23/12

July 1843 #1297

A. J. Hembree - applt

vs

E. M. Campbell - Respt

Dade County

Trover - Two cows, 1 horse, 1 wagon, 2 wagon wheels
taken by Campbell from Hembree

State of Missouri, County of Cole ss.
The State of Missouri. To the Honorable the Circuit Court of Dade County. Greeting: Whereas in the record and proceedings in a certain cause lately pending before you in said Court, wherein Absalom I Hembree was plaintiff and Ezekiel M. Campbell was defendant, manifest error hath intervened to the great damage of the said plaintiff as by his complaint we are informed, Now we being willing that the error if any there be, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remains of record before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held at the City of Jefferson in the County of Cole in said State, on the first Monday in July (inst) so that our Judges of our Supreme Court on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right and according to law ought to be done.

Given under my hand and private seal, having no seal of Office provided, at Office, the 28th day of July 1843.

H. L. Boon Clk. Sup Court.

This writ issued by order of the Court of this date, and placed with the papers of the cause, which have been brought up and filed under an agreement of the parties.

H. L. Boon Clk.

28. July 1843.

A. J. Hembree

vs } writ of error.

C. M. Campbell.

A. J. Hanbry vs E. M. Campbell } Trover in the Dade circuit Court

We John S. Phelps atty for the above Plff. & L. Hendrick atty for said Defendant do agree that the record of the above cause may be filed in the supreme Court on the first day of the next Term thereof & the same shall be proceeded on to a final Decision as if a writ of Error had been send out & notice thereof served -

L Hendrick
John S. Phelps

Clk will make out a copy of the record in the above case & send it to me at Springfield. Phelps

State of Missouri }
County of Dade } ss

Be it remembered that On the 17th day of May A.D. 1843 Absolem J Hembree Filed in the Clerks Office of the Circuit Court of Dade County in the State of Missouri his declaration against Ezekiel M Campbell which is in the words and figures following that is to say

" State of Missouri } In the Dade Circuit
" County of Dade } Court June Term 16
A.D. 1842

" Absolem J Hembree plaintiff Complaines
" of Ezekiel M Campbell deft. of a plea
" of Trespass On the Case. For that
" for that Whereas the said plaintiff
" heretofore towit On the 24th day of
" April A.D. 1842 at the County aforesaid
" was lawfully possesed of Certain goods
" and Chattles towit two heifers 1 horse
" 1 Waggon 1 pair horse geares 1 pair
" of breachbands 1 Waggon and two
" Waggon Wheels of greate Value towit
" of the Value of Five hundred Dollars
" lawfull money of the united States
" and being so possesed the said plaintiff
" afterwards towit On the 23d day of
" April A.D. 1842 at the County
" aforesaid Casually lost the said
" goods and Chattles Out of his posses-
" ion and the same afterwards towit On
" the day & year aforesaid Came to
" the said defendants possesion by
" finding yet the said defendant well
" knowing the said goods and Chttles

" to be the property of the said Plantiffs and
" right to belong and appertain to him
" but Contriving and fraudulently intending
" Craftily and subtilly to defraud and
" deceive the said Plantiff in this behalf
" hath not as yet delivered the said
" goods and Chattles Or any part thereof
" to the said Plantiff (altho often requested
" so to do) but so to do hath hitherto
" Wholly refused and still refuses and
" afterwards towit On the 24th " day of
" April A.D. 1842 at the County afore-
" said Converted and disposed of the
" said goods and Chattles to his the said
" defendants Own use to the damage of
" the Plantiff Five hundred dollars
" therefore he brings Suit &c

Philips & Blair
Attorneys for Plff

" And Which declaration is the following
Endorsement.

" Filed May the 17th " 1842
Joseph Allen Clerk

" And Which declaration the Plantiff
Sued out a Summons which is in
the words and figures following
that is to say

" The State of Missouri To the
" Sheriff of Wade County Greeting.
" You are hereby Commanded to
" Summon Ezekiel M. Campbell to
" be and appear before the Honorable
" Wade Circuit Court. On the first
" day of the next Term thereof to be
" holden at the House of Mathias
" M. Allison Commencing On the
" 4th " Monday in June A.D. 1842 to
" answer the Complaint of Absolem
" J Humbree in the foregoing plea
" of Trespass On the Case. and this
" you Shall in nowise. Omit under
" the penalty annexed by the
" law

" In " Testimony whereof
" I Joseph Allen Clerk
" of the Wade Circuit
" Court. have hereunto
" Subscribed my name &
" affixed my private seal
" there being No Official
" Seal yet provided
" May the 17th " A.D. 1842

Joseph Allen Clerk

" Afterwards at a Circuit Court Contin-
" ued and held for the County of
" Wade On the 28th day of June A.D.
" 1842 The following Order was made

A. J. Hembree Pleff.
vs
E. M. Campbell: deft } Trespass On the Case

Now at this day
Comes the plaintiff by his attorney
On his motion by leave of the Court
he is permitted to amend his declara
tion by subscribing names of attorneys
On his further Motion and On his
further Motion It is Ordered by the
Court that an Alias writ be awarded
in this Cause

Which writ is in the words and
figures following that is to say

The State of Missouri
To the Sheriff
of Dade County Greeting you are
hereby Commanded as you have
been heretofore Commanded to Sum
mons Ezekiel M. Campbell to be
and appear before the Honorable
Dade Circuit Court On the first
day of the next Term thereof which
will be holden at the Court house
in the Town of Greenfield Comm-
mencing On the 4th Monday in
October next A.D. 1842 there and
there to answer Absolum J. Hembree
in the foregoing plea of Trespass
&c. and this you shall in nowise
Omit under the penalty of the law
and make them and there legal
return of this Writ

" In Testimony whereof
" I Joseph Allen Clerk
" of the Dade Circuit
" Court hereunto set
" my hand and affix
" my private seal there
" there being no Official
" seal yet provided
" August the 15th " 1842

" Joseph Allen Clerk

On Which Writ is the following return
that is to say

" I Isaac Routh do hereby Certify
" that I have Examined and the
" defendant Cannot be found in
" the County of Dade July 28th 1842

Isaac Routh
Sheriff D.C.

And afterwards on application of the
Plaintiff the following writ was issued
which writ is in the words and
figures that is to say

" The State of Missouri
" To the Sheriff
" of Polk County Greeting you are
" hereby Commanded to Summon Ezekiel
" M Campbell to be and appear before
" the Hon. Dade Circuit Court on the
" first day of the next Term Thereof
" Which will be holden at the Court

"house in the Town of Greenfield
" Commencing On the 4th Monday
" in October Next 1842 then and
" there to Answer Absolum J.
" Humbree in the Foregoing plea
" of Trespass &c. and this you
" Shall in Nowise Omit under the
" penalty of the law and have
" you then and there this writ

" In Testimony whereof I
" Joseph Allen Clerk
" of the Dade Circuit
" Court have hereunto
" Set my hand and
" affixed my private
" Seal there being no
" Officeal Seal yet
" provided September
" the 28th 1842
" Joseph Allen Clk

On Which is the following return.

" State of Missouri }
" County of Polk }
" I do hereby Certify
" that I Served the within declaration
" and Summons On the within
" named Ezekiel M. Campbell
" by reading the Same to and in
" the hearing of said Campbell
" On the 10th day of October 1842
" done in the County & State aforesaid

J. H. Bunch Sheriff

And afterwards At a Circuit Court Continued and held for the County of Dade On the 26th day of October A.D. 1842 the following Order was made

" A J Humbree
vs
E. M. Campbell } Trespas On the Case

Now at this day
" Comes the defendant by his attorney
" and by leave of the Court plea
" herein his plea of the General Issue

Which plea is in the words and figures following to wit

" State of Missouri } In the Dade Circuit
" County of Dade } Court Oct. Term A.D. 1842

" Ezekiel M Campbell
ats
" Absolum J. Humbree }

" And the said
" defendant by his attorney Comes and
" defends the wrong and injury when
" &c and says that he is not guilty of
" said supposed grievances above laid
" to his Charge Or any or either of
" them Or any part thereof in manner
" and form as the said plaintiff hath
" above thereof Complained against
" him. And of this he the said
" defendant puts himself upon the
" County &c McKinney & Buckner for defendant

And Afterwards at a Circuit Court Continued and held within and for the County of Dade On the 17th day of April A.D. 1843 the following motion was made towit

" Absolem J. Humbree
vs
" Ezekiel M Campbell } Trespass On the Case

" Now at this
" day Comes the defendant by his
" attorney and by leave of the Court
" filed his motion to quash the
" writ in the above Cause

Which Motion is in the words following towit.

E M Campbell
Atts
A. J. Humbree } Action of Trespass On the Case in the Dade Circuit Court

And the defendant
" Comes and moves the Court here
" to quash the writ in this Cause
" Because the same is not
" directed to the proper Officer
" Becaus the same in Other
" respects irregular and illegal

Bedford McKinny &
Hendrick
attorney for deft

And afterwards at a Circuit Court Court Continued and held for the County of Dade On the 18th of April A.D. 1843 the following proceedings

And afterwards At a Circuit Court Continued and held for the County of Dade On the 26th day of October A.D. 1842 the following Order was made

" A J Humbree
vs
E. M. Campbell } Trespas On the Case

Now at this day
" Comes the defendant by his attorney
" and by leave of the Court plea
" herein his plea of the General Issue

Which plea is in the words and figures following to wit

" State of Missouri } In the Dade Circuit
" County of Dade } Court Oct. Term A.D. 1842

" Ezekiel M Campbell
ats
" Absolum J. Humbree }

" And the said
" defendant by his attorney Comes and
" defends the wrong and injury when
" &c and says that he is not guilty of
" said supposed grievances above laid
" to his Charge Or any or either of
" them Or any part thereof in manner
" and form as the said plaintiff hath
" above thereof Complained against
" him. And of this he the said
" defendant puts himself upon the
" County &c McKinney & Buckner for defendant.

And Afterwards at a Circuit Court Continued and held within and for the County of Dade On the 17th day of April A.D. 1843 the following motion was made towit

"Absolem J. Humbree
vs
" Ezekiel M Campbell } Trespass On the Case

" Now at this
" day Comes the defendant by his
" attorney and by leave of the Court
" filed his motion to quash the
" writ in the above Cause

Which Motion is in the words following towit.

E M Campbell
Atts
A. J. Humbree } Action of Trespass On the Case in the Dade Circuit Court

And the defendant
" Comes and moves the Court here
" to quash the writ in this Cause
" Because the same is not
" directed to the proper Officer
" Becaus the same in Other
" respects irregular and illegal

Bedford McKinney &
Hendrick
attorney for deft

And afterwards at a Circuit Court Court Continued and held for the County of Dade On the 18th of April A.D. 1843 the following proceedings

was had towit

" A. J. Humbree
vs
" E. M. Campbell } Trespass on the case

" This day came the
" parties by their attorneys and the
" Motion filed herein on yesterday
" being fully argued and due
" deliberation had thereon by the Court
" was by the Court sustained It is
" therefore Considered by the Court
" that the said defendant recover
" of said plaintiff his Costs by him in this
" suit about his defence expended
" and that Execution Issue
" therefor

And afterwards on the 19th day of
April A.D. 1843 the following entry
was made towit

" Absolem J Humbree
vs
" Ezekiel M Campbell } Trespass on the Case

" Now at this day
" Comes the plaintiff by his Attorney
" and by leave of the Court filed
" herein his bill of Exceptions to the
" Opinion of the Court which was
" signed sealed and made a
" part of the record

Which bill of Exceptions is in the
words following towit

" A. J. Humbree } Dade Circuit Court
vs } April Term
" E. M. Campbell } AD 1843

" Be it remembered
" at the Trial Term of the Court
" and after plea to the merits
" of said Case had been filed
" the defendant filed the following
" Motion to quash the writ
" E. M. Campbell } Action of Trespass
" ats } on the Case in the
" A J Humbree } Dade Circuit Court
And the said defend-
" ant Comes and moves the Court
" here to quash the writ in this
" Cause. Because the same is not
" directed to the proper Officer
" Because the same is in
" other respects Irregular and
" illegal
" Bedford McKinney & Hendrick
" atty. for. deft
" And no Evidence was introduced
" in Support of said Motion except
" an inspection of the record in
" this Case. and Which said
" motion the Court Sustained. to
" which decision of the Court the
" plaintiff Excepts and prays this
" his bill of Exceptions may be
" Signed Sealed and made a
" part of the record in this
" Case. Which is accordingly done
" C. S. Yancey Circuit Judge (Sa[illegible])

State of Missouri }
County of Dade } ss

I Joseph Allen Clerk of the Dade Circuit Court do hereby Certify that the foregoing is a true and perfect Transcript of all the Entries and papers On file in my Office in the foregoing Case of Absolem J. Hembree against Ezekiel M. Campbell

In Testimony whereof I Joseph Allen Clerk as aforesaid have hereunto subscribed my name and affixed my private seal there being no Official seal yet provided by ~~Law~~ Since the 20th A.D. 1843

Joseph Allen Clk

(34.) ~~34.~~ 1297 ~~98~~

A. J. Humbrew

vs Trespass

3 on the case

E. M. Campbell

July 1843

1297

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Filed July 29th 1843.

H. L. Bonnell

A. J. Pemberton
vs
E. M. Campbell

Supreme Court
July Term 1843
Error

And the said Plff in error by his Atty comes & says that in giving & rendering the judgment in said case by said Circuit Court there is manifest error in this

1st That the Court overruled the motion to quash the writ in said case

2d That judgt was given for Dft. when on said motion it should have been given for Plff.

Wherefore the Plff prays said judgt & the record & that it may be remanded to the Dade Circuit Court &c

Phillips atty

and the said Defendant says that in the said record and judgment in the said cause there is no error, and therefore he prays the Court here to affirm the judgment given by the Court below in the said cause.

Winston for
Dft

A. J. Humber

vs } Asgnt of Errors

E. M. Campbell

filed Jany 25. 1844
H. L. Boon CM

A. J. Hembree
vs.
E. M. Campbell

§ Error to the Dade Circuit Court.

Hembree brought an action of trover against Campbell in the Circuit Court of Dade County. Two writs of summons were issued by the Clerk of said Court directed to the Sheriff of Dade County, the last of which was returned non est inventus. A writ was then issued directed to the Sheriff of Polk County which was served on the defendant and returned. At the return term, Campbell appeared and plead not-guilty; and afterwards during the same term moved the Court to quash the writ because it was improperly directed, which motion was sustained, and the suit dismissed.

The question is, whether the motion was properly sustained by the Court below? The statute regulating practice at Law, directs, that a suit instituted by summons or capias shall be brought, when the defendant is a resident of the State, either in the County within which the defendant resides or in the County within which the plaintiff resides and the defendant may be found. It was clearly illegal for a plaintiff residing in Dade County to bring suit against a party residing in another County. But the Circuit Court of Dade County is a Court of general jurisdiction, and the jurisdiction of the subject matter of this suit, and if the defendant being served with its process appeared and plead to the merits of the action thereby acknowledging its jurisdiction of his person, he would not be allowed afterwards to object to the regularity of the proceedings. When a defendant is sued in a wrong County, it is clear

under the act above mentioned, he can, by pursuing the regular steps defeat the plaintiff. But exceptions of this kind do not affect the merits of a controversy, they do not shew that the plaintiff has no right to recover and are no bar to the action. They then must be matter of abatement and if such, a party who would avail himself of them must do it in time. He must do no act, to acknowledge the jurisdiction of the Court over his person, otherwise he will be precluded from afterwards availing himself of them. Had steps for quashing the writ been taken at a proper time, no doubt it should have been done, but after the defendant appeared and plead the general issue, it was too late to avail himself of any matter in abatement. No principle of pleading is better established, than that a plea in bar is a waiver of all dilatory matter of defence. That the matter of abatement was apparent upon the writ can make no difference. Such matters are and should be pleaded. 2. Sen. 209. n. 1. Suppose the plaintiff had violated the above mentioned provision of the statute in a manner as not to be apparent upon the writ, suppose the defendant had been sued in a County in which neither he nor the plaintiff resided. He would then have been driven to his plea of abatement in order to shew the facts, & if a plea of abatement is necessary when the provision is violated in one respect, why not, when it is violated in other respects. The fact that the matter of abatement is apparent on the face of the writ can make no difference. If a party would avail himself of it he must do it in time, & by all books taking a motion (an irregular practice) for a plea

an abatement— he will not be permitted to gain an advantage denied to him by a regular course of proceedings. Wellborn vs. Tindall 1 Mysons Rep. 150. Bettis vs. Logan 2 Mo. Rep. 4. Judge Napton concurring in his opinion the judgment of the Court below is reversed and the cause is remanded

N. Scott

Judge Tompkins dissents

60.

Hembree
vs.
Campbell

Opinion

Scott

Filed March 4th 1844

W. L. Brown Clk

STATE OF MISSOURI-----Sct. The State of Missouri----To the Sheriff of the County of Dade in said State-----GREETING:

Whereas, Absalom I. Hembree

on the Sixteenth day of February in the year eighteen hundred and forty= four at our Supreme Court for the State of Missouri aforesaid, before our Judges of said Court, recovered against Ezekial M. Campbell

the sum of Eight dollars & forty five cents for his costs and charges by him expended in a certain suit wherein the said Absalom I. Hembree was plaintiff

, and the said Ezekial M. Campbell was defendant

, which to the said A. I. Hembree were adjudged, as appears to us of record:==

Therefore, we command you, that of the goods and chattels, lands and tenements of the said Ezekial M. Campbell

in your bailiwick, you cause to be made the aforesaid costs and that you have the same before the Judges of our said Supreme Court, on the first Monday in July next, to render unto the said Absalom I. Hembree the costs aforesaid: and that you certify to our said Judges, how you execute this writ, and have you then there this writ.

Witness, Hampton L. Boon, Clerk of our said Supreme Court, at office, in the City of Jefferson the tenth day of May in the year of our Lord one thousand eight hundred and forty= four.

H. L. Boon

I do hereby Certify that I have Recd payment in full upon the within Execution this June 15th 1844

Isaac Routh Shff
of Dade Co
Mo

70.
Supreme Court
July Term 1844

Absalom I. Hembree
vs Execution
Ezekial M. Campbell
" "

Costs
St. L. Boon — $8.45
This Writ — 1.00
$9.45

Come to hand June the 3d 1844 T. R. McTale
Depot Sheriff of D. C.

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to sustain the judgment of the Court below the Defendant relies upon the following points.

1st That the Court had no right to issue either of the subsequent writs until there had been a return of the first writ.

2nd That the writ which was served upon the Defendant was directed to the Sheriff of the wrong County, ~~and being served by the Sheriff upon the Defendant~~ and thereupon a new writ and that the appearance of the said Defendant, did not preclude him from afterwards taking advantage of a ~~defective~~ void writ.

so as to this 5th Missouri Reps 227

3rd that the Plaintiff did not move the Court below to set aside the judgment rendered in this cause as he ought to have done.

~~Winston for Defts~~

4th. The judgment of the Court below, sustaining the motion to quash the writ is not such a final judgment, from which an appeal or writ of error will lie to this Court.

Winston for Defts

Embree
Defendants
vs Ebrief.
Campbell

Authority
5th Mo R.

A. J. Hembree Plf. below & Plf in Error
vs
E. M. Campbell Dft.

Plf.s Brief

A summons was issued by the Dade Circuit Court - returned not executed - on application of Plf. an alias was issued to Shff. of Polk returned served on Dft. Dft. filed his plea of general issue. at trial term Dft filed his motion to quash the writ which motion the Court sustained & thereupon rendered judgt against Plf. for costs. to which decision of the Court Plf. excepted & brings this case here by writ of error.

Appearance & pleading to the merits cured any defect in the service of the writ - Whiting & al vs Budd 5. M. R. 443 Barnett & Ivers vs Lynch 3d Il 227 — Want of service cured by appearance & defence Griffin & Kinote vs Samuel 6. M. R. 50

That Dft. cannot take advantage of any error or defect in the process after he has appeared to it 1 Tidd Practice 91 - 434

A. J. Hembree

or }

E. M. Campbell

Pl.s Brief

Auth

3.d 5.th & 6.th Mo. Rep.

1 Tidd's Practice