Stuart, John vs Small, William H. 1839 1st D / 7th Cir. / Benton Co 124/3

20 Trespass; perjury; slander

injury his good name

"damned old perjured rascal"

1

State of Missouri }
County of Benton } ss

Jurisdiction

At a Circuit Court of the seventh Judicial Circuit begun and held at the Town of Warsaw within & for the County of Benton on Monday the Seventeenth — Day of December in the year of our Lord Eighteen hundred and thirty eight

Present

Hon J P Wright
Circuit Judge

James W Smith
Sheriff
And Thos J Bishop Clk

Procedings

Amongst other were the following proceedings (to wit)

William H Small }
vs }
John Stewart }

Declaration

Be it remembered that heretofore Towit on the 18th Day of June A.D. 1838 William H Small by his attorney files here in Court his declaration against the said John Stewart in manner and form following Towit — " — State of Missouri County of Benton - In the Benton Circuit Court August Term 1838 William Small Complains of John Stewart of a plea of Trespass on the Case for that Whereas the said William Small now is a good true just honest and faithful Citizen of this State and as such has always behaved and Conducted himself and until the Committing the several grievances by the said John Stewart as hereinafter mentioned was always reputed Esteemed and accepted by and amongst all his neighbors and other good and worthy citizens of this State

to whom he was in anywise known to be a person of good name fame and credit Court at the County of Benton aforesaid. and whereas also the said plaintiff has not ever been guilty or until the time of the committing of the said several grievances by the said defendant as hereinafter mentioned been suspected to have been guilty of Perjury or any such crime by means of which said premises he the said plaintiff before the committing of the said several grievances by the said defendant hereinafter mentioned had deservedly obtained the good opinion and credit of all his neighbors and other good and worthy citizens of the state to whom he was in anywise known Court at the county of Benton aforesaid; yet the said defendant well knowing the premises but greatly envying the happy state and condition of the said plaintiff and contriving, and wickedly, and maliciously intending to injure the said plaintiff in his said good name fame and credit and to bring him into public infamy scandal and disgrace with and amongst all his neighbors and other good and worthy citizens of this State and to cause it to be suspected and believed by those neighbors and citizens that he the said plaintiff had been guilty of perjury, and to subject him to the pains and penalties by the Laws of this state made and provided against, and inflicted upon persons guilty thereof, and vexatious impoverish and wholly ruin him the said plaintiff, heretofore Court on the sixteenth of March in the year of our Lord Eighteen hundred and thirty eight at the County of Benton aforesaid in a certain discourse which he the said defendant then and there had with the said plaintiff, of and concerning him the said plaintiff in the presence and hearing of divers good and worthy citizens of this state then and there in the presence and hearing of the said last mentioned citizens

falsely and maliciously spoke and published to and of and concerning the said plaintiff these false scandalous, malicious and defamatory words following that is to say, you (meaning the plaintiff) are a damned old perjured rascal, go=u, you (the plaintiff meaning) have committed perjury, you (the plaintiff meaning) are a perjured old scoundrel —

And afterwards to wit on the sixteenth of March aforesaid at the county of Benton aforesaid in a certain other discourse which the said defendant then and there had in the presence and hearing of one Charles Bullock and divers other good and worthy citizens of this State, he the said defendant further contriving and intending as aforesaid then and there in the presence and hearing of the said last mentioned citizens falsely spoke and publi=shed of and concerning the ~~last mentioned~~ said plaintiff these other false scandalous and malicious words following that is to say, he (meaning the plaintiff) is a perjured rascal he (meaning the plaintiff) is perjured, he (meaning the plaintiff) ~~has~~ committed perjury by means of the comitting of the several grievan=ces aforesaid by the said defendant he the said plai=ntiff has been and is greatly injured in his said good name fame and credit and brought into public scandal infamy and disgrace with and amongst all his neighbors and other good and worthy citizens of this State in somuch that divers of those neighbors and citizens to whom the inocence and integrity of the said plaintiff in the premis=ses were unknown have on occasion of the committing of the said grievances by the said Defendant as aforesaid from thence hitherto suspected and believed and still do suspect and believe the said plaintiff to be guilty of perjury and have by reason of the committing

the said grievances by the said defendant as aforesaid from thence hitherto wholly refused and still do refuse to have any transactions acquain=tance or discourse as they were before and accus=tomed to have and otherwise would have had To wit at the County of Benton aforesaid To the damage of the said plaintiff of Five thousand dollars and therefore he brings his suit

Winston Atty for Plff

And afterwards Towit on the same day and year aforesaid the said William A Small (by his attorney) sues out his writ of the State of Missouri in the words following Towit.

Summons. The State of Missouri to the Sheriff of Benton County Greeting — We command you to summon John Stewart so that he be and appear before the Hon Judge of our Benton Circuit Court at the Court house in the County of Benton on the first day of ~~the~~ our next term of said Court to answer William Small in an action of Trespass on the case wherein the dam=ages are laid at Five thousand Dollars and this he shall in nowise omit and have you then and there this writ

Witness Thos J Bishop Clerk and the seal of our said circuit Court hereunto affixed at office this 3rd Day of July AD 1838

Thos J. Bishop Clk

Return And afterwards Towit at the County of Benton the Sheriff comes here into court and makes the following Return Towit I A. Cornwall Sheriff of Benton County do hereby certify that I served the within writ by reading the declaration and writ to the defendant on the twenty eighth of July 1838 — " — A Cornwall Sheriff

By E W Ramsey Dept

Afterwards to wit on the 14th Day of August AD 1838 in the year last aforesaid comes here into court John Stewart by his Attorneys and files the following motion to wit.

John Stewart
vs } Trespass on the case.
William H. Small

John Stewart the defendant in the above cause asks the court to rule the plaintiff to security for costs in said cause because 1st the plaintiff is unable to pay the costs of suit and 2nd Because the plaintiff is so unsettled as to endanger the Officers of the Court with respect to their legal demands

motion to Rule to security for costs

Chas P. Bullock &
B. F. Robinson Attys for Deft

And thereon the following proceedings were had to wit on the day and year last aforesaid by and in the said Court aforesaid. To wit

William H. Small
vs } Trespass on the case Declaration filed
John Stewart } Motion to Rule to security for costs.

Now at this day came hereinto Court the said John Stewart by his Counsel and files herein Court a motion which being seen and heard and by the Court here fully understood It is considered by the court here that the said William H Small enter into bond with good & sufficient security for the payment of all costs that have or that may accrue to this case and it is accordingly done in manner and form following to wit.

order of Court to rule to security

Whereas William H Small has instituted a suit in the Benton Circuit Court against John Stewart it being an action on the case for slanderous words (spoken) Now if Judgment should be given against the said William H. Small I Richard Glover hereby bind my self my heirs executors &c. to pay all costs which has accrued or which may hereafter

Bond for costs

accrue to the said John Stewart and also all that may now be or hereafter may be due to the Officers of the court upon the above cause

witness my hand and seal this fourteenth day of August 1838.

Richard Glover (Seal)

Afterwards to wit on the day and year last aforesaid was entered the following leave to wit.

William H Small
vs
John Stewart
} Trespass on the case

Now at this day came the parties aforesaid by their respective attorneys and by agreement of parties & by leave of the court here the said defendant is allowed until thirty days before the next Term of this court to file pleas to the action of him the said plaintiff and it is further agreed between the parties aforesaid that a copy of said pleas shall be served on the said plaintiffs counsel at least thirty days before the said next Term

Leave to plead

After-wards to wit on the 22nd day of September 1838 the said John Stewart by his counsel files herein court the following plea to wit.

John Stewart
vs
William H. Small
} In the Benton circuit court August Term 1838 Case.

And the said John Stewart by his attorney comes and defends the wrong and injury when &c and says that he is not guilty of the said supposed grievances or any or either of them above laid to his charge in manner and form as the said William H Small hath above complained against him and of this the said John Stewart puts himself

Plea not guilty

upon the country &c

Bullock & Robinson Attys. for Deft

Afterwards to wit on the 14 November 1838 the said John Stewart by his Attorney files herein court a further plea in this behalf which is as follows to wit

State of Missouri } In the Benton Circuit Court
County of Benton } December Term 1838.

John Stuart
ads
William H. Small

Plea of Justification

And the said John Stewart by Charles P. Bullock his Attorney comes and defends the wrong and injury when & where he says that before the speaking & publishing the said words of and concerning the said plaintiff in the said first and second counts mentioned to wit on the twentyeth day of January 1838. at the county of Benton aforesaid before one Stephen A. Bowser a justice of the Peace of Lindsey Township in the County of Benton aforesaid legally commissioned and ~~sworn~~ authorized to hold pleas of debt according to the statute in such case made and provided a certain issue was then & there duly joined in an action brought and pending before the said Stephen A. Bowser justice of the peace aforesaid at the county of Benton & township aforesaid by and at the suit of Nathan McStuart assignee of Charles P. Bullock upon a promissory note for fifty dollars as the plaintiff against the said William H. Small as the defendant for the breach of his promise and undertaking in said note alleged and not performed came on to be tried in due form of law and was then and there tried

by a jury of the County in that behalf duly taken and sworn between the parties aforesaid and upon such trial of said issue the said William H. Small the said plaintiff as witness for and on behalf of the said Nathan M. Ster=ett the plaintiff in the said action and the said William H. Small was in open court holden as aforesaid before the said Stephen A. Bowe=ser the justice as aforesaid duly sworn and authorized to hold said plea and took his corporal oath upon the holy gospel of God to speak the truth the whole truth and nothing but the truth touching and concerning the matters in question in said issue he the said Stephen A. Bowser then and there having sufficient and competent power and authority to adminis=ter the said oath to the said William H. Small in that behalf and upon the said trial of the said issue certain questions then and there became and were material to wit. whether or not the said Small had purchased of the said Charles P. Bullock or had any claim to a certain improve=ment which the said small had purchased of the said Charles P. Bullock for which the said note on which the said suit was instituted was executed the consideration of said note in quest=ion and the said plaintiff further says that the said William H. Small being so sworn as aforesaid upon his oath aforesaid then and there to wit on the twentieth day of January 1838 at the county of Benton aforesaid in the township aforesaid falsely wickedly wilfully & maliciously and corruptly and by his own act and concent did say depose swear and give evidence amongst other things at and upon the said trial to and before the said

jurors so sworn to try the said issue as aforesaid and the justice aforesaid that he the said Small had no claim to the said improvement by purchase or otherwise under the said Charles P. Bullock and that he had no claim to the said improvement whatever whereas in truth and in fact the plaintiff had purchased of and held the improvement and then held the improvement under and by purchase from the said Charles P. Bullock and did then have a claim to the said improvement and the said pltff did thereby in the said court at the County of Benton and Township of Lindsay so holden as aforesaid upon his said oath upon the trial of the said issue falsely wickedly & corruptly commit wilful and corrupt perjury whereupon the said defendant at the said several times in the said counts mentioned at the County of Benton aforesaid spoke and published of and concerning the said plaintiff the several words in the said counts mentioned to have been spoken & published by him the said defendant of and concerning the said pltff as it was lawful for him to do for the cause aforesaid and this the said defendant is ready to verify wherefore he prays judgement if the said pltff ought further to have and maintain his ~~action~~ aforesaid action thereof against him &c

Chas P Bullock Atty
for Deft.

Replication — Afterwards to wit on the 18 December 1838 the said William H Small by his Attorney filed herein court his Replication to the pleas aforesaid and which is as follows Towit

William H Small
vs
John Stuart

Replication

And the said plaintiff as to the ~~said~~ plea of the said defendant first above pleaded and whereof he has put himself upon the country doth the like

And as to the said plea of the said defendant secondly ~~above~~ by him pleaded the said Small says that he by reason of any thing by the said Stuart in that plea above alleaged ought not to be bassed from having and maintaining his aforesaid action against the said Stuart ~~in that plea above alleaged~~ in respect of the grievances in that plea mentioned because he says that the said Stuart at the same time when &c in the said first and second counts mentioned of his own wrong and without ~~and without~~ the cause by him the said Stuart in his second plea mentioned did commit the said grievances in the said plea mentioned in manner and form as the said Small has above thereof complained against him the said Stuart to wit at the County of Benton aforesaid and this he the said plaintiff prays may be enquired of by the country

James Winston Atty
for Plff

Leave to withdraw the first plea

Afterwards to wit on the day and year last aforesaid the said John Stuart by his Attorney "asks leave of the court here to withdraw his plea first above pleaded and to him it is granted"—

Appearance of Parties

Afterwards to wit on the 19. December in the year last aforesaid came the parties aforesaid as follows to wit.

William H. Small
vs
John Stuart

} Trespass on the case Decn filed
Plea justification

Trial

Now at this day came the parties aforesaid by their Respective Attorneys and thereupon came a jury to wit Thomas Densman,

Jury

John Phillips, Isaac Wickliffe, William Donaghe, John Carpenter, Westly Harris, William B Robinson, John Fifateller, John Green, Washington Smith, Benjamin Allerson, and Richard Heath, twelve good and Lawful men who being duly elected tried and sworn to well and truly try the issue within joined between the parties aforesaid and for want of time the jury adjourned until to morrow morning at nine Oclock

Afterwards to wit on the 20th Day of December in the year aforesaid came again the parties aforesaid, and thereupon also came the same jury to wit. as aforesaid, and having progressed in hearing the evidence in the above cause and for want of time were adjourned over until to morrow morning at nine Oclock

Afterwards to wit on the 21st day of December in the year aforesaid came again the parties aforesaid and thereupon also came the jury aforesaid — who upon their oath aforesaid

Verdict

do say that the said William H Small did not falsely ~~wilfully~~ wickedly and corruptly commit wilful and corrupt perjury in manner and form as the said John Stewart hath above in his said plea alledged And the jury aforesaid upon their oath aforesaid do further

find that the said William H. Small hath sust=ained damage by reason of the speaking utter=ing and publishing of the false scandalous malicious and defamatory words in his said declaration above mentioned and do assess his damages to the sum of two hundred dollars Therefore it is considered by the court here-

Judgement

that the said William H. Small recover against the said John Stuart the sum of two hundred dollars, the damages aforesaid in form afo=resaid by the jury assessed as also his costs and charges by him about his suit in this behalf laid out and expended and that he have thereof execution

Afterwards to wit on the 22nd day of December in the year last aforesaid the said John Stewart files herein court the following motion to wit.

State of Missouri } In the Benton circuit court
Benton county } Dec Term 1838.
John Stewart } Trespass on the case Verdict &
ats } Judgement for Plaintiff
William H Small } motion for an arrest of Judgment filed

motion to arrest.

The defendant moves the court to set aside the verdict of the jury rendered against him in the above cause for the following reasons. To wit.

1st Because the 5th instruction of the Plaintiff given by the court to the jury was erroneous and incorrect

2nd Because the ninth instruction of the plaintiff given by the court to the jury was erron=eous and incorrect

3rd Because the verdict of the jury is contrary to evidence

4th. Because the verdict of the jury is contrary to law and evidence

6th Because the instructions of the court on the part of the plaintiff were contrary to law

7 Because the verdict of the jury was contrary to the instructions of the court.

8 Because the 7th instruction of the Plaintiff given by the court to the jury was contrary to law.

Allen & McCord Atty for Deft

overruled

whereupon all and singular the premises being seen and heard and mature deliberation being thereupon had the motion is by the court here over-ruled

Affidavit for New Trial

Afterwards to wit on the day and year last aforesaid the said John Stewart by his attorney files herein court the following affidavit to wit.

State of Missouri.

Benton County Towit. In the Benton Circuit Court Dec Term 1838.

William H. Small
vs
John Stewart
} In an action of Slander —

The defendant John Steward deposeth and saith that upon the trial of this cause as he has been informed and verilly — believes that after the jury had been impannelled and sworn and after a part of the evidence had been examined in said cause and at a time when the court had taken a short recess & after giving and delivering to the jury who had been empannelled

to try the issue joined in said cause a charge by the court that the said jury nor any one of them should converse with any person or permit any person to converse with them about or touching the said case or the issue joined thereon One Jonas Heath conversed with and talked to one Richard Heath the Brother of the said Jonas Heath during said recess of the court and in and about the trial of the said issue and in the presence and hearing of the said Richard Heath about and concerning the said issue the said Richard then and there being a juror duly empannelled and sworn to try said issue and who had been duly charged as aforesaid the said Jonas Heath then and there said and stated among other things that there was a party in the county who were trying to put down or brake down the said William H. Small but that it could not be done for that the said Small was a man of the most sense of any man in the county or the smartest man in the county

(Signed)

Sworn & Subscribed } John Stuart
to the 22 dec 1838 }
Thos L Bishop Clk }

Affidavit Mark Heirton of lawful age deposeth and saith that the material ~~facts~~ allegations contained in the foregoing affidavit are true and correct to the best of his knowledge and belief

(Signd) M Heirton

Sworn & Subscribed to the 22 day of dec 1838.

Thos L Bishop Clk

To the Honorable Judge F. P. Wright

Petition

The Humble petition of John Stewart defendant ads William H Small alleges that he is agrieved by the Verdict of the Jury in the aforesaid cause on the grounds set forth in the aforesaid affidavit and because of the tampering with a juror as there stated and therefore prays the court to set aside the Verdict of the jury rendered in said cause and grant him a new trial

John Stewart
by his Counsel –

and afterwards to wit on the day and year last aforesaid the said John Stewart files herein court the following affidavit to wit.

John Stewart ads William H Small } In the Benton Circuit Court December Term 1838. In an action on the case for slanderous words spoken

State of Missouri }
County of Benton }

Affidavit

This affiant John Stewart the above named defendant in the above cause being duly sworn according to law deposeth and saith that before the commencement of the above trial one Logan Kays was duly subpoened as a witness in the above cause on the part of plaintiff that said Logan Kays was in attendance on the court on the first and second days of this term that this affiant believed said Kays was a material witness for this affiant that this affiant expected and believes that he could have established by said Kays that said William Small did purchase the improvement of Charles P. Bullock for which said small executed the note of fifty dollars the note in question also that the said small had possession of the improvement at the time of the trial

of said note before Stephen A. Houser that said small set up a claim before and after the trial on said note to the improvement also that said small acknowledged he owed the money after the trial on said note and pro=mised to pay it to Charles P. Bullock that said Kays departed the court without leave or concent of this affiant and further this ~~deponent~~ affiant saith not.

John Stuart.

And afterwards towit on the day and year last aforesaid the following proceeding was had

William H Small
vs
John Stewart } Trespass on the case
Verdict and judgement for
Pl'ff motion for a new trial filed

motion for new Trial

Now at this day came the parties aforesaid by their respective Attorneys and thereupon the said John Stewart by his Attorney saith that the court here ought not to proceed to render judgement against him of and upon the said Verdict by the jurors aforesaid in form aforesaid found and prays that the same Verdict may be set aside and that the issue aforesaid may be tried anew by other jurors to be afresh impannelled Whereupon all and singular the premises being seen and heard and by the court here fully understood and mature deliberation being thereupon had It is considered by the court here that the said Verdict is in no wise insufficient or erroneous and that the same ought not to be set aside and that no new trial ought to be had of the issue aforesaid Therefore the motion for a new trial is by the court here

overruled

overruled-

State of Missouri
Benton County } to wit

In the Benton Circuit court
December Term 1838.

William H. Small Pltff
vs
John Stewart Deft

Be it remembered that upon the trial of this cause and after the verdict of the jury was had in said cause the said defendant filed his motions upon three several causes to set aside the verdict of the jury rendered therein ~~which~~ and grant him a new trial which said motions are made a part of the record in said cause and also the instructions of the court as filed both for the plaintiff and defendant. as given to the jury be made a part of the record in this cause. The Court overruled all three of the causes to set aside said verdict of the jury and grant the defendant a new trial to which opinion of the court thus overruling the said causes of the defendant he the said defendant excepts and prays this his bill of exceptions may be signed ~~by~~ sealed and inrolled and made a part of the record

Bill of exceptions -

Signed H. P. Wright Seal
Circuit Judge

And afterwards to wit on the day and year last aforesaid the said John Stewart files herein court the following affidavit to wit

John Stewart
ats
William H Small

In the Benton Circuit court
December Term 1838

Affidavit for an appeal

This affiant John Stewart the above named defendant being duly sworn according to law deposeth and saith that he does not make this appeal for the purpose of vexation or delay but because he this affiant this appellant is aggrieved by the judgment of the court and therefore prays

an appeal

Signed John Stewart.

Sworn & subscribed to in open court Dec 22 1838

Thos L Bishop Clerk

And thereon the following procedings were had

William H Small Pltff
vs
John Stewart Deft.

} Trespass on the case
Verdict and judgement
for Plaintiff

Appeal

Now at this day came the parties aforesaid by their respective Attorneys And the said John Stewart having filed an affidavit according to the act of assembly in such case made and provided and thereupon prays an appeal from the judgment of the court here so as aforesaid rendered to the Sup=reme court of the State of Missouri and to him it is granted whereupon Markham Fristoe & Bartholomew W Keown of the county of Benton present herein court in their own proper per=sons and who by the court here are deemed good and sufficient become pledge and bail for the said John Stewart that if it shall hap=pen that the said John Stewart shall be convicted at the suit of the said William H Small in the plea aforesaid then the said Markham Fristoe & B.W. Keown consent that all such damages costs and charges as shall be adjudged unto the said William H Small in this behalf (shall be adju=dged unto the said William H Small in this behalf) shall be made of their bodies lands & chattels and levied to the use of the said William H Small if it shall happen that the said John Stewart shall not pay the said Damages costs and charges aforesaid

William N Small }
vs }
John Stewart }

The plaintiff moves the court

Instructions to instruct the jury

1st That unless they believe from the testimony that Small is guilty of wilful and corrupt perjury as alledged in the plea they must find for the plaintiff

2nd That Small's character is presumed to be good and that he is not required to prove it

3rd That it is unnecessary for the plaintiff to prove a good character until it is proved by those who know his character to be bad

4th That the circumstance of a witness being unfriendly to one of the parties goes to his credit

5th That the defendant attempting to justify unless sustained is an aggravating circumstance that authorizes the jury to increase and enhance the damages for the plaintiff

6th That unless the defendant negatives what the plaintiff swore to before the justice they must find for the plaintiff

7th That unless the jury believe by the testimony of two witnesses, or by the testimony of one witness and circumstances equal to the testimony of another witness that Small knew he had a claim to the improvement at the very time he swore he had no claim ~~to the improvement~~ they must find for the plaintiff

9th That if they believe from the testimony that Small while testifying before the justice believed that Bullock had

no claim to the land at the time of the sale they must find for the plaintiff.

N.B. my belief is that the word land occurring in the last instruction above was read to the jury improvement and so given but the word land appears in the instruction

signed

F. P. Wright Circuit Judge

Stewart
ats
Small

Instructions

The Defendants asks the court to instruct the jury That if the charge in the plea is substantially proven that they must find for the Defendant.

2nd That it is not essential to the plea of justification that the words in the plea is proven before the jury and that it is sufficient to prove the substance of the charge in the plea

3rd That the plaintiffs general character for truth and veracity when on oath before the commencement of the Plffs action shall be taken in mitigation of damages.

4th That if a person swears to a fact which he does not know at the time though true is perjury

5th That the jury are to infer from the facts in the case whether the plaintiff wilfully and corruptly perjured himself —

State of Missouri }
County of Benton }

I Thomas J Bishop clerk of the Benton circuit court hereby certify — that the foregoing record is a true copy of the record and proceedings in the case of William N. Small vs John Stuart as tried in the Benton circuit court December Term 1838. except the entry of leave to withdraw the plea of not guilty which is found in the minutes and has not been entered on the record and therefore been by me supplied to this copy.

In Testimony whereof I have hereunto set my hand and affixed the seal of our said circuit court at Warsaw the 16 Day of February AD 1839

Thos J Bishop
Clerk

1839

William A. Small (20)

vs appeal

John Stuart

filed 6th April 1839

Robt. T. Clarke

Clk

In the Supreme Court April Term 1839

John Stewart appellant
vs
Wm. H. Smalls appellee

Appeal from the Benton Circuit Court

And now at this day comes the said appellant by his attorney and makes the following assignment of Errors in the record proceedings and Judgment rendered in the foregoing cause. Viz. 1st That the Circuit Court Erred in giving the 7th instruction to the Jury.

2nd That the said Court Erred in giving the 9th instruction to the Jury

3rd There is manifest error in the said Circuit Court in not setting aside the verdict of the Jury and in not granting a new trial for the causes set forth in the said Stewart, and one Mark Fristoe, affidavits Charging one Jonas Heath with influencing and tampering with the Jury that tried said cause while the trial was progressing

4th That the said Court Erred in not setting aside the verdict of the Jury and in not granting ~~him~~ a new trial because of the affidavit of the said Stewart with regard to the testimony of one Logan Kays whose evidence he was not able to procure after having said Kays summoned and the said Kays being in attendance at the commencement of the said trial upon said Court

5th That the said Court Erred in refusing to set aside the verdict of the Jury and in

not granting the said Stewart a new trial for the causes set forth in the said record, proceedings and Judgment of the said Circuit Court

6th That there is other and manifest Error in said record and proceedings sufficient to revise the said Judgment of the said Circuit Court and for the foregoing and other reasons the said appellant prays the said Judgment may be reversed &c

Wm W. Cord atto
for Appellant

~~In the Record & proceedings aforesaid~~
The said Wm H Small comes and says that in the record & proceedings aforesaid there is no Error.

James Winston
atty for Apt

Stewart appellant
vs
Small appellee
Appeal

assignment of Errors

Wm McCord atto for appellant

filed 23rd April 1839 R.P. Clark clk

STATE OF MISSOURI, } Sct.
COUNTY OF COOPER,

First Judicial District.

THE STATE OF MISSOURI,

TO THE SHERIFF OF THE COUNTY OF Benton --Greeting:

Whereas, William H Small

on the twenty fifth *day of* April *in the year of our Lord eighteen hundred and* thirty nine *hath recovered against* John Stuart

at our Supreme Court, before the judge thereof his Costs and Charges in a certain suit lately pending in our said Court between the said parties, and which will be found endorsed On this writ

which to the said William H Small

were adjudged as appears to us of record. These are therefore to command you, that of the goods and chattles, lands and tenenements of the said John Stuart

in your bailiwick, you cause to be made the aforesaid ~~debt, damages and~~ *costs, and that you have the same before the judges of our said court on the first day of our next term of said court to render to the said* William H. Small

the ~~debt damages and~~ *costs aforesaid. And for want of sufficient goods and chattles, lands and tenements whereon to levy, and make the sam , we command you to take the said* John Stuart

if he *be found in your bailiwick, and* him *safely keep, so that you have* his *body before the said judges on the said first day of the next term of said court to satisfy the said* William H Small

of the aforesaid ~~debt damages and~~ *costs, and that you certify to our judges how you execute this writ, and have you then and there this writ.*

WITNESS ROBERT P. CLARK, *Clerk of our said court at office this* first *day of* May *eighteen hundred and* forty *and of this State the*

Robert P. Clark Clk
By Bennett Clark D C

I do Certify that I have Rec'd four dollars & 47 Cents in full satisfaction of the within Exc'n

Jas W Smith Shff
8 July 1840 of Benton County

William H Small
vs Z Execution
John Stuart

No. 1.

Judgt rend for costs viz

To Robt P Clark	$3.47
fee for this writ	1.00
	$3.47
Exc'n	1.00
	4.47

To Sheriff of Benton County Return to Fall Term 1840

Come to Land May 8th 1840

J W Smith Shff

William Smale } Appeal from the Circuit Court
vs } of Benton County
John Stewart

Opinion of Tompkins

Smale brought an action in the Circuit Court against Stewart and obtained a Judgment from which Stewart appealed to this court

The appellant took exceptions to certain instructions given by the court which are not incorporated in the bill of exceptions, but referred to as copied below by the Clerk. He also moved to set aside the verdict and for a new trial for reasons not set out in the bill of exceptions. These reasons were contained in affidavits which the clerk had copied and set out before the bill of exceptions where he ought not to have copied them as they constitute no part of the record till incorporated in the bill of exceptions. It may be further observed that none of the evidence on which these instructions were given is preserved in the bill.

I will however proceed to notice the several errors assigned as if there were a good bill of exceptions

The errors assigned and insisted on are

1st That the Court gave the seventh instruction

2nd That the Court gave the ninth instruction

3rd That the Court refused to set aside the verdict and grant a new trial for reasons set out in affidavits filed

4th Because the court refused to grant a new trial on account of the absence of a material witness who had been summoned and in attendance but had absented himself before the trial

Two other errors are assigned being a mere repetition of what was before assigned, and therefore not urged

This was an action for words spoken charging the plaintiff with perjury

1.st The seventh instruction which is the subject matter of the first assignment of errors is that ~~the~~ unless the jury jury believe by the testimony of two witnesses, or by the testimony of one witness and circumstances equal to the testimony of another witness that Small knew he had a claim to the improvement at the very time he swore he had no ~~no~~ claim they must find for the plaintiff. For the defendant below appellant here it was contended that as in ~~an indictment~~ an indictment the crime of perjury must be proved by two witnesses, so on a plea of justification in this action the defendant could prove the facts alledged in justification by nothing less than two witnesses. Starkie vol. 2. p. 879 seems to declare this to be the rule of law. The consequence then would be that the circuit court had expounded the law more favorably to the defendant than it ought to have done This might have been a subject matter of complaint for the plaintiff to make, but surely not for the defendant

2.nd The ninth instruction which constitutes the second ground of complaint is that the court told the jury that if they believed from the testimony that Small while testifying before the justice believed that Bullock had no claim to the land at the time of the sale they must find for the plaintiff. The fact attempted to be set up and proved in the plea of justification is that Small in a trial before a justice of the peace had sworn that he had no claim by purchase or otherwise to an improvement ~~by purchase or otherwise~~ under Bullock, and that he had no claim whatever to said improvement whereas in truth and in fact he had purchased it from Bullock. So that the error charged to have been committed by the Circuit Court is that

the court used the word improvement instead of ~~labor~~ land
All the testimony being omitted the whole matter might
be dismissed as not before the court. It appears however
from the argument of the cause by ~~defendants counsel~~ appellants counsel
that Bullock had improved a lot of land belonging pro-
bably to the United States, and that the object of the
defendant was to establish by evidence (what he had
alleged in his plea) that Small had ~~improv~~ purchas-
ed this improvement, meaning thereby, if any mean-
ing is to be given to the words, that Small had pur-
chased Bullocks interest in this land in this its im-
proved state: which is nothing more nor less than
the trespassers right of possession against all but
the United States. The common phrase of such pro-
prietors, as Bullock is here represented to have been, is
that they sell their labor, or their improvement,
and not the land; and as the purchaser cannot
avail himself of either the labor expended, or the im-
provement made on the land, without occupying
and using the land itself, the Judge of the Circuit
Court might naturally enough and correctly
enough have used the word land instead of improve-
ment in giving his instructions to the Jury. It is
indeed to substitute the substance for the shadow: to
give a word having a meaning for one having none,
or if any, one that is merely figurative; in doing
which as it appears to me he committed no error.
3rd The substance of the affidavit on which this
charge of error is founded, is that, the court having
taken a short recess, one Jonas Heath approached the Jury
and told Richard Heath, his brother and one of the Jury,
although the Jury had been instructed by the Court to con-
verse with no person, not of their body about the subject
matter of the suit, that there was a party in the county

who were trying to put down, or break down the said Small, but that it could not be done, "for that the said "Small was a man of the most sense of any in the "County, or the smartest man in the County".
No misbehavior is charged either on the juror, or on Small the appellee. It might be enough to say that the appellant has not preserved this affidavit in his bill of exceptions: but lest it should seem to him that he fails in this point through a mere slip of his counsel it will be observed that it would be hard for the appellee to lose the benefit of his verdict on account of idle words spoken to a juror by one of the crowd attending a court house. If this were to be established as a rule no verdict would be safe.
× See Aubert vs Hardcastle 6th Bacon. 670
The appellant himself might instigate bystanders to address jurors in passing from the presence of the court to their rooms, and for any thing shown to this court, it might have appeared to the Circuit Court that the appellant himself did prompt Jonas Heath to address this conversation to the juror. We are bound to raise every reasonable presumption to sustain the judgment of the Circuit court; and even admitting the affidavit to be a part of the record there is nothing in it to preclude the idea that Jonas Heath was not instigated to this act by the appellant himself. This might however be rather too strong a presumption: but certainly nothing is detailed in that affidavit to cast any blame on the conduct either of the appellee or the Juror. It is then my opinion that the verdict of the jury ought not to have been disturbed for any thing alledged under this head.

4th. The appellant in his affidavit declares in terms sufficiently plain the materiality of his witness, that he had been summoned, and in attendance part of the term of the court, and that he absented himself without the consent &c of the appellant. But he shows no exertions made to procure the attendance of this witness. It is very common when witnesses have been as long in attendance, as this one appears to have been, to go off with intention to return in time, and thus to be absent at the time of trial. The appellant must have been guilty of the most gross negligence not to have demanded an attachment for this witness: he might have been very easily produced for anything appearing to this court, no attachment was issued, nor asked for. For any things alledged under this head in my opinion the verdict ought to stand

For all the reasons above given the judgment of the Circuit Court ought in my opinion to be affirmed Judge Napton being also of opinion that this judgment ought to be affirmed, it is accordingly affirmed

George Tompkins

I concur in ~~this opinion~~ affirming the judt of the circuit court.

W. B. Napton

Small
vs opinion
Stuart