Thornhill, Reuben, assignee of Garraty, Joseph W., vs. Walker, Benjamin October 1823 St. Charles County 92/19

Oct. 1823 #41

Reuben Thornhill assignee of J. W. Garraty
vs.
Benjamin Walker
debt

State of Missouri
County of Saint Charles } Pleas in the Circuit Court of Saint Charles County in the second Judicial circuit of said State before the Honorable Nathaniel B. Tucker Judge of said Court holden at the Court House in the Town of St Charles within and for the County of Saint Charles on the third Monday in July and in the Year of One thousand Eight hundred twenty three —

In the Record and proceedings of said Court are the following to wit:

Reuben Thornhill assignee of Joseph W. Garraty
vs
Benjamin Walker } Reuben Thornhill assignee of Joseph W. Garraty by Mr. Foreman Attorney of said Thornhill, Moves the Court for a Mandamus against Benjamin Walker a Justice of the peace to compel said Justice to issue an Execution against Robert W. Wells, on a Judgment alledged to have been obtained by Joseph W. Garraty against said Wells before said Justice, or shew Cause why he does not issue said Execution Motion sustained and Mandamus issued returnable forthwith. On the ~~motion~~ return of the Mandamus the Justice shew Cause why he did not issue Execution against said Wells as follows to wit:

There appears on my docket an action brought by said Garraty against said Wells on an account wherein there was the verdict of a Jury in favor of said Wells & Judgment thereon, which Judgment was appealed to the Circuit Court, County of St Charles. Afterwards as appear from my docket and Papers filed a second action was brought

by said Garraty vs said Wells appearantly upon the same account, which last suit is supposed to be the one now alluded to. A Copy of my Docket in that last Case is herewith sent marked No. 1. By which it appears that a Judgment of nonsuit was obtained by defendant against plaintiff On the 25th October 1822. On application of plaintiff the Judgment of nonsuit was opened & Cause set for trial on 28th same Month: On that day Judgment by default was given against defendent and some day immediately the plaintiff took out execution. The execution was returned by plaintiff On the 30th November 1822 & did not appear to have been in the hands of the Constable. On affidavit being filed (paper herewith sent marked No. 2. The Judgment by default was opened and the Cause set for trial on the 23rd November 1822. On which day the Attorney of the plaintiff appeared & the defendent, and by Consent the Cause was continued for trial to the 25th same Month On which day the plaintiff not appearing Judgment of nonsuit was entered against him: I think proper to state that Immediately upon obtaining the Judgment by default the plaintiff took out Execution, that some two or three days after when Mr. Wells learned from me that a Judgment by default had been entered against him he appeared much surprised & informed me that he had not understood the Constable to inform him that there would be a trial; & he then applied to have the Judgment set aside or opened; that I ~~delayed~~ delayed doing so untile the execution could be brought in when I opened it understanding from other Justices that it had been their practice where justice Could not otherwise be done. The Execution is annexed & marked D. & additional Cause marked E.

Joseph W. Garraty
vs
Robert W. Wells

Summons issued 19th July 1822

Summons	18¾	Returnable 1st day of August –
Adjournment	25	Demand Book account. Adjourned
Aug 15th Do	25	to 15th. Again adjourned to saturday
Sept 1st Do	25	Next. Again adjourned to 1st September
7th Do	25	Again adjourned to the 7th Septr –
14th Do	25	Again Adjourned to the fourteenth
Octr 26th Do	25	September, Agained Adjourned to
Nonsuit	37½	to last saturday (October 26th)
1. Oath	6¼	This day (to wit) October 26th the pltff
Default		not appearing defendent appearing
Exn	25	Judgment is given by nonsuit, At the
opening Judgt		request of the plaintiff this Judgement
notice	25	is open for a new trial, On Monday the
Const. fees on Summons	25	28th Inst. October, at 10 Oclock A.M.
affidavit of Dft.	25	This day (to wit) October 28th 1822, the
Const. service of Notices	25	plaintiff appeared and the defendent
2nd Nonsuit	37½	although notified according to Law

(as by notice marked B) did not attend. The plaintiff being Qualified to his account Judgment is herely rendered against Defendent by default for the sum of Forty five Dollars & Twenty five cents and costs of suit Execution Issued October 28th 1822. Returned by plaintiff November 20th. Upon application of Defendent to have a default and shewing cause by affidavit in writing it is therefore considered by the said Justice that the Judgment by default entered against the defendent be opened and set for trial on the 23rd November 1822. between the hours of ten & twelve Oclock forenoon. This day to wit November 23rd the plaintiff appeared by his Attorney and also the defendent & by the wish of both parties this Cause stands adjourned to monday the 25 Inst. at half past 4 Oclock P.M. And now at this day 25th Novr 1822 the Defendent appeared and the plaintiff being solumnly Called Came not It is.

Therefore

therefore considered by the Justice that the plaintiff Joseph W. Garraty be nonsuited for his failure to prosecute his suit and that the defendent Robert W. Wells recover his costs off the said plaintiff in his behalf laid out and expended

Affidavit to have Judgment opened by default in the words & figures following to wit,

Joseph W. Garraty
vs
Robert W. Wells

Before Justice Walker affidavit to open Judgment by default by defendant

Robert W. Wells the defendent in the above suit maketh Oath & saith that a Judgment ~~was ob~~ in the above case was obtained by him against the plaintiff by nonsuit. That the said Judgment was opened in his absence without his consent and without any notice of the application for the same to be opened That he did not know that the case was again set for hearing or trial or he would have attended, That the Constable informed him (as he understood the said Constable that a ~~new trial~~ Motion would be made, On Saturday motion by him, to open said Judgment by nonsuit and did not mention as he believes that there would be a new trial or that the same was set for trial again. And further that he the said Wells would have attended ~~not~~ had the Mistake above not have happened. And further that he has a just and good defence against the said Claim of the said Garraty, or against the greater part thereof.

Sworn to and subscribed before me a Justice of the Peace within the County of St. Charles & Township of Saint Charles this 2nd day of Nov. 1822

Signed R. W. Wells

Signed Benj Walker Just. Peace

The following is a copy of the fiera facias with the endorsments thereon, to wit.

State of Missouri } Fiera Facias

County of St. Charles ss. To the Constable of St. Charles Township Greeting: Whereas Joseph W. Garraty has obtained Judgment before me a Justice of the peace in the Township aforesaid against Robert W. Wells for a debt of Forty five Dollars and twenty five Cents and three dollars for his costs. These are ~~the~~ therefore to Command You, to levy the said Debt & Costs of the goods & Chattles of the said Robert W. Wells and to expose the same within thirty days from this date to sale by public Vendue, giving due notice of the same at least ten days previous to the day of sale by at least three Advertisments put up in the most public places in Your Township and return the Over plus if any to the said Robert W. Wells. Hereof fail not and due return make within thirty days from date. Given under my hand & seal, this 28th day of October 1822

Signed Benja. Walker Justice of the peace

Joseph W. Garraty
vs Execution
Robert W. Wells

Demand	$45:25
Summons	" 18¾
Const. fees	" :25
6 adjournments	1:50
nonsuit	" :37½
Opening Judgment	" :25
Default	" :37½
one Oath	" : 6¼
	$48:25

Whereupon Joseph W Garraty made the following endorsment to wit:

For value Recd. I assign the within to Reuben Thornhill without recorse on me Novr. 17th 1822 — signed Joseph W. Garraty

The following is a copy of the ~~application for mandamus~~ Additional cause shewn (to wit) Reuben Thornhill assn. of J. W. Garraty
vs
Benjamin Walker Justice of peace

Application for mandamus on

On this application against me for a mandamus in the above case I admit the following facts, to wit, that on the 28th day of October 1822 according to the above transcript of my ~~Record~~ Docket I issued execution in favor of Joseph W. Garraty against Robert W. Wells for the sum of $45:25 cts and Costs of suit that said Execution was taken from my office by said Garraty on the day of its date, and on the 20th of November 1822 said Execution was Exhibited to me at my office by Reuben Thorn Hill with an assignment on the back of said Execution by said Garraty to the said Thorn hill, And the said Thorn hill then & there demanded of me one other Execution (there being but 8 days till the return day of the first and I refused to issue an other Execution and still Continue to refuse so to do altho often requested. The said Execution is marked D.

Test. S. W. Foreman Dfts agent) signed Benj Walker J.P.

The following is a copy of the notice, notifying the plaintiff that Judgment of nonsuit had been opened to wit —

Mr. Robert W. Wells Esqr. Take notice that on the application of Joseph W. Garraty shewing good cause I have opened Judgment of nonsuit in the case where said Garraty is plaintiff and You defendent and granted a new trial before me on Monday next the 28th of October You will please attend on that day at my office; on that day at 10 Oblock in the morning and make such defence as You have October 26th 1822

signed Benja Walker Justt Peace

On the back of which said notice the Constable made the following return to wit —

The sevice of the within acknowledged by R.W. Wells Oct 26th 1823 signed W. L. Sublette Const —

Reuben Thornhile assignee of Joseph N. Garraty vs Benjamin Walker } Benjamin Walker the defendent in this case returned the Mandamus issued against him and Shewed cause why he did not issue execution upon the Judgment alledged by the plaintiff to have been obtained before him against said R. W. Wells. But the Court Adjudged the cause shewn by said Justice to be insufficient and awarded a preemptory mandamus, Commanding said Justice to issue said execution against Wells. To which opinion and Judgment, of the Court deciding the cause shewn by said Justice to be insufficient and awarding a preemptory mandamus, the Justice excepts and prays the cause aforesaid to be made a part of the Record in this case and prays an appeal from the opinion & Judgment of the Court aforesaid given to the next Supreme Court to be holden in and for the said second Judicial district all which is granted by the Court —

Bill of exceptions, to wit.

All which cause is not in any manner denyed by the applicants for said Mandamus but is addmitted to be true — But the Court decided and adjudged that the causes herein before shewn shewn to be insufficient & order and adjudge that a preemptory Mandamus should go from this Court to said Justice Commanding him to issue said Execution to which opinion of the Court deciding the causes aforesaid to be insufficient, the Justice excepts & prays that the causes aforesaid shewn & the exception aforesaid to be made a part of the Record in this case. & from the Judgment of this Court awarding, against said Justice a preemptory Mandamus as aforesaid, appeals to the next Supreme Court to be holden in and for the second Judicial District at St Charles

Signed N. D. Tucker

The following is the recognizance to wit. —

Reuben Thornhill assignee of Joseph W. Garraty
vs.
Benjamin Walker

Benjamin Walker the Defendent comes into Court with Andrew Wilson & John J. Wheeler his sureties who are approved of by the Court; And thereupon the said Robert W. Wells for and on behalf of the said Benjamin Walker & the said Andrew Wilson and John J. Wheeler acknowledged themselves to be indebted to Reuben Thornhill the plaintiff in this Case in the sum of Two hundred dollars to be levied of their respective goods & chattles lands & Tenements upon Condition that Benjamin Walker appellant shall prosecute his appeal with effect pay and satisfy the condemnation money and all costs or otherwise abide the Judgment of the Supreme Court in this appeal —

State of Missouri
County of St Charles } I William Christy Jr Clerk of the Circuit Court within and for the County of St. Charles Do hereby Certify that the above & foregoing is a transcript of the Record and proceedings in the case of Ruben Thornhill assignee of of Joseph W. Garraty On motion for a mandamus against Benjamin Walker, Justice of the peace

In testimony whereof I have hereunto set my hand and affixed my official seal at St. Charles this seventeenth day of October A.D. Eighteen hundred and twenty three and of the Independence of the United States the forty Eighth —

Wm Christy Jr.

1823 (41)

Reuben Thornhill
assignee of J. M. Garraty
vs } Transcript of Record
Benj.n Walker

Search of Record $ .25
Transcript 2.87½
Certificate & Seal .50
$3.62½

Filed 17th October 1823
Wm. Christy Jr. C. S. C.

Benjamin Walker
Justice of the Peace.
vs
Reuben Thornhill
assignee of Joseph
W. Gorsey

In Supreme Court
October Term 1823

And now at this day comes the said plaintiff and says that in the record & proceedings aforesaid in said case and in the decision and judgment aforesaid there is Manifest Error.

1st In this that the Court below decided the return of said Justice and the cause shown by him, on the return of the first Mandamus, to be insufficient, when it should have decided said return & cause, sufficient —

2nd There is also error in this that the Court below awarded a peremptory Mandamus against said Justice - notwithstanding said return & cause shown.

3d There is also error in this that the Court on the motion of the said Reuben Thornhill, the plaintiff below, awarded said Mandamus, when the said Thornhill, as appears by said record & proceedings, had no legal interest in the subject matter of the suit or motion.

And the said plaintiff for the Errors aforesaid

and other Errors in said Record, Judgment & decision & Order
prays that the decision, Judgment & Order aforesaid
said may be reversed, annulled, & for nothing held
& esteemed

R. W. Wells
atty. for Pltff
In Error

Founder in Error

Foreman

Justice Walker
Reuben Thornhill
assignee of
Joseph W. Gansby
Assignment of
Errors

Filed 28. Oct. 1823.
Wm Christy Pl. Cl.

Thornhill appellee of Garratt

vs } appeal from the Circuit Court
Walker } of Charles County

This was a ~~[illegible]~~ an application to the circuit Court to issue a ~~[illegible]~~ mandamus to a justice of the peace to compel him to issue an execution on a judgment alleged to have been by him rendered the Justice shewed cause the cause was adjudged insufficient and a peremptory mandamus awarded from which decision the Justice appealed to this Court

It appears by the Justices return that among many other things ~~the judgm that~~ an execution had been issued on a judgment by default in favor of Garratt which ~~was~~ execution was appealed to Thornhill and he thus entitles himself to apply for the mandamus

Thornhill is not entitled to the Mandamus, if any one can have it it must be Garratt The Circuit Court erred in granting a mandamus in favor of Thornhill ~~and~~ an execution is not appealable in law

It is alleged that this appeal ought to be dismissed because it is not ~~a~~ such final decision or judgment as contemplated by the Act giving an appeal from the Circuit Court to this Court The words of the Act are "That if any person shall deem him or herself aggrieved by any final decision or judgment of any Circuit Court he may appeal &c

The words of the Act are very comprehensive
where there is a decision on a matter proper to be litigated
in that court and it is final and not interlocutory
The case is within the Act and can not be dismissed

The Judgment or decision of the circuit court in
awarding a peremptory mandamus is reversed
with costs

Mathias McGirk
Jno Rice Jones
Judges

Not being satisfied that an appeal lies in a case of this
kind, I do not concur in the foregoing opinion

Rufus Pettibone

(19)

Thornhill
vs } Opinion of
Walker } the Court