

14362


No. _____

Supreme Court of Illinois

Banks

vs.

Banks .

71641  7

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

No. 14362

1863

~~Banks~~
Banks
vs
Bark

[Handwritten signature]

delivered the opinion of the court.

Mr. Justice

Preese, ~~et al~~ The only question presented by this record is as to the service of the ~~summons~~ ^{summons} in the case. The summons is in the usual form on which is this endorsement:

"I acknowledge service of the within summons upon me, as required by law, ^{this 9 day of May 1861,} by the same being read to me and receiving a copy of the same." George O. Banks"

In chancery, the service of a summons is by copy. Scates Comp. 139. Here is the written acknowledgment on the summons, signed ^{with} by the name of the defendant in the suit, that he ~~has~~ received a copy of it on the ninth day of May 1861. The summons is dated the eighth of May. The defendant was ruled to answer on the 20th of May, and on his failing to do so the bill was taken pro confesso and the matter thereof remanded by the court.

It is now insisted that the Court had no jurisdiction over the person of the defendant, for the reason the summons was not served upon him. This is a fundamental fact, and if it does not exist, the decree was erroneous.

~~The necessary jurisdiction~~
The decree recites that in appearing to the Court that ^{had} the respondent had been duly served with process more than ten days before the first day of the present term of Court, and no answer filed, &c

dent, and was his act. This finding, as in that case is conclusive, unless the defendant on a motion to set aside the default would show that the Court had erroneously found the fact.

In the case of Walker ^{vs} Gull, 20 id., 351, the service relied on was this: Comed the within writ on the within named George Walker by informing him of the contents of the ^{writ} and he accepting service the 12th of October 1860. This Court said the service was not sufficient, but it might have been sufficient if he had acknowledged service in writing upon the process. And the service is acknowledged in the most formal manner in the proofs and in writing, and we think it is sufficiently proved by the recital in the return. The return must be approved.

~~Clerk of Walker J.~~

~~In this opinion the whole case is affirmed.~~

Decree affirmed.

99 - 24.

Parks

or

Parks

—

opinion by

Phelan

O.K.

Records Book 13

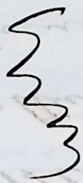
pp. 28.

Phelan

George O. Banks

vs

Louisa B. Banks



Suggestion in Reply to Depts Points

The case of Norwood vs Ridd shows
1. Ala, 195 The endorsement on the
process purporting to be an act of
of Surior - is certainly not sufficient
proof of that fact" but the record
recited "came the Pff & upon the
affidavits of Moses Jones as to the
handwriting of Henry Norwood to
the acknowledgment of Surior of the
bond upon him & the court affirmed
upon the strength of this Recital that
proof was received of the signature
to the admission & without it they may
clearly say the judgment could not have
been sustained

The case Lewis vs State Pff ^(404/3) where the
shff returned that he had executed the
bond on the Depts by their acknowledging
Surior of the same" is expressly overruled
by this court in Mahn vs Bell 348,

The statement of this Court in the latter case an acknowledgment being established the party is not accompanied by a further statement that it would be good without proof - & I suppose was not intended to be understood as any judicial determination of the Court as to whether it would give the Court jurisdiction if proved -

Staty or Precedent 13 Texas 394. It appears that the acknowledgment of service upon the writ in this case was in pursuance of an express provision of the statute authorizing it - & for aught that appears its ^{execution} might have been proved - the Reports of the case does not show what the Record was, but merely that a review by acknowledgment endorsed on the writ is good under the Texas Statute -

A statement of the facts proved, in a Decree, to show that the matters alleged in the Bill were established so as to entitle the Plaintiff to the Decree is a very difficult thing, from pursuing in the Record the ^{evidence} ~~evidence~~

upon which the court appeared
to base its jurisdiction on the
person of the Deft. - & the authorities
cited as to pursuing the evidence
in the Deem have no bearing
whatsoever upon the question

Commonwealth vs Phelps 27. Ills 496. It
as the law provides that a Sheriff Deputy
shall exercise the duties of his office
^{after the death of the Sheriff}
The Summons purported to be executed
by a Deputy the Court had the un-
doubted right to assume that it was
duly executed until the contrary was
made to appear - but in the case above
there was no review by any officer
from which a presumption of due
legal review ^{can} ~~could~~ be inferred
& the record shows that there was no
legal review of the work

Supreme Court of the State of Illinois
Third Grand Division - April Term
1863.

George O. Banks

vs

Louis L. Banks

3
3
3

Argument on part of Pff in Error

In this case, there was no service of
the summons by an officer authorized
by law to make the service, and the
only thing upon which the jurisdic-
tion of the Court below was based
was what purported to be an
admission of service of the summons
by the Pff in error, the execution of
which, was proved in no manner
whatsoever - Waiving, for the present,
the question whether the Court can
reign jurisdiction ^{over} ~~and~~ a Pff
by a simple acknowledgment of
service, the authorities I have cited
show very clearly, that at all
events, that if the record is based
upon such admission, the execu-
tion of the acknowledgment of
service must be proved in this
case no future can be made
that it was proved

It cannot be urged that the

recital in the Decree that it
appears that the debt having
been duly sued ~~with process~~, and
raised a presumption that will
sustain the Decree, because 1. The
Decree shows precisely how the Court
below ^{asumed to} acquiesced in jurisdiction - nothing
is left to inference and there is
nothing upon which to rely
in presumptions - The record shows
that the summons therein set out
was issued & was the only [#] one issued
and it cannot be presumed it
was duly served - because "due
service" is such a service as
the Statute requires - nothing else
can be due service in the eyes
of the law. On the contrary the
Summons shows that there was no
due service, in other words. that
there is no endorsement of service
and the Court cannot ^{therefore} presume
it was served by an officer
authorized to make the service;
the record contradicts the recital
in the Decree - at all events shows
that the Court recognized something
as due service or as evidence of
due service, which was neither

see Recs p
8+9 + 10

sustain

perhaps, it might be urged, if the Record recited that it appeared to the Court that the defendant had admitted service of process. That the Court received proof of this acknowledgment of service & thus the Verdict ~~might be sustained~~ but I still insist. That if the Court could base its jurisdiction upon admissions solely, the Record show show that the execution of the acknowledgment of service ~~was~~ ^{was} ~~proved~~ - But in this case, the Record does not, ^(show) nor does the Verdict recite that the defendant below admitted service.

But, I insist that the Court could not acquire jurisdiction in any such manner, if the Court could acquire jurisdiction upon proof of the execution of the acknowledgment of service, then it might acquire it by ^{simply} receiving proof that the defendant admitted to A. B. on the 21st, that he had been duly served with process in the cause. The ~~object of the~~ Statute ~~is~~ providing that certain officers shall serve process.

29th Feb 1870

What shall be evidence of service
 by an officer - What by of service
 by publication, ^{it suitably} includes the idea
that the Court has the right to
take any other evidence of service
than that prescribed by the statute
 the policy of the law undoubtedly
 is, that upon a question of such
great importance, to the party
affected by it, as the Jurisdic-
tion of the Court over his
person, that the evidence of it
required by the statute & none
other shall be received by the Court,
 and the only thing that can
 dispense with this legal evidence
 of service is the ^{formal} appearance of
 the party in Court either in person
 or by atty. which is not evidence
 of service, but ^{is} a formal waiver
of service in the presence of or upon
 the records of the Court, for although
 the Court may accept the formal
waiver of service through the
 appearance of the party in Court
 it cannot ^{obtain} acquire jurisdiction
 upon proof of his admission
of service. because the statute
only authorises it to proceed when

over his person

the party has been served in
 and prescribed evidence, of which service
 the manner times provided; this
 is the only way it can obtain
jurisdiction. # Suppose a case was
 pending before your Honors in
 this Court & the debt is as debt
 not appear to be served, would
 your Honors assume jurisdiction
 simply upon the verbal testimony
 or affidavit of some one that
 the debt in error admitted that
 he had been duly served with
 process? I think not.

Suppose, that a Deed recited
 that it appeared to the Court that
 the debt had been "duly served"
 with process, which the law says
 shall be 10 days before the first
 day of the term, & the record showed
~~showed~~ from the Return of
 the officer, that the summons
 was served, only one ^{day} would
 such a recital, in the Deed sup
 or suppose the Deed recited that the debt had been duly served
post it unless it could not,
 because, notwithstanding the recital,
 the Record would affirmatively
 show that there was no legal service.
 So, the Record in this case, notwithstanding
 the Recital in the Deed,

The summary commands the Sheriff to execute
 the process or make return as to how he has
 executed it

of service
 & this is a presumption

shows affirmatively. There was
no legal service because the
Clerk Cutlip ^(that he has given) & his record pro
ports to give, a full Return of
everything that the Court below
did in the case, & from which
it appears, there was no service
& no evidence of an admission
of service & consequently, no
jurisdiction: which is a matter
which ^{that} would appear to anyone
upon an inspection of the Record
notwithstanding the Recital in
the Decree - This is not like the
Case of a lost summons when
rights of preclusion have arisen
under a Decree reciting that there
had been due service; which
the law might presume if there was
nothing in the Record to negate
it, but in the case at bar, no one
could inspect the record without
seeing that every thing in fact,
upon which the Court based its
jurisdiction was, ^{what purported to be} a new admission
of service, & of the Execution, of
which there was no evidence
and in support of these views
I respectfully urge the Court to

the cases cited in my printed points
 on file and the provisions of the
 chancery act, It seems to me
 plain that the decree was
 rendered without a shadow of
 jurisdiction in the court rendering
 the same over the person of the
 defendant below & should therefore be
 reversed - L. S. Eldredge
 for ~~Jeffrie~~ Ewin

I notice that that the Dept^{atly} has thrown in at
 the ~~last~~ ~~of~~ his brief a statement ~~that~~
~~the~~ Dept for bankruptcy I suppose - that the
 Dept in error has since ~~maintained~~ ~~suggested~~ that
 it might be my income to her to have the
 Decree ~~voided~~. To this I wish to say, that this
 is a controverted question of fact ~~is~~ which is
 not before the Court ~~some~~ ~~think~~ ~~that~~ ~~she~~ ~~is~~ ~~married~~
 & some think ~~otherwise~~ but she has settled
 that question herself in this Court by appear-
 ing here to defend this suit by atty
 as ~~said~~ ~~L. Banks~~. No suggestion of her marriage
 has been made & no plea in abatement
 filed, & from which it appears that she
 is properly sued as a ~~free~~ ~~sole~~ - the Dept
 cannot ~~very~~ ~~properly~~ avoid ~~tending~~
 deny issue to the Court upon this question in
 a proper form when it could have been
 met and ~~ground~~ & ~~presumed~~ her statement
 made outside of the record will receive
 at the hands of the Court the ~~same~~ ~~consideration~~
~~any~~ ~~other~~ ~~unauthorized~~ ~~statements~~ ~~would~~ ~~receive~~
 & nothing more -

24 No 99
 Supreme Court

George O'Banck

or
 Louisa L. Banks

- Argument
 on part of
 R. Jeffrie Ewin

Given May 2 1867
 J. L. Linnell C.M.

Page 1
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State of Illinois }
LaSalle County } In Chancery
City of Peun }

Hear, Proceedings, Decrees
and Judgments, held and taken before the
Recorders Court of the City of Peun, in the
County of LaSalle and State of Illinois,
at a regular term thereof, commenced and
held at the City Hall, in the City of Peun,
in said County and State, on the twentieth
day of May A.D. 1861, and of the Indepen-
dence of the United States of America.
The Eighty fourth

Present Hear: William Chumasono presiding Judge
Herman Silver Clerk
E. L. Waterman Sheriff

Be it remembered that heretofore to wit
on the Eighth day of May A.D. 1861. a
Bill was filed in the Office of the Clerk
of said Court, in the words and figures
following to wit:

State of Illinois } In Recorders Court
LaSalle County } of said City of Peun
City of Peun } May Term A.D. 1861.

To the Honorable William Chumasono
Judge of said Court in Chancery sitting.

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Respectfully represents unto your Honor
your Orator Louisa S. Banks formerly
Louisa S. Beebe, that on or about the third
day of September A.D. 1844. at the City of
New York, your Orator intermarried with
one George O. Banks her present husband,
and lived with him as his wife at Great
Barrington in the State of Massachusetts
for about six years that on or about day
of September A.D. 1850. your Orator and
said Banks emigrated to the County of
Sasalle and State of Illinois, and have
resided in the City of Peru in said County
ever since that your Orator and said Banks
continued to live together as husband and
wife in said City of Peru until about the
nineteenth day of January A.D. 1861. that
at the time of your Orators Marriage as
aforesaid, said Banks was a widower,
having two Children namely, Mary
Banks aged four years and Steely
Banks aged about eight months, that said
Mary Banks is now of age and said Steely
is doing business for himself away
from home, that during all the time
of your Orators Marriage as aforesaid
she, she has exercised that Maternal
care over said Children, that would ever

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be required of a Kind and Humane
Mother and has ever been a faithful wife
to said Banks, and performed towards
him all her Marital obligations.

Your Orator further represents unto
your Honor that for four or five years
last past, said George O. Banks has been
unmindful and entirely disregarding
of his Marital obligations unto your Orator.

That during said time he has in
repeated instances violently assaulted
your Orator without cause or provocation
and inflicted upon her person, severe
and cruel blows, with his hand and
fist, in some instances when such
assaults were made said Banks was
more or less intoxicated.

Your Orator at such times
has often and repeatedly expostulated
with and reminded said Banks that she
could and would not endure such
treatment from him, and unless he
refrained from such abuse, she should
live separate from him at such times
said Banks would only reply, by
applying harsh epithets to your Orator
accompanied with curses and
defying your Orator to help herself
if she could, that your Orator

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continued to live with said Banks
against all her inclinations and desires
rather than, endure the mortification
and consequences, usually resulting
from a publication of such domestic
misfortunes, until on the said
nineteenth day of January A.D. 1861. said
Banks came to erew their mutual home
in a fit of partial intoxication and with
oaths upon his lips, told your Orator
to leave the house and never return
that they were eternally separated. Said
Banks then followed your Orator into an-
other room in the house and violently
assaulted with severe blows and threats,
and was compelled to desist by the timely
interference of third parties. That your
Orator then immediately left the house,
with the declaration that she should
never live with said Banks again
as his wife, which declaration has
been faithfully kept by your Orator.

Your Orator further represents
that for more than two years last past
owing to the treatment of said Banks
as aforesaid, and his habitual neglect
and a consequent alienation of her

affectionate Grand Juror, her life with him has been painful and delibrious in the extreme to her happiness and peace of mind that according to the understanding of your Orator he has treated your Orator with extreme and repeated cruelty.

And your Orator now represents unto your Honor, with much sorrow that her affections have become wholly and irrevocably alienated from said Banks to such degree that she could not live with him as his wife without enduring mental agony and torture, far more grievous to be borne than physical cruelty extreme and repeated.

Your Orator further represents, that if your Orator had the means of a separate maintenance, she would have been content with a life of separation from said Banks, and would never have resorted to the Judicial Tribunals of her Country to obtain relief from a life of unhappiness occasioned by domestic misfortunes.

But your Orator further represents unto your Honor, that said Banks

is destitute of property within the know-
ledge of your Orator, so that your Orator
cannot expect to obtain alimony,
Except it be the household furniture
now in possession of your Orator, that
your Orator will be compelled to engage
in some business to obtain for herself
a maintenance, that your Orator is
now engaged in keeping a boarding
house in said City of Perm, and desires
to continue in such business, but
your Orator believes that she cannot
successfully or safely do business with-
out great annoyance and inconvenience,
so long as she remains the legal wife
of said Banks, and subject to the
consequent disabilities, said Banks
may have and your Orator fears will
exercise the power to take from her
or in some way control the fruits of
her labors, that said Banks is insolvent
and much indebted, and his cre-
ditors might interfere,

In consideration of the premises
aforesaid, your Orator prays that said
George O. Banks be made a party defen-
dant to this Bill, and that he be

requested to answer the same but
not an oath the same being hereby
specially waived.

And that upon
a final hearing hereof your Honor
will order adjudge and Decree that
the Marital obligations heretofore ex-
isting between your Orator and said
Defendant be dissolved, ~~in all respects~~
and that your Orator be allowed in
all respects to conduct herself as an
unmarried person without the
interference of said Banks.

And for such other and further relief
in the premises as to your Honor shall
seem meet and proper, and your
Orator as in duty bound will ever pray.

C. M. Blanchard

Camp. Solicitors

State of Illinois }
Sasale County } } Louisa L. Banks Com-
plainant in above cause
says on oath that the matters and things
set forth in the foregoing Bill are true
in substance in fact

Louisa L. Banks

Subscribed and sworn to before me

This 10 day of May 1861.

C. Blanchard Not Pub.

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And afterwards to wit: on the said
Eight day of May A.D. 1861. a Summons
was issued out of and under the Seal of
said Court in the words and figures follow-
ing viz:

State of Illinois
Sabine County
City of Peru

The People of the State of
Illinois, to all Sheriffs, Coronors and Caus-
tates of said County, Greeting:

We command you to summon
George O. Banks, if to be found in your
County, personally to be and appear before
the Recorders Court of the City of Peru, on
the first day of the next term thereof,
to be holden at the City Hall in Peru, on
the third Monday in the month of May
instant to answer to a certain bill of
complaint filed in our said Recorders
Court, on the Chancery side thereof, against
him by Louisa S. Banks.

And have you then and there this writ,
and make return thereon in what manner
you execute the same.

Witness Herman Silver, Clerk of said
Court, and the Seal of said Court,

at Peew, This Eight day of May A.D. 1861.
A. Silver Clerk.

On the back of said Summons a return is made in the words and figures following viz:

I acknowledge service of the within Summons upon me as required by law this 9 day of May 1861. by the same being read to me and receiving a Copy of the same

George O. Banks

And afterwards to wit Monday May 20th A.D. 1861. the same being one of the days of the May Term of said Court for said year, an order was entered of record in said cause in the words and figures following viz:

Louisa L. Banks }
vs } Bill for Divorce
George O. Banks }

This day comes the Complainant by C. M. Blanchard her Solicitors, and on their Motion the Respondent is ruled to answer to the Bill of Complaint filed herein against him on or before the coming in of Court to morrow morning.

And afterwards to wit Tuesday May 21st A.D. 1861. the same being one of the days of the May term of said Court for said year, an order was entered of record in the words and figures following viz:

Louisa S. Banks of
vs
George O. Banks of
Bill for Divorce

This day again
comes said Complainant by C. M.
Blanchard her said Solicitors and the
Respondant being three times solemnly
called comes not nor any one for
him but makes default herein.

And afterwards to wit Thursday May
23rd A.D. 1861. the same being one of the days
of the May term of said Court for said
year a Subpoena was issued out of and
under the Seal of said Court, in the
words and figures following viz:

State of Illinois of
Sasale County vs.
City of Peru

The People of the State
of Illinois: to George D. Ladd & A. W. Sch =

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mouldt Greeting: - You are hereby
 commanded, personally to be and appear
 instanter, before the Recorders Court of the
 City of Peru, now in session at the City
 Hall in Peru, to testify and the truth
 to speak in a certain case now pending
 and now terminated in said Court,
 wherein Lousia S. Parks is Complainant
 and George O. Parks Defendant, and
 the part of said Complainant and this
 you will in no wise omit.

Witness Herman Silver, Clerk of
 said Court, and the Seal of said
 Court, at Peru, this 23rd day of
 May A.D. 1861.



H. Silver Clerk

And afterwards to wit on said 23rd
 day of May A.D. 1861. a Decree was
 Entered upon record in the words
 and figures following viz:

State of Illinois
 LaSalle County
 City of Peru

In the Recorders
 Court thereof May
 Term A.D. 1861.

Larissa S. Banks
 vs
 George O. Banks

Bill for Divorce

And now on this twentieth day of May A.D. 1861. the same being one of the days of said term of Court, came the Complainant in the above entitled cause, by her Solicitor and upon their motion the said Respondant is ruled to make answer to the Bill filed herein by the opening of Court in the morning of the second day of this term of Court, And again on the twenty first day of May A.D. 1861. the same being the second day of said term of Court, came the said Complainant by her Solicitors aforesaid, and the said Respondant being three times solemnly called comes not but makes default - and it appearing to the Court that said Respondant had been duly served with process more than ten days before the first day of this present term of Court and that no answer to said Bill had been filed herein, it is therefore ordered that the said Bill be taken against the said Respondant for confessed - And again on this twenty third day of May A.D. 1861. the same being one of the days of said term of Court this cause

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13.

coming on to be heard upon the Bill of Complaint
filed herein and the same taken for confessed
as aforesaid and it appearing from the proofs
produced and Exhibited on the part of the
said Complainant herein, that the parties to this
suit were married on or about the third day of
September A.D. 1844. and had continued to
live together as husband and wife until about
the 18th day of January A.D. 1861. as alleged
in the said Bill, since which time they
had lived separate, and it further appearing
to the Court that the said George O. Banks
had been guilty of treating his said wife
Louisa L. Banks with extreme and
repeated cruelty for some time preceding
said last mentioned date as alleged
in said Bill of Complaint, it is therefore
ordered adjudged and decreed that the
Bonds of matrimony heretofore sub-
sisting between said George O. Banks
and Louisa L. Banks be dissolved and
no longer binding and that said Louisa
L. Banks be allowed to conduct herself
in all respects as an unmarried person,
and that the said Respondant pay
the Costs of this Proceeding

Wm Chumason

Judge

State of Illinois
Sasale County

City of Peun
I Herwan Silver, Clerk
of the Recorder's Court of
the City of Peun, in said County and State
do hereby certify that the above and
foregoing comprises a true, full, perfect
and complete record in the case of
Louisa S. Banks vs. George O. Banks as
the same appears of record and on file
in said cause in my office.

In Testimony whereof I have hereunto
set my hand and the seal of said
Court at Peun This fifteenth day
of January A.D. 1863.

H. Silver Clerk

Supreme Court of the State of Illinois - Third
Division

George O Banks plaintiff in error

vs
Louisa S. Banks Defendant in error

And now

comes the said George O Banks, plaintiff
in error by G. S. Eldridge his attorney
that in the Record and proceedings aforesaid
and in the Recitation of the Record aforesaid
there is manifest error, and the

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Said Plaintiff alleges the following grounds of error viz:

1. That the Bill of Complamant of the said George O. Banks does not make or state such a case as entitles her to the relief therein prayed for as to the Decree therein rendered

2^d That there was no legal source of the Decisions in said Cause

3. That there was no evidence of the admissibility of the said George O. Banks of the Decree of said Decisions

4. That the Court below never acquired jurisdiction over said George O. Banks to render such Decree & that said Decree was void for want of jurisdiction in the Court below to render the same

5. That by the laws of the land the said Decree ought to have been rendered for the ^{Respondent} ~~Complamant~~ in the Court below. & whereas it was rendered for the Complamant

6. That no evidence was received by the Court below of the fact in said Bill alleged to be in favor for the errors of said

Other errors in said Record &
proceedings aforesaid & in
the Rendition of the Jury after
said the same ought of right
to be reversed & a new trial granted.

G. S. Stande Atty for
Plff in Error

And now comes the said defendant's error
by Selaud & Planchard their attorneys and
say that in said record & proceedings there
is no error

Selaud & Planchard
for defendant in error

24 99
Appellate Court

George O. Smith
Plff in Error

Plff in Error

Conrad & Smith

Def in Error

Record in

Filed January 23 1863

L. Leland
Clerk

Edw. ...
Att. ...