44/17

January 1846 #69
State of Missouri
vs.
Milton Witt
Polk Co.

} Larceny

theft of gelding

Larceny
Horses

Be it remembered that among the Records and proceedings in the Polk Circuit Court in the State of Missouri are the following, towit. on the 26th March 1845 the following Indictment was filed in the Polk Circuit Court towit. "

State of Missouri, } In the Polk Circuit Court,
County of Polk } March Term AD. 1845.

The Grand Juror for the State of Missouri

Indictment impannelled sworn and charged to enquire in and for the body of the County of Polk aforesaid, upon their oath present that Milton Witt late of said County of Polk on the third day of January in the year of our Lord one thousand eight hundred and forty five, with force and arms at the County of Polk and State of Missouri aforesaid one bay Gelding of the value of thirty Dollars of the goods and chattles of one Sendaar Smith then and there being found, did then and there feloniously steal, take and carry away, contrary to the form of the Statute in such case made and provided and against the peace and dignity of the State

Thomas Ruffin
Cir. Atty

On which Bill of Indictment was the following indorsement by the foreman of the Grand Jury "A true Bill." Lyman Beeman
foreman of the Grand Jury

On which Indictment the following writ of Capias was issued towit

The State of Missouri,

Capias. To the Sheriff of Polk County Greeting.

We command you to take Milton Witt and him safely keep so that you have his body forthwith before the Judge of our Polk Circuit Court now in session at the Court House in Bolivar to answer the State

of Missouri of an indictment prefered against him for Grand Larceny and have you then and there this writ

L. S. Witness J. H. Davis Clerk with the seal of said Court affixed this 26th March AD. 1845.

J. H. Davis Clk

Endorsed by the Sheriff as follows towit

Sheriffs Certificate I do certify that I served within Capias on the 26th of March 1845 by arresting the within named Milton Witt and bringing him to the County Jail and confining him therein

David D. Stockton Shff.

Afterwards towit at a circuit Court began and held at the Court House in the town of Bolivar on the 22d day of September 1845 for the County of Polk Present Hon. F. P Wright Judge, J. H Davis Clerk D. D. Stockton Shff, the following proceedings were had towit.

State of Missouri vs Milton Witt } Indict for Horse Stealing

This day came the Circuit Attorney who prosecutes for the State in this behalf as well as the said Defendant in his own proper person who being brought into Court by Williams Lunceford and Abram Fenly the Securities of the said Defendant and thereupon surrendered the said Milton Witt to the Custody of the Sheriff and thereupon it is considered by the Court that the said Williams Lunceford and Abram Fenly be discharged from all further liability on the Recognizance of the said Defendant.

Surrender by Bail

3)

Afterwards towit at the Polk Circuit Court on the day and year aforesaid the following proceedings were had towit

The State of Missouri
vs
Milton Witt } Indict for Horse Stealing

Cause Continued

This day came again as well the Circuit Attorney who prosecutes for the State in this behalf as the said Defendant in custody of the Sheriff And on motion of the Circuit Attorney and for good and sufficient cause now here to the Court shown It is ordered that the above cause be and the same is hereby continued until the next term of this Court

And afterwards towit at a special adjourned term of the Polk Circuit Court began and held at the Court House in the town of Bolivar on Monday the 15th day of December 1845 present Hon Foster P Wright Judge D. D. Stockton Shff and J. W. Davis Clerk, the following proceedings were had towit

State of Missouri
vs
Milton Witt } Indt. for Larceny

Plea of Not Guilty

This day came as well the prosecuting Atty as the sd Defendant in his own proper person who for plea says he is not guilty in manner and form as he stands charged in sd indictment and for trial puts himself upon his Country and the Prosecuting Atty doth the like and thereupon came a jury towit Avington Simpson Jacob Sears James Johnson Alexander

4)

Fossett Elias Stuart John Wainscott Wm Lennox P. McDaniel Wm Stuart Samuel Hughes Jos Jenkins and James Scroggins twelve good and lawful men who being sworn well and truly to try the issue joined were by consent of the parties permitted to disperse until to morrow morning 8 Oclock.

Afterwards to wit on 16th December, present as yesterday, the following proceedings were had to wit.

The State of Missouri
Against
Milton Witt. } Indict for Larceny

This day came as well the Prosecuting atty as the said defendant who is brought to the bar in custody of the Sheriff and the jury aforesaid appeared and took their seats and
Verdict the evidence being heard and argument of attorneys the jury retired to consider of their verdict and returned into Court the following verdict to wit "We the jury find the Defendant guilty in manner and form as he stands charged in said Indictment and assess the punishment to two years imprisonment in the penitentiary of this State, and the Prisoner is remanded into the Custody of the Sheriff of this County.

And afterwards to wit the following proceedings were had, on the 17th day of December 1845.

State of Missouri
vs
Milton Witt. } Indict for Larceny.

Now at this day comes the

5)
Motion for New trial

said Milton Witt in his own proper person as well as the Circuit Attorney who prosecutes in behalf of the State of Missouri and thereupon the said Defendant files herein his motion for a new trial in said cause, which which said motion being argued, and ane deliberation thereon being by the Court had, the same is by the Court overruled.

Which motion for a new trial is in the words and figures following to wit.

The State of Missouri } Indictment for
vs } Larceny in the Polk
Milton Witt } Circuit Court.

Motion

The Defendant comes and moves the Court to set aside the verdict of the jury in this case and grant him a new trial.

1st Because the Court gave erroneous instructions to the jury

2nd Because the Court erred in refusing to give instructions asked for by the Defendant

3rd. Because the verdict is against the Law & the evidence.

Means Otter & Hendrick Attys
for Defendant.

Afterwards to-wit on the day and year aforesaid the following proceedings were had to-wit.

State of Missouri } Indictment for Larceny
vs } Verdict of Guilty.
Milton Witt }

Now at this day comes again the

Circuit Attorney who prosecutes for the State of Missouri in this behalf and the said Milton Witt being brought to the bar of the Court here and thereupon the Circuit attorney who prosecutes as aforesaid prays the judgement of the Court here upon the veraict of the Jury in this case rendered and wherein the said Milton Witt was found guilty of having feloniously stole took and carried away one Bay Gelding the property of one Sendaar Smith. And thereupon it is forthwith demanded of the said Milton Witt if he hath or knoweth any thing to say wherefore the Court here ought not upon the premises and veraict aforesaid to proceed against him, who nothing further saith unless as he heretofore hath said. Whereupon all and singular the premises being seen and heard and by the Court here fully understood it is therefore considered by the Court here that the said Milton Witt be taken in the Custody of the Sheriff and by him safely conveyed to the penitentiary of this State there to be imprisoned for the term of two years. And it is further considered that the said State of Missouri have and recover of the said Defendant her Costs and Charges in this behalf laid out and expended and that she have thereof execution

Sentence.

Further Proceedings were had towit.

State of Missouri vs Milton Witt } Indictment for Larceny Verdict of Guilty, Judgement and sentence.

7.

Now at this day comes again the Circuit Attorney, who prosecutes for the State of Missouri in this behalf as well as the said Milton Witt in his own proper person who is led to the bar in the custody of the Sheriff and thereupon the

New trial

said Defendant again files his motion to set aside the verdict in this cause and grant a new trial for reasons therein set forth, and also files an

affidavit

affidavit in support thereof which said motion being seen and by the Court here fully understood the same is by the Court overruled and thereupon the said Defendant prays an appeal to the Supreme

Bill of Exceptions.

Court of this and to him it is granted. And the said Defendant now herein files his bill of Exceptions signed and sealed by the Court and made a part of the record And thereupon the said Defendant prays the Court to delay the execution of the sentence in this Cause until the same can be determined by the Supreme Court, and the Court here not being of the opinion that there is probable Cause for said Appeal, nor that there is so much doubt thereof as to take the judgement of the Supreme Court thereon, Nevertheless for the purpose of allowing the said Defendant an opportunity of and sufficient time to make application to the Supreme Court or a Judge thereof for such order it is by the Court here ordered that the execution of the judgement and sentence aforesaid, except as to Costs, be suspended for the space of thirty days.

Which motion for a new trial is in the words and figures following towit

Milton Witt
ads
State of Missouri

Verdict for Larceny

2d Motion for new trial.

The sd Deft comes and moves the Court to set aside the verdict of the Jury in this cause and grant him a new trial for the following reasons.

1st Because the sd defendant since the first motion made by him in this ~~behalf~~ Cause for a new trial has discovered material evidence towit the evidence of one of the members of the Grand Jury by whom sd Deft was indicted

Atter, Means, Hendrick
Attys for Deft.

Which affidavit as mention above is in the words and figures following towit.

State of Missouri } Before the Polk Circuit
County of Polk, } Court.

Affidavit.

This affiant L. Hendrick being duly sworn doth depose and say that since the trial of the case of the State of Missouri vs Milton Witt charged with stealing a bay gelding in the Polk Circuit Court & since the motion for a new trial in that case was overruled one of the members of the Grand Jury who found the Bill of Indictment against Witt informed this affiant without being asked or interogated about the matter that William Owens Jr one of the Witnesses for the State gave evidence before the grand jury materially different from the evidence which he gave on the trial. That is the said William

9. Owens Jr. testified before the Grand Jury that his Father had furnished him with a Saddle & that he rode on a saddle with Witt to the fort, & also that he and Witt went to bed the night before they started together, & after they had gone to bed Witt got up & went out & was gone all night & never returned to the bed that night, & that the first he saw of Witt the next morning Witt was leading the horse around the barracks.

L. Hendrick.

Sworn to & Subscribed
this 17th December 1845

J. W. Davis Clk.
By A. Williams D. Clk.

Which Bill of Exceptions is in the words and figures following to wit.

Bill of Exceptions.

State of Missouri, } Suit for Larceny in the Polk
Against } Circuit Court December
Milton Witt. } Term 1845,

Be it remembered that at the adjourned Special Term of the Polk Circuit Court the following was all the evidence on the trial of said Cause.

Evidence

Scudder Smith sworn that August 1844. I had rode the horse to Bolivar and rethrned home about sun set the same day and put the horse up in the lot. The next morning I sent my boy to drive up the horse, and he drove all up but the one I rode to Bolivar, the boy told me the horse was not in the lot I told him to look in cane brush in the lot and see if he was not there, The boy said he was not there, My brother came along and said Milton Witt

has stole your horse and gone to the Garison and told me to send down and see if he had started. I told Cattle boy to go down to Mr Stagdons. I started in company with Leonard West Saturday Morning I went to Orleans and enquired if any person had seen my horse. I then met with Capt Hunt and from what his wife said I went to the Garrison and heard of the horse two or three times on the way. I did not see Witt. I enquired of Mr. Mc Cows Jr. where my horse was. I then went with him back to Mr. Duncans, the horse was worth thirty or forty Dollars, he was taken on thursday night. I left here on Saturday and found my horse on Sunday evening at Mr Duncans 10 miles from fort Scott. Mr. Witt had left my house some two months before - he quit my house before my Corn had been ploughed through the first time. Witt had a sore foot. I hired a hand to work in Witts place. Witt said he was well and commenced work again. Witt said I had never misused him to Mrs. Gillespie in my presence. I told him he should not ride the two work horses He had liberty to have a mare of my daughters and did so. I did not drive him away from my house. I never told Mrs Witt that prisoner was to have a horse to ride. Mr. Witt ploughed the horse two hours when I wanted his horse for some laying off. I think the Corn was all ploughed after Witt left there. I do not Know whether Witt to his Brothers the day my daughter was married. I learned he rode him there with bevis in his mouth - he might have rode him to town with my son. I do not remember it. I was frequently from home waggoning, he might have rode this horse never had my permission. The horse I put in lot was the one I found at Mr. Duncans.

L. West. Leonard West. I travelled with Mr Smith after
11. the horse. we got the horse at Mr Duncans We then
left Mr Duncans, came on back with the horse —
the horse which we got at Duncans I know to be
the same horse — the property of Mr Smith in this
County. I saw Witt at the Fort. he was walking
from me through the fort. Mr Smith and myself
were not in company when I saw Witt. He hunted
some for Witt but did not see him a second
time. The prisoner at the bar is the same Milton
Witt that I saw at the fort. I had not seen Witt
at Smiths for a month or a month and a half, or
two months previous to this time. I was at Smiths
house frequently. I don't recollect of ever seeing Witt
work the horses. Milton Witt and ~~one~~ of Smiths
sons rode one of Smiths horses to my farthers
house whilst Witt lived at Smiths, some 4 or 5
miles from Smiths. Smith had another bay horse
that worked. I do not know of Witt riding Smiths horse
to his Witts mother's

Thos Duncan, Thomas Duncan swore, In August year ago I was looking
for Owens son Jr. that ~~came~~ and negro man that came
out to work. In the night the dogs barked, it waked
me. some persons came in at the gate. Wm Owens jr.
hollowed. I asked if it was him, he said it was.
I told them to strip their horses, I went with them to
the lot, and told them to turn their horses in, this
young man led that horse down to the lot, one of them
observed Mr Owens jrs horse was bad to fight I told
them there was a stable and went to the house
I went to bed, I never spoke to Witt that night. I asked
Wm Owens jr. at breakfast what young man that
was he said it was Mr Witt. said he wished to get employ =

ment to work at the fort - after Breakfast was over the Black boy and Mr Owens caught their horses, I was not where Mr Owens and the black boy was saddling their horses. Mr. Witt stepped up to me, and asked me if he could hire me to keep his horse a day or two or two or three days I told him I could not do it had nothing to fed with on I told him the range was good Wm Owens would have to turn his horse in the Range and he could do likewise so if he turned him out afraid he would run away till used to other horses if he hired at the Fort or neighborhood wanted wanted to take the horse there and fed him up was likely & thought he would suit work he was poor if he hired at the Fort that day would take him away the next day said if he hired at the Fort wanted to trade him at Fort or if he did not hire at Fort would go to Arkansas. Smith Came and claimed the horse and took him away Witt had a bridle rope for Rains and no saddle asked me if I thought he would trade well at the Fort -

G.W. Hall

Geo W Hall Mrs Gillespies was his home at the time the horse was taken Witt had been staying there Considerable time had no horse there Wm Owens Jr and black man Came there Witt was there when they came about dark. Witt and Owens were out together two or three times during the night each time out together the longest time they were out was about two hours while I was awake

13. Owens horse was restless & so afraid he would get away before this I heard Witt say that Smith was owing him and if he could not get his pay one way he would another this I went with Witt one day to Smiths to get Witts Clothes Smith asked them to come in the house Witt did not go. asked him second time his Clothes were brought out and given to him except a pair of socks Smith said he would pay him for them Witt was there when I went to sleep when I waked up next morning Witt & Wm Owens had gone it was two miles from Mrs Gillespies to Smiths —

M. Owens Jr. Wm. Owens Jr swore that Witt rode Smiths horse from Gillespies in Polk County and left him at Mr. Duncans, rode him from Mrs Gillespies — when Witt saw Smith at the fort said yonder is old Scud damn him and left off. When Witt saw Smith he seemed to try to get out of the way of Smith Went in a contrary direction, Ashe and Witt was going to Duncans Witt said. Smith was owing him and if he could not get his pay one way he would another Witt said he would fatten up the horse up and sell him or swap him for a younger one the horse Smith took from Duncans Witt rode from Mrs Gillespies. The night we staid at Mrs Gillespies Witt and myself slept together, we went to bed together about usual bed time, and never went out the house neither Witt nor myself after we went to bed. Witt was there when I came there about dark. He started next morning from Mrs.

14.

Gillespies for Mr Duncans about day light went along the public road went through Orleans, the middle road to Fort Scott a little town 4 or 5 miles from Mr. Smiths went the road usually travelled to Fort Scott. Fort Scott is about 80 miles from this place Duncans is ten miles from Fort Scott this side We went about 50 miles first day. Staid on Munday fork of Spring River, got to Duncans and staid all night. Witt rode the horse, I never was on him. The witness was asked to state whether he did not, in the Court of Enquiry refuse to answer the question, whether he rode the horse to Duncans, first said because he thought it an unfair question because he was told at the time not to answer it. Witt never told me whose horse it was called the horse his, saw Witt and Duncan off talking on a trough, did not hear what they said. I rode there without a saddle, on the negroes Quilts and Clothes.

Wm Owens Sr. Wm. Owens Sr. swore that in August 1844 he sent his son and servant to the fort told them to go to Mrs Gillespies first night and start early next morning as flies were bad, and furnished each of them with a horse, This was all the evidence the plff offered in Chief. Deft then proved by

Mrs. Witt. Mrs Nancy Witt who swore, that after Milton Witt commenced working with Mr Smith in 1844. Senator Smith told her that Milton was to have one fourth of crop raised except the wheat and was to have the care of the horses and was to have the privilege of riding a horse when he wished to do so provided he was not wanted for ploughing Smiths daughter was Mar-

15.

-nied whilst Milton lived with Smith and Milton rode the horse, the same one eye broken winded horse to my house twice that day - Milton rode his his horse frequently when he wished to do so, has seen him ride the horse frequently. Milton came back to my house in two or three days after Smith brought his horse from Mr. Duncans My house is 6 miles from Smiths in this County - remained here and had his trial before the Justices, and was acquited - remained here then until Circuit Court. He never concealed himself at my house was there like the rest of the family night and day all the time. He was arrested at my house after night - He spoke of going after money

Mrs. Miller. Mrs. Miller swore that while Witt lived at Smith's she lived in 300 yards of Smith's Witt had a sore foot & was unwell, saw him at different times ride Smith's horse frequently,

A Feuly. Abram Feuly swore he saw Witt riding a horse of Smith's whilst Witt lived there since has known Witt five or six years, his general Character for honesty is good has heard some people speak hard of the boy then so that it was Smith he heard speak unfavorable of him, don't recollect any other person. Witt was at work at my house, Smith told me he was a bad boy, and after that hired him himself.

C. F. Bewly C. F. Bewly swore that he has known Witt three or four years, his general Character for honesty is good never heard any thing against him until this prosecution

The pltff then called

16 Samuel Box, who swore he heard some rumors against Witt had known him five years heard rumors of his character not good two years since though general character is good as far as he knows

N. Wilson Nathaniel Wilson, swore Has known Witt some time, has heard bad rumors against him cant say his general character is good.

This was all the evidence in the cause the Defendant then asked the nine instructions in the words and figures following:

1st The Court instruct the jury that the openness & notoriety of the Defendants conduct in reference to the taking & carrying away of the horse are circumstances which tend to rebut the presumption of felonious intention

2d That if the taking was under a claim of right that fact is a circumstance which tends to rebut the presumption of felonious taking

3d That unless the Jury believe from the evidence that the taking & carrying away of the horse was done feloniously, without the consent or permission of Smith, & without a claim of right they ought to find the Defendant not guilty

4th That if the Jury believe from the evidence that the horse was taken and carried away openly & notoriously & under a claim of right they ought to find the Defendant not guilty

5th That unless the State has proved to the satisfaction of the Jury, beyond a reasonable doubt, that the Defendant is guilty of taking the horse feloniously they ought to find the Defendant not guilty

6th If the Jury believe from the evidence that the Defendant Witt took the horse under a

supposed claim of right however unfounded such
17. claim might be they should find him not guilty

7th. That if the Jury believe from the evidence that Defendant Witt took & rode the horse under a supposed right to do so they should find him not guilty.

8th That if Defendant Witt took the horse & carried him away openly & notoriously it was not larceny, and the jury should find him not guilty

9th, That unless the Jury believe from the evidence that Defendant Witt took the horse wilfully & feloniously and without any supposed right to do so beyond a reasonable doubt they should find him not guilty

Which instructions the Court refused to give to the opinion of the Court in refusing to give said instructions of the Defendant; the said Defendant excepted The Court then gave the following instructions

If the Jury believe from the evidence - that it was the agreement between Smith and the prisoner that prisoner was to have the privilege of riding the horse, and that when the prisoner rode the horse to Duncan's he had no intention of selling the horse or converting him to his own use but merely took him for the purpose of riding him at that that particular time, they ought to find him not guilty

If the Jury have a reasonable doubt of the guilt of the Defendant they ought to find him not Guilty

If the Jury believe from the evidence that the horse belonged to Smith and that the prisoner took and carried away the horse without the knowledge or consent of Smith with the intention of selling him or of ~~converting~~ converting him to his own use they ought to find him guilty. And although the jury may believe from the

evidence, that Smith, in the contract spoken of, had agreed that the prisoner might ride the horse, yet if they believe the prisoner took the horse with the intention of selling him or of converting him to his own use they ought to find him guilty.

To the opinion of the Court in giving said instructions by the Court the Defendant objected & excepted. The defendant then filed his motion for a new trial (for Motion see page 5th) which motion was by the Court overruled— to the opinion of the Court in overruling said motion and refusing to grant a new trial the Defendant excepted The Defendant then filed an affidavit herein of Littleberry Hendrick (for which see pages 8 & 9) the Defendant then filed his second motion for a new trial in the words and figures following ~~to wit~~ (for which second motion see page 8.) which second motion for a new trial was by the Court overruled. to the opinion of the Court in overruling said second motion for a new trial the Defendant excepted To all which decisions of the Court the Defendant excepts & prays that this his "Bill of Exceptions may be signed sealed and enrolled & made a part of the record in this case, & it is accordingly done.

J. P. Wright. (Seal)
Cir Judge.

State of Missouri } ss.
County of Polk }

I, Israel W. Davis Clerk of the Circuit Court of said County, Do Certify that the foregoing 18 pages of manuscript, contain a full, true, and complete transcript of the Records and proceedings in the case of the State of Missouri against Milton Hitt as the same appears of Record in my said office.

Witness Israel W. Davis Clerk of said Polk Circuit Court with the seal of said Court affixed at office this 19th day of December A.D. 1845

I. W. Davis Clerk

By A. Williams Dpty. Clerk

~~(71.)~~ (~~61.~~) ~~109.~~

69.

State of Missouri

vs. Transcript.

Milton Witt.

Filed Jany 13. 1846.

H. L. Boon clk

Milton Witt
vs.
State of Missouri } Appeal from the Polk Circuit Court.

Witt was indicted, convicted & sentenced to imprisonment in the penitentiary for stealing a gelding the property of S. Smith. After the close of the evidence tending to show that the horse was taken by the prisoner, sundry instructions were asked and refused on behalf of the defence. The court then gave the following instruction which was excepted to by the prisoner: If the jury believe from the evidence that the horse belongs to Smith and that the prisoner took and carried away the horse without the knowledge or consent of Smith with the intention of selling him or of converting him to his own use, they ought to find him guilty. And although the jury may believe from the evidence that Smith in the contract spoken of had agreed that the prisoner might ride the horse, yet if they believe the prisoner took the horse with the intention of selling him or of converting him to his own use they ought to find him guilty.

The legality of the conviction must depend on the propriety of the foregoing instruction. Larceny is defined to be the wrongful taking and carrying away of the personal goods of any one from his possession with a felonious intent to convert them to the use of the offender without the consent of the owner. 2 R. C. 563. The taking must be done animo furandi or as the civilians express it lucri causa. Every felony includes trespass and every indictment for larceny must have the words felonice cepit as well as asportavit. The felonious intent is the material ingredient in the offence. To constitute this offence

therfore in any form there must be a taking from the possession, a carrying away against the will of the owner and a felonious intent to convert it to the offenders use. 3. Chit. 675. There must be a felonious intent and goods taken possession of on a claim of right although that right may be unfounded is not a felony. Bauk. What acts constitute this felonious intent is a matter of great difficulty. Sir William Blackstone says the ordinary discovery of a felonious intent is when the party doth it clandestinely, or being charged with the fact denies it. But this is by no means the only criterion of criminality. For in cases that may amount to larceny the variety of circumstances is so great and the complication thereof so mingled, that it is impossible to recount all those which may evidence a felonious intent or animum furandi, wherefore they must be left to the due and attentive consideration of the court and jury. 4 Com. Chitty says, when the taking exists but without fraud it may amount only to a trespass. This is a point frequently depending on circumstantial evidence and to be left to the jury's decision" 1 Chit. Archbold says in all cases of larceny, the questions whether the defendant took the goods knowingly or by mistake, whether he took them bona fide under a claim of right or otherwise, and whether he took them with an intent to return them to the owner or to deprive the owner of them altogether & to appropriate or convert them to his own use or fraudulently and to deprive ~~them~~ the owner of them altogether. are questions entirely for the consideration of the jury to be determined by them upon a view of the particular facts of the case. 180.

A claim to the property stolen is for

quently set up as a defence in prosecutions for larceny. It is always a question for the jury, whether such a pretension is an after thought to screen a felonious intent or whether the property was taken in good faith under a belief that the party had a right to it. If the bare assertion of a claim to stolen goods shall prevent a conviction for larceny there is no protection to property against the invasions of depredators.

It will thus be seen from what has been observed, that there cannot be a larceny without a felonious intent. That the taking the personal goods of another without this intent may be a trespass but it cannot amount to larceny. The prisoner then might have done every act supposed by the instruction of the Court without being guilty of a felony. The instruction defined a trespass and not a larceny and it was error to have told the jury, that the commission of the acts mentioned in it rendered the person guilty of larceny. The other judges concurring the judgment will be reversed, and a new trial had ~~therein~~ in the cause.

W. Scott

Milton Mill

vs.

State of Missouri

Opinion

Scott

Filed January 22. 1846.

H. L. Boon clk

The Record in the case of The State against Watt is sent down for the purpose of asking for an order staying the execution of the sentence until the Supreme court can hear & decide the case taken up by appeal, It being taken within 30 days before the Court &c,

The Defendants counsel think that the court erred in refusing the instructions asked by Deft. First, because the carrying away of the horse was open & notorious, & thereby is a circumstance to be weighed by the Jury tending to rebut the presumption of felonious intention,

Second there is evidence conducing to show that he had some claim of right as to taking & riding the horse & if he took & rode him under such claim he can not be guilty of larceny by afterwards conceiving the idea of selling him unless he did so especially as he acted openly & before persons who he knew would talk all about it & thereby gave notice of an action of trespass against him

The Defts counsel also think the court erred in giving the instructions that were given; They were calculated to instruct the Jury to convict when they might be satisfied that the taking and carrying away was a trespass only, It is not sufficient that the taking & carrying away was wrong but it must be felonious,

The court also erred in refusing a new trial, for the above reasons, & for the reason that he was convicted on the testimony of a witness who swore contrary before the grand Jury to what he did on the trial to a material fact, & which was unknown to Deft at the trial

Means & Hendrick Attys.

It is desirable that action as to a stay of execution until the Deft can be heard be taken immediately as we have only 30 days to go on & the time is almost out.

Mess & Hendrick Atty.
F. R.

Mr. Crenshaw will please send a copy of the order of the Court & send it to the Sheriff of Polk county or to Wm. H. Otter at Bolivar

Brief of Appellant