

No. 12551

Supreme Court of Illinois

Day

vs.

Hackney

~~104~~ 58.

Dwyer

Hackney

58

1858.

1255/

X.

Refused

State of Illinois }
County of Cook } p.

Pleas before the Honorable John M. Wilson
Judge of the Cook County Court of Common Pleas within and
for the County of Cook and State of Illinois, at a vacation
term of said Cook County Court of Common Pleas, begun
and held at the Court House in the City of Chicago in
said County and State on the first Monday being the
seventh day of July in the year of our Lord one thousand
eight hundred & fifty six, and of the Independence of
the United States the eighty first

Present the Honorable John M. Wilson, Judge
James S. Beach, Coroner & acting Sheriff
Walter Kimball, Clerk.

Attest

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Be it remembered that heretofore, to wit, on the tenth day of July in the year of our Lord one thousand eight hundred and fifty six, said day being one of the days of the July vacation term of the Cook County Court of Common Pleas within and for said County and State, the following among other proceedings were had in said Court, and entered of record, to wit:

Defendant Jb M Day by his Attorney filed with the clerk the bill of exceptions signed and sealed by the Judge of this Court. which is in the words and figures following viz-

State of Illinois, }
Cook County, } p.

In the Cook County Court of Common
Pleas July Term 1856. In the
Matter of a motion, by

Benjamin Hackney
Levi Jenks & Albert Jenks

vs
Henry M. Day, Sheriff
of the County of Kendall

Be it remembered that on the
10th day of July A.D. 1856, when said motion came on

to be heard, the said plaintiffs appeared by Goodrich, Farwell & Scoville, and the defendant N. M. Day appeared by B. F. Fridley as his Attorney and resisted said motion.

And thereupon plaintiffs read to the Court an execution with said Sheriffs return & endorsements thereon, in favor of said plaintiffs & against John W. Chapman and Clark B. Alford, issued from said Court dated the 14th day of March A.D. 1855, for Five hundred & ninety three dollars and nine cents, besides Cost which execution and on which was a receipt signed by Jeremiah J. Cole & the endorsements thereon, was and is in the words and figures following, viz:

State of Illinois,

County of Cook,

}
} The People of the State of Illinois,
to the Sheriff of Kendall County - Greeting

We command you that of the Lands and Tenements, Goods and Chattels of Clark B. Alford and John W. Chapman defendants in your County, you cause to be made the sum of Five hundred and ninety three dollars and nine cents, which Benjamin Hackney, Levi Jenks & Albert Jenks plaintiffs, lately in the Cook County Court of Common Pleas of said County, at a term thereof begun and held at Chicago, in said County, on the first Monday of February last past, recovered against the said defendants and which by the said Court was adjudged to the said plaintiffs for their damages. And also, the further sum of

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four dollars and seventy cents, which were adjudged to the said plaintiffs for their costs and charges in that behalf expended, whereof the said defendants were convicted as appears to us of record: And have you these moneys ready to render to the said plaintiffs for their damages and costs aforesaid, and make return of said writ with an endorsement thereon in what manner you shall have executed the same, in ninety days from the date hereof.

D. S.

Witness, Walter Kimball, Clerk of our said Court, and the seal thereof, at Chicago, in said County, this 14th day of March A.D. 1855.

Walter Kimball Clerk.

(Endorsements on said writ)

Received this writ March 15, A.D. 1855 at one o'clock P.M. from J. J. Cole agent for plaintiff

H. M. Day Sheriff of Kendall County

March 15th 1855, By virtue of the within execution Seized on the following described Real Estate in Township number 36, Range 7 East of 3rd principal Meridian, and more particularly described as follows,

Beginning at a point South from the North East corner of the South West quarter Section number 3 three, Township (36) thirty six Range 7 East on the quarter Section line thence South 51° West fourteen chains and 88 links to the North West corner of Land

conveyed by said Clarke B. Alford to L. Ferris and
place of beginning, thence North $16^{\circ} 50'$ West eleven
chains to the center of a State Road, thence South 59°
West along said Road 7 chains and 60 links to the
center of a Road, thence South 31° East along said
Road 11 chains 24 links, thence North 51° East four chains
97 links to the place of beginning, Containing Six $\frac{98}{100}$
acres of Land for further reference see deed from
David Ferris to the said party of the first part Recorded
Book A. page 533, Also one other piece or parcel of
Land being parts of Sections 3 and 10 in Township 36
Range 7 East 3^{rd} principal Meridian, and bounded
and described as follows, beginning fifteen chains
6 links North of the South West corner of the South West
quarter of Section number (3) three thence South along
the West line of Section (3) three and 10 thirty four chains
56 links to land now or formerly belonging to G. Stevenson,
thence South 87° East forty chains 6 links to the
East line of the North West quarter of Section 10, thence
North along the East line of the North West quarter
of Section (10) ten and the East line of the South West
quarter of Section (3) three forty one chains 24 links,
thence West ten chains 37 links, thence 9° West Eight
chains 91 links to the Center of a County Road, thence
South 58° West along the center of said Road thirty-
four 98 links to the place of beginning containing
One hundred and seventy one acres and $\frac{41}{100}$ of land,
lying and being in the County and State aforesaid,

Also one other piece or parcel of Land bounded and described as follows, beginning at the South East corner of Section number thirty three (33) Township 37 North Range 7 East, thence West 3 chains 87 links, thence North $45^{\circ} 20'$ West 3 chains 50 links, thence North 6° East seven chains 58 links, thence North $52^{\circ} 50'$ East 7 chains 31 links, thence East parallel with the South line of Section 34 twenty chains, thence South on the one eighth section line 14 chains 52 links, thence West on section line twenty chains to the place of beginning, containing thirty four acres and $\frac{90}{100}$ of an acre of land more or less, for a further reference see deed from James McClellan and wife to the said C. B. Alford Recorded in Book D page 534 of the Records of said County of Kendall, the whole of the Lands above described containing two hundred and sixteen Acres $\frac{29}{100}$ of an acre more or less.

Also the following described personal property,
2 Horses, 7 Cows, 1 three year old Heifer, 8 two and three year old Steers, 7 yearlings, 1 Hog, 20 Sheep, 1 lumber Wagon.

H. W. Day Sheriff
of Kendall County

The above Real-estate was by me advertised according to law by giving a Notice upwards of twenty days previous to the twenty fifth day of June A.D. 1855 at 1 O'clock P.M. when the said Real Estate aforesaid was by me sold & the same was struck off.

to Jeremiah J. Cole agent for the said plaintiffs
for the sum of Six hundred and nineteen dollars
and nine cents being the amount of said debt and
costs & interest and he the said Jeremiah J. Cole
being the highest and best bidder but no money
was paid to me, the Land being bid off as aforesaid
by said Jeremiah J. Cole and this Execution is retur-
ned in this manner by his direction.

Henry M. Day, Sheriff
Kendall County.

Rec^d of H. M. Day Sh^r of Kendall Co. the amt^t of
debt & costs on the within Ex^t for Mackney Jenks & Co
Jeremiah J. Cole.

Filed July 7th 1856

W. Kimball Clerk.

Plaintiffs then read in evidence a notice
and an Affidavit of James G. Barr thereto attached,
which Notice and Affidavit are as follows, viz:

To Henry M. Day Sheriff of Kendall C^y Illinois,
Sir,

You are hereby notified that there is now due the
sum of Two hundred & forty three ³³/₁₀₀ (\$ 243.33) dollars
or thereabouts to the plaintiffs on an Execution in
your hands wherein Benjamin Mackney & Levi
Jenks & Albert Jenks were plaintiffs and John

W. Chapman & Clark B. Alford were defendants,
And also on a fee Bill in the same case which
Execution & fee Bill issued out of the Cook County
Court of Common Pleas of the State of Illinois, said
Execution being for the sum of Five hundred &
ninety three dollars & nine cents damages & four
dollars & seventy cents costs & said fee Bill for the
sum of One dollar & thirty cents, & were dated the
14th day of March A.D. 1855 or thereabouts.

And demand is hereby made upon you for
the money due thereon (said fee Bill & Execution)
And you are further notified that unless you
return said Execution & fee Bill & pay over said
money to said plaintiffs or their attorney within
ten days from date hereof, that at the next term of
said Court aforesaid to be holden at Chicago on the
first Monday of July next, to wit, On the first day
thereof or as soon thereafter as hearing can be had
said plaintiffs will apply to said Court for relief
according to the Statute in such case made & provided,
and for a judgment against you for the amount
due them together with twenty per cent. damages
according to statute.

Benjamin Mackney, Levi Jenks &
Albert Jenks plaintiffs
per J. G. Barr Plffs atty.

Chicago June 13th 1856.

I hereby acknowledge service of this notice upon me, &
waive all exceptions as to form or time of service.
N. M. May Sheriff of Kendall Co.
June 13, 1856.

State of Illinois
Cook County, ss. Jas G. Barr of Kane County in
said State being duly sworn,
deposes & says, That Benjamin Mackney, Levi Jenks
& Albert Jenks on the 14th day of March A.D. 1855
recovered a judgment in the Cook County Court of
Common Pleas, against Clark B. Alford & John
W. Chapman for the sum of Five hundred & ninety
three dollars and nine cents & costs, & thereupon
an Execution was issued upon said judgment for
said damages & four dollars & seventy cents costs,
as also a fee Bill against defendants for One dol-
lar & thirty cents, & directed to the Sheriff of Kendall
County Illinois, That on the following day said
Writs were by this affiant forwarded to Kendall
County to be delivered to the Sheriff thereof, with
directions to have the same levied. That on the
next day as this affiant recollects, to wit, March
16th 1855 this affiant went to Oswego in said County
to attend to the same, called on said Sheriff
(Henry M. Day) who informed him that he had
received the same (said Writs) & had levied upon
Real Estate of defendant Alford; & this affiant
consulted & directed him in regard to the same.

This affiant having heard that said lands so
levied upon were to be sold on the 25th day of June
A.D. 1855 went to Oswego in said Kendall County
to attend the sale, he then learned that said

Sheriff had two other executions levied upon the same property, & that if the same was sold, it would be sold upon all of said Executions, one of which as this affiant recollects & believes was in favor of Jeremiah J. Cole of Oswego - That as he understood that said Cole perhaps with others, was trying to purchase the premises levied upon, of said defendant Alford, & negotiations were going on when this affiant had to leave. That said Cole informed this affiant that if said premises were sold upon said Executions he intended to bid off the same for enough to cover all of said judgments &c. & with that understanding this affiant left Oswego before said sale was made, And that said Sheriff knew at the time that this affiant was there attending to the same as the Attorney of plaintiffs -

That afterwards this affiant learned that said premises were sold & bid off by said Cole, & went to Oswego to see about the same & get the money thereon,

That he called on said Cole & enquired for the Sheriff &c. who informed this affiant that said Sheriff was not in Oswego, but that he could pay a part of the money going to plaintiffs, & this affiant received of said Cole, as he recollects, Four hundred dollars to apply on the same.

That this affiant understood from what he has seen & heard that said Sheriff kept his official papers at Oswego in the Office of said Cole, & that

when property was bid off or redeemed by said Cole, the money was not paid over at the time, but credit given on the deal between the parties as a deposit or otherwise.

And this affiant states that from his recollection of the contents of the record of the certificate of sale as recorded in the Recording Office of Kendall County, that said premises were sold upon all of said Executions together & but one Certificate of purchase given for the whole & that to said J. J. Cole. That afterwards he saw said Execution with a return thereon which he believes to have been in the hand writing of said Sheriff in form or substance as follows, "I return this execution satisfied, money paid to plaintiffs" which return was upon the same on the 13th day of June A.D. 1856 & before, but that the same is now erased,

And that the return now appended to said execution was not then on the same & he believes that the signature thereto is not in the hand writing of said Sheriff & that the said return does not state to whom the Certificate of sale was made.

This affiant also says, that the receipt on said Execution signed by said Cole was not on said Execution at any time when he saw the same as he recollects & believes, until this 7th day of July 1856, nor the words "from J. J. Cole agent for plaintiff" in the endorsement of the receipt thereof by

the Sheriff, and this affiant did not know of any pretence by said Sheriff or said Cole, that said Cole was the the agent of said Plff in this matter until about one year after the delivery of said execution to said Sheriff as he now recollects or believes, & he believes that said pretence & said returns have been got up by & between said Cole & said Sheriff to delay & hinder said plaintiffs.

That said Execution was sent by this affiant to said Cole as a friend with a request that he would hand the same to said Sheriff &c. & not with the idea that he was or should be the agent of said plaintiffs in & about the same, & he believes said return is untrue as far as it states any agency of said Cole except as aforesaid.

This affiant further says that he has twice made demand upon said Sheriff (H. M. Day) in writing to pay over the balance due to plaintiffs upon said writs to said Plaintiffs or their Attorney & also to return said writs; Notwithstanding which said Sheriff has neglected & still does neglect to pay over the same - & the present returns on said Execution have been made thereon since such demand as he believes, having seen the said Execution on the day said notice was served.

This affiant also says that in all his acting & doings aforesaid, in taking judgment & attending

to the same, he was the Attorney of said plaintiffs
I was the only one employed to his knowledge by
them in & about the same - Also that said Cole
is not to the knowledge or belief of this affiant
an Attorney at law in this State.

Also that the accompanying notice was
served upon said Sheriff on the 13th day of June
A.D. 1856.

This Affiant therefore as the Attorney of
said plaintiffs, prays that said Sheriff, Henry
M. Day may be required to pay over to said
plaintiffs or their Attorney the money so due
to said plaintiffs upon said Execution, and that
in default thereof said plaintiffs may have
such order & relief in the premises as is by Statute
in such case made & provided.

Jas. G. Barr.

Subscribed & sworn to before
me this 7th day of July A.D. 1856.

Walter Kimball Clerk.

Plaintiffs also read in evidence affidavits of
Levi Jenks and Albert Jenks (two of the plaintiffs)
which affidavits are in the words & figures follow-
ing, viz:

State of Illinois }
Kane County } sp.

Levi Jenks being duly sworn

deposes & says, that he was one of the plaintiffs in the suit of Benjamin Mackney et al, vs Clark B. Alford & John W. Chapman; wherein there was a judgment in the Cook County Court of Common Pleas in March A.D. 1855. That the Note then sued upon was put into the hands of J. G. Barr as the Attorney of Plaintiffs & this affiant intended that said Barr should have full control of the same: That this affiant does not now recollect of ever authorizing said Cole to act in any manner as the Agent of plaintiffs in collecting said judgment; That it is possible that in correspondence with him he may have enquired something about the same. - That said J. G. Barr by request of this affiant for Plaintiffs went to Oswego, Kendall County on the day of sale to attend to the same. That said Barr informed him on his return that he did not know certainly what would be done, that negotiations were pending between said Cole & others with defendant Alford to either purchase the property levied on or get a release of his Homestead Exemptions, but that in case of sale of the premises said Cole had informed said Barr that he intended to bid off the property for enough to cover the several executions levied thereon. - That afterwards & after the sale said Cole called on affiant &

informed him that he was to pay Plaintiffs their demand & as this affiant recollects he subsequently wrote to said Cole to know why the same was not paid as he had informed him he was to do, but that this affiant does not now recollect of ever authorizing said Cole to be the agent of said Plaintiffs in collecting said judgment or bidding off the property for them at the sale upon said Execution. And this affiant believes that he was the only one of said firm or Plaintiffs that ever had any correspondence with said Cole about said matter in any way.

Levi Jenks.

Subscribed & sworn to before me
this 8th day of July A.D. 1856

Jas E. Barr, Justice of the Peace

State of Illinois,
Kane County, ss.

Albert Jenks of Aurora in said County, one of said Plaintiffs, being duly sworn deposes & says, that to the best of his present recollection he never had any correspondence with said Cole in regard to the matters specified in the above affidavit of Levi Jenks. Nor did he as one of said firm, himself ever authorize said Cole to be the Agent of said plaintiffs in collecting said judgment or bidding off said property &

that whatever correspondence was had with said Cole in any way, he believes was done by said Levi Jenks & not either of said other Plaintiffs.

Albert Jenks.

Subscribed & sworn to before me
this 8th day of July A.D. 1856.

Jas G. Barr Justice of the Peace.

State of Illinois }
Kane County } p.

I, James Herrington, Clerk of the County Court, within and for the said County, do hereby certify, that James G. Barr was on the 8th day of July A.D. 1856 an acting Justice of the Peace, within and for said County, duly commissioned and sworn.

And that I am well acquainted with the hand writing of said Justice, and verily believe his signature above is genuine.

S.S.

Given under my hand and the seal of said Court, this 8th day of July A.D. 1856.

James Herrington, Clerk.

This was all the evidence given, and all the evidence offered by the Plaintiffs.

Defendant then read in evidence an extract from a letter written by plaintiffs under

date March 9th 1855 to Jeremiah J. Cole, which extract was as follows

"Can that demand against Alford & Chapman be collected if sent to you"

Defendant also read in evidence another letter written by plaintiffs to Jeremiah J. Cole and dated January 3rd 1856, which letter was & is in these words, viz:

"Can you get at that old matter of John Chapman & Alford, bal due Mackney, Jenks & Co. - and send it to me on receipt of this - If not can you give us a statement of the bal. due and how we must proceed to get it."

This was all of the evidence given in the case - & thereupon the matter was submitted to the Court after argument, and the Court took the same under advisement - And again on the 16th day of July - the Court upon consideration rendered judgment and made the following order

Benjamin Mackney.	}
Levi Jenks & Albert Jenks	
vs	
Henry M. Day, Sheriff	}
of Kendall County	

This cause coming on to be heard before the Court upon an application by said plaintiffs for a rule on said defendant

to pay over the money upon and to return the execution heretofore issued to him out of this Court, upon a judgment in favor of said plaintiffs, against Clark B. Alford & John W. Chapman defendants, recovered at the February term of this Court A.D. Eighteen hundred & fifty five, for the sum of Five hundred & ninety three dollars & nine cents damages & four dollars & seventy cents costs of suit, which execution was issued on the fourteenth day of March A.D. Eighteen hundred & fifty five, And it appearing to the Court that said Sheriff of Kendall County has returned said Execution since the service of notice upon him by the plaintiffs in this cause; to wit, On the seventh day of July A.D. Eighteen hundred & fifty six, and that from his return thereon endorsed, he sold property of the said defendants on said execution to make the money thereon, on the twenty fifth day of June A.D. Eighteen hundred & fifty five, and that the same was struck off & sold to Jeremiah J. Cole, who is stated in said return to have been the Agent of said plaintiffs, for the sum of six hundred & nineteen dollars and nine cents, the amount of said judgment and costs and interest to that date.

And it further appearing to the Court, from the evidence that said Cole was not the agent of the plaintiffs as alleged in said return

to which decision of the Court in sustaining said
motion and rendering said judgment the said
defendant Henry M. Day by B. F. Fridley his
attorney then and there excepted.

at the time of said sale nor since, And further
that said Sheriff collected on said execution
the money due thereon, June twenty fifth Eight-
teen hundred & fifty five, And further that said
plaintiffs have received the sum of Four hundred dollars
on said execution, And that the amount now due to
them thereon from said Sheriff is two hundred and
nineteen dollars and nine cents, besides the penalty
imposed by the statute: And the Court being now fully
advised in the premises, Orders, that the said Sheriff
Henry M. Day, pay over to said plaintiffs immediately
the said balance of Two hundred & nineteen dollars &
nine cents on said execution with twenty per cent there-
on from the time of collection, to wit from June 25th 1855
till paid, And further that he pay the costs of this proceeding.

And thereupon the said Henry M. Day by
his Attorney B. F. Fridley enters his motion herein for
a new trial in this cause, which motion is over-ruled
by the Court, to which ruling & decision of the Court the
said Day excepts, and prays an appeal to the Supreme
Court, which is allowed on his filing his appeal bond
in the sum of Five hundred dollars with Joseph
Kennedy as security, said Bond and bill of Exceptions
to be filed within fifteen days from this day.

~~(To which decision of the Court in sustaining
said motion and rendering said judgment the said
defendant Henry M. Day by B. F. Fridley his Attorney
then and there excepted.)~~ Defendant then moved for

a new trial which the Court refused & def^t. excepted and prayed that this his bill of Exceptions should be signed, sealed and made a part of the record, which is done.

John W. Wilson Seal

This is right I believe

Geo Scoville.

B. F. Fridley.

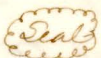
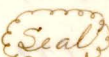
And afterwards, to wit, On the twenty fifth day of July in the year last aforesaid the said defendant filed in the Office of the Clerk of said Court, his appeal Bond which said Bond is in the words and figures as follows, to wit.

Know all men by these presents, that we Henry M. Day and Joseph Kennedy of Kendall County in the State of Illinois are held and firmly bound unto Benjamin Mackney, Levi Jenks and Albert Jenks, in the penal sum of Five hundred dollars, to the payment of which sum well and truly to be made we do bind ourselves, our heirs, executors and administrators jointly and severally firmly by these presents.

Witness our hands and seals this 22^d day of July A.D. 1856.

The condition of the above obligation is such, that whereas the said Benjamin Mackney, Levi Jenks

and Albert Jenks did at the July term A.D. 1856
of the Cook County County Court of Common Pleas, in
the County of Cook and State of Illinois, in a proceeding
by motion against the above bounden Henry M. Day
as Sheriff of Kendall County in said State, recover a
judgment in said Court against the said Henry
M. Day for the sum of Two hundred and nineteen
dollars and nine cents, together with costs and a pen-
alty of twenty percent per annum on said sum from
the twenty fifth day of June A.D. 1855, from which judg-
ment the said Henry M. Day prayed an appeal to the
Supreme Court of said State. Now if the said Henry
M. Day shall duly prosecute his said appeal and
shall will and truly pay the said judgment, costs,
penalty and interest in case the said judgment
shall be affirmed by the said Supreme Court, then the
above obligation to be void, otherwise to be and remain
of full force and virtue.

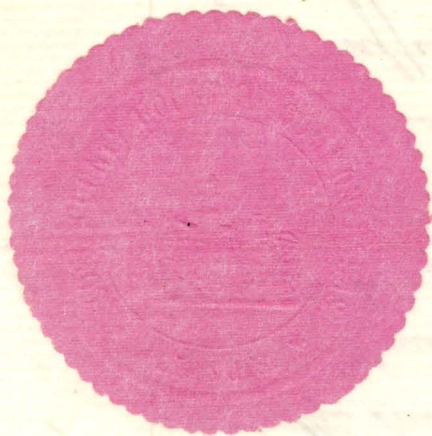
Henry M. Day 
Joseph D. Kennedy 

State of Illinois
County of Cook } S.S.

I. Walter Kimball Clerk
of Cook County Court of Common Pleas. in and
for said County, do hereby certify that the above
and foregoing is a full and true transcript of
all the papers on file in my office, and of the
proceedings entered of Record in said Court in the
case in which Benjamin Hackney Levi Jenks &
Abner Jenks. are plaintiffs and Henry M. Day
Sheriff of the County of Kendall defendant.

In testimony whereof I hereunto
subscribe my name and affix the seal
of said Court at the City of Chicago
in said County this 17th day of
April AD 1857

Walter Kimball Clerk



State of Illinois
Supreme Court - April Term
1858

Henry M. Day

vs. } appeal from
Benjamin Hackey et al } Cook
County

And now comes said Henry
M. Day appellant in said cause
by J. Lyle Dickey his attorney
and says that there is manifest
error in the record - proceedings
and judgment aforesaid,
and prays that said judgment
may be reversed and for nothing
held - and presents the
following assignment of errors

- 1st The court below erred in rendering
judgment against appellant -
- 2nd The court erred in admitting improper
evidence against appellant.
- 3rd The court erred in rendering
judgment for the amount and
in the form stated in the record

4th The Court erred in rendering judgment in favor of appellees -

5- The Court erred in finding the facts as stated in the record upon the evidence in the case

6th The Court Erred in ^{not} granting a new trial to appellant -

9th The Court erred in rendering judgment for 20 per cent - upon the amount unpaid on said supposed judgment - from the 25th of June 1855 -

10th - The Court Erred in giving judgment in such proceeding for money supposed to have been collected upon a fee bill

Apr 27, 1858

Isaiah Drisker
Atty for appellant

Drfts commission in error & much for drfts.

184 58
Jay
vs.
Hackney -

Record

Filed April 21 1867
L. Leland
Clerk

H. M. Day appellant

^{vs}
Brig. Jackson et al appellees

Argument for appellees -

The abstract shows the facts in the case -

¶ The Court below found that the
Calk was not the agent for
the pliff. in the execution -

Is not this fact clearly made out in
the facts & testimony?

1st Calk was not an attorney, and
had therefore no implied authority
from his employment or otherwise -
Therefore, he and those claiming
protection under his acts, must
show a specific, express power
conferred by his principals -

All the evidence they offer is the letter
of Jackson & Smith of March 9th
1833, in which they ask of him
whether the judgment can be col-
lected - This was 5 days before the
execution issue - Calk does not
show he ever answered this letter
at all - And the fact that the

a paper, did not send the execution
to him, is clear evidence that they
had not constituted him their agent
and had made no arrangement with
him to act as their agent. If he
had any letter from them directing him
to act as their agent in the matter,
he would have produced it, and
its non production is evidence of
its non existence. If they had con-
stituted him their agent, they would
have sent the execution to
him. But instead of doing so,
they even atty. obtains, and
sends the fr. fr. to Cole as a friend
requesting him to hand it to the
Sheriff - If that letter constituted
him their agent, or conferred
on him any power in the prem-
ises, except a request to hand
it to the Sheriff, he could have
produced it and settled the point.
Its non production is evidence of
its non existence the non existence
of any such authority.

2^d There is nothing else relied upon
as proof of such agency, except
the sales agent's letter; This was written
after the sale, and could confer

no power - Instead of insisting,
that a knowledge or expecta-
tion that Cole had bid off the
land for them, the inference is directly
the contrary - They want to know how
they can get at it, & the balance
due - This was doubtless after
he had paid the \$400 to Pan, and
said "The payment by Cole of
the \$400 is a direct admission
that the money had been received on
the fi. fa. And Cole makes no su-
ggestion that the land had been bid off
for plaintiff in the execution - It was
certainly an accommodating
agent, bid off land in his princi-
pal's name, and then pay them
\$400 of the proceeds much as may.
The future is too hard to leave even
the emblem of probability.

5th The testimony of Pan is conclu-
sive - He swears he only owes
the fi. fa. to Cole as a fund with
a request to hand it to the plaintiff.
He was not a guaranty, or any thing
from which any power results, except
to execute the power given, to wit to

to land the p. fa. to the Sheriff. When
this was done his power was executed,
and ended.

But Cole told Pan he intended to
sell off the lands for enough to satisfy
by all the executions.

Pan says one of these executions he
believed was in favor of Cole. If
it was not, Cole or the Sheriff on
this motion could have shown
it, and this was material, & his
not having done so is a con-
firmation of Pan's testimony in
this respect. And shows that Cole
was endeavoring to get the lands,
and to buy he intended & agreed
to bid them off for the amount of all
the executions.

Besides Pan saw the Sheriff & di-
rected him in relation to the execution,
which was notice to him, that he
was the agent for the p. fa. -

II II

The facts show a combination & con-
currence of action between Cole and
the Sheriff to defraud the creditors.

1st Dan Stowers testifies that when he saw
the fr. fr. in the hands of the Sheriff,
the words "from J. S. Cole agent for plain-
tiff" were not on it - and that these words
He further Stowers that he saw the ex-
ecution after the return was made &
that the return then on it was, "I
return this execution satisfied - money
paid to sheriff." And that the return now
on the execution was not then on it,
and this was more than one year after the
date of the execution -

The subsequent return on the execution
is not in the hand writing of the Sheriff.
and does not show any certificate of
sale made and, nor to whom it had
been made and. If any had been made
and he ought to have shown it in his
return - it was in his power to do so, &
not having done so the presumption
is he never found any -

2nd We say no evidence exists respecting
the Sheriff to pay over the money to
Cole, and any such payment if it

was made, ~~there~~ is no satisfaction, left
the Sheriff, still liable to us. But it is
clear from all the facts, that this pro-
tector of agency was got up afterwards,
between the Sheriff & Cole to defraud
the asphaltum, and this new return made
in fulfillment of such fraudulent pro-
pense.

The receipt of Cole from Deane was
not an execution when he saw
it in 1856

- 3 The testimony of Deane shows the Sheriff
kept his possession Cole's office - from
which & other facts, it appears there was
some confidential relation between
Cole & the Sheriff, by which Cole was
enabled to induce the Sheriff to lend him
self to this fraud -
- 4 Deane also swears, that when he called
at Cole's office, he said the Sheriff was
out of town, and he could pay part of
the money. When did this money come
from? if Cole laid in the land as agent
for Sheriff? Deane understood the money
was considered in the hands of Cole as
a deposit. All these facts show con-
clusively that he hid off the land

On his own account, and at that time
he had no idea of setting up an agency -
If he had hid off the land for profits, why
did he not then say so, and deliver
over the Certificate, instead of paying over
Money he was under no obligation to pay,
& which had now been collected on the
execution?

Yet the facts demonstrate there is
no agency of Cole, to hid off the land or
re-cipe the money - There is no proof of
it, and as his agency was no official,
it must be proved -

This is like the verdict of a Jury, & there is
evidence to sustain the verdict finding

IV

I have not the record present, and
the abstract does not show what
reasons if any were filed for a new trial,
or whether there were any -

The finding of Judge was certain. & if there
be any clerical error, it is cured by the
statute of Jeofails - By the 44th Sec. of Practice
Act, the form of the writ is given, & in this case the writ
is in form of the statute. It is an order not a judgment.

Wm. Madrick
for debts in error

58
4. (Mr. Way appointed.)

Truj. Quaking et al
as follows.

Argument for
as follows.

No 58

Filed May 14. 1858
L. Leland
clerk

Grant Guardian
for as follows

VI