

13198

No. _____

Supreme Court of Illinois

Houghton

vs.

Durkee

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 299.

Longman

25

Garth

13498
1861

16
13
12
15
21

30
30
30
85
21
14

In the Supreme Court of the State
of Illinois.

Calvin C. Houghton } Ottawa Term
vs. } a. d. 1861

Julius A. Durkee } Appeal from Verdict
Is the Hon. the Judges of said Court.
Humbly Complaining, Your Petitioner, Julius A. Durkee, by John S. Bennett, his attorney, would respectfully represent to your Honors that said Cause below was tried Oct. 31st 1860. and that leave was granted to file Bill of exceptions by appellant within twenty days thereafter. That no Bill of exceptions was filed within the rule. nor in fact is there any filed till this time as your petitioner is informed by the Record & believes. Your Petitioner further represents that after the expiration of said rule - your petitioner caused execution to issue on the judgment below and some time in the month of February, ¹⁸⁶¹ as he believes, by virtue thereof, sold real estate to satisfy the same & Cost. and had no intimation or knowledge

* That said Wells then - upon the request of said Bennett
so to consent said that if appellants told the
cause up to the Supreme Court it would be
by writ of error.

edge of appellants intention to pro-
ceed in this Court until May 2nd
1861 - when your petitioner's attorney
Bennett, by accident learned that
the cause was here pending.
Your Petitioner states to your Honors
that he the Petitioner resides in
the State of New York, at New
York City and relies entirely upon
his said attorney Bennett.
Your Petitioner states that after the
expiration of said twenty days -
Appellants' attorney Wells - Convers-
ed with your Petitioner's attorney
Bennett and informed him, as your
petitioner is informed & believes, that
appellant had not complied with
and desired said Bennett to ~~consent~~ ^{and desired} to ~~file~~ ^{file} ~~the~~ ^{the}
said rule. Your Petitioner has had
no other cause, or notice that said
Cause would be here pending than
as aforesaid. Your Petitioner states
that the record in this Cause was
filed in this Court on the 18th of
April 1861 - that a rule ^{was} ~~would~~ be
entered in said Cause on the

19th to join in error by the 22^a and
on said 22^a April. judgment of rever-
sal for non-joinder in error.

Your Petitioner states, that the errors
assigned by the appellant, are
1st The Court erred in overruling the
Defts Motion to suppress depositions.
2^a The Court erred in rendering judg-
ment for the Plaintiff. And that no
other & different errors are assign-
ed than the above.

Your Petitioner states that neither of
the above errors appears upon the
Record. Your Petitioner states that
no depositions appear in the Record
and that there is nothing in the
Record by which the Court could
determine whether the ^{court} below erred
in suppressing the depositions and
that not appearing and it not appear-
ing that ^{there} are any depositions in the
Case - this Court will presume that
the Court below decided properly.
The Record does not show what
the evidence below was and hence
this Court can not say whether

the evidence warranted the judgment of the Court below - and this Court will presume that the Court below decided properly - (see many decisions of this Court).

Your petitioner, therefore, states that should a re-hearing be granted in the above case - Your Honors would probably affirm the judgment below or dismiss said appeal and therefore prays your Honors that a rehearing may be granted to your petitioner and your Petitioner will ever pray
cc.

John J. Bennett
Attorney for appellee
Durbin

299
Calvin C. Hough

for vs

C. A. Durbin

Petitioner

Filed May 4 1861

L. L. Durbin
Clerk

Not for Durbin

State of Illinois
In the Supreme Court
Ottawa Term 1861-
Calvin C. Houghton
v.
Julius H. Durkee

No.

299-

Appeal from Henry
Suggestions against Mo.
to let aside reversal.

1. The applicant seems to think that the appeal depended in some manner on the Bill of exceptions; and to overlook the fact, that the filing of the appeal bond alone, perfected the appeal, and transferred the cause to this court.
2. The court cannot on this application inquire whether there are errors in the record or not. As a matter of fact, the declaration was

in one form of action
and the issue tried
in another; and when
other errors may have
intervened I am not
now prepared to say -

3. All the proceedings to
sell land &c. were in
the appellees own wrong.
If he did not choose
to inquire whether the
appeal was perfected,
this is no reason why
our judgment of reversal
should be set aside.

4. The appeal has been pen-
-ding here since last
December - this
application is not made
till after the second call
of the docket has been
completed -

5. No fraud, deceit,
or unfair dealing is shown,
- it is simply a case of
appellees own mistake

Bonney
for appellants

299-

Houghton
v
Durkee

James

Suggestions
v. No.

Filed May 4, 1861

L. Leland

Clerk

Bonney

In the Supreme Court of Illinois.

Calvin C. Houghton } Ottawa Term a.d.
vs } 1861- appeal from
Julius A. Durkee } Henry.

John J. Bennett,
being duly sworn, says, that
he was one of the original Coun-
sel for the appellee in the Court
below. Affiant states, that the trial
of said Cause below was had
on the 31st day of Oct. a.d. 1860- &
that on that day an order ^{was entered} al-
lowing appellant twenty (20)
days thereafter to file a Bill
of Exceptions therein. Affiant
says, that after said rule had
expired - to wit - after Nov. 20th 1860 -
affiant called upon the Clerk
of the Court below - who informed
affiant that no Bill ^{of exceptions} had been
filed therein. Affiant says that
after the expiration of said twenty
days - and before a Bill of Ex-
ceptions was filed - affiant had
an interview with H. W. Wills
one of appellants' attorneys below.
in which interview said Wills
stated to affiant that appellant

affiant further says that he is informed by the Clerk & believes
that the Record is the only paper filed in this case, at present
and that no abstract of Points has been filed by appeal.
Lamp. herein

had not filed a Bill of Exceptions in said Case and requested
affiant to agree that appellant
might file the same then which
affiant did not do. ^{then stated to affiant that appellant would take} said Wells
Affiant ^{with} supposed ^{error of the Clerk} no appeal could
be rightfully perfected. Caused
a fieri facias to issue on the
judgment below - which was
levied upon real estate of
the appellant by the Sheriff of
Henry County & by virtue thereof
Sold in satisfaction of judgment
and Costs - some time in the month
of February - as affiant remembers -
though he will not be positive as to
time. Affiant states that during
all this time before said sale
affiant had no notice that
appellant intended to attempt
the further prosecution of said
appeal - except as aforesaid.
Affiant states, that he is informed
and believes, that there never
has been and is not now any
Bill of exceptions filed in
the Court below - as will appear
by the Record herein also.
Affiant further states, - that

the record was filed in this Case
Apr. 18th A.D. 1861 - as appears by the
filing thereof - that this Court
on the 19th Apr. entered a rule on
appellee to join in error by the 22^d
Apr. and that on the last men-
tioned date - this Court reversed
the judgment below for non-join-
der in error - as appears by the
Records of this Court. Affiant
states that appellee resides and
has resided since the commence-
ment of this suit, in New York
City, and relied upon this affi-
ant to look after this suit and
as affiant believes - has had no
notice herein - since the said sale
of Repl estate. Affiant says,
that ^{by reason of said non-compliance with} ~~he did not~~ ^{suppose} -
any proceedings would be had in
this Court and did not know
until the 2^d day of May - that the
Case was here pending - where
affiant ^{at half past 11 o'clock} learned the fact by ac-
cident and took the next morn-
ing train for this place and
on said 3^d day of May - learned
what action had been taken
herein.

Calvin C. Houghton
 vs
 J. A. Durbin
Appidavit.

Filed May 4th 1861
 L. Leland Clerk

Appellant states, upon belief, based upon his knowledge of the case below & the condition of the papers - that appellee has a good case and that should a rehearing be granted - there is a strong probability that this Court would affirm the judgment below - or dismiss the appeal.

Subscribed and sworn to before me this day
 of May 4th A. D. 1861.

L. Leland Clerk
 J. B. Durbin Deputy

Page 1

State of Illinois } Henry County Circuit Court
Henry County } October Term AD 1860

Pleas before the Hon John W Howe Judge
of the 6th Judicial Circuit of the State of Illinois. At a
regular Term of the Circuit Court begun and holden at
the Court House in Cambridge in said County of Henry and
State of Illinois on the second monday of October in the year of
our Lord One thousand Eight Hundred and Sixty it being
the Eighth day of said month

Present Hon John W Howe Judge
" Thomas Wiley for Clerk
" Samuel W Smith Sheriff

Now ye that on the 15th day of June AD 1860 came John
I Bennett plaintiffs Attorney and files his precepe for
summons and also his bond for costs in the following
entitled cause in words and figures following to wit
State of Illinois } Circuit Court in and for said County
Henry County } October Term AD 1860

Julius A Durkee

vs

Calvin C Houghton

} Assumpsit

} Damages \$ 500.00

The Clerk of the Circuit Court in

& for said County vice please issue summons in said

cause returnable to the said term of said Court, directed

Page 1

Page 2

to the Sheriff of Henry County

John I Bennett Sheriff Etc

State of Illinois

Henry County } Circuit Court in and for said County, Oct Term AD 1860

Julius A Durkee

vs

Cubim C Houghton

I do hereby enter myself as security
for costs in the above entitled cause, and acknowledge myself
bound to pay or cause to be paid all costs which may accrue
in said cause either to the opposite party, or to any of the officers
of said Court in pursuance of the Laws of the State of Illinois
Dated July June 14th 1860

John I Bennett

And afterwards to wit on the 15th day of June in the year
last aforesaid a summons issued out of said Court in
the words and figures following to wit.

State of Illinois

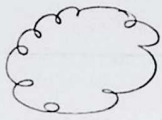
Henry County }

The People of the State of Illinois. To
the Sheriff of said County Greeting. You
are hereby commanded to summon Cubim C Houghton
to appear before the Circuit Court of Henry County
on the first day of the next term thereof to be holden
at Cambridge on the 2^d Monday of Oct next to answer
the complaint of Julius A Durkee in a plea of assumpsit

Page 2

Page 3

Damages claimed \$ 500.00 And have you then and there
this int. Witness Thomas Wiley Jr Clerk of said Court
and the seal thereof this 15th day of June A D 1860



Thomas Wiley Jr Clerk
By William L Dabrymple Depty

Upon which summons appears the following endorsement
"I have served the within summons by reading the same
to the within named Calvin C Noughton this 22^a
day of June A D 1860

J. H. Smith Sheriff of Henry County
By Geo A Brown Deputy Sheriff

And afterwards to wit on the 30th day of August A D 1860
the said plaintiff by Bennett & Boies his Atty file their
Declaration in said cause in words and figures following
to wit.

State of Illinois } Henry County Circuit Court
Henry County } of the October Term A D 1860
Julius A Durkee }
vs } Assumpsit Damages \$ 500.
Calvin C Noughton }

Julius A Durkee Plaintiff by Bennett
& Boies his attorneys complain of Calvin C Noughton
Defendant, of a plea of trespass on the case on premises
For that Whereas the said Defendant afterwards to wit, on the

Page 3

Page 4

on the first day of June in the year of our Lord One thousand eight hundred and sixty, to wit at said County of Henry became and was indebted unto the said Plaintiff, in a large sum of money, to wit. Five Hundred (\$500) Dollars for money before that time lent and advanced to the said defendant by said Plaintiff at said defendants request, and also in the like sum for money before that time paid laid out and expended for said defendant by the said Plaintiff, at the like special request of said defendant; and in the like sum for money before that time had and received by said defendant to and for the use of said Plaintiff, and for so much money before that time and then due and payable from the said defendant to the said Plaintiff, for interest upon and for the forbearance of divers large sums of money before then due and owing from the said defendant to the said Plaintiff, and by the said Plaintiff forbore to the said Defendant for divers long spaces of time, before then elapsed, at the like special instance and request of the said Defendant, and also in the like sum for the labor, care & diligence of the said Plaintiff, done and performed at the like special instance and request of the said Defendant, and also in the like sum then and there found to be due and owing to said Plaintiff on account stated between them; and being so indebted said Defendant in consideration thereof then and there undertook and promised to pay said Plaintiff

Page 4

Page 5-

said several sums of money above mentioned, when thereunto afterwards requested. Yet the said Defendant, not regarding his said promises and undertakings but contriving & although often requested so to do, has not paid said Plaintiff either of said sums of money above mentioned, or any part thereof but so to do has hitherto wholly neglected and refused, and still does neglect and refuse, to the damage of said Plaintiff of Five Hundred (\$500) Dollars, and therefore he brings this suit. &c

Bennett & Poiré Plaintiffs Attorneys

Copy of Instrument and Account sent on
Reelin C. Houghton

To Julius A. Durkee Dr

1856 Dec 1	To freight and cartage	\$ 14.51
" " 3	" " " "	15.27
" " 4	" " " "	171.75
" " " "	Lease	600.00
" " 5	" freight & cartage	43.17
" " 8	" " "	4.41
" " 26	" " "	205.60
" " " "	" " "	8.40
1857 May 15	" Storage, Labor, Commission & Interest	130.00
" "	" interest on same since May 15/57	<u>97.00</u>
	Whole Amount	\$ 1240.34

Page 5-

Contra

By Cash

\$ 790.24

Balance Due

\$ 500.00

Calvin C. Houghton

To Julius A. Durkee

Dr

To Money lent and advanced

\$ 500.00

To Money paid laid out and expended

\$ 500.00

To Money had and received To and for the use of said Plaintiff

\$ 500.00

To Goods, Wares and Merchandise sold and delivered

\$ 500.00

To Labor and services

\$ 500.00

To Balance due on account stated

\$ 500.00

Bennett & Boies

Attorneys for Pltfs

And afterwards to wit at the Term aforesaid and on the 9th day of October the following proceedings were had in said cause to wit.

Julius A. Durkee

Vs

Calvin C. Houghton

Accomplice

At this day came the Plaintiff by Bennett & Boies his attys and the Defendant by Frost his atty. and this cause being called for the hearing of motions &c And motion is made by defendant to suppress depositions filed herein in the words and figures following

to wit

Page 7

State of Illinois }
Henry County }

County Court

Julius A. Durkee

vs

Calvin L. Houghton

The Defendant moves the Court to suppress the depositions in the said cause because of various and numerous informalties and illegalities in the same

1st The deposition is that of a Witness residing in the County of Henry and State of Illinois

2^a The depositions are improperly taken and improperly certified

3^a It does not appear that they were taken before the same Officers to whom the commission was directed, nor does it appear that the officer taking the same was properly authorized, or a proper commissioner. The depositions are not properly sealed but appear to have been tampered with. They are in many other respects informal and illegal

Wells & Lohinger

and afterwards to sit at the term ^{on the 10th day of October} aforesaid, ^{comes the} said Defendant and by his Attorneys and file their plea of general issue in said cause in words and figures following

Page 7

to wit

Page 8 State of Illinois } Henry Circuit Court
Henry County } October Term A.D. 1860

Julius A. Durkee
vs
Calvin C. Houghton }

Now comes the said Defendant
and defends the wrongs & injury when he and says that
he does not owe and is not indebted to said Plaintiff
as the said Plaintiff hath above explained against him
of this he puts himself upon the Country

Wilkinson & Pleasants

Wells & Lobinger Jr Deft

And afterwards to wit on the 25th of Oct this cause being again
called and on the hearing of the motion to suppress depositions
by the Court, and the Court being fully advised in the
premises, orders that the motion be overruled, and
thereupon the said Defendant by his attorney takes
exceptions to the rulings of the Court. Motion by
Defendant for continuance, and not having filed
affidavit setting forth cause of continuance, said
Defendant is ruled by the Court to file such affidavit
by Tuesday morning next

Page 8

Page 7

And afterwards to wit, on the 31st day of Oct of the Term aforesaid, this cause being again called and issue joined by the parties, and on their agreement a trial by jury is waived, and this cause is submitted to the Court to be tried. And the Court having heard the evidence to be adduced herein, and the arguments of the counsel and being now fully advised in the premises, the Court finds the issue for the Plaintiff, and assesses his damages at the sum of \$ 179.68. It is therefore ordered and ordered by the Court that the Plaintiff have and recover of the Defendant the said sum of One Hundred and Seventy Nine Dollars and Sixty Eight cents damages together with his costs in this behalf expended and that he have execution therefor against the said Defendant.

And afterwards to wit, on the day last aforesaid comes the said Defendant by his Attorney, and enters his motion for a new trial, which motion is by the Court overruled, and thereupon said Defendant takes exceptions to the ruling of this Court, and prays an appeal from the Judgment of this Court to the Supreme Court of the State of Illinois, which said prayer is granted by the Court, and leave given to the Defendant to prepare and file Bill of Exceptions within 20 days from the entry of this order. And it is further ordered by the Court that the Defendant file his Appeal

Page 7

Bond herein by January 1st AD 1861 with security
to be approved by the Court

And afterwards to wit on the 26th day of December of the
year last aforesaid comes the said Defendant and files
his Appeal Bond in said case which reads in
the words and figures following to wit -

Know all men by these presents that We Calvin C
Koughton as principal and Sam W Johnson as
security are held and firmly bound unto Julius A
Durkee in the penal sum of Six Hundred Dollars
for the payment of which well and truly to be made
We bind ourselves our heirs executors and administrators
jointly and severally and firmly by these presents
signed and sealed this 19th day of December
AD 1860 Now the nature of this obligation is
such that Whereas at the October Term AD 1860
of the Henry Circuit Court, in a certain cause therein
pending, wherein said Julius A Durkee was plaintiff
and said Calvin C Koughton was Defendant
the said Court did render judgment in favor
of said plaintiff and against said Defendant
from which said judgment said Defendant
prayeth and obtained an appeal to the Supreme
Court of the State of Illinois. Now if the said

Page 11

Calvin C Houghton shall prosecute his said
Appeal with effect, or in case of failure thereon
shall fully pay and satisfy said Julius A Durkee
said judgment and shall fully and strictly keep
the order and judgment of the said Supreme
Court. Then this Bond to be void, otherwise
to remain in full force and effect

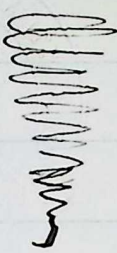
Calvin C Houghton 
Sam W Johnson 

State of Illinois
Henry County

I Amos Guice Clerk of the
Circuit Court for said County, do hereby certify
that the above and foregoing is a full true and
perfect copy of the Record of said Court in
said cause and also a true copy of all the
papers filed in said cause in my Office
Witness Amos Guice Clerk of said Court and
the seal thereof at Cambridge this 11th day
of April A.D. 1861

Amos Guice Clerk
By E. S. Bond Deputy



In the Supreme Court of Illinois
Calvin C. Houghton  Ottawa Term A.D. 1861.
v. Appeal from Henry.
Julius A. Durkee
Assignments of Error

1st The Court erred in overruling the
defendant's motion to suppress depositions
2 The Court erred in rendering judgment
for the plaintiff.

H. W. Miles for defendant
appellant

Charles C. Boney 
of counsel

277
Julius A. Durkin

v.s. *officer*

Calvin C. Houghton
appellant

Record

Filed April 18. 1861
L. Leland
Clerk

Charles C. Bowney
H. N. Wells
for appellant