31/4

VAN 1845 #5

WILLIAM BAILEY
VS
CHURCHILL GIBBS
} debt

CALLOWAY COUNTY

On Sheriffs' bonds

Attys - Gordon + Hardin
Tompkins

Missouri Record # 45

STATE OF MISSOURI----Sct.

The State of Missouri....To the Judge of the Second — Judicial Circuit in said State....**GREETING:**

WHEREAS, *In the record and proceedings in a certain cause lately pending in the Circuit Court within and for the County of* Callaway *in said circuit, wherein* William H. Bailey *was plaintiff, and* Churchill J. Gibby

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 corrected, and full and speedy justice done to the parties aforesaid, in that behalf,* **command you,** *that you send to us certified under your* **seal,** *the record and proceedings in the cause aforesaid, as fully as the same remain 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* Second *Monday in* January *next, 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.*

WITNESS, Hampton L. Boon, *Clerk of our said Supreme Court, at office, in the City of Jefferson, the* twenty ninth *day of* November *in the year of our Lord, one thousand eight hundred and forty-* four.

SEAL OF THE SUPREME COURT OF MISSOURI

H. L. Boon

Received the within writ. 2d December 1841

In Testimony whereof I Geo Bailey clerk of said Court have hereto set my hand and affixed the seal of said Court at Office in the City and year aforesaid

Geo Bailey clerk
Callaway Circuit

/

Bailey
vs
Gibbs

Pleas before the Honorable John D. Leland. Judge of the second Judicial Circuit in the State of Missouri, and as such Judge of the Circuit Court within and for the County of Calloway) at the Courthouse in the Town of Fulton on the 19th day of October A.D. 1824

Be it remembered that heretofore towit on the 8th
of day of March 1824. William H. Bailey filed in the Clerks office of the Circuit Court of said County the following declaration towit:

"State of Missouri In the Calloway Circuit Court
Calloway County ss. William H. Bailey plaintiff
Debt complains of Churchill J. Gibbs and Joseph Johnson Defendants of a plea of Trespass on the case in Assumpsit. For that whereas the said defendants on the first day of January in the year of our Lord One thousand Eight hundred and forty four at the County of Calloway aforesaid were indebted to the said plaintiff in the sum of Three hundred and fifty dollars, for so much money before that time, by the said plaintiff paid laid out and expended to and for the use of the said defendants, and at their instance and request, and being so indebted, they the said defendants afterwards towit, on the day and year aforesaid at the County of Calloway aforesaid undertook and then and there faithfully promised him the said plaintiff to pay him the aforesaid sum of Three hundred and fifty dollars, when they the said defendants should be thereunto afterwards requested

2 Yet the said defendants not regarding their said promise and undertaking, but contriving and fraudulently intending to deceive and defraud the said plaintiff in this behalf, have not paid the said plaintiff the aforesaid sum of Three hundred and fifty dollars nor any part thereof, but to pay the same have hitherto wholly neglected and refused and still do neglect and refuse to the damage of the said plaintiff of Five hundred Dollars and therefore he brings his suit. Jones & Campbell attorneys for plaintiff

And thereupon the following Summons issued Viz: The State of Missouri to the Sheriff
Summ. of Callaway County Greeting you are hereby commanded to summon Churchill J. Gibbs and Joseph Johnson to appear before the Judge of our Circuit Court for the Circuit and County of Callaway at the Courthouse on the first day of our next April Term, which term will commence on the second Monday in April next to answer the complaint of the plaintiff William M. Bailey as set forth and exhibited against them in our said Court by the foregoing copy of his petition, and this you shall not omit and have then there this writ Witness

George Bailey clerk of our said Court and
(L S) the seal of said Court annexed at office
this 8th day of March 1824 and in the 25
Year of the State. Geo. Bailey clerk

upon which the Sheriff made the following return Viz: "The within petition and Summons
Sheff return was served by reading in the presence and hearing of the within named Joseph Johnson

5. on the 12th day of March 1844 served on C. I. Gibbs in the same way this 15 of March 1844

R. E. Baker Sheriff
of Callaway County

and afterwards to wit, At a Circuit Court continued and held for Callaway County at the Courthouse on Tuesday the 9th day of April 1844. This day came the defendants by their attorney, and produced their Demurrer which is ordered to be filed. And afterwards to wit, on Wednesday the 10th day of April 1844 On motion of the defendants by their attorney leave is granted to withdraw the demurrer in this cause, and thereupon produced their plea which is ordered to be filed, and is as follows to wit. Churchill I. Gibbs & Joseph Johnson ats William H. Bailey. In the Callaway

Plea Circuit Court April Term 1844. And the said defendants by their attorney come and defend the wrong and injury, when &c. and saith that they did not undertake or promise in manner and form as the said plaintiffs hath above thereof complained against them, and of this they put themselves upon the Country &c. Reed & Hardin Attys for Defts.

Jd. And the plaintiff doth the like

Todd & Overfelt Attys for plaintiffs

And at the Term last aforesaid on Monday the 15th day of said month. Ordered that

Cont'd this suit be continued until the next term And afterwards to wit, at a Circuit Court continued and held for Callaway County at the Courthouse on Saturday the 19th day of October 1844. This day came the parties aforesaid by their attorneys and the death of

the defendant Johnson being suggested it is
Ordered that this suit abate as to him, and
Jury thereupon came a Jury Vouit, George W. Morris
Thomas Davis, James M Davis, Shelton Smith
Cyrus Poage, Larkin Fleshman, William T.
Craig, Geo. M Emerson, William Carrington
Epaphroditus Smith, William Mosby and Robert
Paine, who being elected tryed and sworn
well and truly to try the issue Joined, and
nonsuit thereupon the plaintiff takes a nonsuit. There-
-fore it is considered by the Court that the
Judg.o plaintiff take nothing by his action, but that
the defendant recover of the plaintiff his
costs by him about his defence in this behalf
expended and that he have thereof execution
And at the Term last aforesaid on Monday
the 21.o day of October 1844. This day came
the plaintiff and produced his motion to
set aside the nonsuit in this cause, which is
Ordered to be filed. And at the Term last
aforesaid on Tuesday the 22.d day of October
1844. This day came the parties aforesaid and
the motion of the plaintiff to set aside the
nonsuit being heard, It is considered by the Court
that the same be overruled. The plaintiff
produced his bill of exceptions which was
signed sealed and allowed by the Court
and Ordered to be filed and made a part
of the record (here insert it) To wit, "Callaway
Bill of Circuit Oct.o Term 1844. Wm. H. Bailey plt vs Church
Exp.ons -ill J. Gibbs deft. Be it remembered that on the
trial of this cause the plaintiff gave in evidence
the following records Viz., the original papers
from the files of this Court, and the Judgment and

5 execution with the endorsements of credits and return of the coroner in a cause late pending in said Court wherein Jefferson Garth was plaintiff and James McCampbell and others were defendants (here copy them) Towit, State of Missouri County of Callaway SS. To James McCampbell, John A. Robertson Thomas Boyd Jr. Churchill J. Gibbs. James G. Slaughter Sam Humphries alias Samuel Humphries and Joseph D. Johnson Take notice that on Wednesday the 6th day of April 1842. it being the 3d day of the Callaway Circuit Court I will proceed by motion against each and all of you before said Court to render Judgment against each and all of you for the sum of three hundred and thirty three dollars with lawful interest thereon, together with such damages as the law allows on account of the failure and neglect of the said James McCampbell as Sheriff of Callaway County to pay over to the person entitled thereto said sum of $333.58. collected by him as Sheriff aforesaid on the 8th day of Decr. 1841. on an Execution to him directed from the Callaway Circuit Court in favor of Jefferson Garth and against Isaac Cura William Henry Russell, Reuben B. Overton, Willis W. Snell Daniel Nolley and James S. Henderson, which said Execution was issued upon a Judgment obtained in favor of the plaintiff aforesaid and against the defendants aforesaid in said Circuit Court on the 7th day of August 1841. said sum being paid to said McCampbell by said defendants in part satisfaction of said Judgment Jefferson Garth by James Fulton March 26th 1842

6 H. Tuel atto. On the back of which is the following return to wit, served the within

Return notice on the within named by delivering to the said James McCampbell a true copy on the 28th March 1842 and on the within named James G. Slaughter by leaving a copy at his dwelling house with a white member of his family over 15. years of age on the 30th of March 1842, on the within Churchill J. Gibbs by leaving a true copy of said notice with a white member of his family above the age of 15. years on the 3d day of April 1842. and in the within named John A. Robertson, Thomas Boyd Jr. Samuel Humphries on the 30th of March 1842 and on the within named Joseph D. Johnson on the 28th March 1842 by reading said notice in their presence and hearing in Callaway County on the respective dates mentioned

Wm. H. Bailey Coroner
Callaway County

and afterwards to wit, at a Circuit Court continued and held for Callaway County at the Courthouse on Tuesday the 5th day of April 1842. This day came the plaintiff by his attorney and produced his notice which is ordered to be filed, he also produced his motion which is ordered to be filed and is as follows to wit " Jefferson Garth vs James

Motion McCampbell et al. Callaway Circuit Court April 1842. And the said plaintiff by his attorney comes and moves the Court to enter up Judgment against the said James McCampbell Sheriff of Callaway County and of the Court aforesaid and against John A. Robertson Thomas

7. Boyd Jr. Churchill J. Gibbs Sam. Humphreis otherwise Samuel Humphreis, James G. Slaughter and Joseph D. Johnson securities of the said M. Campbell upon his bond as Sheriff for the year 1840 and 1841. and 1841. and 1842 for the sum of three hundred and thirty three dollars and thirty three cents, and such damages as the law allows, together with interest at the rate of 10 per cent per annum from the 8th day of December 1841. for the failure of the said M. Campbell to pay over to the said plaintiff or his authorised agent the said sum of $333.33/100 collected by the said M. Campbell as Sheriff aforesaid upon an execution to him directed from the Callaway Circuit Court in favor of said plaintiff and against Isaac Curd, William H. Russell, Reuben B. Overton, Willis W. Snell, Daniel Nolley and James S. Henderson, which said Execution was issued upon a Judgment obtained in said Court on the 7th day of August 1841. in favor of said plaintiff and against said Curd and others, said sum of money being paid to said M. Campbell as Sheriff aforesaid in part satisfaction of said Judgment so obtained as aforesaid by said plaintiff against said defendants, Curd et others and the said plaintiff avers to this Court that lawful demand has been made to said M. Campbell for said money, and that he has wholly neglected and still does neglect and refuse to pay said sum; whereupon said plaintiff asks the Court to render up Judgment as before prayed &c. James H. Tuel all for

Gaith

Credits on Exon

Credit this execution writ sixty five cents, this 30th May 1842 Wm M. Bailey Coroner

Credit this Execution writ ten cents this 11th June 1842 Wm M. Bailey Coroner

Return on Exon

I returns this execution satisfied in full by order of the plaintiff this 6th day of August 1842. Wm M. Bailey Con Calloway County

Bill of Exptns Cont'd

"The plaintiff also proved that after he returned the Execution, upon the demand of the money due upon the execution by the defendant therein, he paid the same to the said Gault, the said Gault requiring the plaintiff to pay the same, otherwise he would sue him to recover the same which was all the evidence given. The plaintiff then offered to prove by Daniel Nolly that whilst the above Execution was in the hands of the plaintiff for collection as the Coroner of Calloway County two of the children Gibbs and Johnson to whom he was indebted some money, one for which they held separate notes upon him then due, for money to assist them in paying off their shares of said Execution which amounted to the balances due on it, after the Credits endorsed - that he promised them to make up the sum except 35¢ which one James L. Henderson promised to raise & pay for said Johnson - That the said Nolly called upon James M. Tull attorney at law of said County and acting for the plaintiff Gault as his attorney of record in the collection of the debt a few days before the return day, and the plaintiff promised to pay to said

11. That during the Term of the Court to which the Execution was returnable, a sum over one hundred dollars for the said Gibbs & Johnson, and the said Judd then upon wrote a return upon the Execution for the plaintiff Bailey as coroner to sign which was done in the Witness presence, which return was, that the Execution was satisfied by order of the plaintiff. That the said Judd gave no receipt upon said return being made to the Witness for the said debtors of any money received, nor was any credit given for any payment on the notes of Witness held by the said Gibbs and Johnson, and the Witness never paid Judd the money or the plaintiff Bailey, the said Judd knowing left the country, before the term of the Court at which execution, and the said plaintiff offered to prove by James S. Henderson that he had promised on the said Execution to pay the said Judd as attorney for said Bailey the sum of thirty five dollars for the debtor Johnson in said Execution, during the said term but he never paid it owing to a fraud on Johnson part to comply with a contract made with him as the consideration of said payment, which Evidence so offered to be given was upon the motion of the plaintiff by his Counsel by the Court rejected upon the ground that it went to contradict the record, to which opinion of the Court in rejecting said Testimony so offered as aforesaid the plaintiff by his Counsel excepts. The said

=dant then by his counsel moved the Court
Bill Exposs Cont. to instruct the Jury that the plaintiff could not recover upon the Testimony he had given which motion being sustained by the Court the plaintiff took a nonsuit, with leave to move to set it aside, and afterwards in the Term the plaintiff moved to set the nonsuit aside, and for a new trial upon these grounds. (Towit) Wm H. Bailey plt vs C. J. Gibbs deft. Callaway Cirt. Octo Term 1844 The plaintiff moves the Court to set aside the nonsuit in this case & grant him a new trial, because 1. the Court rejected legal & competent evidence on the trial of the case, offered by plaintiff. 2 The Court misinstructed the Jury in the case

Todd p.q.

Bill Exposs Cont. and the same being heard by the Court was overruled and the plaintiff excepted to the opinion and instructions of the Court in the trial in refusing the plaintiffs Evidence offered, and that the plaintiff ought not to recover upon the Evidence given and in overruling the motion for a new trial and for not setting aside the nonsuit, and the Court signs seals and makes this bill of exceptions a part of the record at the request of the plaintiff

Jno. D. Leland (Seal)

State of Missouri } Sct
Callaway County }

I Geo Bartley clerk of the Circuit Court within and for said County do hereby certify that the foregoing twelve

13 pages contain a full, true, and complete
transcript of the record and papers
of the suit of William H. Bailey plaintiff
and Churchill C. Gibbs defendant as
fully as the same remain in this Office
In Testimony Whereof I have
hereto set my hand and
affixed the seal of said
Court at Office this sixth
day of December A.D. 1824
Geo. Bailey Clerk

6 (4) (5)

William H. Bailey

vs } Transcript of Record

Churchill J. Gibbs

Clerk Fee $4.60

Attest Geo. Bailey clk

Filed Dec: 9th 1844

H. L. Boon clk

Callaway 2

Supreme Court Jany T. 1845

Wm H Baily
ps
Churchill & Gibbs,

Writ of Error to Callaway Co

Now at this day comes the plaintiff and moves the Court to reverse, set aside and hold for naught the judgment of the Circuit Court of Callaway County rendered in this cause, because of the manifest error in the record and proceedings of the cause by said Court, and the said Plaintiff assigns specially as reasons for the same the following To wit

1 The Court erred in rejecting the evidence offered by the Plaintiff upon the trial.

2 The Court erred in giving the instructions in favor of the defendant.

And for many other apparent and manifest errors therein.

Wherefore he prays judgment of this Court in the premises &c.

Todd & p. q.

Wm. H. Bailey
vs East of mm.
Churchill J. Gibbs

Files Jany 13. 1845.
N. L. Bonnell

W. Churchill J Gibbs

Dec. 13 1844

You will take notice that I have sued out a writ of error from the Supreme court of this State to reverse the judgment of the Calloway Circuit court in your favor against me at their last term: which writ will be returned at the January Term of said court in 1845.

Wm H. Bailey

W. C. H. Hardin atty of record will accept this notice, and forward to Supreme court, in the suit now making suit.

David Todd

Sutton Mo
Dec. 16th 1844

I acknowledge Service of the above notice, for the purpose therein mentioned

Chas. H. Hardin
atty for C. J. Gibbs

6

Bailey
vs
Gibbs } notice

Hon D. Todd
Jeffurson city
Mo

Phas. Ne Hardiwing
Fulton

Filed Jany 18. 1845.
H. L. Boon clk

Bailey
vs
Gibbs
} Error to the Circuit court of Callaway County

William H. Baily brought an action of Assumpsit in the Circuit court Callaway county against Churchill J. Gibbs and the judgment of that court being given against him, he appealed to this court

On the trial of the cause he gave in evidence a record by which it appears that one Jefferson Earth had obtained a judgment on motion in the Circuit court of said county against the Sheriff of that county and his securities, on which judgment an execution was issued and delivered to the plaintiff as Coroner of said county commanding him to collect the amount from James Campbell Sheriff, and Churchill J. Gibbs the defendant & others his securities in his official bond. Several credits were endorsed on the execution and it was finally endorsed thus "I return this execution satisfied in full by order of the plaintiff this 6th day of August 1842, and signed by the plaintiff as coroner. No money was in reality paid, but it was so endorsed by the direction of the plaintiffs attorney on the promise of another to pay. The attorney about that time left the country.

After the return of the execution Earth the plaintiff* demanded the money due on that execution, and Baily the plaintiff in this cause to escape a law suit paid what by his return appeared to be due. This was all the evidence given. Baily then offered to prove by one Daniel Nolly that, whilst the said execution was in the hands of him said plaintiff as Coroner for collection, two of the debtors Gibbs and Johnson to whom he (Nolly was indebted, and for which they held separate notes on him then due [applied to him] for money to assist them in paying their shares of said execution

* in the execution

that he [Nolly] promised them to make up the same except $35; which one Henderson promised to raise and pay for said Johnson; that the said Nolly called on James H. Teel an Attorney at law of said court and attorney of Record for said Earth in the collection of this debt— a few days before the return day, and the witness (Nolly) promised to pay to said Teel during the term of the court, to which the execution was returnable a sum over one hundred dollars for the said Gibbs and Johnson, and the said Teel thereupon wrote a return upon the execution for the plaintiff Bailey as Coroner to sign, which was done in the witness's presence, which return was that the execution was satisfied by the order of the plaintiff— That the said Teel gave no receipt to the witness upon said return being made, nor were any credits given for any payment on the notes of the witness held by Gibbs and Johnson, and the witness never paid Teel the money, or the plaintiff Earth

The plaintiff then offered to prove by the above mentioned Henderson that he had heretofore offered to pay Teel in like manner thirty five dollars for Johnston; but that he had not done it

This evidence so offered was rejected on motion of the defendant on the ground that it contradicted the record. The plaintiff excepted to this opinion of the court. The defendant then moved the court to instruct the jury, that the plaintiff could not recover on the testimony he had given. The instruction was given and excepted to by the plaintiff. He then took a nonsuit with leave to move to set it aside, and afterwards during the term he moved to set it aside and for a new trial because 1st the court on the trial rejected competent evidence 2 Because it misinstructed the jury. The Circuit court of said Circuit court overruled this motion and the plaintiff excepted to its decision

Had the plaintiff been requested by Gibbs to pay on this execution the amount of Gibbs indebtedness I am not able to see that it would be any contradiction of the record for him to prove that fact, nor indeed that what he has now proves is

is any contradiction of any part of the record except that part which states that the return was made by the order of the plaintiff in the execution, and as he paid the money to the plaintiff he has injured nobody, and indeed the plaintiff in the execution alone had the right to deny the truth of that return. But he proves that he paid this money without the request of Gibbs, and moreover he proves no promise by Gibbs to repay the money. A promise to pay ~~for~~ made after the payment would have been a good consideration to support an action in such a case as this. Nolly according to the evidence promised Tuel Garths attorney to pay during the term of court and Tuel wrote the return for Bailey to sign as coroner. It does not appear that Gibbs was even present. If any body is liable to Bailey the coroner on the implied promise it must be either Nolly or Tuel. It is not seen that the Circuit court committed any error either in rejecting the evidence or in instructing the jury. Its judgment is affirmed.

G Tompkins

We concur

~~W. B. Napton~~

W. Scott

W. B. Napton

9.

Bailey v Gibbs

opinion

Filed Jany 30. 1845.
H. L Boon
Clk

In the Supreme Court January T. 1845.

Wm. H. Bailey plaintiff
against
Churchill J. Gibbs defendant. Calloway Co.

} Writ of error to

The plaintiff sued the defendant, and one Johnston in the Calloway circuit in general assumpsit upon the money counts, plea non assumpsit and upon as to Gibbs, abatement by Johnstons death as to him. Upon the trial at the October term 1844, the plaintiff took a non suit upon the ground of the court rejecting the evidence offered by him to support his action, and having made a motion, with leave, to set aside the non suit, the court overruled the motion, and exceptions were taken setting out the evidence offered, and objections made to the several opinions of the court on the trial, and the plaintiff upon writ of error sued out, has brought up the record & seeks to reverse the judgment of the inferior court.

By the bill of exceptions it appears that Jefferson Garth on the 6th day of April 1842 by the judgment of the Calloway circuit court recovered a judgment against James M. Campbell as principal in a late Sheriffs bond and John A. Robertson Thomas Boyd jr. Churchill J. Gibbs Samuel Humphries James G. Slaughter and Joseph D. Johnson the sureties of the said Sheriff in said bond for three hundred & thirty three dollars debt and for damages and costs, and that in May 1842 an execution upon that judgment was placed in plaintiffs hands as coroner of the County to execute and return at the august term of the court 1842, that upon that execution the plaintiffs attorney credited the sum of $175 20/100 on 6th April 1842, and the coroner (the plaintiff) credited it for $65. and $10. received in May and June 1842, and made return at the

return day "I return this execution satisfied in full by order of the plaintiff" After the return of the execution upon the demand of the said Gaith who was plaintiff in the execution, disavowing the return as made by his order, and threatening to sue the coroner (the present plaintiff) for the recovery of the ballance due him upon the execution, the coroner paid over to him the amount due, after the credits endorsed on it, were deducted. The plaintiff then offered to prove by Daniel Nolly that whilst the execution was in the hands of the coroner he was indebted to Gibbs and Johnson on notes they held and upon application of them to him for money to pay off the ballance of the execution after allowing the defendants in it, the credits endorsed on the execution, he agreed to raise the money for them, and to pay it; that he called upon James H. Teal who was the attorney of record for the plaintiff Gaith and he made a promise to him to pay over the money for Gibbs and Johnson the defendants therein to the amount of the residue of the execution due, at any day in the return term of the execution, and that upon such promise, he the said Teal and the witness Nolley went to the coroner, and by arrangement, he the said Teal writing the return for the coroner on the execution of it being "satisfied in full by order of the plaintiff" the said Teal directed the officer, so to return the execution and said coroner signed the return and so made: that during the same term the said Teal the attorney privately left the court and county, and has not since returned; and that the said Nolley did not during the term, nor at any time since pay the money so promised to be paid, to the said Teal, or

the creditor Garth, or to any person for them — that when he made the promise to Deal, it was verbal and no receipt passed nor was any credit ever given on Gibbs or Johnsons notes held against the witness for any payments promised so to be made

He also offered to prove by one Henderson that he had promised upon the same execution to pay to the coroner for the defendant Johnson some thirty five dollars in part of it, upon an agreement with Johnson, and he Johnson not complying with his previous contract, he did not absolutely become bound to pay it, and never had paid any sum for Johnson upon the execution

The defendant objected to the plaintiffs giving any such evidence as this offered, and the Court sustained such objection on the ground that it contradicted the record offered before by the plaintiff, and the plaintiff offering no other evidence, at the request of the defendant, the Court instructed the Jury that the plaintiff could not recover in the action upon the testimony given by him; and thereupon he took a nonsuit with leave to move to set it aside, which he did, upon the grounds 1 of the rejection of the evidence offered by him 2. for the misdirection of the Court to the Jury. which motion was overruled.

The plaintiff insists to reverse the cause.

1. That assumpsit will lie upon principles of equity when a benefit is conferred to defendant, or injury to plaintiff by defendants acts.

2. That an officer holding execution, upon a failure of defendants to pay it upon payment, becoming responsible and paying it, can in assumpsit recover the money; and is upon

a good legal consideration

3. That an attorney directing satisfaction of execution without receiving the money, is no release of plaintiffs right, nor discharge to the defendants

4 That the officer returning satisfaction by order of plaintiff, and satisfying the plaintiff, as upon a false return produces a discharge to defendants and such a benefit as makes a legal consideration.

5. That a return by order of plaintiff, is not contradicted by evidence that an agent of plaintiff or his attorney of record made the order - for the maxim applies quod facit per aliud, facit per se"

Wm H. Bailey
vs
Z Brief
Churchill J. Gibbs
for plaintiff

Authorities
1. Bibb 564

8 Johnson 361.
10 do 220
5 Peters Sup. C. R. 113.
5 Randolph 639.
6 Litt. 271.
5 Mon. 126.
1. J. J. M. 12.

Todd attº for plt.

In the Supreme Court.
January Term 1845.

William H. Bailey Plaintiff in Error
vs
Churchill J. Gibbs Defendant in Error.

Defendant in Error by his counsel make statement of the following facts and rely upon the following points and authorities.

This was an action of Trespass on the case on promises instituted in the Callaway Circuit Court by William H. Bailey Plaintiff against Churchill J. Gibbs and Joseph D. Johnson Defendants, for money paid, laid out and expended to and for the use of said defendants. Said defendants filed for plea, the General Issue. At the trial Term the death of Defendant Johnson was suggested on the record and the Suit abated as to him. On the trial of said cause, the plaintiff gave in evidence the records of the original papers from the files of the Court and the

Judgement and execution with the endorsements of credits and return of the Coroner, in a cause late pending in said Court wherein Jefferson Garth was plaintiff and James McCampbell & others were defendants; And it appears from the execution that the following is the return of the Coroner made thereupon, "Return this execution satisfied in full by order of the plaintiff. This 6th day of August 1842"

The plaintiff also proved that after he returned the execution, upon the demand of the money due upon the execution therein he paid the same to the said Garth, the said Garth requiring the plaintiff to pay the same otherwise he would sue him to recover the same, which was all the evidence given.

The plaintiff then offered to prove by Daniel Nolley that whilst the execution was in the hands of plaintiff for collection as Coroner of the county, two of the defendants in

said execution, Gibbs & Johnson & to whom he owed some money, applied for money to enable them to pay off their shares of said execution, which amounted to the ballance due after the credits endorsed - that he promised to make up the sum except $35 - that said Nolley called upon James H. Fuel attorney at law and acting for the plaintiff Gorth as his attorney of record and promised to pay said attorney during the Term of the Court to which said execution was returnable a sum of money for said Gibbs & Johnson - that said Fuel wrote said return upon the said execution for plaintiff Bailey as Coroner to sign which was done - that said Fuel gave no receipt to said witness for the said debtors of any money received and that said witness never paid the money promised either to Fuel or to Gorth.

The said plaintiff offered to prove by James S. Henderson that he had promised on the same execution

to pay said Juel for said Gouth the sum of Thirty five dollars for the debtor Johnson, but that he had never paid it:

Which evidence so offered to be given was upon motion of the defendant by his counsel, by the Court rejected, upon the ground that it went to contradict and impeach the record.

The court then upon motion of defendant instructed the jury that plaintiff could not recover upon the testimony he had given.

The plaintiff took a nonsuit with leave to move to set it aside and afterwards the plaintiff in the suit moved to set aside the nonsuit and for a new trial upon these grounds: 1st The Court rejected legal and competent evidence on the trial of the case offered by plaintiff: 2nd The court misinstructed the jury in the case

The same being heard by the Court was overruled.

Points and Authorities

1 That the Circuit Court committed no error in rejecting the testimony of Polley & Henderson because it goes to contradict and impeach the record of the return made by Plaintiff as Coroner of the County.

See 1 J. J. Marshall 12 = 2 J. J. Marshall 26 = 3 Monroe Rep. 351 = Townsend v. Olin 5 Bend. 207 = 4 Monroe Rep. 399 = 3 Lit. Rep. 44 = 6 Mass Repts 325; 15 Mass Repts 82.

2. That the Court below committed no error in granting Defendant the instruction asked for.

Gordon & Hardin
Counsel for Gibbs Defendant

3 The plaintiff could not make the defendant his debtor by voluntarily paying the debt of the defendant without a previous request by the defendant or a subsequent promise to pay the same to the plaintiff See Chitty on Contract, 591. 10 John R 361. 3 John Rept 434.

Wm H. Bailey Plff.

vs

C. J. Gibbs Defts

"Defendants Brief"
Gordon & Gordin
counsel

1 J. J. Marshall 12
2 J. J. Marshall 26
3 Monroe Rep. 351.
5 Ward. 207.
4 Monroe Rep. 399.
3 Lit. Rep. 44.
6 Mass Repts 325
15 Mass Repts 82.
7 Mass R 388.
Chitton Con - 591.
10 John R 361
1 John R 434.