64/5

October 1947 #36

William Milburn
vs.
State of Missouri
St. Louis Co.

} Misconduct in Office / Debt

Milburn failed to return an execution and forfeited his $50,000 bond

William Milburn appellant } Appeal from
v } Shoris Circuit Court
The State, use of Ray appellee }

And now the said William Milburn the appellant comes here into the Supreme Court & says that in the record & proceedings aforesaid and in the rendition of the said judgment there is manifest error, in this to wit:

1. That the said Circuit Court rendered & gave judg=ment for sin favor of the said appellee against the said appellant, whereas by the law of the land the said court ought to have given & rendered judg=ment for sin favor of the appellant against the appellee.

2. That said court refused to decide, as moved by the appel=lant at the trial of the cause, that ~~the~~ upon the case agreed by the parties the plaintiff ought not to recover in this action, whereas by law, the motion of the appel=lant ought to have been sustained.

All which the appellant is ready to verify — Wherefore, for the error aforesaid & other errors apparent in the record, the appellant prays that the said judgment be reversed, annulled & for naught held, & that he be restored &c

by atty.

Gamble & Baty

Wm Milburn Appt

v

The State use of Roy

= Errors assigned

Filed March 17. 1847
H. L. Boon Clk

= Gamble & Bates Atty

p. 1 State of Missouri } ss Be it remembered that heretofore to wit
County of St Louis } on the Thirty first day of October
A. D. eighteen hundred and forty
: five there was filed in the Office of the Clerk of
the St Louis Circuit Court within and for the County
aforesaid, a Declaration in the words and figures follow
: ing viz:

Declaration State of Missouri St Louis County ss. In the Saint Louis
County Circuit Court of November Term A. D. 1845. The
State of Missouri on the relation of and to the use of
Alfred Ray and Emaline Ray his wife by Leslie Ford
its Attorneys complains of William Milburn Defendant in
this suit of a plea that he render said Defendant
render unto the said plaintiff the sum of Fifty thous
: and Dollars which he owes to and unjustly detains
from the said plaintiff.

For that whereas the said Defendant on the
tenth day of August in the year of our Lord one thous
: and Eight hundred and forty two at Saint Louis in
the County of Saint Louis aforesaid by his certain bond
or writing obligatory sealed with his seal and to the
Court now here shewn, acknowledged himself to be held
and firmly bound unto the said plaintiff in the sum
of Fifty thousand Dollars for the payment of which
to the said plaintiff well and truly to be made he
bound himself & his heirs firmly by the said writing
obligatory, which said bond or writing obligatory was &
is subject to a certain condition thereunder written where
: by after reciting that the said William Milburn had
been duly elected Sheriff of the County of Saint Louis
at the general election held on the first second & third
days of the then present month. The condition of the
said bond was and is that the said William Milburn
should faithfully discharge the duties of the Office Sheriff

of the County of Saint Louis during his continuance in said Office, then the said obligation was to be void, otherwise to remain in full force. And the said Plaintiff in fact saith that heretofore to wit on the thirty first day of December in the year of our Lord one thousand eight hundred and forty two, by the Judgment and consideration of the Macon County Circuit Court, the said Emaline Ray, and while the said Emaline Ray was sole and unmarried to wit on the said thirty first day of December in the year of our Lord one thousand eight hundred and forty-two by the name of Emaline Dodd recovered before the said Court & before the Judge thereof against one Benyamin Dodd the sum of five hundred Dollars and seven Dollars and fifty cents costs of suit whereof the said Benyamin Dodd was convicted as appears by the record and proceedings thereof still remaining in the same Court, wile more fully appear. And the said Plaintiff further saith, that the said Judgment being in full force and the said sum of Five hundred Dollars remaining unpaid and unsatisfied, the said Emeline Ray by the name of Emeline Dodd (now being the wife of the said Alfred Ray as aforesaid) on the twentieth day of April in the year 1843, for the obtaining of satisfaction thereof, sued and prosecuted out of the said Macon County Circuit Court a certain writ of Execution directed to the Sheriff of St Louis County, by which the said Sheriff was commanded, that of the goods and chattels and real Estate of the said Benyamin Dodd he should cause to be made the aforesaid sum of Five hundred Dollars and costs and that he should have that money before the said Judge of the Macon County Circuit Court at the Court house in the town of Bloomington in said County of Macon on the thirtieth day November

fi. 3 then next to satisfy the same and that he should certify to the said Judge how he had executed the said writ and that the said Sheriff should have then (then) that writ of Execution, upon which said writ of Execution afterwards and before the delivery thereof to the said Sheriff of St Louis County as hereinafter mentioned to wit on the said twentieth day of April in the year 1843 aforesaid was duly endorsed (the sum to be recovered to wit) the sum of five hundred Dollars & costs and which said writ of Execution so endorsed, afterwards to wit on the said Twentieth day of April in the year 1843 was delivered to the said Defendant who then and from thence until and at and after the return day of the said writ of execution was Sheriff of the said County of Saint Louis, to be executed in due form of law. And for assigning a breach of the said writing obligatory the said Plaintiffs say that the said Defendant so being such Sheriff as aforesaid did not make return of the said execution so as aforesaid delivered to him on the said thirteenth (but wholly failed so to do) day of November as he was commanded to do. By means of which several premises the said the said Plaintiffs have been greatly injured and have sustained damages to a large amount to wit to the amount of one thousand dollars, whereby the said Defendant hath become liable to pay the said debt to the said Plaintiffs in this suit, whenever he should be thereunto afterwards requested and thereby an action hath accrued to the said Plaintiffs to demand and have of and from the said Defendant the said sum of money above demanded. Nevertheless the said Defendant have not yet paid the said sum above demanded or any part thereof to the said Emaline while she was sole and unmarried or to the said plaintiffs or either of them since their intermarriage but he so to do hath hitherto wholly

p. 4 neglected & refused and still does neglect and refuse
to the damage of the said plaintiffs One thousand
Dollars & therefore they bring their suit
Leslie & Lord for plff

On which the Clerk issued a Summons as follows: to wit

Summons "County of St Louis ss. The State of Missouri To the
Sheriff of St Louis County, Greeting: We command you
to summon William Milburn if he be found in your
County that he be and appear before the Judge of
our Circuit Court, on the first day of the next term
thereof, to be held at the City of St Louis, within and
for the County of St Louis, on the third Monday of
November next, then and there to answer unto the
State of Missouri on the relation of and to the use
of Alfred Ray and Emaline Ray his wife in an
action of debt to the damage of said plaintiffs One
thousand Dollars. And have you then there this writ
Seal With Witness John Ruland, Clerk of our said
Court, with the seal thereof hereto affixed, at Office
in the City of St Louis this thirty first day of October
in the year of our Lord eighteen hundred and forty
five.

John Ruland Clerk

on which the Sheriff made his return as follows to wit

Return "Executed the within writ in Saint Louis County
Missouri by offering to read it and the declaration to
William Milburn which he refused to hear but ac-
knowledged service of the same this thirty first
day of October 1845

Hugh Miller Coroner of St Louis County

And on the 22nd day of November A. D. 1845 four pleas
were filed in the words and figures following viz:

(4) Pleas. The State of Missouri use of Alfred Ray & wife vs
William Milburn. And the said Defendant by his

p. 5 — Attorney comes and defends the wrong and injury, when &c and says that the said supposed writing obligatory in the declaration mentioned is not the Deed of the said Defendant in manner and form as the said plaintiff hath above thereof complained against him and of this he puts himself upon the Country &c

And for further plea in this behalf the said Defendant says, as to the breach of the condition of the said supposed writing obligatory in the declaration ~~mentioned~~ assigned that the said Defendant did make return of the said Execution in the said breach mentioned on the said thirteenth day of November in the year 1843 and this he prays may be enquired of by the Country

And for further ~~plea~~ to the said breach of the said condition of the said writing oblig: atory, the said defendant says, that he did make return of the said execution in said breach mentioned during the term of the said Circuit Court of Macon County, to which the said Execution was returnable and this he is ready to verify, wherefore he prays Judgment &c

And for further plea in this behalf to the said breach of the said condition of the said supposed writing obligatory, the said Defen: dant says, that the said Execution was retained by the said Defendant in his possession until he made return thereof with the knowledge and consent of the said plaintiff therein and this he is ready to verify wherefore he pray judgment &c

Gamble & Bates Atts for Dft

And on the 25th day of November the plaintiff files a Similiter to 1st Plea & Replication to 3rd & 4th pleas to wit

Similiter to 1st Plea "The State of Missouri use of Alfred Ray & trip vs William

p. c. Milburn. And the said plaintiff by its Attorney as to the said two first pleas, whereof the said Defendant hath put himself upon the Country doth the like.

Replication to 3rd & 4th Pleas

"And to the third plea the said Plaintiff says that the said Defendant did not make return of the said Execution in said writ mentioned during the term of the said Circuit Court of Macon County, to which the the said Execution was returnable, and this he prays may be enquired of by the Country &c.

And to the fourth plea the said plaintiff says, that the said Execution was not retained by the said Defendant in his possession until he made return thereof with the knowledge and consent of him the said plaintiff and of this he puts himself upon the Country &c.

Leslie & Lord Attys for plff

And on the 11th day of December A. D. 1846, the following further proceedings were had in said cause viz

Affidavit and add'l Pleas filed

The State of Missouri to the use of Alfred Ray and Emeline his wife vs William Milburn Now, at this day comes the Defendant by his Attorney and files his Affidavit and upon his motion leave is given him to file additional pleas herein upon payment of all the costs that have accrued in this cause whereupon the Defendant files additional pleas herein.

which Affidavit and additional pleas are as follows.

Affidavit

"The State of Missouri to the use of Ray & wife vs William Milburn. This day personally appeared in open Court William Milburn the above named Defendant, who being duly sworn says that he believes that he has both a legal and just defence to the action of said plaintiff. that he is advised that additional pleas may be necessary to the establishment of his defence in this action, that additional pleas have been drawn by his Counsel and

p. 7
p. 7 are herewith produced to the Court which he asks leave to file. that the defence set up in said pleas was not known to this affiant at the time of the filing of the original pleas or at any time during the last term of this Court. that said defence has come to the knowledge of this Affiant within the present week and has come to the knowledge of this Affiants Counsel also within that time. That this Affiant is willing to submit to such terms as the Court may decree reasonable on allowing the said pleas to be filed, and this affiant submits the said pleas to the Court, that if the defence therein set up, is by the Court deemed material the same may be allowed to be filed.

Sworn to & subscribed in open Court Decr 11th 1846
Jno Ruland Clerk

William Milburn

add.l Pleas The State of Missouri to the use of Ray & wife vs William Milburn. And the said Defendant for further plea in this behalf says, that the said plaintiff ought not to have or maintain her said action against him because he says, that the said writ of Execution in the declaration mentioned, was not returnable to any Term of the Circuit Court of Macon County and this he is ready to verify, wherefore he prays judgment &c

And for further plea in this behalf the said Defendant says that the said day in the said Execution mentioned as the return day thereof was not a day in any term of the Circuit Court of Macon County and this the said Defendant is ready to verify, wherefore he prays judgment &c.

And for further plea in this behalf the said Defendant says that the said plaintiff ought not to have and maintain her said action against this Defendant because he says that the said day in the said

p. 8 writ of Execution mentioned as the return day thereof was not a day in any term of the Circuit Court of Macon County and that he the said Defendant made return of said writ of Execution to the said Circuit Court at the Term of said Court next after the said return day in said writ mentioned and this he is ready to verify wherefore he prays Judgment.

Gamble & Bates for Defts.

And on the 16th day of Jany A. D. 1847, an agreed case was filed in the words and figures following to wit

Agreed case "In St Louis Circuit Court Nov. T. 1846 The State of Missouri on the relation of and to the use of Alfred Ray & Emaline his wife vs William Milburn This is an action of debt on the Official Bond of the Sheriff of St Louis County and the breach assigned is that the Defft did not make return of a certain Execution as he was commanded to do. It has been agreed between the parties hereto, by their respective Attornies to submit the case upon the following agreed state of facts to wit. on the 31st day of December in the year 1841 at the December Term of the Circuit Court held in and for the County of Macon Emaline Dodd by the consideration & decree of the said Macon Circuit Court, made on the Chancery side of said Court recovered against one Benjamin Dodd as alimony & for maintainance the sum of five hundred Dollars & costs of suit & afterwards & on the 20th day of April 1843, an execution was sued out of said Macon County Circuit Court by the said Emaline Dodd against the said Benjamin Dodd directed to the Sheriff of St Louis County, by which said Execution the said Sheriff was commanded of the goods and chattels & real estate of the said Benjamin Dodd he cause to be made the said sum of five hundred Dollars & seven dollars & fifty cents costs & that he have the said writ before the the Judge of the said Macon Circuit Court, at the Court

p. 9/ house in the Town of Bloomington in said County of Macon on the 13th day of November 1843, to satisfy the same and that he should certify to the said Judge how he had executed the said writ & that the said Sheriff should have then there that writ, that said writ of Execution was delivered to this Defendant who was then the Sheriff of said St Louis County to be executed on the 27th day of April 1843, with the amount to be collected endorsed on the back thereof, that said Execution was not returned to the Office of the Clerk of Macon County Circuit on the said 13th day of November 1843 but the same was enclosed in an envelope & directed to the Clerk of the Macon Circuit Court at Bloomington Macon County ~~the~~ Missouri & mailed at St Louis Post Office on the 11th day of March 1844 & received by the Clerk of said Court & filed in said Court between the 21st & 30 days of April 1844 with a return endorsed thereon, that the Defendant had no goods & chattels lands or tenements whereof to levy & make the amount of said Judgment or any part thereof in the said County of St Louis, that the Nov Term for 1843 of said Circuit Court for Macon County adjourned on the 10th day of November & was not in session on the day when the said writ was made returnable ~~that~~ that afterwards and before the commencement of this suit, the said Emeline Dodd intermarried with Alfred Ray. For the times of holding the Terms of the Macon Circuit Court reference is made to the Almanac & Statutes without stating them here

Gamble & Bates for Defts
Leslie & Lord

And on the 6th day of February A.D. 1847 the following further proceedings were had in said cause viz

Judgment The State of Missouri to the use of Alfred Ray & Emeline his

p. 10 — wife vs William Milburn Debt on Bond This day come the parties by their Attorneys and submit this cause to the Court on the agreed case herein before filed, and after the argument of Counsel. the Court being fully advised in the premises doth find in the said agreed case for the plaintiff and doth assess the damages by reason of the premises at Five hundred and forty six dollars and seven cents. It is therefore considered that the plaintiff recover of the Defendant, the said sum of fifty thousand Dollars her debt aforesaid and that she have Execution against the said Defendant for the sum of five hundred and forty six Dollars and seven cents her damages aforesaid by the Court assessed and also for her costs herein expended.

The Defendant files his bill of Exceptions herein

Bill of Exceptions "The State to the use of Ray vs William Milburn. Be it remembered that the parties to this case submitted the same for trial & determination to the Court upon an agreement of the facts by them made in writing & filed, which agreement is in the words & figures following (which agreement will be found set out on page No 8) At the hearing and trial of this cause the Defendant moves the Court to decide, that upon the agreed case agreed by the parties, the Plaintiff ought not to recover in this action, And the Plaintiff moves for action Judgment on the agreed case. But the Court refused to decide as moved by the Defendant, but on the contrary thereof, decides upon the said agreed case that the plaintiff is entitled to recover against the Defendant & gives final Judgment accordingly.

To which refusal of the Court & to the giving of which Judgment the Defendant excepts.

And he tenders here this his bill of Exceptions and prays the Court that the same may be signed &c which is done accordingly. John M. Krum

p. 11 — And on the 13th day of February A. D. 1847 the following further proceedings were had in said cause viz

affidavit filed & appeal granted — The State of Missouri to the use of Alfred Ray & wife vs William Milburn Debt on Bond. This day comes the Defendant and files his affidavit and prays an appeal from the Judgment herein rendered to the Supreme Court and the same is granted him and thereupon William Milburn as principal and John O Fallon and Alexander Hayes as securities acknowledge themselves indebted to the State of Missouri to the use of Alfred Ray and Emeline his wife in the sum of Eight hundred dollars To be void if the Appellant will prosecute the Appeal now taken with due diligence to a decision in the Supreme Court, and if the Judgment appeal from is affirmed or the appeal dismissed the appellant will pay whatever debt damages and costs have been recovered against him by the Judgment of the Circuit Court together with the interest that shall grow due thereon and pay all costs and damages that may be adjudged against said appellant in the Supreme Court upon this appeal — otherwise to remain in full force and effect.

which affidavit is as follows to wit:

affidavit — "The State of Missouri (to the use of Ray) vs William Milburn. The Defendant prays an appeal from the Judgment of the Court and makes the following affidavit.

William Milburn the Defendant being duly sworn upon his oath, says, that his appeal from the Judgment of this Court, rendered in this cause, is not made for vexation or delay, but because this affiant verily believes, that he, the appellant is aggrieved by the Judgment of the Court.

Sworn & Subscribed to in open Court Feb. 13. 1847

Jno Ruland Clerk — William Milburn

p. 12.

State of Missouri } ss
County of St Louis }

I John Ruland Clerk of the St Louis Circuit Court within and for the County aforesaid, Certify the foregoing to be a full true and complete Transcript of the record and proceedings in the case of "The State of Missouri, to the use &c vs William Milburn" as fully as the same now remains of Record and on file in my Office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Office in the City of St Louis, this Twenty fifth day of February A. D. 1847.

Jno Ruland Clerk

Index

Declaration	1
Summons	4
Sheriffs Return	4
(4) Pleas	4
Similiter to 1st Plea	5
Replication to 3rd & 4th Pleas	6
Affidavit & addl 6th Plea filed	6
Affidavit	6
Addl 6th Plea	7
Agreed Case	8
Judgment	9
Bill of Exceptions	10
Affidavit for appeal filed & same granted	11
Affidavit	11
Clerks Certificate	12

(36.) 3 ~~109~~

William Milburn
Appellant

vs

The State of Missouri to the
use of Alfred Ray and
Emeline Ray his wife
Appellee

Copy for E Bates

Filed March 17. 1847
H. L. Boon clk

475 Ex

William Milburn
vs. appellant
vs.
The State of Missouri
to use of Ray Shipe
appellee

In Sup. Court -

and now comes the said State of Missouri by her attorney Lesley Hord, and says that there is no Error either in the record or proceedings aforesaid or in giving the judgement aforesaid, and prays that the same may be examined: & that the judgement aforesaid be in all things affirmed

Lesley Hord
for State of Mo.

109

William Milburn
v. appellant

The State of Missouri
to use of Hay Shipe
appellee

Joinder in Error

Lester & Loeb
for appellee

Filed 18. Oct. 1847.
H. L. Boon Clk.

Milburn v. The State use of Roy

appeal from C. C.
St Louis Co.

This was an action on the official bond of Milburn, as sheriff of St Louis county, & the breach assigned was, that Milburn did not return a certain execution as he was commanded to do. The defendant pleaded 1. Nunc est factum. 2. That he did return the execution on said 13th Nov. 1843. 3. That he returned the execution during the term at which it was returnable. 4. That Defendant kept back the execution with the knowledge & consent of plaintiff. Issue was taken on these pleas. The defendant, by leave, filed an additional plea. 1. That the execution was not returnable to any term of the Circuit Court of Macon county. 2 That the return day mentioned in the execution was not a day in any term of the Circuit Court of Macon county. 3. Same as record, with the addition, that Defendant made return of the execution, at the term of said court, next after the return day mentioned in the writ.

The case was finally submitted to the circuit court upon the following agreed state of facts:= On the 31 day of Decr in the year 1841, at the December Term of the Circuit Court

held in & for the county of Macon, Emeline Dod by the consideration & decree of said Court, recovered against one Benj. Dod, as alimony & for maintenance, the sum of five hundred dollars, & costs of suit, & afterwards on the 20th day of april 1843, an execution was issued out of said Macon county Circuit Court by the said Emeline Dod against said Benj. Dod, directed to the Sheriff of Mclean county, by which said execution the said Sheriff was commanded of the goods & chattels & real estate of the said B. Dod, he cause to be made the said sum of five hundred dollars & seven dollars & fifty cents costs, & that he have the said writ before the judge of the said Macon Circuit Court, at the Court House in the town of Bloomington, in said county of Macon on the 13th day of November 1843, to satisfy the same, & that he should certify to the said Judge how he had executed the said writ, and that the said Sheriff should have there & there said writ: That said execution was delivered to the Defendant, who was then

the sheriff of Macon county to be executed, on the 27th april 1843, with the amount to be collected endorsed upon the back thereof; that said execution was not returned to the office of the clerk of Macon county circuit ~~clerk~~ court on the said 13th day of November 1843 - but the same was enclosed in an envelope & directed to the clerk of the Macon cir: court at Bloomington, Macon county Illinois, & mailed at Mount Pulaski Post Office on the 11th day of March 1844 & received by the clerk of said court between the 20th & 30th days of April 1844, with a return endorsed thereon, that the defendant had no goods & chattels, lands or tenements whereof to levy & make the amount of the said judgment or any part thereof in the said county of Macon: That the November Term for 1843 of said Macon Cir. Court adjourned on the 10th day November 1843 & was not in session on the day, when said writ was made returnable. That afterwards & before the commencement of this suit, said Emeline Dod intermarried with Alfred Roy.

Upon this agreed case judgment was rendered for the plaintiff.

This suit is based upon the provisions of the 52nd section of the Execution law, as it stood in the Revised Code of 1835. That section made the sheriff liable, upon failing to return a writ according to law, for the whole amount of money specified in the writ.

The writ, in this case, was made returnable in vacation, whereas the law requires it to be made returnable to the next succeeding term, unless the plaintiff otherwise direct. Does this error make the writ void?

The authorities cited at the bar are decisive upon this point. A writ returnable out of term is merely erroneous, & not void. Campbell v. Cumming 2 Burr. 1187. Cramer v. Van Alstyne 9 John R. 386.

An process, merely erroneous, is a justification to the officer who executes it; & on the other hand, the officer, who fails to execute it & ought to be held responsible for such delinquency, cannot take advantage of the error. 2 Saund. 101. n. 2 & cases there cited.

If we take these principles to be settled, in relation to final process, we do not see how the Defendant can escape the penalty affixed by law to his failure in not returning the execution

against Dod, according to the directions of the law, regardless of the mistake of the Clerk who issued it. The case in 4 Bibb. 332 (Wilson v. Hurston) is directly in point. The execution, in that case, was made returnable more than 90 days from its teste, when, by the law of Kentucky, the execution should have been returnable in 90 days. The court held, that the return day was fixed by law, - that the writ was not void, but that the sheriff was bound to obey it; that the sheriff was bound to take notice of the law, & as the return day was fixed by the law, his ~~was~~ duty was to return it on that day & not on the one ~~then~~ erroneously specified in the writ. It is impossible to distinguish that case from this, in principle. Instead of being returnable within 90 days, as in Kentucky, the writ here is returnable, as in England, in term time, & the authorities upon which the Kentucky court rested their opinion, are more directly & literally applicable to our statute than to theirs.

The hardship of the case is most manifest; but it grows out of the statute, which inflicts a penalty upon the sheriff greatly disproportioned

in many cases, to the delinquency. The principle,
of law fixing the sheriff's liability, are the
same, which, in other cases, would be essential
to his protection.

Judge McBride
~~The judges~~ concurring, the judgment
is affirmed.

W. B. Napton

Judge Scott did not sit in this cause.

Mc Clung

v.

The State use of Roy

Opinion of
the Court

W. B. Napton

Filed January 8. 1848.
H. L. Boon clk.

St Louis Circuit Court
State of Missouri to the use
of Alfred Ray & Wife
v.
William Milburn

This is an action against the Sheriff for not returning an Execution founded on the Statute Laws of 1835 § 52. page 260.

I. The Sheriff is positively liable, & there is no necessity to prove damage or make a demand.
Douglass et. al. v. Baker 9. Mo. 41
Sublette & Campbell vs. Welton & others 8. Mo. 417 –

II. Executions by the Statute of 1835. were to be returned to the next term of the Court? It being admitted by the case made, that the day upon which the suit was made, returnable was after the adjournment of the Nov. Term for that County. Was the Sheriff bound to execute the process?

Note. The Copy of Grahams Practice in Library 316-17.

as to void, & Voidable Executions
See 2. Burr. 1187 – 9. John. 385. 1 Ed. 316-17
3. Conn. 303 – 3. Gra. Prac. 2. Ed. 363-4
as to the time of issuing – 1. Cow. 736.79 G. Practice 1st Ed. 316-17 363.4
8. Cow. 192. 2. Caines 62 note –

III.

Note. The case from Bibbs Reps is conclusive upon all the points of the case

If the process is only Voidable, the Sheriff is bound to Execute – Voidable process is good till set aside. Watson on Sheff. 5. Law Library 53. 2. Saunders 101. note 2. 8. Cow. 192
4th Cranch Rep. 332 – 10th Peters 477 4th Bibb. 332
Wilson vs. Huston –
Equities between parties do not come into this case –

Leslie & Lord –
F. M. Haight –

State La

~~Milburn~~

v.

~~Milburn~~

State of

Milburn use of Ray & Wife

- Brief for Deft in Error

~~Pl ff~~

Leslie & Ford

F. M. Haight

for Deft in Error

William Milburn, appellant } Supreme Court. Oct. T. 1847.
v
The State, use of Ray, appellee } Appeal from Macon Circ. Court.

Action of debt on Milburn's official bond, as Sheriff of Macon County; and the breach assigned is that the Sheriff did not make return of a certain writ of Execution which had come to his hand, on the day commanded.

There are two sets of pleas: First set — 1. Non est factum — 2. Deft: did make return of the Execution, on said 13th Nov: 1843 — 3. He did make return of the Execution during the term at which it was returnable — 4. That Deft: kept back the Execution with the knowledge & consent of the plaintiff. On all of which there were issues. Second set of pleas, filed on motion & leave — 1. That the Execution was not returnable to any term of the Circuit Court of Macon County — 2. That the return day mentioned in the Execution was not a day in any term of the Circuit Court of Macon County — 3. Same as record, with the addition that Deft: made return of the Execution, at the term of said Court, next after the return day mentioned in the writ.

The parties submitted the case to the Court on an agreed state of facts, in writing — substantially that On the 31. Dec. 1841, in Macon Circuit Court, on the Chancery side, Emeline Dodd recovered judgment against Benj: Dodd, for $500, for alimony. On the 20. April 1843, Execution was issued, directed to the Sheriff of Macon County, and on the 27 April delivered to Defendant, he being such Sheriff, to be executed. The writ was, on its face, made returnable on the 13th day of Nov: 1843, before the Judge &c, at the Courthouse &c. It was not returned on that day, but was endorsed &

directed to the clerk of the Circuit Court of Macon, at Bloomington, Macon County Mo., and mailed at St Louis on the 11th of March 1844, with the defendants return - nulla bona - written thereon. The November term of Macon Circuit Court closed on the tenth day of November, and the Court was not in session on the thirteenth, when the writ was made returnable.

Afterwards, before the bringing of this suit E Dodd intermarried with Ray.

For the times of holding Court in Marion, the agreement authorises a reference to the printed Statutes, & to the Almanack. And by these it appears that the writ was made returnable at a day between terms; and that the actual return was in time for the ~~return~~ term next after the return day.

Att'y. for the appellant

Gamble Bates

Wm Milburn appt

v

The State, use of Ray, applce

Statement

/

William Milburn
appellant

vs.

The State of Missouri
to use of Alfred Ray
& wife
appellee

In Sup. Court -

This action was brought in the St. Louis Circuit Court upon the official bond of the Sheriff of St. Louis Co. & the breach assigned was, that the appellant did not make return of a certain execution as he was commanded &c - on the 22nd day of November 1845. the appellant filed four pleas, Non est factum, a traverse of the breach assigned in the declaration, & two special pleas, & on the 25th day of November 1845. Replications were filed to the said special pleas, & the issue in this cause made up - More than a year afterwards viz. the appellant applied to the Court on affidavit, for leave to file additional pleas, which was granted upon condition of paying all the costs, and on the 15th day of December 3 special pleas were filed: and afterwards on the 16th day of January A.D. 1847. an agreed case was made between the parties to this suit, in the words & to the effect following to wit -

" In St. Louis Circuit Court Nov. T. 1846
The State of Missouri on the relation of &
to the use of Alfred Ray & Emaline his
wife vs. William Milburn

"This is an action of debt on the official Bond of the Sheriff of St Louis County, and the breach assigned is, that the Deft. did not make return of a certain Execution, as he was commanded &c.- It has been agreed between the parties hereto by their respective attorneys to submit the case upon the following agreed State of facts: to wit:- on the 31st day of December in the year 1841. at the December Term of the Circuit Court, held in & for the County of Macon, Emaline Dodd by the consideration and decree of the said Macon Circuit Court, made on the chancery side of said Court, recovered against one Benjamin Dodd, as alimony and for Maintenance the sum of five hundred Dollars & costs of suit, & afterwards & on the 20th day of April 1843. an execution was sued out of said Macon County Circuit Court by the said Emaline Dodd, against the said Benjamin Dodd, directed to the Sheriff of St. Louis County: by which said Execution the said Sheriff was commanded, of the goods and chattels and real estate of the said Benjamin Dodd he cause to be made the said sum of five hundred Dollars, & seven dollars and fifty cents costs, & that he have the said writ, before the judge of the said Macon Circuit Court, at the Court house in the town of Bloomington, in said County of Macon, on the

13th day of November 1843. to Satisfy the same. and that he should certify to the said Judge. how he had executed the said writ. & that the said Sheriff should have there there that writ. that said writ of Execution. was delivered to the dependant. Who was then the Sheriff of St. Louis County. to be executed, on the 27th day of April 1843. with the amount to be collected endorsed upon the back thereof: that said Execution was not returned to the office of the clerk of Macon County Circuit Court on the said 13th day of November 1843. but the same was enclosed in an envelope. & directed to the clerk of the Macon Circuit Court, at Bloomington Macon County Missouri. & Mailed at St. Louis Post office on the 11th day of March 1844. & received by the clerk of said court and filed in said court, between the 20th & 30th days of april 1844. with a return endorsed thereon thereon. that the dependant had no goods & Chattels, lands or tenements. whereof to levy & make the amount of the said judgement, or any part thereof in the said county of St. Louis that the November Term for 1843. of said Circuit Court for Macon County adjourned on the 10th day of November, and was not in Session on the day. when the said writ was made returnable—

- That afterwards and before the commence=
=ment of this Suit, the said Emaline Dodd
intermarried with Alfred Ray. - For the
times of holding the Terms of the Macon
circuit Court, reference is made to the
Almanac & Statutes without stating them
here (Signed) Gamble & Bates for Deft.
Leslie & Lord -

Upon this agreed case, judgement was
rendered for the appellee, and the case
is brought here by appeal -

William Milburn
vs
State of Missouri
use of Rey & Wife

Statement of
Case by Deft
in Error -

Leslie & Lord
T. M. Haight
for Deft in Error

William Milburn, appellant.

vs

The State, to the use of Ray wife - applee

This is an action of debt for $50,000, on Milburn's official bond, as Sheriff of St. Louis; and the breach assigned is, that the said Sheriff did not make return of a certain execution, on the day he was commanded.

There are two sets of pleas: First set. 1. Non est factum. 2. Deft: did make return of the Execution, on the said 13th Nov: 1843. 3. He did make return of the Execution, during the term at which it was returnable. 4. That Deft: kept back the Execution with the knowledge and consent of the plaintiff. On all of these pleas, issue was joined.

Second set of pleas. 1. That the Execution was not returnable to any term of the Circuit Court of Macon. 2. That the return day mentioned in the Execution was not a day in any term of the Circuit Court of Macon. 3. Same as 2d. with the addition, that Deft. made return of the Execution, at the term of said Court, next after the return day mentioned in the writ. To these there were no replications.

The parties submitted the case to the Court on an agreed state of facts, as follows:

On the 31. Dec. 1841, in Macon Circuit Court, on the Chancery side, Emeline Dodd recorded judgment against Benjamin Dodd, for $500, for alimony.

On the 20th April, 1843, Execution was issued, directed to the Sheriff of St. Louis County, and on the 27th April, delivered to Deft: he being such Sheriff, to be executed.

The writ was, on its face, made returnable on the 13th day of Nov. 1843, before the judge &c. at the Court house &c. It was not returned on that day, but

was enclosed and directed to the clerk of the Circuit Court of Macon, at Bloomington, Macon County, Mo., and mailed at St. Louis, on the 11th of March 1844, and was received by the clerk, and filed in said Court, between the 20th & 30th days of April 1844, with the defendants return — nulla bona — written thereon. The November term of Macon Circuit Court closed on the 10th day of November, and the Court was not in session on the 13th when the writ was made returnable.

Afterwards, before the bringing of this suit, E. Dodd intermarried with Alfred Ray.

For the times of holding Court, in Macon, the agreement authorises a reference to the printed Statutes and to the Almanac. And by these it appears, that the writ was made returnable at a day between terms; and that it was actually returned before the term, next after the return day named.

The plaintiff below claimed, that the Sheriff was liable on this state of facts, under the S. 52. of the Law of Executions, (R.C. of 1835, p 260) for failing to "return the Execution according to law."[a]

(a) this clause is omitted in the corresponding S. of R.C. 1845 — See p. 486. S. 58.

That the Sheriff was bound to return the writ on the day named, whether it was term time or vacation, and that failing to do so, he was answerable for the debt. And of that opinion was the Circuit Court, and gave judgment accordingly. From which the Defendant appeals.

The Defendant below claimed and still claims that he did return the writ according to law — That is, he returned it as well as such a writ could be returned.

The writ of Execution can only be made returnable

R.C. 1845. James L. 475. N. 5

to a term of the Court that issues it. It is so expressly provided by the same Law of Executions. R.C. of 1835, §.7. p. 254.

Under this general proposition, which is undeniably true, the appellant submits the following

Points.

1. The writ, & the return thereof, being prescribed by statute, it is not in the power of the party, the clerk, or even the Court, to cause a different writ to be issued. And so, the writ was void from the beginning.

3. Mo. R. 286. Halliday v Cooper.

5. Wend. R. 276. 9. Wend R 338.

2. The writ being void, the Sheriff was not bound to execute it or return it, at all.

3. But if not void, still its requirements being inconsistent, the sheriff ought to obey the most important requirements, to the neglect of the least important, when both can not be done. This writ requires to be returned on the 13th of Nov. at the Court-House before the judge, which, taken with the 7th §. necessarily means, in open Court. Now, there was no court on that day; the judge was not required to be at the Court house. The particular day of the return is not very material; but it is material, that it should be returned to the Court that issued it, whose duty it is, to see that its own process is not abused — that it is rightly issued, executed and returned.

4. The Sheriff could not return this writ to the first term after it was issued, because the return day named was after that term; and the return of a writ nulla bona before the return day is merely void. Cro: Eliz: 512 — 1. Backus on Sheriff 259.

And he did actually return it to the next term after the return day, for the agreed case says, it was "filed in Court." And this, we submit, is all he could do.

= All mesne process ought to be returned; but when final process has issued, on which no judgment or other process is to be had — as a fi: fa: which levied the whole debt — no return is necessary —

5. Co: 90 — Cro: Eliz: 209.

Our statute however, does require a return.

Supt. Court, Octo: 7. 1847.

Wm. Milburn, Appellant

The State, use of Roy Appl.

R. C. of 1835
3. Mo R. 286 — 5. Wend 276 — 9. Wend 338.
Cro: Eliz 512
1. Backus on Sheriff: 259.
5. Co: 90. Cro: Eliz 209
8 Mass R. 79 — 85

Appellant's brief
Gamble & Bates