Cavin, William C. vs. Smith, John W. and James Kerr; 1855 Polk Co. 202/7

68/12

· Livestock

Cavin <
· original case over wrongful conversion of sorrel mare
· seeking payment
· motion to suppress testimony

Be it remembered that on the 25th day of March A.D. 1854 William C Carin by his Attorney filed in the Office of the Clerk of the Circuit Court of Polk County in the State of Missouri a Petition against John W. Smith and James Kerr and which said Petition so filed is in the words and figures following to wit

William C Carin Plaintiff
against
John Smith
James Kerr Defendants

In Circuit Court Polk County

The Plaintiff Complains of the Defendants for this Court that on the 18th day of October 1853 in Polk County he was possessed of and was the owner of a certain Sorrel Mare of the value of one Hundred Dollars his own property of the value aforesaid and the said Defendants have wrongfully converted said Sorrel Mare to their own use whereby the said pleff says he is

damaged to the amount of one Hundred Dollars for which he asks judgement

Otter Atty for Pltff

William C. Cavin the above Pltff being sworn makes oath that the facts stated in the foregoing Petition are true

Wm Cavin

Sworn to & Subscribed this 25th March 1854
J. W. Davis clk

Annexed to a certified Copy of said Petition a writ of Summons issued in the words and figures following to wit

" The State of Missouri
To the Sheriff of Polk County Greeting
We Command You to Summon James Kerr to be and appear before the Judge of our Polk Circuit Court on the first day of the next term thereof to be holden at the Court House in Bolivar on the third Monday after the fourth Monday in March 1854 to answer the Complaint of William C. Cavin as set forth in the foregoing

Petition and have you then and there
this Writ Witness Israel W. Davis
Clerk of said Circuit
Court with the seal of
said Court affixed at
Office this 27th day of
March 1854
I. W. Davis clerk

On which is the following endorsement
to wit

I do hereby certify that I executed
the within Petition to wit by reading
to James Kerr and delivering to him
a copy of the original Petition and
Writ in Polk County Mo.
March 27th 1854
James W. Johnson Sh'ff
By Jas. M. Jones D Sh'ff

And afterwards to wit at a
Circuit Court begun continued
and held within and for the County
of Polk on the 17th day of April
A.D. 1854 at the Court House
in the Town of Bolivar the
following proceeding among
others were had to wit

William C. Cavin
vs
Kerr & Smith } Civil Action

Now at this day comes the said Defendants and file herein their Answer to said Plaintiffs Petition

And which said Answer so filed as aforesaid by said Defendants is in the words and figures following Quiet

William C. Cavin plaintiff
against
John Smith &
James Kerr Defendants } In the circuit Court of Polk County

Defendants for answer to plaintiffs Petition say they specifically deny taking or converting wrongfully or otherwise to their own use a Sorrel Mare of the plaintiff as he has complained of them of the Value of One Hundred Dollars or of any other Value Defendants deny that Plaintiff has sustained damage of One Hundred Dollars

or that he is entitled to Judgement therefor or for any other sum of Money Means for Defts

James Kerr being sworn states that the foregoing Answer and the Matters therein as stated he believes to be true

Sworn to Subscribed in Open Court April 17 1854 } James B. Kerr

J. M. Davis clk

And afterwards Court at a circuit Court began and held at the Court House in Bolivar within and for said County of Polk on the 16th day of October 1854 the following proceedings among others were had in said Court Court

William C. Davis vs James Kerr & John W. Smith } Civil Action

Now at this day Comes the Parties aforesaid by their

Attorneys and on Motion of the said Defendants and for good and sufficient cause here now to the Court shown It is ordered that the above cause be and the same is hereby Continued until the next term of this Court

It is therefore Considered by the Court that the said Plaintiff have and recover against said Defendants his costs and charges by him in this behalf at this term of the Court laid out and expended and that Execution &c

And afterwards, Towit at a Circuit Court began and held within and for said County of Polk on the 18th day of April AD 1855 the following proceedings among others were had in said Court Court

William C. Cavin
vs
Smith & Kerr
} Civil Action

Now at this day came the said Plaintiff by his Attorney and filed herein a Motion to suppress the Depositions filed in this cause

And afterwards, Court at the Court aforesaid Continued and held on the 19th day of April A.D. 1855 the following proceedings among others were had in said Court Court

William C. Carver
vs
James Kerr and
John W. Smith

} Civil Action

Now at this day comes the parties aforesaid by their attorney and the Motion filed to suppress the Depositions in this cause coming on to be heard and being heard and fully understood was by the Court sustained and thereupon came a Jury Court Joseph Hogg Isaac Ingram Seth Walker Henry Potts David M. McClure Jesse Grover James M. Pike Jason Ashworth Ebenezer Arnold Christian Picker James H. Perryman and James Sawyer twelve good and lawful men

who being duly elected tried and sworn to well and truly try the issue joined and thereupon this cause is adjourned until tomorrow Morning

And afterwards Court on the 20th day of April A.D. 1855 at the Court aforesaid the following proceeding among others were had in said Court Court

William C. Cavin
vs
James Kerr & John W Smith
} Civil Action

Now at this day came again the parties aforesaid by their attorney and also the Jury duly annalled and sworn for the trial of this cause on their oaths do say we the Jury find for the Defendants It is therefore considered by the Court that said Plaintiff take nothing by his Bill but for his false clamor be in Mercy and that said

Defendants have and recover against said Plaintiff their costs and charges in this behalf laid out and expended and that Execution issue &c

And afterwards Court at the Court aforesaid and on the day and Year last aforesaid the following Proceedings among others were had in said Court Court

William C. Cavin
vs
Kerr & Smith
} Civil Action

Now at this day came again the parties aforesaid by their Attorney and the said Plaintiff files herein a Motion to set aside the Verdict of the Jury and grant a New trial in said cause which Motion being seen and heard was by the Court Overruled

And afterwards, Court at the Court aforesaid Continued and held on the 21st day of April 1855 the following Proceedings among others were had in said Court Court

William C. Cavin
vs
John W. Smith & James Kerr
} Civil Action

Now at this day comes the parties aforesaid by their Attorneys and the said Plaintiff files herein his Motion to set aside the verdict of the Jury and grant a new trial in said cause which Motion being seen and heard and fully understood nearly the Court Overruled, To which opinion and Judgement of said Court in Overruling said Motion the said Plaintiff excepts and tenders his Bill of Exceptions which is signed sealed and ordered to be enrolled as forming

a part of the record in said cause and the same is done accordingly and thereupon the said Plaintiff files herein his Bond and prays an appeal to the Supreme Court in said cause and the same is granted accordingly and a stay of Execution Ordered in said cause until said appeal be determined

And which said Bill of exceptions so tendered signed sealed and enrolled is in the words and figures following Towit

"Wm C. Cavin } In the Circuit Court
vs } of Polk County
Smith & Kerr }

Be it remembered that on the trial of this cause plaintiff introduced John Mathews as a witness who stated that about the last of September or 1st of Oct 1853 I knew the Mare in Controversy she was a sorrel Mare with a bald face and one

eye out she was worth about forty Dollars I had known her for twelve months during that time she was in plaintiffs possession and he exercised acts of ownership over her

Logan Mayfield another witness for plaintiff stated I have seen the mare in controversy plaintiff owned her when I knew her she was a sorrel mare with white face & some of her feet white I never examined her very closely & dont know as to her eye I saw her last in the possession of Caven in the fall or winter of 1853 I never saw her in the possession of Smith & Kerr I suppose she was worth in cash 40 dollars

Cross Q

If she had but one eye I dont know it and do not think that she would be worth so much if that were the case

S. B. Anders another witness on the part of plaintiff stated that he was at the constables sale and saw the mare sold I think she sold for $32.50 cents Caven was

at the sale forbid it he claimed the
mare the mare is of the same descip
tion given by Mr Mayfield I dont
know her value when Cavin forbid the
sale Smith directed the Constable
to sell her Kerr was also present
Kerr & Smith were in partnership Mer
chandizeing It was in Polk County
Smith bid off the mare at the sale
I dont know that I saw the mare
after that time

Joseph Cavin another witness
on the part of the plaintiff stated I
had seen the mare several times she
was a sorrel mare white face two
feet white & one eye out I had seen
her for several times during the
twelve months before on plaintiffs farm
in his possession she was worth 35 or
40 dollars I was present on the day
of the Constables sale she was worth
35 or 40 dollars Smith bid her off
Plaintiff claimed the mare &
forbid the sale Kerr was also there
It was at Pleasant Hope in Polk County
when plaintiff forbid the sale Smith
directed the Constable to sell her

A. D. Fullerton another witness states that he was at the time of the sale Constable Mooney Township in Polk County & sold the mare as such Constable on an Execution in favor of Smith & Kerr Defendants. The Execution handed witness is the same which is as follows and offered and read in evidence

"The State of Missouri
To the constable of Mooney Township in the County of Polk Greeting
Whereas Smith and James B. Kerr on the 12 day of October 1853 obtained Judgement before the undersigned Justice of the Peace of the Township of Mooney in Polk County against Alonzo Ray for Twenty Six Dollars and 64 cents for his Debt and one Dollar for his costs You are therefore commanded to levy the same of the goods and chattles of the said Alonzo Ray According to law You are further Commanded to return this Writ to the undersigned Justice within sixty days from the date Given under my hand

this the 12 day of October 1853
John Burns J.P.
Endorsed
" The within Execution come
to hand Oct the 12th 1853
A.D. Fullerton Const
The within levied on one Sorrel
Mare this 18 day of Oct 1853
The within Satisfied
Both Smith & Kerr were present at
the Sale Cavin was there and forbid
the Sale both Smith & Kerr directed
the constable to Sell The Mare sold
for about 32 Dollars and Smith bot
the Mare I suppose for the benefit
of both Smith & Kerr and I delivered
the Mare to Smith this was in Oct
1853 in Polk County
Cross Ex
I found the Mare at Driskills It was
on Sunday Morning Mr Ray was
there I in bed the Mare was in the
Stable It was a Sorrel Mare blaz
face one eye & some white feet The
same Mare sold by me under
Execution at the Constable Sale

I levied on the Mare and Ray claimed her at the time I found her in Driskills Stable Driskill did not claim her I never saw her in the possession of any one

Plaintiff here closed his evidence in chief

Defendants Evidence

Defendants then introduced Henry Brady as a Witness who stated that friday or Saturday before the fall term of the circuit Court 1853 I had a conversation with plaintiff was working on the road others also Wm Vinyard was also there working the Road in which he told me to tell my Father he need not come to look at the Mare for he had sold or traded her to Alonzo Ray I am not certain whether He said he had sold her or traded her The Mare had a Ball face & one eye & Father has since purchased her If he said any thing about conditions of the sale I dont recollect it, I dont know where Ray is now I have understood that he is in Kansas Territory

Defendants also introduced Wm Vinyard who stated that in the last of September or 1st of October 1853 Plaintiff told me he had sold the mare he did not say to whom

Defendants also introduced Wm Cowden who stated I saw Alonzo Ray riding the mare on Saturday before the levy of the Attachment he came to the blacksmith shop to have her shod he could not get her shod & he shod her himself. Plaintiff was in the habit of having some of his blacksmithing done at that shop & he also might have had work done at other shops Ray was working for Cavin at that time I had seen him ride another of Cavins Horses there before that time. The time I saw Ray at the shop with the mare was last fall a year ago the clothes of Alonzo Ray was at the store of Smith & Kerr at the time I saw him riding the mare he was working about had no particular home

Defendants also introduced Croaker who stated that about the month of October 1853 and after Ray had left the County I was at Mayfield's Store in this County Plaintiff was there he was talking with a man I dont who the man was I dont recollect whether with an old or Young man they were talking about Ray trading leaving the Country about Ray having left the Country and being in debt to him. I asked him if Ray owed him any thing besides for the Mare He said he owed him for borrowed Money besides I expected I would be a witness after I heard they had gone to law I forget what other Persons were present I have seen Ray riding other horses belonging to plaintiff I dont recollect the other man who was talking to Cain To all which evidence of Deft tending to prove title in Ray at the of the levy & sale plaintiff objected because of the State of the Pleadings which objection the Court overruled & admitted all said evidence & Pltff excepted

The Plaintiff then offered to introduce Logan Mayfield as a witness and after stating the object of his testimony & what he expected to prove the Court sent the Jury out & the said Mayfield being sworn stated to the Court that in the latter part of August or 1st of September 1853 at my store in Polk County Ray & Plaintiff came there Ray wanted to buy some articles I was rather doubtful of him not knowing much about him Ray then stated to me Cavin being also present that he was working for Pleff Cavin Ray also said he would make me safe for what I would let him have Ray also said he was to work for Pleff for some time and that he had conditionally bought a mare from plaintiff for which he was to pay 65 dollars in work as well as I recollect the mare was to remain plaintiffs until he Ray had finished the work Plaintiff was to keep the mare and take care of him and the colt was still to suck and run with the mare when the work was finished the mare was to be Rays

was my understanding during all this time Cavin was setting by on the Counter I did not learn particularly what kind of work Ray was to do, but I think it was about a well I have seen the well several times & it is not finished yet Ray also said he was to furnish water in the well I cant state whether there was water or not there might have been water sometimes and sometimes not but when I saw the well there was no water I live a neighbor to Plaintiff, the conversation of which I speak was sometime before taking out the attachment by Smith & Kerr I cannot say whether Ray had any other means I suppose this conversation was to show that he Ray would have means to pay me If Ray had any other means I do not do it I dont know where Ray is he has left this portion of the Country

The Jury having been recalled into Court plaintiff offered to prove the above facts as stated by Sd Centrup as to what Ray said in relation

to Rays contract with plaintiff for the mare as explanatory of the admission of Plaintiff which had been given in evidence and in explanation of Rays claim to the mare but the Court refused to let the witness Testify as to what Ray said in relation to the contract with Plaintiff to which refusal of the Court plaintiff excepted

The Court then instructed the Jury on the part of the Plaintiff as follows

" If the Jury believe from the evidence that Plaintiff some thing like a Year before the Sale had purchased for the mare & then received her as his own property and had kept her on in his possession exercising acts of ownership over her and that defendants converted her to their own use they will find for the Plaintiff unless the Jury are further Satisfied from the evidence that previous to her being levied upon Cavin had

sold & delivered her to Ray and if Cavin had so sold her to Ray it devolved on Defendants to prove that fact to the satisfaction of the Jury

If the Jury believe from the evidence that the Mare belonged to Plaintiff at the time of the levy and sale and that she was sold on an Execution in favor of Defendants & that Plaintiff was at the sale and forbid the same but that Defendants were present & directed the sale and she was sold by direction of Defendants & for their benefit they will find for the plaintiff

The Court then instructed the Jury on the part of Defendants as follows

Unless the jury believe from the evidence that the commencement of this suit that William C. Cavin Pltff was the owner of the Mare in Controversy

then they must find for the Defendants

Unless the Jury believe from the evidence that Plaintiff at the commencement of this suit was the owner of the mare in controversy and that Defendants converted said mare to their own use then they must find for the Defendants

Although the Jury may believe that Cavin had owned the mare for twelve months Yet if they find that before the commencement of this suit Plff sold the mare in controversy to Ray then they must find for Defendant

To the giving the 3rd said instruction plaintiff objected & Excepted.

The jury having found a verdict for Defendant Plaintiff filed his Motion for a new trial as follows Lowe t

(24)

Wm. C. Cavin } In the Circuit
vs } Court of Polk
Mitch. J. Kerr } County

Now at this day comes the said Plaintiff & Moves the Court to set aside the Verdict of the Jury and grant a new trial in said cause

1st Because the Court erred in excluding proper evidence offered on the part of Plaintiff

2nd The Court admitted proper evidence on the part of the Defendant

3rd The Court improperly instructed the Jury on the part of Defendant

3d The Verdict is against the law & Evidence

& for other causes

Wright & Otter
attys for Deft

Which was by Seen and heard and Overruled to the Overruling of which Plaintiff excepted and prays this his Bill of exceptions be Signed Sealed and made a part of the record which is accordingly done

Dewitt C Ballou Esq
Circuit Judge

State of Missouri }
County of Polk }

I Israel W. Davis Clerk of the Circuit Court of said County do Certify that the foregoing is a full true and Complete Transcript of the Record and proceedings had in Said Court in said cause as the Same now remains of Record in my said Office

Given under my hand with the Seal of said Court affixed at office this 11th day of June A D 1855

I. W. Davis

I. W. Davis Clk Fees $5.75
Postage 10

12. ~~36.~~

July 7 55

Wm. C. Cavin, appt.

v

Jno. W. Smith and

James Kerr —

filed June 18 1865.

Wm E Dunscomb

Clerk

Polk

7th

(28)

In the Supreme Court
July Term 1855

William C Cowen appellants
vs } appeal from Polk
John Smith & Jas Kerr appellees—

Now at this day comes the said plaintiff by his attorney and says that in the record & proceedings aforesaid and in the judgment aforesaid there is manifest error in

There is error in this to wit. The judgment is rendered for said defendants whereas by the law of the land it should have been rendered for plaintiff—

The court erred in admitting improper evidence on the part of defendants & in refusing to permit plaintiff the evidence of Mayfield & other proper evidence & in giving improper instructions on the part of defendant

The court erred in not granting plaintiff a new trial, wherefore, for the errors aforesaid and other manifest errors plaintiff prays that the judgment aforesaid be reversed annulled and held for nought & that he may be restored to all things which he has lost by reason of said judgment—

J P Wright
atty for pltff

William C Carson
vs
John Smith &
James Kerr

assignment
of errors

filed July 6 1855

Wm E Dunscomb
Clerk

In the Supreme Court
July Term 1855

William C Cavin
vs
John Smith &
James Kerr

appeal from Polk

Plaintiffs sued defendants in the Polk Circuit Court averring that he was possessed & the owner of a sorrel mare of the value of one hundred dollars and that defendants wrongfully converted her to their own use —
The defendants' answer is barely a denial of the taking or converting to their own use a sorrel mare of plaintiff —
Upon the trial, plaintiff proved that he had swapped for the mare & had owned her & had her in possession for more than a year. and was that she worth about forty dollars — That the defendants were doing business in partnership as merchants — The mare was levied on by a constable to satisfy an execution in favor of defendants and against one Ray who was at the time living with & working for plaintiff in digging a well — Plaintiff attended and forbid the sale — Both of the defendants were also at the constables sale, and both directed the constable to sell the mare — She was accordingly sold — Smith one of the defendants became the purchaser and she was delivered to him & the amount bid credited on the execution — And they afterwards sold the mare —

when the constable levied on the mare he found her at a neighbors of Cavin's. It was in the morning on Sunday. & Ray was there in bed - but it was proved that Ray had been in the habit of riding that & other horses of Cavin's — He immediately after the levy left the country - having no settled home —

Defendant introduced Henry Boads as a witness who stated that previous to the levy, plaintiff told him to tell his father he need not come to look at the mare for he had sold or traded her to Alanzo Ray — witness was not certain whether he said sold or traded —

- Bingard, another witness stated that about the 1st of October 1858. plaintiff told him he had sold the mare but did not say to whom:

Croaker an other witness for defts. stated that just after Ray had left the country he heard plaintiff and an other man in conversation about Ray's having left the country and in debt to him - witness says he asked plaintiff if Ray was in debt to him for any thing besides the mare & he said yes, for borrowed money — Plaintiff objected to all the above evidence of defts - tending to prove property in Ray, because no such defense had been set up in the answer - but the court overruled the objection, admitted the evidence to go to the jury. & plaintiff excepted —

To rebut this evidence, plaintiff called Mr Magfield,

and plaintiffs counsel having stated to the court the nature and object of Mayfield's evidence, the court caused the jury to retire & then heard witness statement which in effect was that plaintiff & Ray came to the store of witness — Ray wished to purchase some articles in the store — witness was doubtful of his ability to pay — Ray then stated — Cavan being also present — that he was working for Cavan & would make it safe — he said he was to work for Cavan for some time and that he had conditionally bought a mare from Cavan for which he was to pay 65 dollars in work — that the mare was to remain Cavans until he had finished the work — Cavan was to keep the mare and take care of her — the colt to run with & suck the mare, & when the work was finished the mare to be Rays — witness thought the work was about a well — the well is not yet finished — Ray said he was to furnish water — witness lives a neighbor & when he has seen the well there was no water — this conversation was before the taking out of the attachment and levy of the execution —

The jury, being recalled plaintiff offered to prove these facts, by the witness, to the jury as explanatory of the admissions of plaintiff which had been given in evidence by defts, and in explanation of Rays claim to the mare — but the court refused to let witness testify as to what Ray said in relation to the contract with plaintiff — & plaintiff excepted.

Plaintiff then asked the following instructions which the court gave

1st If the jury believe from the evidence that plaintiff, something like a year before the sale had swapped for the mare, and thus received her as his own property, and had kept her on, in his possession — exercising acts of ownership over her, and that defendants converted her to their own use, they will find for the plaintiff, unless the jury are further satisfied from the evidence that previous to her being levied upon, Owen had sold and delivered her to Ray — and if Owen had so sold her to Ray it devolved on the defendants to prove that fact to the satisfaction of the jury —

2. If the jury believe from the evidence that the mare belonged to plaintiff, at the time of the levy & sale, and that she was sold on an execution in favor of defendants — and that plaintiff was at the sale and forbid the same, but that defendants were present and directed the sale and that she was sold by the direction of defendants and for their benefit, they will find for the plaintiff —

The court then instructed the jury for the defendants — as follows —

1 unless the jury believe from the evidence that the commencement of this suit that William C. Cavan pltff was the owner of the mare in controversy then they must find for the defendants

2 Unless the jury believe from the evidence that pltff at the commencement of this suit was the owner of the mare in controversy and that defendants converted her to their own use then they must find for the defendants

3° Although the jury may believe ~~from~~ that Cavan had owned the mare for twelve months yet if they find that before the commencement of this suit plaintiff sold the mare in controversy to Ray they must find for the defendant.

Plaintiff objected & excepted to the giving of the 3d instruction

The jury found a verdict for the defendants Plaintiff filed a motion for a new trial which was overruled & exceptions taken. & he brings the case here by appeal

Points & Authorities

1. The court erred in admitting the evidence tending to show possession in Ray & also in giving the 3d instruction for defendants —
The petition avers that plaintiff on the 18 of oct 1883 was possessed of & owner of the mare — This allegation is not denied by answer. & stands admitted —

the answer merely denies the conversion — as alleged in the complaint — In order to justify the court ~~the court~~ in letting in the evidence of a contract with Ray. the answer should have set up that fact. This pretended Contract was new matter which should have been stated in order that plaintiff might have come prepared to meet it —
5 Howards pratum R. 14 —
Under the new code, the answer must state the facts on which the defendant relies. Sapington vs Jeffries. 15 Mo R 630 — There is now no ~~general issue~~ — longer such a plea as the general issue and there cannot be an answer in that form. Fay vs Grimstead — 10 Barbour 321

2°. The evidence of Mayfield should have been received. and was competent to show the nature of the trade between Ray & plaintiff concerning the mare. 2 Starke Ev. part. 2°. p. 82. — Ivatt vs Finch. 1 Taunton 139 — which was an action of trespass for taking three mares the property of plaintiffs — Plaintiff claimed that one Alice Watson, who, it was admitted, once owned the mares, had transferred them to him — To prove this a witness was called to speak to a conversation in which Mrs Watson had stated that she had given up her farm & stock to plaintiff — Lord Mansfield ch. J. held the evidence admissible The two cases are exactly ~~alike~~ and the principles the same —

Wm C Covington
vs
John Smith &
James Kerr

Plaintiffs
Brief

Filed July 9th 1855
Wm T. Dunscomb
Clk

Wm C. Cavin Plff in error } Error to the Polk Circuit Court.
J. Smith & J. Kerr Deftts

The Court should have admitted, the testimony of the Witness Mayfield. The defendants answer to the action, as appears from the evidence, though not in the pleadings, rested on the assumption that Ray was the owner of the mare: Now it is a settled rule of law that a party cannot create evidence for himself, yet he may by his acts & declarations ~~he may be may~~ make evidence against himself If Ray was the owner of the mare, although he could not confirm or strengthen his title by his own declarations ~~weaken~~ yet his declarations may weaken or disprove his title: The possession of property nothing more appearing is presumed by the law to be the owner of it The law raises this presumption in favor of him who is ~~now~~ in the possession of property, now if he will against his interest and against the presumption of law make declarations or admissions those declarations & admissions are like all others made against a partys interest & will be evidence against him. When one is in possession of property, the presumption of law is that it is his, if nothing more appears. Now if he will by his words show that the property is not his, why should not those ~~the~~ admissions be evidence against him, just as any other admissions made against his interest?

In order to show property out of another is or not every day's practice, to receive his declarations or admissions that it does not belong to him or that he has only a limited interest in it or holds it in a fiduciary capacity.? Turner vs. Belden 9 Mo. Rep. 797.

The answer did nothing more than controvert the allegations of the petition. If the defendants acquired title in any way to the property they should have set up the matter in their answer: As the pleadings now stand there is nothing but a denial of the conversion alleged in the petition: This however can be of little consequence, as the judgment is reversed on another ground and the cause will be remanded where there will be an opportunity of amending the pleadings if the parties shown see fit.

Rev & Remanded

The other judges concur.

Wm Scott

36,

Cavin
vs
Smith & Kerr

Opinion

filed Sep. 29 1855
Wm E Dunscomb
Clerk

93.

THE STATE OF MISSOURI, SCT.

THE STATE OF MISSOURI TO THE SHERIFF OF THE COUNTY OF Polk IN SAID STATE, **Greeting:**

WHEREAS, Wm C Cavin

on the twenty eighth day of September in the year eighteen hundred and fifty five at our Supreme Court for the State of Missouri aforesaid, before our Judges of said Court, recovered against Geo. W. Smith & Jas Kerr the sum of eleven $\frac{80}{100}$ dollars for his costs and charges by him expended in a certain suit wherein the said Cavin was appellant and the said Smith & Kerr were respondents which to the said appellant were adjudged, as appears to us of record: **Therefore,** We command you, that of the goods and chattels, lands and tenements of the said John W. Smith and James Kerr in your bailiwick you cause to be made the aforesaid costs, and that you have the same before the Judges of our said Supreme Court, on the second Monday in January next, to render unto the said Wm C Cavin the costs aforesaid, and that you certify to our said Judges how you execute this writ, and have you then there this writ.

SEAL OF THE SUPREME COURT OF MISSOURI

Witness, William E. Dunscomb, Clerk of said Supreme Court, at office; in the City of Jefferson, the fifth day of October in the year of our Lord one thousand eight hundred and fifty five

Wm E Dunscomb

State of Missouri }
County of Polk } I James M Jones Sheriff of Polk County Mo
return the within Execution Satisfied
this 15 day of Oct 1852

Jas M Jones Sheriff of
Polk Cty Mo

93.

January Term 1856

Cain
Vs } Exam.
Smith & Kerr

Costs
O. W. Davis Paid 5.85
Mc L Davis 30
Wm E Drummond 5.65
this ins 1.00
$12.80

Polk

In the Supreme Court
July Term 1855

William C. Cavin Plaintiff in Error
vs
John Smith and James Herr } Defendants & Respondents

Statement of Case by Respondents.

The Plaintiff sued the Defendants ~~in the~~ in the Polk Circuit Court for a sorrel mare which he claimed as his property and charged the Defendants with wrongfully converting to their own use. The alleged value of the mare is one hundred dollars and the Plaintiff asks judgment for that account.

At the return term of the writ the Defendants appear and answer. The answer is a "Specific" Denial of the taking of the mare of the ~~Defendant~~ Plaintiff by the Defendants. Afterwards a motion was filed & sustained to suppress depositions taken by Defts. No exception appears to have been taken to this judgment. A jury was then called who after hearing the evidence returned a verdict for the Defendants. The Plaintiff filed a motion for a new trial which was overruled by the Court, & the Plaintiff excepted; and brings this here by appeal.

Evidence

Upon the trial of the cause the Plaintiff proved by one John Mathews that he knew the mare in controversy. She was

a sorrel mare with a bald face and one eye out, worth about forty dollars - He had known her for about 12 months during which time she was in Plaintiffs possession.

L. Mayfield testified substantially to the same facts

J. B. Sanders testified that he was at the constables sale & saw the mare sold - thinks she sold for $32.50. Plaintiff was at the sale & forbid it. He claimed the mare. The mare sold was of the description given by the witnesses - did not know her value. When the Plaintiff forbid the sale, Smith one of the defendants directed the constable to sell. Kerr the other defendant was also present. The defendants were in partnership merchandising. Smith bid off the mare.

Joseph Cavin, gave the same description of the mare as the two first witnesses and the same account of the sale, substantially as the last witness

A. D. Fullerton testified that he sold the mare as constable on an Execution in favor of Smith & Kerr. The Execution was shewn him & read. It was against one Alonzo Ray. An endorsement on the Execution shews that it was levied upon a sorrel mare on the 12th Oct. 1853. He testifies, also, that Smith & Kerr were present at the sale. both of them directed him to sell the mare, - that Cavin, the Plaintiff forbid the sale, - that Smith bought the mare ~~mare~~ & he delivered her to him.

On cross Examination he testified that he found the mare at Driskills. It was Sunday morning. Ray was there and in bed. The mare was in the Stable. Gives the same description of her as that given by the other witnesses. Sold the mare as Constable - Ray claimed her at the time he levied upon her. Driskill did not claim her never saw her in any ones possession. The Plaintiff here closed his evidence ~~[illegible]~~ in Chief.

Defendants then proved by one Brady that he had had a conversation with Plaintiff, in the presence of one Vineyard, in which told witness to tell his father he need not come to look at the mare; that he had sold her to Alonzo Ray. Is not certain whether Plaintiff said he had sold or traded the mare. - The mare had a ball face & one eye. Did not recollect any thing about any conditions to the sale. Stated that he understood Ray was in Kansas Territory

William Vineyard also testified that the Plaintiff told him in September, that he had sold the mare, - He did not say to whom.

Defendants then proved by William Cowder that he saw Alonzo Ray riding the mare on Saturday before the levy. He came to a blacksmith Shop to have her Shod. He could not get it done & Shod her himself. Plaintiff was in the habit of having some work done at that shop & might have had work done at other shops. Ray was working for Plaintiff at the time - He

He had seen Ray ride another of Davis horses. At time he saw Ray at the blacksmith shop Rays clothes were at the store of Smith & Kerr. At the time he saw Ray riding the mare he was working about had no particular home

Croker testified that he had heard Plaintiff speaking of Rays leaving the country and being in debt to him. Witness asked Plaintiff if Ray owed him any thing else besides for the mare. Plaintiff said he owed him borrowed money besides. Witness had seen Ray riding other horses of Plaintiff. All the evidence on the part of the Plaintiff was objected by Plaintiff

The Plaintiff then offered to prove by Mayfield, a conversation which witness had with Ray in relation to his ownership of the mare. This conversation was at the store of witness. Plaintiff was present when the conversation took place. The defendants were not. It does not appear that Plaintiff took any part in the conversation but that he was setting by. And no attempt was made to show that Plaintiff participated in the conversation. The Court refused to admit this testimony & the Plaintiff objected

The Court instructed the jury on the part of the Plaintiff as follows:

If the jury believe from the evidence that Plaintiff, something like a year before the sale had swapped for the mare and thus received her as his own property and had kept her on in his possession exercising acts of ownership over her, and that Defendants converted her to their own use they will find for the Plaintiff unless the jury are further satisfied from the evidence that previous to her being levied upon Lavin had sold and delivered to Ray it devolved on the defendant to prove that fact satisfactorily to the Jury.

If the jury believe from the evidence that the mare belonged to plaintiff at the time of levy and sale and that she was sold on Execution in favor of Defendants and that Plaintiff was at the sale and forbid the same but that Defendants were present and directed the sale and she was sold by direction of Defendants and for their Benefit they will find for Plaintiff

The Court then instructed the jury on the part of Defendants as follows:

That unless the jury believe from the evidence that [at] the commencement of this suit William C. Lavin Plaintiff was the owner of the mare in controversy then they must find for Defendants—

Unless the jury believe from the evidence that Plaintiff, at the commencement of this suit was the owner of the mare in controversy & that Defendants converted said Mare to their own use then they must find for Defendants

Although the jury may believe from the evidence that Cavin had owned the mare for twelve months, yet if they find that before the commencement of this suit Plff sold the mare in controversy to Ray then they must find for the Defendants

The record in this cause presents but three questions: that is:

First as to the admission of the evidence offered by Defts.

Second as to refusal of the Court to admit the Evidence of Mayfield in relation to the conversation of Ray as to the ownership of the Mare.

Third the giving of the last instructions asked by Defts.

Points & authorities.

First, the the court did err in refusing to admit the evidence of Mayfield. It was hearsay evidence, the statements of Ray made in the absence of the Defendants. It is not the case a party proving a contract who was present at the making, but a statement of one who was a competent witness on the case and

therefore properly excluded —

2nd The Evidence offered by Defendants to prove title to the mare in controversy was admissible under the pleadings. The Petition contains but one allegation — a general charge that Defendants wrongfully converted the mare in controversy to their own use, The answer is a specific denial of this charge and is as full as it could be made to be responsive to the petition. The law does not require a defendant to state what facts he expects to prove on the trial, but only a response to the allegations in the petition, See Whittaker vs Moore 19 Mo. R. 556

There is no error in the third instruction given for Defendants —

E D Hanna Atty
for Respondents

Carrin

vs

Smith & Kerr

Respondents Brief