONES.

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24th Ills. Rep. p. 598
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Att'y for Plff. in Error.

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Brief for Plff in Error

Filed April 24th 1861
L. Delano
Clk.

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D. B. WATERMAN & CO.

Also, a warrant of attorney attached to said note in words as follows, to-wit: " Know all men by these presents, that we, " D. B. Waterman & Myron V. Hall, of the firm of D. B. Waterman & Co, are justly indebted to John Jones upon a certain " promissory note, bearing even date herewith *for the sum of two* " thousand, twenty-seven and 25-100 dollars with interest at the " rate of ten per cent per annum and due on demand. Now " therefore, in consideration of the premises, we, or either of us " do hereby make, constitute and appoint Chas. Wheaton or any " Attorney of any Court of Record to be our true and lawful Attorney irrevocable of us and in our names, places and stead to " appear in any Court of Record in term time or vacation, or before any Justice of the Peace in any of the States or Territories of the United States at any *time from and after the date* " *hereof* to waive the service of process and confess a judgment in " favor of the said John Jones or his assigns or assignees upon " the said note for the above sum, or as much as appears to be " due according to the tenor and effect of said note and interest " thereon to the day of entry of such judgment, together with all " costs and twenty dollars attorney fees, and also to file a cognovit for the amount that may be so due with an agreement therein that no writ of error or appeal shall be prosecuted upon the " judgment entered by virtue hereof, nor any bill in Equity filed " to interfere in any manner with the operation of said judgment, " and to release all errors that may intervene in the entering up " of said judgment or issueing the execution thereon, and also " consent to immediate execution upon such judgment. Thereby " ratifying and confirming all that our said attorney may do by " virtue hereof. Witness our hands and seal this 20th day of " November, A. D. 1860.

M. V. HALL, [SEAL.]
D. B. WATERMAN [SEAL]
The firm of WATERMAN & CO, [SEAL.]

On the back of which said note and warrant of attorney is the following affidavit: "State of Illinois, Kane County, City of "Aurora. *ss.* Charles Wheaton of said city, being duly sworn, "deposes and says that he saw said Daniel B. Waterman, who "is known to him, sign the within power of attorney, and J. G. "Stolp being duly sworn deposes and says that he is acquainted "with the handwriting of Myron V. Hall from having seen him "write, and that the within signature purporting to be his is the "handwriting of said Hall, as he verily believes. Subscribed "and sworn to before me this 20th day of Nov. 1860,

CHAS. WHEATON, J. G. STOLP.

J. G. BARR, Clerk.

And on the same day there was filed in the Office of said Clerk a certain paper called a cognovit, in words and figures following: "State of Illinois, Kane County, City of Aurora, *ss.* "The Court of Common Pleas of the City of Aurora, in vaca-"tion after October special term 1860, Myron V. Hall and Dan-"iel B. Waterman advs. John Jones, and the said defendants by "R. G. Montony their attorney came &c., when &c., and say that "they cannot deny the action of the said plaintiff, nor that they "the said defendants did undertake and promise in manner and "form as the said plaintiff has above thereof complained against "them, nor but that the said plaintiff has sustained damages to "two thousand and forty-seven dollars and twenty-five cents, in-"cluding twenty dollars attorney fees &c.

R. G. MONTONY, Att'y for Defendent.

And afterwards, on the same day, being one of the days in vacation after the October special term, A. D, 1860 of said Court, the following proceedings were entered of record to wit: City of Aurora, November 20, A. D. 1860. John Jones vs. Myron V. Hall and Daniel B. Waterman, Confession.

"Therefore, it is ordered by the Court that the plaintiff do "have and recover of said defendants his damages of two thous-"and forty-seven dollars and twenty-five cents in form aforesaid "confessed, and also his costs and damages by him about this "suit expended and have execution therefore."

And at the December term, A. D. 1860, the said defendants, by C. J. Metzner their attorney, moved said Court to vacate said judgement and quash the execution issued thereon.

~~A. D. 186~~ motion overruled by the Court, defendants except to the ruling of the Court.

Errors assigned are, the Court erred in rendering judgment, ~~for~~ against the defendants & 2d the Court erred in not granting defendants motion to vacate the Judgment.

C J Metzner
Atty for Plffs in Error.

Myron & Hall et al
vs
John Jones
Amended abstract

Filed April 25th 1862
L. Leland
Clerk.

Supreme Court of the State of Illinois,

IN THIKD GRAND DIVISION.

DANIEL B. WATERMAN,
MYRON V. HALL,
vs.
JOHN JONES.

April Term, A. D. 1862.

Additional Abstract of Record of Plaintiff's in Error.

Declaration in Assumpsit one special count, and all the common counts, filed in the office of the Clerk of the Court of Common Pleas of the City of Aurora, on the 20th day of November, A. D. 1860.

This seems to have been entered before the time the atty was authorised to confess the paper.

The same day there was filed a certain note in said office in words following to-wit: " $2027.25. Aurora, Nov. 20th, 1860. " On demand for value received, we promise to pay to John Jones " or order, two thousand, twenty-seven and 25-100 dollars with " Interest at the rate of ten per cent per annum.

D. B. WATERMAN & CO.

Also, a warrant of attorney attached to said note in words as follows, to-wit: " Know all men by these presents, that we, " D. B. Waterman & Myron V. Hall, of the firm of D. B. Waterman & Co, are justly indebted to John Jones upon a certain " promissory note, bearing even date herewith for the sum of two " thousand, twenty-seven and 25-100 dollars with interest at the " rate of ten per cent per annum and due on demand. Now " therefore, in consideration of the premises, we, or either of us " do hereby make, constitute and appoint Chas. Wheaton or any " Attorney of any Court of Record to be our true and lawful Attorney irrevocable of us and in our names, places and stead to " appear in any Court of Record in term time or vacation, or before any Justice of the Peace in any of the States or Territories of the United States at any *time from and after the date* " *hereof* to waive the service of process and confess a judgment in " favor of the said John Jones or his assigns or assignees upon " the said note for the above sum, or as much as appears to be " due according to the tenor and effect of said note and interest " thereon to the day of entry of such judgment, together with all " costs and twenty dollars attorney fees, and also to file a cognovit for the amount that may be so due with an agreement therein that no writ of error or appeal shall be prosecuted upon the " judgment entered by virtue hereof, nor any bill in Equity filed " to interfere in any manner with the operation of said judgment, " and to release all errors that may intervene in the entering up " of said judgment or issueing the execution thereon, and also " consent to immediate execution upon such judgment. Thereby " ratifying and confirming all that our said attorney may do by " virtue hereof. Witness our hands and seal this 20th day of " November, A. D. 1860.

M. V. HALL, [SEAL.]
D. B. WATERMAN [SEAL]
The firm of WATERMAN & CO, [SEAL.]

On the back of which said note and warrant of attorney is the following affidavit: "State of Illinois, Kane County, City of "Aurora, *ss.* Charles Wheaton of said city, being duly sworn, "deposes and says that he saw said Daniel B. Waterman, who "is known to him, sign the within power of attorney, and J. G. "Stolp being duly sworn deposes and says that he is acquainted "with the handwriting of Myron V. Hall from having seen him "write, and that the within signature purporting to be his is the "handwriting of said Hall, as he verily believes. Subscribed "and sworn to before me this 20th day of Nov. 1860.

CHAS. WHEATON, J. G. STOLP.

J. G. BARR, Clerk.

And on the same day there was filed in the Office of said Clerk a certain paper called a cognovit, in words and figures following: "State of Illinois, Kane County, City of Aurora, *ss.* "The Court of Common Pleas of the City of Aurora, in vaca- "tion after October special term 1860, Myron V. Hall and Dan- "iel B. Waterman advs. John Jones, and the said defendants by "R. G. Montony their attorney came &c., when &c., and say that "they cannot deny the action of the said plaintiff, nor that they "the said defendants did undertake and promise in manner and "form as the said plaintiff has above thereof complained against "them, nor but that the said plaintiff has sustained damages to "two thousand and forty-seven dollars and twenty-five cents, in- "cluding twenty dollars attorney fees &c.

R. G. MONTONY, Att'y for Defendent.

And afterwards, on the same day, being one of the days in vacation after the October special term, A. D, 1860 of said Court, the following proceedings were entered of record to wit: City of Aurora, November 20, A. D. 1860. John Jones vs. Myron V. Hall and Daniel B. Waterman, Confession.

"Therefore, it is ordered by the Court that the plaintiff do "have and recover of said defendants his damages of two thous- "and forty-seven dollars and twenty-five cents in form aforesaid "confessed, and also his costs and damages by him about this "suit expended and have execution therefore."

And at the December term, A. D. 1861, the said defendants, by C. J. Metzner their attorney, moved said Court to vacate said judgement and quash the execution issued thereon.

~~A. D. 186~~ motion overruled by the Court, defendants except to the ruling of the Court.

Errors assigned are, the Court erred in rendering judgment against ~~for~~ the defendants 2d the Court erred in not granting defendants motion to vacate the judgment.

C J Metzner
Atty for Plffs in Error.

76—17.1

Myron V. Hall et al
76
vs
John Jones

Amended abstract

Filed April 23/1866

L. Leland
Clk.

United States of America
State of Illinois " Kane } ss.
County " City of Aurora

Pleas before The Honorable
Benjamin F. Parks The Judge
of The Court of Common
Pleas of The City of Aurora at a regular
Term of said The Court of Common Pleas
of the City of Aurora begun and held at
the Court Room in said City on Monday
the 18th day of March A.D. 1861

Present The Honorable Benjamin F. Parks
Judge
" Demarcus Clark Sheriff of Kane Co.

Attest James G. Barr Clerk.

The Court opened by Proclamation.

Be it remembered that heretofore Towit
on the 20th day of November A.D. 1861
There was filed in the office of The Clerk
of The Court of Common Pleas of The
City of Aurora a certain Declaration
which is in the words & figures following
Towit:

State of Illinois
Kane County } ss. The Court of Common
City of Aurora } Pleas of the City of Aurora
In vacation after Oct

Special Term A D, 1861

John Jones plaintiff in this suit by Wheaton his attorney, complains of Daniel B Waterman & Myron V. Hall copartners under the name firm & style of D. B. Waterman & Co Defendants in this suit in a plea of Trespass on the case upon promises; For that whereas the said Defendants as copartners under the name firm & style of D. B. Waterman & Co. heretofore towit, on the 21st day of November in the year of our Lord, one thousand eight hundred and fifty made a certain note in writing, commonly called a promissory or judg= =ment note, bearing date the day and year aforesaid, and then and there delivered the said note to the plaintiff by which said note the said Defend= =ants under the firm & style of D B Waterman & Co promised to pay to the plaintiff under the name & style of John Jones or order two thousand & twenty seven & 25/100 dollars with interest at the rate of ten per cent per annum on demand for value received which period has now elapsed.

By Reason Whereof, and by force of the statute in such case made and provided, the said defend= =ants as said partners then and there 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 as said partners in consideration thereof, afterwards, towit, on the same day and year, and at the place aforesaid undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said

plaintiff the said sum of money in the said note specified, according to the tenor and effect of the said note.

Nevertheless the said defendants (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 oftentimes since, to wit, at the place aforesaid) have 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 defendants as said partners have hitherto altogether refused, and still do refuse, to the damage of the said plaintiff of Four thousand dollars and therefore the said plaintiffs brings suit. &c

Chas Wheaton Plaintiffs Attorney.

Copy of note declared on.

"$2027.25 Aurora Nov 20th 1861

On demand for value received we promise to pay to John Jones or order two thousand & twenty seven & 25/100 Dollars with interest at the rate of ten per cent per annum

(signed) D B Waterman & Co.

And afterwards towit, on the same day last aforesaid. there was filed in the office of the Clerk of said Court a certain note & warrant of attorney attached which said note & warrant of attorney are in the words & figures following towit:

$2027.25. Aurora Nov 20th 1860.

On demand for value received we promise to pay to John Jones or Order two thousand & twenty seven & 25/100 Dollars, with interest at the rate of ten per cent per annum

D B Waterman & Co.

Know all Men by these Presents, That we D B Waterman & Myron V. Hall of the firm of D B Waterman & Co. are justly indebted to John Jones upon a certain Promissory Note bearing even date herewith, for the sum of two thousand twenty seven & 25/100 Dollars with interest at the rate of ten per cent. per annum, and due on demand. Now Therefore in consideration of the premises, we or either of us do hereby make, constitute and appoint Chas Wheaton or any Attorney of any Court of Record, to be our true and lawful Attorney, irrevocably of us, and in our names, places and stead; to appear in any Court of Record in term time or in vacation, or before any Justice of the Peace, in any of the States or Territories of the United States, at any time from and after the date hereof, to waive the service of process, and confess a judgment in favor of said John Jones or his assigns or assignees upon the said Note, for the above sum, or for as much as appears to be due according to the tenor and effect of said Note, and interest thereon, to the day of entry of such judgment, together with all costs, and twenty Dollars Attorneys Fees; and also to file a cognovit

for the amount that may be so due, with an agreement therein, that no writ of error or appeal shall be prosecuted upon the judgment entered by virtue thereof, nor any bill in equity filed, to interfere in any manner with the operation of said judgment, and to release all errors that may intervene in the entering up of said judgment, or issuing the execution thereon, and also consent to immediate execution upon such judgment.
Hereby ratifying and confirming all that our said Attorney may do by virtue hereof.
Witness our hands and Seals, this 21st day of November A. D. 1861.
In the presence of

M. V. Hall (Seal)
D B Waterman (Seal)
The firm of D B Waterman & Co (Seal)

And on the back of said warrant of Attorney appears an affidavit which is in the words and figures following to wit:

State of Illinois
Kane County
City of Aurora } ss. Chas Wheaton of said City being duly sworn deposes and says that he saw said Daniel B Waterman who is known to him sign the within power of Attorney and J. G. Stolp being duly sworn deposes and says that he is acquainted with the handwriting of Myron V. Hall from having seen him write & that the within signature purporting to be his

is the handwriting of said Hall as he verily believes

Subscribed & Sworn to before me this 21st day of Nov 1861
J. G. Barr
Clerk.

Chas. Wheaton
J. G. Stolp.

And afterwards Towit, on the same day last aforesaid there was filed in the office of the Clerk of said Court, a certain cognovit which is in the words & figures following Towit.

State of Illinois
Kane County. ss.
City of Aurora

The Court of Common Pleas of the City of Aurora in vacation after Oct. Special Term 1861.

Myron V Hall &
Daniel P Waterman
adj
John Jones

And the said defendants by R G Montony their attorney, come &c When &c and say that they cannot deny the action of the said plaintiff, nor but that they the said defendants did undertake and promise in manner and form as the said plaintiff has above thereof complained against them, nor but that the said plaintiff has sustained damages to two thousand & forty seven dollars and twenty five cents including twenty dollars attorneys fees &c

R G Montony
atty for Deft

And afterwards Towit, on the same day last aforesaid the same being one of the days in vacation after the October Special Term A.D. 1861. of said The Court of Common Pleas of The City of Aurora. the following proceedings were had and entered of record in said Court. Towit:

City of Aurora. November 21st A.D. 1861

John Jones
vs
Myron C. Hall &
Daniel P. Waterman
} Confession.

This day comes the Plaintiff by Charles Wheaton his attorney and files herein his Declaration of a plea of Trespass on the case upon promises. Thereupon come the Defendants by A. G. Moutony their attorney in fact who files herein his warrant of attorney duly executed and proven. and also his cognovit Confessing the action aforesaid of said Plaintiff against them. and that said Plaintiff has sustained damages by occasion of the premises to the sum of Two Thousand and forty seven Dollars and twenty five cents.

$2047.25 Therefore it is considered by the Court that said Plaintiff do have and recover of said Defendants his damages of Two Thousand and forty seven Dollars and twenty five cents in form aforesaid confessed, and also his costs and charges by him about this suit expended and have execution therefor.

And afterwards, Towit, on the 11th day of December 1861. there was filed in the office of the Clerk of said Court a certain notice which is in the words and figures following Towit.

John Jones
vs
Daniel B Waterman
& Myron V. Hall

Court of Common Pleas of the City of Aurora.
December term A.D. 1861
Judgment by Confession.

To John Jones.

Sir

Please take notice that on the first day of the next term of the Court of Common Pleas of the City of Aurora. to be holden at the Court room in Aurora on the 10th inst. I shall move on behalf of the defendants to vacate the judgment and quash the execution issued thereon and also to open said judgment and leave to file pleas in said cause when and where you are requested to be and appear and to resist said motions if you may elect.

Aurora. December 4th 1861.

Charles J. Metzner
Atty for Defd.

And on the back of said notice appears an affidavit which is in the words & figures following Towit.

State of Illinois
Kane County } ss.
City of Aurora

H. F. Van Nortwick being duly sworn upon his oath says that on the fourth day of December A.D. 1861 at and within the City of Aurora he served a copy of the within notice upon Charles Wheaton attorney for the Plaintiff in the case entitled John Jones vs Daniel B Waterman & Myron V Hall being the within entitled case.

Sworn and Subscribed before me this fourth day of December A.D. 1861
Chas J Metzner } H. F. Van Nortwick
N. P.

And afterwards to wit: on the 11th day of December 1861, the same being one of the days of the December Term A.D. 1861 of the Court of Common Pleas of the City of Aurora the following among other proceedings were had and entered of Record in said Court to wit:

68 John Jones
vs
Myron V. Hall &
Daniel B Waterman } Confession

This day come the Defendants by Metzner their attorney and enter their motion to vacate the Judgment entered in this cause & quash the Execution issued thereon

And afterwards To wit: on the 29th day of December A.D. 1860 there was filed in the office of the Clerk of said Court a certain affidavit which is in the words and figures following To wit,

68 John Jones
vs
Myron V. Hall &
Daniel P. Waterman

Court of Common Pleas of the City of Aurora.
December Term A.D. 1860

Daniel P. Waterman being first duly sworn upon oath says that he is one of the defendants in the above entitled suit that after the execution of the note & before the judgment was entered up by said plaintiff in said cause upon said note, no demand was made upon D. P. Waterman & Co. for the amount mentioned in said note nor any part thereof

sworn & Subscribed to before me this 29th day of December A.D. 1860
J. G. Barr
Clerk

D. P. Waterman

And afterwards. To wit: on the 29th day of December 1860 the same still being one of the days of said December Term of said Court the following among other proceedings were had and entered

of Record in said Court Towit:

68 John Jones vs Myron V. Hall & Daniel S Waterman } Conf. Pet to set aside Judgt.

This day again Come the Parties to this suit and the Court having heard the arguments of Counsel on the motion heretofore entered in this cause and not being fully advised takes the same under advisement for the Term.

And afterwards Towit: on the 2d day of April A.D. 1861 the same being one of the days of the regular March Term A.D. 1861. of said Court. the following among other Proceedings were had and entered of record in said Court Towit.

21 John Jones vs Myron V. Hall & Daniel S Waterman } Confession Petition to vacate Judgment

This day this cause coming on to be heard upon the Defendants motion entered at the last Term of this Court to vacate the Judgment entered in this cause & quash the execution issued thereon. and the Court now being fully advised denies

said motion. To which decision of the Court the defendants at the time ex=cepted. and it is ordered that the Defendants have twenty days to file their Bill of exceptions herein.

State of Illinois }
Kane County } ss.
City of Aurora }

I. Charles P. Johnston Clerk of The Court of Com=mon Pleas of The City of Aurora. in said City County and State do hereby certify that the foregoing Transcript contains a true. correct & complete copy of the Dec=laration. note. warrant of attorney and affidavit thereon. notice of Defendants & affidavit thereon. & affidavit of Defendant. of the Judgment of the Court. and all orders of the Court entered of record in said cause wherein John Jones is Plaintiff & Myron V Hall & Daniel P Waterman are Defendants as appears to us of record.

Witness my name & seal of said Court at the City of Aurora aforesaid this 8th day of April A.D. 1861

Chas P Johnston
Clerk

And now comes the said Daniel B. Waterman & Myron O. Hall & say that there are the following Errors in the above record to wit

1st

The Court erred in rendering judgment against the defendants

2d The Court erred in not granting defendants motion to vacate the judgment ~~& this they are ready to verify &c~~ wherefore they pray that said judgment may be reversed & vacated.

Storrs & Wetmore
Atty for Pltff in Error

And now comes the said John Jones Defendant in error by Glover, Cook & Campbell his attys and says that in the record & proceedings aforesaid and in the rendering of judgment aforesaid there is no error & this he is ready to verify & sustain wherefore he prays judgt &c

Glover, Cook & Campbell
Attys for Deft in Error

Joinder in Error
Filed April 23. 1862
J. Lehaus
Clerk

Com Plea Aurora

John Jones

vs

Myron V. Hall &
Daniel B. Waterman

Filed April 18 1861
L. Leland
Clerk

$5.- pd. Clk.

Fees
31½ folio $3.15
certificate .35
$3.50