

8769

No. \_\_\_\_\_

# Supreme Court of Illinois

D. M. Walsh

---

vs.

H. Horner

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71641  7



State of Illinois  
Monroe County

Monroe County  
Circuit Court, May  
Term A. D. 1864

Be it remembered that hitherto, to wit on the 20th day of November, A. D. 1863 the following writ was issued, out of the office of the clerk of the Circuit Court of said Monroe County, in the words and figures, as follows, to wit:

State of Illinois vs The People of the State  
Monroe County of Illinois to the Sheriff  
of said County Greeting,  
Whereas at the October Term A. D. 1863 of the Circuit Court of the said County a Judgment was rendered, in favor of David O'Kelly and against David M Walsh for the sum of Four Hundred, twenty nine dollars and 16 cents Damages and cost, upon which Judgment Execution has been duly issued and returned by Charles Frick Sheriff of said County, no property found, and whereas affidavit has been made and filed before me, setting forth that the said David M Walsh has no property within the knowledge of the affiant, in his possession, liable to Execution, but that he has just reason to believe that Harrison Prince is indebted to the said defendant, or has Effects or Estate of said defendant in his hands. We therefore command you to summon the said Harrison Prince if he shall be found in your County personally to be and appear before the Circuit Court of said Monroe County, on the first day after the next term thereof to be holden at the Court house



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in Waterloo, in said Monroe County, on the 2nd  
Monday of May next, 1864 to answer as you  
wish in said cause, and to abide such order  
or Judgment as shall be made or rendered  
in the premises, And have you then and there  
this writ with an endorsement thereon, in what  
manner you have executed the same.

Witnes William Ord Clerk of our  
said Circuit Court and the seal  
thereof, at Waterloo aforesaid, this 20<sup>th</sup>  
day of November, A. D. 1863  
W<sup>m</sup> Ord Clk

upon which writ there appears the following  
endorsement to wit:

State of Illinois I have duly served the  
Monroe County within by reading the same  
to the within named Harrison Hoins, this 20<sup>th</sup>  
day of November, A. D. 1863, as I am therein  
commanded. Charles Frick Shff MCD  
Per Geo S. Peep Deputy  
Shriff

Filed in the Circuit Court, this 20<sup>th</sup> day of  
November, A. D. 1863. W<sup>m</sup> Ord Clk

And afterwards, to wit, on the 20<sup>th</sup> day of  
November, A. D. 1863, the following bond for cost  
was filed, in the office of the Clerk of the said  
Circuit Court, in the words and figures as follows  
to wit:

State of Illinois May Term, A. D. 1864  
Monroe County Monroe Circuit Court.  
David M. Walsh for the use  
of David O'Kelly vs } Garnishment  
Harrison Hoins



I do hereby enter myself security for costs in this cause and acknowledge myself bound to pay, or cause to be paid all costs which may accrue in this cause, either to the opposite party or to any of the officers of this Court, in pursuance to the laws of this State.

Dated at this 19th day of November A. D. 1863  
H. C. Talbot

Endorsed: Filed November 21, 1863  
Wm. C. D. H.

And afterwards, to wit. at the May Term 1864 of the Monroe Circuit Court, the following proceedings were had and entered of record to wit:

David M Walsh who  
sues for the use of David Kelley Tuesday  
May the 10th 1864  
Harrison Hooper garnishes Garnishment.  
Now comes the plaintiff by H. C. Talbot his attorney, and the said David M Walsh by H. H. S. Combs his attorney, thereupon the said D. M. Walsh makes a motion to dismiss this suit for reasons set forth in his affidavit on file, which motion is allowed by the Court and this suit dismissed at the cost of the plaintiff. It is thereupon considered by the Court that Judgment for cost be entered against said plaintiff, that the defendant recover his proper cost and have Execution. Thereupon by agreement of the parties a bill of Execution is to be filed within thirty days.

And afterwards, to wit. on the 14th day of



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Since 1862 the following bill of Ex captions was  
filed, in the office of the clerk of the said Circuit  
Court to wit:

State of Illinois May Term A. D. 1864  
Monroe County & Monroe Circuit Court.

David M Walsh for use  
of David O Kelly } Garnishment

vs  
Harmon Horine

Be it remembered that the following affidavit was  
filed, in this cause, to wit:

State of Illinois October Term A. D. 1860  
Monroe County & Monroe Circuit Court.

David O Kelly } return of a sum of

vs  
David M Walsh } Judgment for \$429.16  
Cost 4.70

H. C. Talbot attorney for the plaintiff being  
duly sworn says that whereas Execution issued upon  
the said Judgment dated December 1<sup>st</sup> 1860  
directed to the Sheriff of said Monroe County  
which was by him on the 23<sup>rd</sup> day of February  
A. D. 1861 returned, no property found to levy  
this Execution on, endorsed thereon, for this  
affiant saith that said defendant David M  
Walsh has no property within the knowledge of  
of this affiant in his proper hands liable to Execution  
and that this affiant has just reason to believe  
that Harmon Horine is indebted to said David  
M Walsh and that he has effects of said  
David M Walsh in his hands.

Subscribed & sworn to before H. C. Talbot  
me this 18<sup>th</sup> day of November  
A. D. 1863. Wm. C. Ord  
(54 00)



And upon the back thereof was endorsed the following: Filed November the 1<sup>st</sup> 1863  
Wm. C. Ord

And the following interrogatories to be answered by said Garnishee, Harrison Horine was also filed  
Int. 1 Do you know the parties David M Walsh and David O Kelly.

Int. 2. Had you any property Effects, or choses in action, or money, in your possession power or control belonging to the said David M Walsh at the time of the serving of the summons herein, if so state fully the description, character, nature, amount and extent of any such ~~and all~~ all such choses in action, property and Effects and money you may have had at that time in your possession belonging to said David M Walsh.

Int. 3. Were you at the time of the serving of said summons in any manner indebted to said David M Walsh, if so set forth the precise amount and nature of such indebtedness

upon and to which said Harrison Horine filed the following answers.

Answer to 1<sup>st</sup> Int. I am well acquainted with the persons mentioned in said interrogatories

Ans. to 2<sup>nd</sup> Int. I believe in May (the 10<sup>th</sup> I think) 1862 I as Master in Chancery and in accordance with a decree made by the Circuit Court of Monroe County, Mo. sold the Homestead of David M. Walsh, in accordance with the Statute in such case



made and provided so short time after the sale  
I tendered said Walsh or Walsh the Homestead  
viz: \$1000. he refused to take it at the time but said  
'let it be a while' or something to that purport and  
thus the matter rested up to the time I was  
served with the summons; the \$1000. is in my  
hands

Ans. to Int 3. At the time of serving the summons  
on me by the Sheriff I owed D.  
M. Walsh nothing Except the \$1000. above,  
alluded to which I owed to him, in my  
official capacity

Thereupon said David M Walsh by his  
attorney <sup>second H. K. Jones</sup> made the following motion.

And now comes the said D. M. Walsh and moves  
the Court to dismiss this suit

1<sup>st</sup> Because said David O'Kelly has no right  
to use the plts name in this behalf as plaintiff

2<sup>nd</sup> No bond was filed for cost before the com-  
mencement of this suit

3<sup>rd</sup> David O'Kelly is a minor & has no right to  
sue Except by Guardian or next friend

And said David M Walsh filed the follow-  
ing affidavit & motion also

David Walsh for the  
use of David O'Kelly } Garnishment

as  
Harison Horine garnisher } David M.  
Walsh who is made plaintiff in the above  
suit moves the Court to dismiss this suit because



he says that the money in the hands of the said  
Harrison Horne if any is the sum of one Thousand  
dollars which money accrued of right to the  
said plaintiff under and by virtue of the Home-  
stead law. That is to say M. J. Horne foreclosed  
a Mortgage on the residence and Homestead of  
the said plaintiff who was a household residing  
with his family upon said lot mortgaged and  
which said lot was sold by the Master in  
Chancery, to wit Harrison Horne without first tend-  
ering the \$1000. to said plaintiff, but that said  
sum was declined to be accepted on the ground  
that said plaintiff intended and supposed  
that he would be able to redeem it.

That said sum of money has never been paid  
him, that he filed his motion to set aside the  
sale of said lot, on the ground of irregularity  
in said sale which motion was not finally  
disposed of until the last term of this Court  
to wit: the September Term A. D. 1863, that  
the sale by the said Master in Chancery was  
on the 10th day of May A. D. 1862, and that  
after the overruling of said motion sometimes  
as this plaintiff believes, in September of last  
year he demanded of said Harrison Horne  
the said sum of \$1000.

This plaintiff further moves the Court to deny  
this writ, because the said money came to the  
hands of said Harrison Horne as an affair of  
this Court.

Thirdly this plaintiff moves the Court to deny this  
writ for the reason that he denies the right of  
the said David O. Kelly to use the name of



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plaintiff as plft and that he never gave his  
consent to such use and he swears he never  
abandoned his right to said money  
Sworn to and subscribed & used W Walsh  
the 10th day of May  
1864 Wm Ord W

No Evidence except as above was introduced  
upon which motions the Court decided this  
suit at the cost of the said O'Kelley to which  
decision of the Court, O'Kelley at the time accepted  
and prays this his bill of Exceptions may be  
signed, sealed and made a part of this  
record which is done

Silas S. Boyan (seal)  
Judge 2<sup>nd</sup> Judicial Circuit

State of Illinois I the undersigned  
County of Monroe Clerk of the Circuit  
Court, within and for said County, in the said  
State, hereby certify, that the foregoing record  
contains a true and correct copy of the writ, of  
the order of Court, of the bill for cost, and of  
the bill of Exceptions, as the same appear  
of record in my office in the above entitled  
Cause,

In Testimony whereof I the  
Clerk of said Court have  
hereunto set my hand and affix-  
ed the seal of said Court at office  
in Waterloo, the 23<sup>rd</sup> day of  
June A. D. 1864  
Wm Ord W



David M. Walsh } In Supreme Court  
 for the use of } Mount Vernon  
 David O'Kelly }  
 vs. }  
 Harrison Horine } comes the plff. in error  
 and says that in the  
 record and proceedings aforesaid there is  
 manifest error in this to wit the court  
 below erred in dismissing said suit  
 and also in failing to render judg-  
 ment against said garnishee, wherefore  
 said plff. in error prays said judgment  
 may be reversed &c.

W. H. Underwood Atty for  
 plff. in error

founder in error -

H. K. & O. O'Keefe  
 for Walsh & Horine

<sup>25</sup>  
 David M. Walsh  
 for the use of  
 David O'Kelly

vs.  
 Harrison Horine

Error to Monroe

The Clerk and  
 please to file this  
 record & take up the  
 same for the  
 High Court, Sept.  
 Sheriff of Monroe  
 County against  
 Harrison Horine &

David M. Walsh  
 W. H. Underwood &  
 W. C. Talbot  
 Attys for plff.  
 in error

Filed, Oct. 17, 1864.  
 N. C. Johnston cly  
 by us - \$11.00



The People of the State of Illinois,

To the Sheriff of Monroe County.

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Circuit Court of Monroe county, before the Judge thereof between

David M. Walsh for the use of  
David O. Kelly plaintiff and

Harrison Horin defendants it is said that manifests error hath intervened to the injury of said Plaintiff

as we are informed by his complaint, the record and proceedings of which said judgment, we have caused to be brought into our Supreme Court of the State of Illinois, at Mount Vernon, before the justices thereof, to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to the said Harrison Horin

that he be and appear before the justices of our said Supreme Court; at the next term of said Court, to be holden at **Mount Vernon**, in said State, on the first Tuesday after the second Monday in November next, to hear the records and proceedings aforesaid, and the errors assigned, if he shall think fit; and further to do and receive what the said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said Harrison Horin notice together with this writ.

WITNESS, the Hon. P. H. Walker Chief Justice of the Supreme Court and the seal thereof, at MOUNT VERNON, this seventeenth day of October in the year of our Lord one thousand eight hundred and Sixty four.

Wm. Johnston  
Clerk of the Supreme Court.



SUPREME COURT.  
First Grand Division.

David M. Walsh -  
for the use of  
David C. Kelley  
Plaintiff in Error,

VS.

Harrison Horine  
Defendant in Error.

Executed this writ by reading the same to  
the within named Defendant Harrison Horine  
on October the 21<sup>st</sup> 1864.  
Charles F. Smith, Clk. of the Court.  
Diffs. fees. Serving, 50 Oct. 18 Postage, 4. .66

SCIRE FACIAS.

FILED. Nov. 8.

1864.  
N. Johnston Clk



Vertical text on the left margin, including "The Judge of the State of Illinois" and "Charles F. Smith, Clerk of the Court".

Extensive handwritten notes in cursive script covering the right side of the page, including a large circular stamp.



State of Illinois,  
SUPREME COURT,  
First Grand Division.

} SS

The People of the State of Illinois,

To the Clerk of the Circuit Court for the County of Monroe Greeting:

**Because,** In the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of Monroe county, before the Judge thereof between David M. Walsh for the use of

David C. Kelly plaintiff and

Harriet Horine defendant it is said manifest error hath intervened to the injury of the aforesaid Plaintiff

as we are informed by his complaint, and we being willing that error, if any there be, should be corrected in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly without delay send to our Justices of our Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at **Mount Vernon**, in the County of Jefferson, on the 1<sup>st</sup> Tuesday after The 2<sup>d</sup> Monday in November next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

WITNESS, the Hon. P. H. Walker Chief Justice of the Supreme Court and the seal thereof, at MOUNT VERNON, this seventeenth day of October in the year of our Lord one thousand eight hundred and sixty four.

Noah Johnston

Clerk of the Supreme Court.







# Illinois Supreme Court--November Term, A. D. 1864.

DAVID M. WALSH, for the use of DAVID O'KELLY, }  
vs } Error to Monroe.  
HARRISON HORINE.

Page 1 In Oct. 1860, David O'Kelly recovered a judgment in the Monroe Circuit Court for \$129 16-100 damages and costs; upon which judgment execution was issued and returned by the Sheriff of said county "No property found." An affidavit was then filed in due form of law as per Sec. 38 of 1 Purp. Stat. 649, and  
" 4 garnishee process was issued out of said court against Harrison Horine on the 20th of Nov. 1863. On  
" 2 the same day a bond for costs was filed for plfff. Plfff. filed interrogatories, which were answered by  
" 3 Harrison Horine that sometime in May, A. D. 1862, Horine as Master in Chancery and in accordance  
" 5 with decree made by the Circuit Court of said county sold the homestead of said David M. Walsh, in accordance  
" 6 with the statute in such cases made and provided, and a short time after the sale tendered said Walsh the homestead, viz., \$1000. He refused to take it at the time, but said, "let it be awhile," or something to that purport, and thus the matter rested up to the time Horine was served with the summons. The \$1000 was still in his (Horine's) hands. Horine owed Walsh nothing except this \$1000 in his official  
" 7 capacity. David M. Walsh filed also an affidavit and motion to dismiss the garnishee suit. He swears that the \$1000 accrued of right to him under the homestead law. That said homestead was sold by Horine as Master in Chancery without first tendering to him Walsh the \$1000. That Walsh declined to accept it on the ground that Walsh intended and expected that he would be able to redeem from the sale. That the \$1000 has never been paid him, Walsh. That he filed his motion to set aside the sale of the lot for irregularity, and that said motion was not disposed of until Sept. 1863. That the sale was made Sept. 10, 1862, and that after the overruling said motion, he believes in Sept. last, he demanded said \$1000 of Horine, and that he never abandoned his right to said money. Walsh thereupon moved the court to dismiss the garnishee suit because the money came to the hands of Horine as an officer of said court, and because he denied the right of O'Kelly to use the name of said Walsh as plfff without his consent. On  
" 3 the 10th of May, 1864, the motion to dismiss the garnishee proceeding was sustained by the court, said  
" 8 suit dismissed at plfff. cost; to which decision of the court O'Kelly at the time excepted. No evidence was heard except said affidavit and the answer of garnishee, which are recited in the bill of exceptions.  
" 9 Plfff. assigns for error that the court below erred in dismissing said suit and also in failing to enter judgment against said garnishee.

## BRIEF.

1.—The \$1000 is exempt from execution only for one year after the sale. 1 Purp. Stat., 651, Sec. 48.

2.—The year having expired it was money had and received by the Master for the use of Walsh and subject to garnishment of his creditors. Pierce vs. Carleton, 12 Ill. R., 364. Langdon vs. Lockett, 6 Alabama R., 727, 160. Drake on Attachments, Sec. 488 and note I. 2 Har. (Del.) R., 144. 1 Hump. R., 300. 5 Mass. R., 271. 1 Harrison R., 305. 17 Verm. R., 193. 5 New H. R., 519.

3.—The proceedings and judgment should have been and were properly conducted in the name of Walsh, the judgment debtor, for the use of O'Kelly, the judgment creditor, against the garnishee. 3 Gil. R., 97. Stahl vs. Webster, 11 Ill. R., 518. 18 Id., 289. 26 Id., 52, 463. 27 Id., 352.

4.—Even if the cause was improperly docketed, the court should have rendered judgment in the proper names. Above authorities, and 2 Seam. R., 8, 9.

WM. H. UNDERWOOD and  
H. C. TALBOT,

Attys for O'Kelly.



H. C. TILDEN,  
W. H. ENDBERWOOD and

names. Above authorities, and 2 Green, L. 8<sup>o</sup>.

4—Even if the cause was improperly docketed, the court should have rendered judgment in the proper  
R. 31. Stapl vs Webster, 11 Ill. R. 218. 18 14<sup>o</sup> 280. 28 14<sup>o</sup> 68. 403. 27 14<sup>o</sup> 395

Walsh, the judgment debtor for the use of O'Kelly, the judgment creditor against the garnishee. 9 Ill  
3—The proceedings and judgment should have been and were properly conducted in the name of  
300. 2 Mass. R. 211. 1 Harrison R. 302. 12 Verin R. 133. 2 New H. R. 619.

Alphian R. 153. 160. Drake on Attachments, Sec 488 and note 1. 5 Hart. (Del.) R. 144. 1 Hunt R.  
5—The year having expired it was money had and received by the Master for the use of Walsh and

1—The \$1000 is exempt from execution only for one year after the sale. 1 Barb. Stat. 621. Sec 18.

**PRINCE.**

Judgment against said Garnishee.

9 Bill assigns for cause that the same before said in this case by the bill for garnishment  
was heard except said affidavit and the answer of Garnishee, which are recited in the bill of exceptions

8 said dismissed at bill cost; a writ of execution of the court O'Kelly at the time excepted. No evidence  
3 the 10th of May 1864, the bill of exceptions of the Garnishee proceeding was sustained by the court

because he denied the right of O'Kelly to the name of said Walsh as bill without his con-  
sents the Garnishee to receive the money to the hands of Hoine as the subject of said bill

time, and that he had assigned his right to said money. Walsh thereupon moved the court to  
1863, and that before the overrule of said bill of exceptions he believed in good faith the sale was made  
irregularly, and that the bill of exceptions was sustained by the court.

the \$1000 has not been paid to him by Walsh, but he filed his motion to set aside the sale of  
it on the ground that he had introduced affidavits in evidence that he would be able to recover from the  
as Master in October 1863, upon the return of the bill of exceptions to him Walsh the \$1000. That Walsh declined

that the \$1000 was not his property, and that the same was not his property, and that the same was not  
a capacity. David M. Walsh, the plaintiff, and motion to dismiss the Garnishee bill.

The \$1000 was not in the hands of Hoine, and Hoine owed Walsh nothing except this \$1000 in  
thing to that effect, and that the same was not his property, and that the same was not his property.

Walsh the plaintiff, \$1000, and that the same was not his property, and that the same was not  
6 ordinance with the said Walsh, and that the same was not his property, and that the same was not

with decess in the said Walsh, and that the same was not his property, and that the same was not  
2 Harrison Hoine, that something in May, A. D. 1863, Hoine as Master in Chancery and in the

8 the same day a bond for costs was filed for bill. Bill filed interrogatories, which were answered  
2 Garnishee process was issued out of said court against Harrison Hoine on the 20th of Nov. 1863. On

4 party found. An affidavit was then filed in due form of law as per Sec. 38 of 1 Barb. Stat. 619, and  
costs; upon which judgment execution was issued and returned by the Sheriff of said county. No dis-

Page 1 In Oct. 1860, David O'Kelly received a judgment in the Monroe Circuit Court for \$150. He 100 damages  
HARRISON HOINE  
DAVID M. WALSH, for the use of DAVID O'KELLY, } Error to Monroe

25

*Walsh for the  
Use of O'Kelly  
Harrison Hoine  
Error from Monroe  
Abstract & Brief*

*Filed Oct. 17-1864  
N. Johnston Clk*

Illinois Supreme Court—November Term. 3<sup>rd</sup> 1864



Supreme court, first grand division  
Brief of appellee

DAVID M. WALSH, for the use of David O'Kelly, }  
vs. }  
HARRISON HORENE, Garnishee.

M. T. Horene foreclosed a mortgage on the house and lot, it being the Homestead of Walsh.

1 Harrison Horene the garnishee, was the master in chancery and sold the property May 10th, 1862, and tendered \$1000 to Walsh, who did not take it at the time saying "let it be a *while*" the sale was reported at the October Term 1862. At the Spring term 1863, Walsh filed his motion to set aside the sale for irregularity, but which motion was continued to the Oct. Term 1863, when it was disposed of by overruling same. Before Walsh demanded the \$1000 of the Master in Chancery, Horene was garnisheed, and the Plaintiff for whose use this suit is brought claims so much of the money as shall satisfy his said Judgement, under sec. 5 of the Act to exempt homesteads, from sale on execution: (1st Purple's Statutes 651), which declares that the officer selling "shall out of the proceeds of such sale pay to the execution debtor, \$1000, which shall be exempt from execution for one year thereafter." (Laws 1851.)

1st. This money is in the hands of an officer and not liable to garnishment. (Drake on Attach. §409 and §505, 3d Scam 452.)

2d. The money was neither actually paid over nor absolutely refused, "let it remain a little *while*." And clearly it never was abandoned, as is shown by the affidavit of Walsh and the answer of the garnishee. (25th Ill., 224.)

3d. Since the passage of the Act of 1851, before the homestead can be sold or waived the wife must join in the writing to its release, so too *quod* even if the husband abandoned the money the wife and family still have an interest in the fund, which may arise from its sale.

4th. The time embraced in litigation on the motion ought to be deducted. (Sec. 12 Purple's Statute, 730.)

5th. The Statute exempts the money, and authorized its seizure by "*execution*" only, not by garnishment, which presumes its delivery by the officer to the party.

H. K. S. O'MELVENY, Attn'y. for Appellee.



Walth foreuse of  
 O'Kelly  
 25  
 Horner, -Garman

Brief of Depts

H. E. S. O'MELVANY, VINC. J. for Appellee

Garman's claim against the money, and anticipated its seizure by "execution," only, not by

21st. The claim exempts the money, and anticipated its seizure by "execution," only, not by

22d. The claim exempts the money, and anticipated its seizure by "execution," only, not by

23d. The claim exempts the money, and anticipated its seizure by "execution," only, not by

24d. The claim exempts the money, and anticipated its seizure by "execution," only, not by

25d. The claim exempts the money, and anticipated its seizure by "execution," only, not by

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38d. The claim exempts the money, and anticipated its seizure by "execution," only, not by

39d. The claim exempts the money, and anticipated its seizure by "execution," only, not by

40d. The claim exempts the money, and anticipated its seizure by "execution," only, not by

41d. The claim exempts the money, and anticipated its seizure by "execution," only, not by

42d. The claim exempts the money, and anticipated its seizure by "execution," only, not by

43d. The claim exempts the money, and anticipated its seizure by "execution," only, not by

44d. The claim exempts the money, and anticipated its seizure by "execution," only, not by

HARRISON ROBERT, Garman's

DAVID S. WASSER, for the use of David O'Kelly

*[Faint handwritten notes and signatures on the left margin]*



# Illinois Supreme Court--November Term, A. D. 1864.

DAVID M. WALSH, for the use of DAVID O'KELLY, }  
vs. } Error to Monroe.  
HARRISON HORINE }

Page 1 In Oct. 1860, David O'Kelly recovered a judgment in the Monroe Circuit Court for \$429 16-100 damages and costs; upon which judgment execution was issued and returned by the Sheriff of said county "No property found." An affidavit was then filed in due form of law as per Sec. 38 of 1 Purp. Stat. 649, and  
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" 2 the same day a bond for costs was filed for plfff. Plfff. filed interrogatories, which were answered by  
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" 4 with decree made by the Circuit Court of said county sold the homestead of said David M. Walsh, in ac-  
" 5 cordance with the statute in such cases made and provided, and a short time after the sale tendered said  
" 6 Walsh the homestead, viz., \$1000. He refused to take it at the time, but said, "let it be awhile," or some-  
" 7 thing to that purport, and thus the matter rested up to the time Horine was served with the summons.  
" 8 The \$1000 was still in his (Horine's) hands. Horine owed Walsh nothing except this \$1000 in his official  
" 9 capacity. David M. Walsh filed also an affidavit and motion to dismiss the garnishee suit. He swears  
" that the \$1000 accrued of right to him under the homestead law. That said homestead was sold by Horine  
" as Master in Chancery without first tendering to him Walsh the \$1000. That Walsh declined to accept  
" it on the ground that Walsh intended and expected that he would be able to redeem from the sale. That  
" the \$1000 has never been paid him, Walsh. That he filed his motion to set aside the sale of the lot for  
" irregularity, and that said motion was not disposed of until Sept. 1863. That the sale was made Sept. 10,  
" 1862, and that after the overruling said motion, he believes in Sept. last, he demanded said \$1000 of Ho-  
" rine, and that he never abandoned his right to said money. Walsh thereupon moved the court to dis-  
" miss the garnishee suit because the money came to the hands of Horine as an officer of said court, and  
" because he denied the right of O'Kelly to use the name of said Walsh as plfff without his consent. On  
" 3 the 10th of May, 1864, the motion to dismiss the garnishee proceeding was sustained by the court, said  
" 4 suit dismissed at plfff cost; to which decision of the court O'Kelly at the time excepted. No evidence  
" 5 was heard except said affidavit and the answer of garnishee, which are recited in the bill of exceptions.  
" 6 Plfff. assigns for error that the court below erred in dismissing said suit and also in failing to enter  
" 7 judgment against said garnishee.

## BRIEF.

- 1.—The \$1000 is exempt from execution only for one year after the sale. 1 Purp. Stat., 651, Sec. 48.
- 2.—The year having expired it was money had and received by the Master for the use of Walsh and subject to garnishment of his creditors. Pierce vs. Carleton, 12 Ill. R., 364. Langdon vs. Lockett, 6 Alabama R., 727, 160. Drake on Attachments, Sec. 488 and note 1. 2 Har. (Del.) R., 144. 1 Hump. R., 300. 5 Mass. R., 271. 1 Harrison R., 305. 17 Verm. R., 193. 5 New H. R., 519.
- 3.—The proceedings and judgment should have been and were properly conducted in the name of Walsh, the judgment debtor, for the use of O'Kelly, the judgment creditor, against the garnishee. 3 Gil. R., 97. Stahl vs. Webster, 11 Ill. R., 518. 18 Id., 289. 26 Id., 52, 463. 27 Id., 352.
- 4.—Even if the cause was improperly docketed, the court should have rendered judgment in the proper names. Above authorities, and 2 Seam. R., 8, 9.

WM. H. UNDERWOOD and  
H. C. TALBOT,

Attys. for O'Kelly.



J. O. FARBER,  
WM. H. UNDERWOOD and

Attorneys. Above authorized, and S. Geem, Jr. & G.

1. Upon the issue of the cause was improperly docketed, the court should have rendered judgment in the proper  
2. The proceedings and judgment should have been and were properly conducted in the names of  
3. The year having expired it was money had and received by the master for the use of Walsh and

4. The year having expired it was money had and received by the master for the use of Walsh and

5. The year having expired it was money had and received by the master for the use of Walsh and

**INDEX.**

judgment against said Garnishes.

1. The assignor for error that the court below erred in dismissing said suit and also in failing to enter  
2. The court below erred in dismissing said suit and also in failing to enter

3. The court below erred in dismissing said suit and also in failing to enter

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*Walsh for the use of O'Kelly*  
*Hamilton Keorine*  
*Terror from Monroe*  
*Abstract & Brief*

*Filed Oct. 17-1864*  
*A. Johnston*

Page 1 In Oct. 1863 David O'Kelly recovered a judgment in the Monroe Circuit Court for \$150 10-100 damages and

HARRISON HORINE

DAVID M. WYLSH for the use of DAVID O'KELLY, } Error to Monroe.

Illinois Supreme Court---November Term, 3. D. 1864



DAVID M. WALSH, for the use of David O'Kelly, )  
vs.  
HARRISON HORENE, Garnishee. }

M. T. Horene foreclosed a mortgage on the house and lot, it being the Homestead of Walsh.

1 Harrison Horene the garnishee, was the master in chancery and sold the property May 10th, 1862, and tendered \$1000 to Walsh, who did not take it at the time saying "let it be a *while*" the sale was reported at the October Term 1862. At the Spring term 1863, Walsh filed his motion to set aside the sale for irregularity, but which motion was continued to the Oct. Term 1863, when it was disposed of by overruling same. Before Walsh demanded the \$1000 of the Master in Chancery, Horene he was garnisheed, and the Plaintiff for whose use this suit is brought claims so much of the money as shall satisfy his said Judgement, under sec. 5 of the Act to exempt homesteads, from sale on execution: (1st Purple's Statutes 651), which declares that the officer selling "shall out of the proceeds of such sale pay to the execution debtor, \$1000, which shall be exempt from execution for one year thereafter." (Laws 1851.)

1st. This money is in the hands of an officer and not liable to garnishment. (Drake on Attach. §409 and §505, 3d Scam 452.)

2d. The money was neither actually paid over nor absolutely refused, "let it remain a little *while*." And clearly it never was abandoned, as is shown by the affidavit of Walsh and the answer of the garnishee. (25th Ill., 224.)

3d. Since the passage of the Act of 1851, before the homestead can be sold or waived the wife must join in the writing to its release, so too even if the husband abandoned the money the wife and family still have an interest in the fund, which may arise from its sale.

4th. The time embraced in litigation on the motion ought to be deducted. (Sec. 12 Purple's Statute, 730.)

5th. The Statute exempts the money, and authorized its seizure by "*execution*" only, not by garnishment, which presumes its delivery by the officer to the party.

H. K. S. O'MELVENY, Attn'y. for Appellee.



Walter forward

A Kelley

Horne

Garnish

Brief of paper

Filed, Nov. 15 - 1864.

A. Johnston CM

HARRISON HOLEMAN, Garnisher.  
DAVID M. WALSH, for the use of David O'Reilly.

1. Harrison Holman the Garnisher, was the master in obvious and sold the property July 10th, 1864. M. T. Holman foreclosed a mortgage on the horse and lot, it being the Homestead of Walsh.

H. F. S. O'NEILLY, Attorney for the Garnisher.



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