Hurton, Felix vs. McNeeley, Sarah K; 1860 Dade Co #13 Cir 246/4

87/13

· Affirmed, case properly tried, proper instructions given
· unlawful seizure and conversion of horses

Sarah R. McNeeley, plaintiff, } Civil
against } action.
Felix Hunton, Defendant. } Dade circuit
} Court.

Be it remembered that on the 4th day of April A.D. 1859, certain papers were filed in the office of the Clerk of the Circuit Court of Dade county, of which the following are true copies, to wit:

"State of Missouri, } ss.
County of Benton, } Be it remembered that on the 18th day of April 1856 Sarah R. McNeeley filed in the office of the Clerk of the Circuit Court of Benton County her petition against Felix Hunton, which petition is in the words and figures following, to wit:

Sarah R. McNeeley, plaintiff, }
against }
Felix Hunton, defendant. }

Plaintiff Sarah R. McNeeley, complains of Felix Hunton defendant for the said defendant on or about the 3rd day of March A.D. 1856, at the County of Benton aforesaid seized took and led away certain horses belonging to and the property of plaintiff, to wit: one dark gray horse

of great value towit of the value of one hundred dollars and one other dark gray horse of the like value of one hundred dollars and one light gray horse of the like value of one hundred dollars. The said three horses of great value towit of the value of three hundred dollars then and there found and being. And the said Felix Hunton afterwards towit on or about the 15th day of March 1856 directed and caused the same to be sold and he on the day and year last aforesaid converted and disposed of the same to his own use. Wherefore plaintiff says she is injured and has sustained damages to the amount of three hundred dollars and for which she asks judgment.

Wright & Williams,
Attys for Plff.

James Burns on oath states that he is the agent of plaintiff and that the above petition and the matters therein as stated he believes to be true.

James Burns.

~~Sworn &~~ Subscribed and sworn to before me, the 15th day of April 1856.

Edward L. Major. Clerk.

And on the day and year last aforesaid there was issued by the clerk of the circuit court of Benton county a writ of summons on said petition which writ of summons is in the words and figures following to wit.

Benton County Set
The State of Missouri To the Sheriff of Benton county, Greeting:
We command you to summon Felix Hunton so that he be and appear before the Honorable Judge of our Benton circuit court at the Court house in the city of Warsaw on the first day of the next term of said court which will be begun and held at the court house in the city of Warsaw on the Eighth Monday after the fourth Monday in March 1856, to answer the complaint of Sarah R. McNeely and this he shall in nowise omit and have you then and there this writ.
In Testimony whereof I Edward T. Major clerk of the circuit court within and for the county of Benton have hereunto set my hand and affixed the seal of said Court at Warsaw the 15th day of April 1856.
(Seal.)
Edward T. Major clerk.

On which said writ of Summons is endorsed the following return towit

State of Missouri
County of Benton } I do hereby certify that I executed the within petition and writ on the within named Felix Hunton by reading the same to him and within his hearing within Benton County Missouri on the 22nd day of April 1856.

John C. Arthur Shff. B. C.
By A. A. Webb D.S.

And afterwards towit at the Regular May term of our Benton circuit court for the year 1856 begun and held at the courthouse in the city of Warsaw on Monday the 19th day of May 1856.

present. Hon. DeWitt C. Ballou circuit Judge

John C. Arthur Sheriff and Edward S. Major Clerk. It being the return term for said cause among other procedings were the following towit:

Sarah R. McNeely } civil action
vs
Felix Hunton. } Now at this day come here into court the parties

aforesaid by their attorneys and thereupon defendant files herein his answer to plaintiffs petition, which said answer of defendant is in the words and figures following, to wit

Sarah R. McNeely, vs Felix Hinton. } In the Benton Circuit Court

This defendant for answer to the petition of the plaintiff states that it is not true that he seized and led away the horses mentioned in plaintiffs petition and described as her property, but he says that at the time mentioned in plaintiffs petition this defendant had an execution against one James Burns for about $288 that he understood and believed that Burns had horses at plaintiff's farm, and this defendant says that he had caused said execution to be placed in the hands of John C. Arthur Sheriff of Benton County and that he went with the said Sheriff to the farm of the plaintiff and he directed the said Sheriff to levy the said execution upon six horses which were then at the farm of plaintiff.

and the said Sheriff did levy upon the six horses and sold three of said horses by virtue of the execution I placed in his hands, but this defendant utterly denies that the said horses ever did belong to the plaintiff.

Felix Hunton.

This defendant states and makes oath that the above answer and matters therein as stated are true as he believes.

Felix Hunton.

Subscribed and sworn to before me the 22nd day of May 1856.

Edward T. Major. Clerk

And afterwards to wit at the November term of our Benton circuit Court for the year 1856

On Tuesday the second day of said term among other proceedings had were the following to wit:

Sarah R. McNeely } Civil action
vs
Felix Hunton } Now at this day come here into court the parties aforesaid by their attorneys and thereupon the said defendant filed

herein his motion and affidavit for a continuence of this cause, which motion and affidavit is in the words and figures following to wit

Sarah R. McNeely } In the circuit court
vs } of Benton County, Nov.
Felix Hunton. } Term 1856.

And Now on this day comes the defendant and moves the court here for a continuence in this case for the want of the testimony of certain witnesses whose evidence is material in said suit said witnesses have been duly subpoenaed but are not in attendance that he knows of no one else by whom he can prove the same facts, that this is the first application for a continuence that the same is not asked for vexation or delay but that justice may be done that he expects to be able to procure their attendance at the next term of this court. Felix Hunton

Subscribed & sworn to in open court this 18th day of November 1856.

Edward T. Major clerk.

And the said motion being seen heard and fully understood by the court, this cause is continued until the next term of this court at the cost of defendant. Therefore it is considered by the court that the said plaintiff recover of and from the said defendant her costs and charges by her in said suit at this term of this court laid out and expended and that she have thereof execution.

And on the next day and during the same term the following proceedings were had in said cause to wit.

Sarah R. McNeely, vs Felix Hunton. } Civil action.

Now at this day come here into court the parties aforesaid by their attorneys and both parties being ready for trial Thereupon comes a jury viz. Henson G. Fristoe, David Kidwell, Samuel Fouler, Samuel Hicks, William Bradshaw, Joseph Monroe, Marcus Walker, Dudley Hicks, Henry Johnson, Walter McFarland, William Glazebrooks, and William Graham, twelve good and lawful men who being elected, tried and sworn well

and truly to try the issue joined between the parties aforesaid and after the testimony was closed on the part of the plaintiff, the said defendant asked leave to amend his answer and to him it was granted, which amended answer is in the words and figures following to wit:

Sarah R. McNeely, } In the Benton
vs } circuit court.
Felix Hunton.

This defendant for answer to the petition of the plaintiff, states that it is not true that he seized took and led away the horses mentioned in plaintiff's petition and described as her property, but he says that at the time mentioned in plaintiff's petition this defendant had an execution against one James Burns for about $288. That he understood and believed and this defendant avers and charges the fact to be that said horses levied upon by virtue of said execution were not the property of the plaintiff but were the property of James Burns that Burns had horses at plaintiff's farm and this defendant says he

caused said execution to be placed in the hands John C. Arthur Sheriff of Benton County and that he went with the said Sheriff to the farm of the plaintiff and he directed the said Sheriff to levy the said execution upon six horses which were then at the farm of plaintiff and the said Sheriff did levy upon the six horses and sold three of said horses by virtue of the execution I placed in his hands, but this defendant utterly denies that the said horses ever did belong to the plaintiff.

J. Hunton

Subscribed & sworn to
before me Ed. T. Major.
clerk of Benton circuit Court,
19th Nov. 1859.
Edward T. Major. Clerk.

And said amended answer being filed said plaintiff filed her motion to strike out all of defendants amended answer except that part which states that "this defendant for answer to the petition of the plaintiff states that it is not true that he seized took and led away the horses mentioned in plaintiff's

petition and described as her property;
and except these words, "the de-
fendant utterly denies that the
said horses ever did belong to
plaintiff;" which said motion is in
the words and figures following to wit,

Sarah R. McNealy, } In the Circuit
vs } Court of Benton
Felix Hinton. } County.

Plaintiff moves the court to
strike out all of defendants amended
answer except that part which states
that "this defendant for answer to
the petition of the plaintiff states
that it is not true that he seized
took and carried away the horses
mentioned in plaintiffs petition and
described as her property," and
except these words, "this defendant
utterly denies that the said horses
ever did belong to plaintiff."
Because the residue is immaterial
redundant and frivolous and purports
to be a plea in bar and in justification
and does not admit that it was
the same trespass complained of in
the petition nor does it admit the
taking the horses in the petition
mentioned.

Means, Wright & Johnson
for Pltff.

which motion being seen heard and fully understood by the court was sustained. And thereupon said defendant asked leave to amend his answer and to him it was granted, and which amended answer is in the words and figures following to wit:

Sarah R. McNely, plaintiff, vs Felix Hunton defendant. } In the Benton Circuit court.

This defendant for answer to the petition of the plaintiff states that it is not true that he seized took and led away the horses mentioned in plaintiffs petition and described as her property. Defendant for further answer says that the three horses mentioned in plaintiffs petition are the three identical horses which were sold under said execution and for which this suit is brought. And this defendant says that he believes the said three identical gray horses so sold were the property of James Burns and not the property of the plaintiff in this suit, but this defendant utterly denies that the said horses ever did belong to plaintiff.

Felix Hunton.

Subscribed & sworn to before me
this 19th day of November 1856
Edward J. Major Clerk.

And said amended answer
being filed and there not being
sufficient time to finish the
cause the jury was discharged
and put under the usual rule until
tomorrow morning at 9 o'clock.
Until which time this cause
is continued.

And on the next day and during
the same term the following
proceedings were had, to wit:

Sarah R. McNeely, } Civil action.
vs
Felix Hunton. } Now at this
day come again here into court
the parties aforesaid by their
attorneys and thereupon comes
the jury also Viz. Henson S. Fristoe,
David Kidwell, Samuel Fouler, Sam-
uel Hicks, William Bradshaw, Joseph
Monroe, Henry Johnson, Walter
McFarland, William Glasgebrooks,
Marcus Walker, Dudley Hicks, and
John Graham, who having heard
all the evidence, arguments of
counsel and instructions of the court,

Upon their oaths do say M the jury find the issues for the plaintiff and assess her damages at the sum of three hundred dollars. Therefore it is considerd by the court here that the said Sarah R. McNeely recover against the said Felix Hunton the sum of three hundred dollars the damages aforesaid by the jury assessed, and also her cost and charges by her about her suit in this behalf laid out and expended and that she have thereof execution.

And on the next day and during the same term the following proceedings were had to wit:

Sarah R. McNuly, vs Felix Hunton. } Civil action. Verdict for plff. & Judgment.

Now at this day come here again into court the parties aforesaid, by their attorneys, and thereupon the said defendant files herein his motion to set aside the verdict and grant a new trial in this cause, and the said motion being seen heard and fully understood by the court is overruled. And thereupon the

said defendant files herein his bill of exceptions and prays that the same may be signed and sealed by the court and made a part of the record and it is accordingly done, and thereupon said defendant prays an appeal to the supreme court and files herein his bond with James Dunn Jr. and Elijah Fitzpatrick as his securities and the same is by the court here approved and an appeal is granted in this cause. And it is ordered that a full and complete transcript of the record and proceedings be made out certified and transmitted to said Supreme Court ten days before the first day of the next term thereof. And it is further considered that all further proceedings on the judgment rendered in this cause be stayed untill the appeal is determined in the Supreme court."

And the said transcript of the record and proceedings had in said cause, having been made out certified and transmitted to the supreme court and said cause coming on to be heard in said supreme court at the city of Jefferson at the January term of said court for the year 1857. The judgment of the Benton circuit court

was reversed and said cause remanded for a new trial. A certified copy of which opinion and judgment of reversal of said cause by the supreme court was filed in the office of the clerk of the Benton circuit court on the 23d day of March 1857. and is in the words and figures following to wit:

S. R. McNulty } Appeal from the
vs } Benton circuit court.
Felix Hunton.

Judge Scott delivered the opinion of the court.

The witness Whitlow was properly directed not to answer the question put to him respecting what he had heard Burns say as it does not appear that any ground had been laid for such an inquiry in the previous examination of Burns who should first have been asked the question, whether he did not make the declaration that he was purchasing horses for the government agent.

We do not see on what ground the court refused to let the witness Dozier answer the question whether one of the six horses was not purchased by Burns on a credit, who gave his note

for it with Dozier as security.
Surely it could not have been on the ground that it did not appear that the horse about which the inquiry was made was one of the three claimed by the plaintiff as the plaintiff maintained on the the hand that Burns was her agent and as on the other this was denied and it was insisted that she was a mere screen to hide the fraud of Burns. She could not assume that the property was hers, and that therefore the declarations of others should not affect her rights, this would be taking the matter in controversy for granted.

The purchase of the whole number of horses so far as the question of fraud was concerned must be regarded as a single transaction, and whether Burns was acting for the plaintiff in good faith or was using her name in making his purchases as a cloak to his fraud, should have been submitted to the jury with all attending circumstances calculated to throw any light upon the questions.

The declarations of Burns while acting as agent were as part of the res gestae evidence against the

plaintiff. In ferreting out fraud great captiousness against evidence on the ground of its irrelevancy merely is a suspicious circumstance, and induces the thought, that such a spirit is manifested from a fear that the evidence may elicit the truth.

If a suitor's conduct has been fair he will not dread an investigation of it, the pretence of saving the time of the court, is but a weak apology for such a course as it well known that where this captiousness is displayed more time is consumed in arguing questions of evidence than would be spent in hearing the matter alleged to be irrelevant. If the evidence is merely irrelevant it cannot properly do any harm to the party against whom it is offered. In relation to this subject we refer to what was said in the case of Lane vs Kingsbury 11 Mo. 410.

We see no ground for refusing evidence as to the ~~irrelevancy~~ insolvency of Burns at the time he was employed in purchasing the houses. such evidence furnished proof a motive for fraudulent conduct on his part and with other circumstances would have its weight.

The defendant could surely have shown collusion between the plaintiff and Burns and that the money used by him was his own.

These points were not saved but they are now noticed because for other reasons the judgment will be reversed and the cause remanded for a new trial.

For reasons before given the evidence of the witness McDonald should have been admitted. It relates to what was said and done by Burns during his agency for the purchase of the horses. It was primary evidence and there was no necessity for laying any foundation for its admission.

From what has been said it will be seen that the testimony of other witnesses was properly excluded because no previous foundation had been laid for contradicting the witness Burns. After Burns had ceased to act for the plaintiff his actions and conduct could not effect his rights.

J. Ryland concurring, reversed & remd.

State of Missouri Sct.

as clerk of the

Supreme court of the State aforesaid. I do certify the foregoing opinion to be correctly copied from the original on file in my office. Given under my hand and the seal of said Court at the city of Jefferson, this 20th March 1857.

L. S.

Wm E. Dunscomb.

And afterwards to wit, at the August term of our Benton circuit court for the year 1857, among other proceedings had were the following to wit:

Sarah R. McNeely,
vs
Felix Hunton. } Now at this day comes here into court the defendant aforesaid and files herein his motion to dismiss this cause, and the said plaintiff being also here present by her attorneys insisting that this is not the trial term for said cause, and said motion being seen heard and fully understood by the Court is by the Court overruled. And thereupon said defendant filed herein his bill of exceptions and prays that the same may signed and made sealed by the Court and made a part of the record and it is accordingly done, and the cause set for trial at the next

Term of this court, Which bill of exceptions filed as aforesaid is in the words and figures following to wit:

Sarah R. McNeely pl'ff } In the Benton
vs } circuit court
Felix Hunton Def't. } 1857.

Be it remembered that on the calling of the above cause the defendant insisted upon a trial and filed his motion to dismiss said cause for the reasons therein stated which motion is in the words and figures following to wit

Sarah R. McNeely pl'ff } In the circuit
vs } court of Benton
Felix Hunton Def't. } county in the
} State of Missouri.

And now on this day comes the said defendant and moves the court here to dismiss the above entitled cause from the docket for the following reasons.

1st Because the said defendant is now ready for trial and insist on a trial having all of his witnesses in attendance.

2nd Because said plaintiff has not asked and filed affidavit for continuence.

3d Because this court has

no right to continue said cause.

4th Because defendant has ever been ready and is now ready to try this cause and that the plaintiff will not proceed to trial in this case.

5th Because the plaintiff has never offered any reason why she should have a continuence and has never made any application for a continuence in this case. J. Hunton Dft.

The court overruled said motion for the reason that said cause had been tried and reversed in the Supreme court and this being the first term after said opinion of the supreme court had been filed upon the ground that it was the practice of this court not to try any cause at the first term after it is sent back from the supreme court, to which overruling of said motion defendant excepts and prays that this his bill of exceptions be signed sealed and made a part of the record which is accordingly done.

D. Witt C. Ballou
Cir. Judge. Seal

And afterwards to wit at the February term 1858, of our Benton circuit court for the year 1858, among other proceedings had were the following to wit:

Sarah R. McNeely, } Civil action
vs
Felix Hunton, } Now at this day come here into court the parties aforesaid by their attorneys and thereupon defendant files his motion to dismiss this cause,

And on the next day and during the same term the following proceedings were had to wit

Sarah R. McNeely, } Civil action,
vs
Felix Hunton, } Now at this day come again here into court the parties aforesaid by their attorneys and the motion heretofore filed by defendant to dismiss this cause being seen heard and fully understood by the court is overruled.

And on the next day and during the same term the following proceedings were had to wit:

Sarah R. McNeely } Civil action, motion
vs } to dismiss, overruled.
Felix Hunton. } Now at this day come here into court the parties aforesaid by their attorneys and said defendant now files herein his bill of exceptions and prays that the same may be signed and sealed and made a part of the record, and it is accordingly done which bill of exceptions is in the words and figures following to wit:

Sarah R. McNeely } Feb. term 1858.
vs
Felix Hunton. } Be it remembered that on the trial of the motion filed by defendant at the present term of this court to dismiss said cause which motion is in the following words and figures, to wit

Felix Hunton } Motion
ads
Sarah R. McNeely } The defendant moves the court to dismiss this suit for the following reasons to wit.
Because the said cause was set for trial on Thursday the 4th day of August term of the Benton circuit court in the year 1857.

That subpoenas were issued by the clerk of said court to defendants witnesses to attend said court and to give testimony, upon the trial of said cause upon that day, that in obedience to the command of said writs they did attend the said court upon that day and the succeeding day (Friday) that the plaintiff McNely nor her attorneys made no application whatever for a continuence of the cause that the defendant Hunton urged a trial of the cause, that the court refused to call the case or to try the cause but continued it under the above mentioned circumstances all of which facts the defendant proposes to prove upon competent testimony upon the hearing of this motion. McClain & Freeman
attys for Deft.

Which motion plaintiffs counsel resisted, the following was all the evidence.

E. T. Major sworn for defendant says that he put this cause upon the trial docket at the last term of this court for thursday, I issued subpoenas at defendant's instance

to appear on that day.

Cross ex by pl'ff.

There was no order of this court setting this cause for trial at that term, the case had been to the Supreme court and reversed and the opinion of the Supreme court filed in my office on the 23rd day of March A.D. 1857. the court in August last was the first court after the cause had been sent back from the Supreme court.

Mr. Whitlow a witness for defendant sworn says that he was subpoenaed a witness by defendant at the last term on thursday and Mr. King and Dozier were here also as defendants witness witnesses he were here on thursday of the last term.

W. P. Johnson & F. P. Wright witnesses for defendant state that at the last term of this court they did not apply for a continuance but at that time when the defendant insisted for a trial of this cause they objected to a trial at that term for the reason that it was not the trial term according to the practice of this court.

Thereupon the court overruled plaintiffs motion filed at this term

as it has always been the practice of this court that when a case had been reversed by the supreme court not to try it at the first term of this court after it had been reversed but to set it for trial at the next term if there was to be a new trial according to the decision of the supreme court,

To which decision of the court in overruling said motion to dismiss this cause the defendant excepted, and prays that this his bill of exceptions may be signed sealed and made a part of the record which is accordingly done.

D. W. H. C. Ballou
Cir Judge Seal

And afterwards to wit at a special adjourned term of our Benton circuit court held in continuation of the regular August term for the year 1858. begun and held at the court house in the city of Warsaw on Monday the 3rd day of January 1859.

Present the Honorable George W. Miller Judge of the first Judicial circuit in the State of Missouri who on or about the th day of October A.D. 1858. was requested by the Honorable D. W. H. C. Ballou

who was then judge of the Benton circuit court to hold this adjourned term and there being now a vacancy in the office of circuit judge of the seventh judicial circuit in the state of Missouri. Wherefore the Honorable George W. Miller appears to hold this term.

B. W. Keown Esq. Sheriff and Edward T. May clerk

Among other proceedings had at said adjourned term were the following towit

Sarah R. McNeely, vs Felix Hunton. } civil action. Now at this day come here into court the parties aforesaid by their attorneys and thereupon said defendant files herein his motion to dismiss this cause, which motion is in the words and figures following towit.

Sarah R. McNeely, vs Felix Hunton. } In the Benton circuit court Augt. adjd term 1858.

The defendant in this case moves the court to dismiss this case for the following reasons, viz: That this cause was set for trial:

On the day of September 1857
That upon that day the defendant
was ready for trial, and that his
witnesses were in attendance, That
the court did not call the case
upon the day it was set for trial
and passed it. That upon
the second day after the case was
set for trial this defendant
urged a trial. That the plaintiff
for herself, nor by attorney asked
for a continuance of the cause,
and this court continued it
upon its responsibility
Felix Hunton pro se.

And afterwards to wit at the
regular February term of our
Benton Circuit Court for the year
1859, begun and held at the
court house in the city of Warsaw
on Monday the 28th day of February
1859. Present Hon. Foster P. Wright
Cir. Judge, B. W. Keown Esq. Sheriff
Edward J. Major, Clerk.

Among other proceedings had
were the following to wit.

Sarah R. McNely, Civil action.
vs
Felix Hunton. Now at this day

come here into court the parties aforesaid by their attorneys and the Honorable Foster P. Wright Judge of the Benton circuit court having been of counsel for plaintiff in this cause. It is therefore ordered that this cause be sent to the circuit court of Dade county in the state of Missouri to be tried, and it is further ordered that the clerk of this court make out a full and complete transcript of the record and proceedings had in said cause in this court as well as copies of all the original papers filed in said cause and transmit the same to the clerk of the Dade circuit court.

State of Missouri, } ss.
County of Benton, } I Edward J. Major clerk of the circuit court of Benton county do certify that the above and foregoing twenty eight pages of manuscript contain a full and complete transcript of all the record and proceedings had in said cause in the Benton circuit court as well as copies of all the original papers filed in my office

in said cause except the motion to set aside the verdict and grant a new trial the bond and bill of exceptions upon which an appeal was taken to the supreme court at fully as the same remain of record in my office.

Witness my hand and
L. S. Official seal the 24th day
of March 1859.
Edward J. Major Clerk.

And afterwards, to wit: At a circuit court began and held at the court house in Greenfield, in the county of Dade, in the State of Missouri, commencing on Monday the 16th day of May AD. 1859. Present Honorable John R. Chenault, circuit Judge. John M. Tarrant Sheriff and Nelson McDowell, clerk.

On the 2nd day of said Term among others, were the following proceedings to wit,

Sarah R. McNeely, pltff, } civil action.
vs
Felix Hunton Deft. } Now at this day come the parties aforesaid by their respective attorneys and by consent of said parties, this cause is by the court continued until the next term of this court."

And afterwards, to wit: on the 5th day of said term among others were the following proceedings, to wit:

"Sarah R. McNeely, Plaintiff, } Civil action.
against
Felix Hunton, Defendant.

Now at this day comes the defendant by his attorney and filed herein depositions and also a transcript of a judgment entitled "Felix Hunton vs James Burns Jr."

The following is a copy of the depositions above named. (See Bill of exceptions) Also for transcript above named see bill of exceptions.

And afterwards, to wit: on the day last aforesaid were the following proceedings, to wit:

"Same } Civil action.
vs
Same } Now at this day comes the plaintiff by her attorney and filed herein a motion to suppress depositions, which motion was by the court overruled."

which motion is in the following words & figures, to wit:

"In the Circuit court of
Dade county, Mo.

Sarah R. McNely } Civil action.
vs
Filip Hunton. } Plaintiff by her attorney comes and moves the court to suppress the depositions of Jacob King and Henry Whitlow taken by Deft in this cause and filed in this court on the 20th May 1859.

Because defendant had failed to give pltff due notice of the time and place of taking said depositions as the law requires.

Because defendant had given pltff notice (as shown by the papers filed with the depositions) that he would take the depositions of witnesses at Warsaw Mo. on the 14th May 59 and three days had not elapsed from the 14th day of May to the 16th day when the Deft gave pltff notice that he would take depositions in said cause at Quincy, Mo. thereby requiring from the pltff labor and travel not contemplated by the laws of the land.

Because, as to the depositions of Whitlow, that it is manifest

from the papers themselves that the deposition of King could have been taken in half an hour, that there was plenty of time to complete taking all the depositions in said cause on the 16th of May between the hours of 7 O'clock A.M. & 6 O'clock P.M. and the justice had no right to adjourn the taking of said depositions on the 16th to the 17th without a good reason and it is manifest from the papers themselves that the reason assigned by the justice for the adjournment is false.

Because the caption of the depositions, the certificate of the justice, the questions propounded to the witnesses as well as the direction to the clerk are all in the hand writing of the defendant to the suit which is contrary to public policy.

Because the justice instead of sending the depositions to the clerk of this court by the mail or some other unobjectionable mode, delivered the same to deft, and they were brought to the clerk by said deft.

Because the notice is defective.

Because the service is defective.

Johnson & Ballou atty for Plff."

upon the back of which is the following endorsement, to wit:

"Filed May 20th 1859,
N. McDowell clerk,
By L. A. McDowell, deputy."

And on the same day were the following proceedings, to wit:

Same, vs Same. } Civil action.
Now at this day come the parties aforesaid by their respective attorneys, and took up the motion heretofore filed by the defendant in the Benton circuit court to dismiss this cause, which motion was by the court overruled.

And on the same day among others were the following proceedings, to wit:

"Sarah R. McNeely, plaintiff, against Felix Stanton, defendant. } Civil action.
Now at this day come the parties aforesaid by their respective attorneys, and by consent of said parties It is ordered by the court that the order for the continuance of said cause be set aside, and that the case be tried now.

Thereupon comes the jury, to wit: Drewry Edwards, William J. West, C. C. Mallicoat, James Chappell, John Stockton, Josiah Stephenson, Isaac Preston, David V. Rankin, Pharaoh Cook, William Johnson, Benjamin A. Cantrell and Lafayette Cantrell, twelve lawful jurors who were duly sworn to well and truly try the issues between the parties who sat together, heard the evidence and arguments of counsel and received the instructions of the court, retired to consider of their verdict, and returned into court the following verdict, to wit:

"We the jury find the issue for the plaintiff and assess her damages to three hundred dollars.

It is therefore considered by the court that the plaintiff recover of and from the said defendant the said sum of three hundred dollars assessed as aforesaid, together with her costs in this suit expended, and that execution issue therefor."

And afterwards, to wit: on the 6th day of said term among others were the following proceedings, to wit:

"Sarah R. McNely, Plaintiff, } Civil
against } action.
Felix Hunton, Defendant.

Now at this day comes the deft. by his attorney and filed herein his motion to set aside the verdict and grant a new trial in this cause, Which motion was by the court overruled."

Which motion is in the words and figures following, to wit:

"Sarah R. McNely, pltff.
vs
Felix Hunton Deft.

The deft moves the court to set aside the verdict of the jury in this case & grant a new trial.

Because the court gave improper instructions for pltff.

Because the court refused the instructions of deft.

Because the verdict of the jury was not authorized by the evidence.

Because there was no evidence that plaintiff seized took & led away the horses in pltffs petition mentioned.

Because the verdict of the jury was against the evidence

Grant, McClain & Price,
attys for Deft."

Upon the back of which is the following endorsement, to wit:

"Filed May 21st 1859.
N. McDowell clerk."

And afterwards, to wit: on the day last aforesaid, among other were the following proceedings, to wit:

"Sarah R. McNeely, plaintiff, against Felix Hunton, defendant. } civil action.

Now at this day comes the defendant and filed herein his affidavit for an appeal to the Supreme court, and entered into recognizance & the plaintiff with Sebastian McGrant and John C. Price as his securities, in the sum of seven hundred dollars, conditioned as follows, That whereas the said Felix Hunton has appealed from a judgment of the Dade circuit court in favor of the said Sarah McNeely against the said Felix Hunton, now if the appellant shall prosecute his appeal to a decision in the supreme court, and shall perform such judgment as shall be given by the supreme court, or such as the supreme

court may direct the circuit court to give, and if the judgment of the circuit court be affirmed or any part thereof, that he will comply with and perform the same so far as it may be affirmed, and that he will pay all damages and costs which may be awarded against him by the Supreme court. Which recognizance is approved of by the court and ordered to be filed. And it is ordered by the court that an appeal be allowed.

And by consent of parties, it is agreed that for want of time to write out the bill of exceptions, that the said bill of exceptions in this cause be written out, signed, sealed and filed in vacation."

Which affidavit for an appeal is in the following words & figures, to wit;

Sarah McNeily, vs Felix Hunton. } In the circuit court of Dade county, May term A.D. 1859.

This affiant Felix Hunton the above defendant appellant makes oath and says that the appeal in the above entitled cause is not made for vexation or delay, but because he believes that he

(the appellant) is aggrieved by the judgment or decision of the court.
Felix Hunton.

Sworn to and subscribed before me this 21st day of May AD. 1859.
Nelson McDowell. clerk."

Upon the back of which is the following endorsement, to wit:

"Filed May 21st 1859.
N. McDowell. Clerk."

The following is a copy of the recognizance, to wit:

"Know all men by these presents, that we Felix Hunton as principal and Sebastian M. Grant and John G. Price as securities acknowledge ourselves indebted to Sarah McNeely in the sum of seven hundred dollars.
The condition of the above obligation is such, that whereas the said Felix Hunton has appealed from ~~the~~ a judgment of the Dade circuit court in favor of the said Sarah McNeely, against the said Felix Hunton. Now if the appellant shall prosecute his appeal to a decision in the supreme court, or shall

perform such judgment as shall be given by the Supreme court, or such as the Supreme court may direct the circuit court to give, and if the judgment of the circuit court be affirmed or any part thereof, that he will comply with and perform the same so far as it may be affirmed and that he will pay all damages and costs which may be awarded against him by the Supreme court.
As witness our hands this 21st May A.D. 1859.

Felix Hunton
Sebastian M. Grant
John C. Price, "

Upon the back of which is the following endorsement, to wit,

"Filed May 21st 1859.
Nelson McDowell clerk."

The following is a copy of the bill of exceptions filed in the above entitled cause in vacation according to the agreement of the parties, in open court, to wit,

"Sarah McNeely } In Dade circuit court
vs } At May Term A.D. 1859.
Felix Hunton }

Be it remembered that on the trial of the above cause the following was all the testimony given viz:

James Burns sworn. Stated that some time in the month of February A.D. 1856, the plaintiff gave him some money with which she requested him to purchase some horses for her saying at the time that she wanted him to purchase for her and for her own use two gentle work horses and if he saw an opportunity of purchasing others upon which he thought she could make a profit by selling them to the government agent to do so. That he did not now recollect the exact amount, but it was about $500. That he purchased for her one horse in the city of Warsaw and six other horses in Hickory County, and in the neighborhood of Quincy. That he purchased one of the horses of Jacob King upon a credit and that B. Le Dozier became his security for the payment of the purchase money for the horse bought of King. That in the purchase of all the horses except the

One purchased of King, he was acting as the agent of the plaintiff, but that he did not disclose that agency to any of the parties of whom he purchased the horses. That he purchased six horses in the neighborhood of Quincy and one at Warsaw for plaintiff. That he purchased the horse at Warsaw some ten days before the others in Hickory county & sent it out to her the same day he purchased the same in Warsaw.
That at the crossing of the Pomme de Terre on his return from Hickory county and before he got to plaintiffs residence north of Warsaw, he met with Judge Alexander and informed Judge Alexander that he purchased the horses either for the Government agent or to sell to the Government agent, dont recollect which.
Dont recollect telling Alexander that he purchased the sorrel horse for Mrs. McNely as she wanted a gentle work horse.
That he took these horses to the farm of Mrs. McNely the plaintiff and delivered them up to her on Saturday or sunday and told her to select out such as she wanted and that he would sell the rest for her. That on Monday after he met defendant and Jno C. Arthur the Sheriff of Benton county going towards Mrs McNely's about two miles from Mrs McNely's. That Arthur told him in

the presence of Hunton that he was going to Mrs. McNely's to buy on the horses I had taken to Mrs. McNely's

That some ten days or two weeks thereafter Arthur the Sheriff of Benton County sold three of the horses in the city of Warsaw, two of the horses sold by Arthur were dark gray horses and one of them, the third rather a light gray horse. That he heard Hunton tell the Sheriff to sell the horses.

That the horses sold were worth about $100. each. That one of the six horses purchased by witness of King in Hickory County and which was not sold was claimed by him as exempt from execution under the statute.

That a few years before that time he had been engaged in the mercantile business and had failed. That he had since that time he had compounded with his creditors & paid off or settled some four or six thousand dollars.

That he still owned some $2500. and hoped to be able to settle that. He stated that when he purchased the horse of King that he had not the money to pay King for the horse and promised Dr. Dozier that when he went to Warsaw he would pay the money to Doctor Dunn, of Warsaw for Dr. Dozier, that at that time Dr

Dozier was owing the witness some fifteen dollars & that some time after that he paid to Dunn the amount for the horse except the amount of about $15- That he is the son in law of Mrs. McNeely, the plaintiff. Witness states that the three gray horses sold by John C. Arthur Sheriff of Benton by the direction of Hunton, were horses that witness had purchased for Mrs. McNeely, as her agent and that he had paid for these horses with the money furnished to him by Mrs. McNeely.

That witness a few years previous to that time had been a horse trader, that witness had frequently bought and sold property for plaintiff.

That Mrs. McNeely was a widow and her only son was something like sixteen years old when witness purchased these horses in Hickory and that her son had no experience in trading. That at the request of plaintiff he witness got William D Barkley to purchase in for her the three gray horses when they were sold by the Sheriff of Benton County

William McNeely, a witness sworn that John C. Arthur and Felix Hunton came to his Mothers house together

that they went to the stable and Hunton told Arthur to levy upon the horses which were there. They were the horses that Burns had brought there. Neither Hunton nor Arthur took any of the horses away. That some time after that that he William McNulty took the said horses to Warsaw and hitched them to a rack in Warsaw.

That he heard Hunton bid for some of the horses, but did not hear Hunton direct Arthur to sell the horses.

That he saw his Mother give Burns some money did not see it counted That he heard his mother at the time she gave the money to Burns say how much money there was, dont now recollect the amount stated — but his best impression is that it was between five & six hundred dollars. That he heard his mother tell Burns that she wanted him to purchase horses with the money. That she wanted two gentle work horses for her own use.

Bradford L Dozier, a witness for Defendant stated that Burns purchased of King in Hickory County, a horse, that Burns bought King's horse on a credit, and that witness told King that

he would suit paid. That Burns purchased a horse from him at ninety or ninety five dollars. That Burns owed him at that time some small amount, dont recollect the amount. That he did not owe Burns anything. That Burns paid him for the horse purchased of him and that he loaned Burns fifteen dollars to pay Bernard. That Burns paid him for the horse purchased of King. Cant tell when, but it was between six weeks and twelve months thereafter.

Defendant proved by Judge Alexander that he saw James Burns as he crossed the Pomme de terre with some horses purchased in Hickory county, and that Burns told him that bought the horses to sell to a Government agent, except the sorrel horse, which he had bought for Mrs. McNeely that she wanted a good work horse.

Defendant then read the depositions of William D. Barkley, Jacob King and Henry Whitlow, which depositions are in the words and figures as follows to wit:

"Depositions of witnesses produced sworn and examined on the 14th day of May A.D. 1859, between the hours of 7 o'clock in the forenoon and six o'clock in the afternoon of that day in the Court room of the court house in the city of Warsaw Mo. before me an acting Justice of the peace within and for the County of Benton in the State of Missouri, in a certain cause now pending in the circuit court of Dade county in the State of Missouri, between Sarah McNeely plaintiff and Felix Hunton defendant, upon the part of Defendant,

W. D. Barkley of lawful age being produced sworn and examined upon the part of the defendant deposeth and saith.

Question by Defendant—
State whether or not in March A.D. 1856, you purchased at a Sheriff's sale some horses which were sold by John C. Arthur then Sheriff of Benton County, Mo. as the property of James Burns Jr.

Ans. —

Question by same— State the number of the horses and the description of the horses you purchased.—

Ans—

Question by same — State whether or not you purchased those horses at the request of James Burns Jr. —
Ans. — I to the best of my knowledge I bought some horses at a Sheriff sale in Warsaw Benton County Mo. three or four horses. Mr. Burns requested me to buy the horses for Mrs. Sarah McNeiley and she furnished the money to pay for them. John C. Arthur was Sheriff of Benton County at the time and sold the horses. To the best of my knowledge the sale was in March 1856. They the horses were sold as the property of James Burns Jr.
Ans. 2. There was a dark gray horse one nearly white, and one a light iron gray.
There was three horses all gray but different shades of gray.
There was four horses present but only three sold the horse nearly white was not sold but the three bought by me were all grey.
Ans. 3. I purchased the horses for Mrs. Sarah McNeily through James Burns Jun. at his request. he stating to me that she Mrs. Sarah McNeily wanted me to buy

them for her,

Quest. by same — State whether or not you paid your own money for those horses,

Ans. 4. The money was furnished me by Jas. Burns Jun. or her son William McNeily, for her Mrs. Sarah McNeily so the persons told me who gave me the money,

W. D. Barkley,

Subscribed and sworn to before me on the day at the place and within the hours first aforesaid,

Chas Walls J. P.

I Chas. Walls an acting Justice of the peace within and for Benton County, State of Missouri do certify that in pursuance of a notice came before me at the court house in Warsaw Benton County State of Missouri W. D. Barkley who was by me sworn to testify the whole truth of his knowledge touching the matter in controversy aforesaid. That he was examined and his examination reduced to writing and subscribed by him in my presence on the day between the hours and at the place in that

behalf first aforesaid, and his said deposition is now herewith returned. And I further certify that said W. D. Barkley is a resident of said county of Benton in said State of Missouri.

Given at Warsaw in the County of Benton and State of Missouri this 14th day of May 1859.

Chas Walls J. Peace

fee 60 cents paid by Deft.

"Depositions of witnesses produced ~~and~~ sworn and examined on Monday the 16th day of May A.D. 1859 between the hours of 7 o'clock A.M. and 6 o'clock P.M. of that day at the Tavern house of W. C. White in the Town of Quincy Hickory County, Mo. before me an acting Justice of the Peace within and for the County of Hickory State of Mo. in a certain cause now pending in the Circuit court of Dade County State of Missouri wherein Sarah McNaly is plaintiff and Felix Hunton is defendant upon the part of the defendant.

Jacob King being of lawful age and being produced sworn and

examined upon the part of the defendant deposeth and saith as follows.

Question by defendant.

State whether or not about the 1st of March A.D. 1856. You sold to James Burns Jr. a horse and if so state the description of the horse.

Ans.

I sold Mr James Burns a horse about the first of March 1856, of the following description towit:

He was a gray horse.

Question by same.

State whether or not James Burns told you at that time, for what person he was purchasing the horse

Answer

He did not tell me for what purpose or who he was buying the horse for.

Question by same.

State whether or not he paid you for the horse at the time he bought him.

Answer

He did not pay me for the horse at the time he bought him.

Question by same.

State whether or not any other person become the security of James Burns Jr. for the payment of the horse, and if

So State who that person was.
Answer
B. L. Dozier became security for the payment of the horse and B. L. Dozier said he would see it paid.
Jacob King.
Subscribed and sworn to before me on the day at the place and within the hours first aforesaid
Thompson Blair Justice of the peace.

Not being able to complete the taking of said depositions for the want of sufficient time between the aforesaid hours of 7 o'clock A.M. and 6 o'clock P.M. I adjourn the further taking of them until tomorrow then to be continued at the same place and within the same hours mentioned in the annexed notice
Thompson Blair. J. P.

Pursuant to adjournment as above stated on the 17th day of May A.D. 1859. at the tavern house of W. C. White in the town of Quincy between 7 o'clock A.M. and 6 o'clock P.M. I continued the taking of said depositions as follows—
Henry Whitlow being of lawful age first duly sworn deposeth and saith

Question by defendant.
State whether not about the 1st of March A.D. 1856 you sold to James Burns Jr. some horses, and if so state the description of said horses.
Ans.
I sold him two horses one of them was a yellow iron gray, the other a sorrel horse.
Question by same.
State whether or not James Burns told you at the time for what person and for what purpose he was buying the horses.
Answer
Mr. Burns come to my house and asked me if I had any horses for sale I told him I had. I went with him to the stable and showed him the gray horse, he asked me the price, I told him that I asked one hundred and twenty five dollars for him, He said that that price was a above his limits but that he would give me his limits for him and that was one hundred and fifteen dollars, and that he was buying them for the government. I then told him I would sell him a sorrel horse, he said he did not want him.

I told him he was a fine horse and that maby I could do better by him by selling him both. He went and looked at him and I sold him both of them he Burns remarked that the sorrel did not suit the purpose for which he was buying them for but that he could keep him for his own use.

Question by same -
Did or did not Burns tell you at the time why a sorrel horse would not suit the purpose for which he wanted them.

Answer.
Burns said the sorrel horse would not suit him for the reason that he was buying them for the government.

Henry Whitlow

Subscribed and sworn to before me on the day at the place and within the hours first aforesaid.

Thompson Blair Justice of the peace.

State of Missouri } ss.
County of Hickory } I Thompson Blair an acting Justice of the peace within and for the county of Hickory and State of Missouri do hereby certify that on the 16th day of May A.D. 1859 between the hours of 7 o'clock

A.M. and 6 o'clock, Jacob King came before me at the Tavern house of W. C. White in the town of Quincy Mo. who was by me sworn to testify the whole truth in the matter in controversy wherein Sarah McNeely is plaintiff and Felix Hunton is defendant, that he was examined and that his examination was reduced to writing and subscribed by him in my presence at the time, and place and between the hours above mentioned - and I further certify that on the 17th day of May A.D. 1859 between the hours of 7 o'clock A.M. and 6 o'clock P.M. Henry Whittow came before at the Tavern house of W.C. White in Quincy Mo. was by me sworn to testify the whole truth in the matter in controversy wherein Sarah McNeely, is plaintiff and Felix Hunton, is defendant, and that he was examined and that his examination was reduced to writing and subscribed by him in my presence at the time and place and between the hours above mentioned.

Thompson Blair, a Justice of the peace.

Justices fees paid by the defendant $1.50"

Defendent then read in evidence the transcript of Judgment and execution from the Circuit court of Benton County in the case of Felix Hunton against James Burns (as follows to wit:)

"State of Missouri, } ss:
County of Benton. } Be it remembend that at a Special adjourned term of the circuit court of Benton County held in continuation of the Regular September term of said court for the Year 1855 began and held at the court house in the city of Warsaw on Monday the 19th day of November A.D. 1855.

present.

Hon D. S. Witt C. Ballou
Cir Judge.
John C. Arthur Esq. Sheriff and
Edward T. Major Clerk.

Among other proceedings had at said Special adjourned term were the following to wit:

"Felix Hunton. } Civil action
vs } petition on notes.
James Burns Jun. } Now at this day comes the said plaintiff by

his attorney and the said James Burns Jun being three times solemnly called, comes not but makes default. Nor has he filed his answer herein, whereby the said action remains undefended. And it appearing to the Court by the Sheriff's return that said James Burns Jun has been duly served with process, and the action being founded on two promissory notes, the Court here doth find that the said James Burns Jun is justly indebted to the said Felix Hunton on said promissory notes and the interest thereon in the sum of two hundred and eighty Eight dollars and twenty eight cents. And the Court directs that Judgment be entered accordingly. Therefore it is considered by the Court that the said plaintiff Felix Hunton have and recover of the said defendant James Burns Jun. the said sum of two hundred and eighty eight dollars and twenty eight cents, the debt and interest so found due as aforesaid, as well as his cost and charges by him in this behalf

laid out and expended and that he have thereof execution.

And afterwards towit on the 3rd day of March 1856 there was issued from the office of the clerk of the circuit court of Benton county an execution on the above judgment directed to the Sheriff of Benton county and against the goods and chattels lands and tenements of the said James Burns Jr. which said execution is in the words and figures following towit

Benton County, Set.
The State of Missouri
To the Sheriff of Benton County, Greeting
Whereas Felix Hunton Felix Hunton on the 27th day of November A.D. 1855 at our circuit court before our Judge thereof recovered against James Burns Jr. the sum of two hundred and eighty eight dollars and twenty eight cents and also cost, which to the said Felix Hunton were adjudged as appears to us of record, these are therefore to command you

that of the goods and chattels lands and tenements of the said James Burns Sr. in your bailiwick, you cause to be made the aforesaid debt and costs, and that you have the same before the judge of our said court on the eighth Monday after the fourth Monday in March 1856 to render to the said Felix Hunton the debt and cost aforesaid and that you certify to our said Judge how you execute this writ.

In witness whereof I Edward T. Major clerk of the Benton circuit court have hereunto set my hand and affixed the seal of said court at the city of Warsaw the 3rd day of March A.D. 1856.

{L.S.}

Edward T. Major Clerk of the B.C.C.

Upon which said execution are the following endorsements and return to wit

This Execution came to hand March the 3d 1856. Jno C. Arthur Sheriff. B.C.

Levied this execution on the following property to wit six head of horses

five grays and one bay as the property of James Burns Jr. the defendant in this execution March 3d 1856.

Jno C. Arthur Sheriff B.C.

Received on the within execution three hundred dollars March 18th 1856.

Jno C. Arthur Sheriff B.C.

State of Missouri } ss:
County of Benton } I Edward J. Major clerk of the circuit court of Benton county do certify that the above and foregoing four pages and a half of manuscript contains a full and complete transcript of the judgment rendered by said court in the above entitled cause at the time and term above specified, and of the execution issued thereon as well as the endorsements and return entered on said execution by the Sheriff as fully as the same remains of record in my office

In Testimony whereof I Edward J. Major clerk of the circuit court of Benton County have hereunto set my hand and affixed the

seal of said court the 11th day of May 1859.

{L.S.} Edward T. Major clerk.

The court then gave the following instructions for plaintiff, to the giving of which defendant excepted.

"If the jury believe from the evidence that Mrs. Sarah McNeely was the owner of the horses mentioned in the petition at the time therein specified, and further ~~to~~ believe from the evidence that the defendant Hunton did cause the horses to be levied upon and sold as the property of James Burns Jr they will find a verdict for the plaintiff, and assess the damages at the amount they believe from the evidence the horses were reasonably worth at the time they were so sold.

And although the jury may believe from the evidence that said James Burns Jr. did purchase the horses, yet if he Burns at the time was acting as the agent of Mrs McNeely the pl'ff and that

Mrs McNely furnished the money to pay for the horses. They will find a verdict for the plaintiff.

The court then gave the following instructions for defendant.

"That if the jury believe from the evidence that the witness James Burns knowingly and corruptly made any false statement or statements in his evidence permitted by the court to be given to the jury they have a right to disregard his whole testimony.

That if the horses in pltffs petition mentioned were the property of James Burns & not the property of plaintiff the jury will find the issues for deft.

That if the plaintiff furnished the money with which the horses were bought and permitted Burns to use it in trading for his own benefit and if this was done to screen the horses from Burns' creditors & the jury believe from the evidence that defendant was at the time a creditor of Burns they ought to find the issues for defendant."

The defendant then asked the court to instruct the jury that unless the defendant seized, took and led away the horses in plaintiffs petition mentioned they should find the issues for defendant. Which instruction the court refused to give. And defendant excepted.

The jury then found a the issues for plaintiff and assessed her damages to three hundred dollars.- And the defendant filed his motion for a new trial in words & figures following.

Sarah R. McNuly pltff.
vs
Felix Hinton deft.

The deft moves the to set aside the verdict of the jury in this case & grant a new trial.

Because the court gave improper instructions for pltff.

Because the court refused the instructions of deft.

Because the verdict of the jury was not authorized by the evidence

Because there was no evidence that plaintiff seized took & led

away the horses in pleffts petition mentioned.

Because the verdict of the jury was against the evidence.

Grant, McLain & Price.
attys for Deft."

Which motion was by the court overruled, to which opinions of the court in giving plaintiffs instructions and refusing defendants instruction and overruling defendants motion for a new trial defendant excepts and prays that this his bill of exceptions be ~~signed~~ signed, sealed, enrolled and made a part of the record in ~~and made~~ this cause, which is accordingly done.

John R. Chenault (Seal)
Cir. Judge.

upon the back of which bill of exceptions is the following endorsement, to wit:

"Filed June 9th A.D. 1859.
N. McDowell Clerk."

State of Missouri,
County of Dade. } I, Nelson McDowell
Clerk of the Circuit Court within
and for the County and State
aforesaid, do hereby certify that
the foregoing is a full, true and
perfect transcript of all the
papers, records, and proceedings
had in the case of Sarah R.
McNeely, vs Felix Hunton, in
the Dade Circuit Court, together
with a true, full and complete
copy of the transcript in said
cause, as certified by the Clerk
of the Benton Circuit Court,
as the same appears of record
and on file in My office.

In Testimony whereof
I have hereunto set my
hand and affixed
the seal of said Court,
this 14th day of
June A.D. 1859.

Nelson McDowell Clerk.

Sarah R. McNely,
vs } Civil action.
Felix Hunton.
Cost as follows,

To Edward J. Major, clerk.	17	40
J. C. Arthur Sheriff	4	00
A. F. Doak, "	1	50
B. W. Keown, "	2	00
W. G. Evans, "	2	28
W. B. McNely, a witness	11	70
Jacob King, "	3	10
Wesley Johnson "	1	40
W. W. Hood, "		50
George Alexander "	1	80
B. L. Dozier, "	10	20
A. Whitlow "	4	00
James Burns Jr "	10	00
J. V. Benard, "	4	00
Jury fee in Benton,	4	00
Felix Hunton, cash pd for Depositions	2	10
Jury in Dade	6	00
John M. Tarrant, Shff	1	10
W. W. Edwards, S. Shff	1	00
W. V. Murray " "		50
N. McDonell, clerk	11	00
Making out transcript & go to supreme court, containing 13400 words & figures at 15	20	60
& certificate		36
postage		
Total	120	54

Nelson McDonell clerk

~~51.~~ ~~XXX~~

32

Sarah R McNeeley

vs

Felix Hunton appt.

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filed Jany. 5th 1864
(Clerks fee $10 paid)
Wm E Dunscomb
Clerk
filed June 23rd 18

Anton Dade
13th

Sarah R McNeely } Civil action
Against }
Felix Hunton }

Be it remembered that on the 4th day of April AD 1859, a transcript of the above entitled cause was filed with the clerk of the Circuit Court of Dade County Missouri of which the following is a true copy to wit;

State of Missouri }
County of Benton } ss

Be it remembered that on the 18th day of April 1856, Sarah R McNeely, filed in the office of the Clerk of the Circuit Court of Benton County her petition Against Felix Hunton which petition is in words & figures following to wit

Sarah R McNeely Plaintiff }
Against }
Felix Hunton Defendant }

Plaintiff Sarah R McNeely Complains of Felix Hunton Defendant for the said defendant on or about the 3rd day of March AD 1856, at the County of Benton aforesaid seized took and led away Certain

Horses belonging to & the property of Plaintiff to wit. one dark Gray hose of great value to wit of the value of One Hundred dollars & one other dark gray horse of the like value of one Hundred dollars & one light Gray horse of the like value of one Hundred dollars. the said three Horses being of Great value to wit of the value of three Hundred dollars. then and there found and being. & the said Felix Hunton afterwards to wit. On or about the 18th day of March 1860. directed and caused the same to be sold. & he on the day & year last aforesaid Converted & disposed of the same to his own use. whereof Plaintiff says she is injured and has sustained damage to the amount of three Hundred dollars & for which she asks judgement

Wright & Means
attys for Plaintiff

James Burns on oath states that he is the agent of plaintiff and that the above petition and matters therein as stated he believes to be true James Burns

Subscribed and sworn to before me the 18th day of April 1860

Edward J. Mayor Clerk

And on the day & year last aforesaid there was issued by the clerk of the Circuit Court

of Benton County a Writ of Summons on said petition which writ of summons is in words and figures following to wit

Benton County Set

The State of Missouri
County of To the Sheriff of Benton County Greeting

We command you to summon Felix Hunton. So that he be and appear before the Honorable Judge of our Benton Circuit Court at the Court House in the City of Warsaw on the first day of the next term of said Court. which will be begun & held at the Court house in the City of Warsaw on the eighth Monday after the fourth Monday in March 1856 to answer the Complaint of Sarah R McNeely & this he shall in no wise omit & have you then & there this writ.

In Testimony whereof I Edward T Mayor Clerk of the Circuit Court within and for the County of Benton have hereunto set my hand and affixed the seal of said Court at Warsaw the 18th day of April 1856

L S

Edward T Mayor Clerk

On which said writ of summons is endorsed the following return, to wit

State of Missouri }
County of Benton }

I do hereby Certify that I executed the within petition and writ on the within named Felix Hunton by reading the same to him and within his hearing within Benton County Missouri on the 22nd day of April 1856, John C Arthur Shff. B.C.

By A H Webb D. S.

And afterwards to wit at the regular May term of our Benton Circuit Court for the Year 1856 began & held at the court house in the City of Warsaw on Monday the 19th day of May 1856

Present

Hon D E Witt C Ballew Cir Judge
John C Arthur Esqr Sheriff & Edward J Mayor Clerk

It being the return term for said cause, among other proceedings had were the following to wit.

Sarah R McNeely
vs
Felix Hunton } Civil Action

Now at this day Comes here into Court the parties aforesaid by their Attorneys & thereupon defendant files herein his answer to plaintiff's Petition. Which said

answer of Defendant is in the words and figures following to wit:

Sarah R McNeely } In the Benton Cir
Vs } Cuit Court
Felix Hunton

This defendant for answer to the petition of the plaintiff, States that it is not true that he seized & led away the horses mentioned in Plaintiff's Petition and described as her property but he says at the time mentioned in Plaintiff's petition this defendant had an Execution against one James Burns for about $288. That he understood and believed that Burns had horses at Plaintiff's farm and this defendant says that he had Caused said Execution to be placed in the hands of John C Arthur Sheriff of Benton County & that he went with the said Sheriff to the farm of the plaintiff & he directed the said Sheriff to levy the said Execution upon six horses which were then at the farm of Plaintiff and the said Sheriff did levy upon the Six horses and sold three of the said horses by virtue of the Execution I placed in his hands. but this defendant utterly denies that the said Horses ever did belong to the

Plaintiff Felix Hunton

This defendant states and makes oath that the above answer and matters therein as stated are true as he believes Felix Hunton
Subscribed and sworn to before me the 22nd day of May 1856
Edward J Mayor Clerk

And afterwards to wit at the November term of our Benton Circuit Court for the year 1856, On Thursday the second day of said term among other proceedings had were the following to wit

Sarah R McKeely
vs
Felix Hunton
} Civil action

Now at this day comes here into Court the parties aforesaid by their attorneys & thereupon the said defendant filed herein his motion and affidavit for a continuance of the cause, which motion and affidavit is in words and figures following to wit,

Sarah R McKeely
vs
Felix Hunton
} In the Cir court of Benton County Nov term 1856

And now on this day comes the defendant and moves the court here for a continuance in this cause for the want of testimony of certain witnesses whose evidence is material in said suit. said witnesses have been duly subpoenaed but are not in attendance that he knows of no one else by whom he can prove the same facts that this is the first application for a continuance that the same is not asked for vexation or delay but that justice may be done. that he expects to be able to procure their attendance at the next regular term of this court Felix Hunton

Subscribed & sworn to in open court
this 18 day of November 1856 Edward J. Mayor Clerk

And the said motion being seen heard & fully understood by the court, This cause is continued until the next term of this court at the cost of defendant Therefore it is considered by the court that the said plaintiff recover of and from the said defendant, her cost and charges by her in said suit at this term of this court laid out and expended & that she have thereof execution

And on the next day and during the same term the following proceedings were had in said cause to wit;

Sarah R McNeely
vs
Felix Hunton } Civil action

Now at this day comes here again into court the parties aforesaid by their attorney's and both parties being ready for trial thereupon comes a jury viz Henson G Fristoe Kidwell Samuel Fouler, Samuel Hicks William Bradshaw, Joseph Monroe, Marcus Walker Dudley Hicks Henry Johnson Walter McFarland William Glazebrook & William Graham twelve good & lawful men who being duly elected tried & sworn well and truly to try the issue joined between the parties aforesaid and after the testimony was closed on the part of the plaintiff, the said defendant asked leave to amend his answer & to him it was granted which amended answer is in the words and figures following to wit,

Sarah R McNeely
vs
Felix Hunton } In the Benton circuit court

This defendant for answer to the petition of the plaintiff states that it is not true that he seized took and led away the horses mentioned in the plaintiff's

petition. this defendant had an Execution against one James Burns for about $288. that he understood & believed and this defendant avers and charges the fact to be that said Horses levied upon by virtue of said Execution were not the property of the plaintiff but were the property of James Burns, that Burns had horses at plaintiff's farm & this defendant says he caused said Execution to be placed in the hands of John C Arthur sheriff of Benton County & that he went with the said Sheriff, to the farm of the plaintiff & he directed the said Sheriff to levy the said Execution upon six horses which were then at the farm of plaintiff & the said sheriff did levy upon the six horses and sold three of said Horses by virtue of the execution I placed in his hands, but this defendant utterly denies that the said horses ever did belong to the plaintiff

Subscribed & sworn to before me Ed T Mayor clerk of Benton Cir Cuit court 19th Nov 1859 } J Hunton

Edward T Mayor clerk

And said amended ~~petition~~ answer being filed said plaintiff filed her motion to strike out all of defendants amended answer Except that part which states that this defendant

to the petition of the plaintiff States that it is not true that he seized took and led away the horses mentioned in plaintiff's petition & described as her property & Except these words "the defendant utterly denies that the said Horses ever did belong to plaintiff" which said motion is in words and figures following to wit

Sarah R McNeely vs Felix Hunton } In the circuit court of Benton County

Plaintiff moves the court to strike out all of defendant's amended answer Except that part which states that "this defendant for answer to the petition of the plaintiff. States that it is not true that he seized took & led away the horses mentioned in plaintiff's petition and described as her property" and except these words "this defendant utterly denies that the said horses ever did belong to plaintiff" Because the residue is immaterial redundant & Frivolous and purports to be a plea in bar and in justification and does not admit that it was the same trespass Complained of in the petition, nor does it admit the taking the horses in the petition mentioned. Means Wright & Johnson for pl'ff

Which motion being seen heard and fully understood, by the court was sustained & therefore said defendant asked leave to amend his answer and to him it was granted and which ~~amended petition~~ answer is in the words and figures following to wit

Sarah R McSeely plaintiff } In the Benton Circuit
vs } Court
Felix Hunton Defendant }

This defendant for answer to the petition of the plaintiff States that it is not true that he seized took and led away the horses mentioned in plaintiffs petition & described as her property, defendant for further answer says that the three horses mentioned in plantiff's petition are the three identical horses which were sold under said execution & for which this suit is brought & this defendant says that he believes the said three identical Gray horses so sold were the property of James Burns & not the property of the plaintiff in this suit but this defendant utterly denies that the said horses ever did belong to plaintiff

Subscribed & Sworn to before me the 19th day of November 1856 } Felix Hunton

Edward T Mayor Clerk

And said amended answer being filed and there not being sufficient time to finish the cause, the jury was discharged and put under the usual rule until to morrow morning at 9 Oclock until which time this cause is continued.

And on the next day & during the same term the following proceedings were had to wit,

Sarah R McKeely
vs
Felix Hunton
} Civil action

Now at this day come ~~here~~ again here into court the parties aforesaid by their attorneys & thereupon come the jury also viz: Henson G. Fristoe David Kidwell Samuel Fouler, Samuel Hicks William Bradshaw, Joseph Monroe, Henry Johnson, Walter McFarland, William Glazebrooks, Marcus Walker Dudley Hicks & John Graham, who having heard all the evidence, arguments of Counsel & instructions of the court, upon their oath do say, We the jury find the issues for the plaintiff and assess her damages at the sum of three hundred dollars. Therefore it is considered

by the court here, that the said Sarah R McKeely recover against the said Felix Hunton the sum of three Hundred dollars the damages aforesaid by the jury assessed and also her cost & charges by her about her suit in this behalf laid out and expended & that she have thereof Execution

And on the next day and during the same term the following proceedings were had to wit.

Sarah R McKeely } Civil action verdict for
vs } Plaintiff & Judgement
Felix Hunton }

Now at this day come here again into court the parties aforesaid by their attorney & thereupon the said defendant files herein his motion to set aside the verdict & grant a new trial in this cause, & the said motion being seen heard & fully understood by the Court is overruled & therefore the said defendant files herein his bill of exceptions and prays that the same may be signed & sealed by the court, & made a part of the record & it is accordingly done & thereupon said defendant prays an

appeal to the supreme court & files herein his bond with James Dunn jr & Elijah Fitzpatrick as his securities & the same is by the court here approved & an appeal is granted in this cause & it is ordered that a full & complete transcript of the records and proceedings be made out Certified & transmitted to said supreme court ten days before the first day of the next term hereof & it is further considered that all further proceedings on the judgement rendered in this cause be stayed until the appeal is determined in supreme court.

And the said transcript of the record & proceedings had in said cause, having been made out Certified & transmitted to the supreme court & said cause coming on to be heard in said supreme court at the city of Jefferson, at the January term of said court for the year 1857, the judgement of the Benton Circuit was reversed & said cause remanded for a new trial; A Certified copy of which opinion & judgment of reversal of said cause by the supreme court was filed in office of the clerk of the Benton Circuit Court on the 23rd day of March 1857 and is in words & figures following to wit:

Sarah R McKelly } Appeal from the Benton
vs } Circuit court
Felix Hunton }

Judge Scott delivered the opinion of the court:—

The witness whitton was properly directed not to answer the question put to him respecting what he had heard Burns say as it does not appear that any ground had been laid for such an enquiry in the ~~enquiry~~ previous examination of Burns who should first have been asked the question whether he did not make the declaration that he was purchasing horses for the Goverment agent.

We do not see on what ground the court refused to let the witness Dozier answer the question whether one of the horses was not purchased by Burns on a Credit; who gave his note for it with Dozier as security. Surely it could not have been on the Ground that it did not appear that the horse about which the enquiry was made was one of the three claimed by the plantiff as the plantiff maintained on the hand that Burns was her agent; & as on the other this was directed & it was insisted that she was a mere screen to hide the frauds of Burns. She could not assume that the property was her's. and that therefore

the declarations of others should not affect her rights, this would be taking the matter in controversy for granted.

The purchase of the whole number of horses so far as the question of fraud was concerned must be regarded as a single transaction; and whether Burns was acting for the plaintiff in good faith or was using her name in making his purchases as a cloak to his fraud should have been submitted to the jury with all attending circumstances calculated to throw any light upon the questions.

The declarations of Burns while acting as agent were as part of the res Gestae evidence against the plaintiff. In ferretting out fraud great captiousness against evidence on the ground of its irrelevancy merely is a suspicious circumstance, & induces the thought, that such a spirit is manifested from a fear that the evidence may elicit the truth.

If a suiters conduct has been fair he will not dread an investigation of it, the pretense of saving the time of the court is but a weak apology for such a course as it well known that where this captiousness is displayed more time is consumed in arguing questions of evidence than would be spent in hearing

the matter alledged to be irrelevant. If the evidence is merely irrelevant, it cannot properly do any harm to the party against whom it is offered.

In relation to this subject we refer to what was said in the case of Lane vs Kingsberry 11 Mo 410.— We see no ground for refusing evidence as to the insolvency of Burns at the time he was employed in purchasing the horses. Such evidence furnished proof a motive for fraudulent conduct on his part and with other circumstances would have its weight, the defendant ~~surely~~ could surely have shown collusion between the plaintiff and Burns and that the money used by him was his own.— These points were not saved but they are now noticed because for other reasons the Judgment will be reversed & the cause remanded for a new trial.

For reasons before given the evidence of the witness McDonald should have been admitted. It relates to what was said & done by Burns during his agency for the purchase of the horses it was primary evidence and there was no necessity for laying any foundation for its admission.

From what has been said it will be seen that the testimony of other witnesses was properly excluded because no previous foundation had been laid for contradicting the witness Burns. After Burns had ceased to act for the plaintiff his actions and conduct

could not affect her rights.

J Ryland concurring reversed & rem'd.

State of Missouri Set

as clerk of the supreme court of the state aforesaid - I do hereby certify the foregoing opinion to be correctly copied from the original on file in my office.

L S

Given under my hand and seal of said court at the city of Jefferson this 20th March 1857

Wm E Dunscomb

And afterwards to wit at the August term of our Benton circuit court for the year 1857 among other proceedings had were the following to wit

Sarah R McKeely
vs
Felix Hunton

Now at this day comes here into court the defendant aforesaid and files herein his motion to dismiss this cause & said plaintiff being also here present by her attorneys insisting that this is not the trial term for said cause & said motion being seen heard & fully understood by the court. is by the court overruled.

And thereupon said defendant filed herein his bill of exceptions & prays that the same may signed and sealed by the court & made a part of the record. & it is accordingly done & the cause set for trial at the next term of this court which bill of exceptions filed as aforesaid is in the words and figures following to wit

Sarah R McKeely Plaintiff
Vs
Felix Hunton Deft
} In the Benton Cir Cuit court 1857

Be it remembered that on the calling of the above cause the defendant insisted upon a trial & filed his motion to dismiss this cause for the reasons therein stated which motion is in the words and figures following to wit—

Sarah R McKeely Plf
Vs
Felix Hunton Deft
} In the circuit court of Benton County in the State of Missouri

~~Now at this day come here into court the parties aforesaid by their attorneys and thereupon defendant files his motion to dismiss this cause~~

erroneously entered & erased turn to next page

~~And on the next day & during the same term the following proceedings were had to wit~~

And now on this day comes the said defendant and moves the court here to dismiss the above entitled cause from the docket for the following reasons

1st Because the said defendant is now ready for trial and insists on a trial having all of his witnesses in attendance

2nd Because said Plaintiff has not asked & filed affidavit for continuance

3rd Because this court has no right to continue said cause

4th Because defendant has ever been ready & is now ready to try this cause & that the plaintiff will not proceed to trial in this cause

5th Because the plaintiff has never offered any reason why she should have a continuance and has never made any application for a continuance in this case J Hunton

The court overruled said motion for the reason that said cause had been tried & reversed in the supreme court & this being the first term after said opinion of the supreme court had been filed, upon the ground that it was the practice of this court not to try any cause at the first term after it was sent back from the supreme court to which overruling of said motion defendant excepts and prays that his bill of exceptions be signed sealed & ~~delivered~~ made a part of

the record which is accordingly done

D E Witt C Ballou

Cir Judge (Seal)

And afterwards to wit at the February term 1858 of our Benton Circuit court for the year 1858 among other proceedings had were the following to wit

Sarah R McKely
vs
Felix Hunton
} Civil action

Now at this day come here into court the parties aforesaid by their attorneys & thereupon defendant files his motion to dismiss this cause

And on the next day & during the same term the following proceedings were had to wit;

Sarah R McKely
vs
Felix Hunton
} Civil action

Now at this day come the again here into court the parties aforesaid by their attorneys & the motion heretofore filed by defendant to dismiss this cause being seen heard & fully understood by the court is overruled.

And on the next day & during the same term the following proceedings were had to wit;

Sarah R McKely } Civil action motion to
vs } dismiss overruled
Felix Hunton

Now at this day come here into court the parties aforesaid by their attorneys & said defendant now files herein his bill of Exceptions & prays that the same may be signed & sealed & made a part of the record and it is accordingly done which bill of exceptions is in the words and figures following to wit,

Sarah R McKely }
vs } Feb term 1858
Felix Hunton

Be it remembered that on the trial of the motion filed by defendant at the present term of this court to dismiss said cause which is the following words & figures to wit

Felix Hunton }
ads } motion
Sarah R McKely

The defendant moves the Court to dismiss this suit for the following reasons to wit; Because the said cause was set for trial on Thursday the 4th day of August term of the Benton Circuit court in the year AD 1857. that subpoenas were

issued by the clerk of said court to defendants witnesses to attend said Court & give testimony upon the trial of said cause upon that day that in obedience to the command of said writs they did attend the said court upon that day & the second day (Friday) that the plaintiff McNely nor her attorneys made no application whatever for a continuance of the cause. that the defendant Hunton urged a trial of the cause. that the court refused to call the case or to try the cause but continued it under the above mentioned circumstances all of which facts the defendant proposes to prove upon competent testimony upon the hearing of this motion

McClain & Freeman
Attorney's for Defendant

Which motion plaintiffs counsel resisted. the following was all the evidence

E J Mayor sworn for defendant says that he put this cause upon the trial docket at the last term of this court for Thursday. I issued subpoenies at Defendants instance to appear on that day

Crofs ex by plaintiff

There was no order of this court setting this cause for trial at that term the case had been to the supreme court & reversed & the opinion

of the supreme court filed in my office on the 23rd day of March AD 1857. the court in August last was the first court after the cause had been sent back from the supreme court.

Mr Whitton a witness for defendant sworn says that he was subpoenied a witness by defendant at the last term on Thursday & Mr King & Dozier were here also as defendants' witnesses he were here on Thursday of the last term. W P Johnson & F P Wright witnesses for defendant state that at the last term of this court they did not apply for a continuance but at that time when the defendant insisted for a trial of this cause they objected to a trial at that term for the reason that it was not the trial term according to the practice of this court. Thereupon the court overruled plaintiffs motion filed at this term as it has always been the practice of this court that when a case had been reversed by the supreme court. not to try it at the first term of this court after it had been reversed but to set it for trial at the next term if there was to be a new trial according to the decision of the supreme court.

To which decision of the court in overruling said motion to dismiss this cause the defendant

Excepted and prays that this his bill of exceptions may be signed sealed & made a part of the record which is accordingly done

D E Witt C Ballou
Cir Judge (Seal)

And afterwards to wit a special adjourned term of our Benton Circuit Court held in Continuation of the regular August term for the year 1858 begun & held in the court house in the city of Warsaw on Monday the 3rd day of January 1859

Present

The Hon George W Miller Judge of the first Judicial Circuit in the state of Missouri who on or about the 1st day of Oct AD 1858 was requested by the Hon D E Witt C Ballou who was then Judge of the Benton Circuit court to hold this adjourned term & there being now a vacancy in the office of circuit Judge of the 7th Judicial circuit in the state of Missouri Wherefore the Honorable George W Miller appears to hold this term

B W Keoun Esq Sheriff &
Edward J Mayor Clerk

Among other proceedings had at said adjourned term were the following to wit

Sarah R McKely
vs
Felix Hunton } Civil action

Now at this day come here into court the parties aforesaid by their attorneys & thereupon said defendant files herein his motion to dismiss this cause which motion is in the words & figures following to wit!

In the Benton Cir Civil Court
Aug't adj term 1858

Sarah R McKely
vs
Felix Hunton

The defendant in this case. moves the court to dismiss this case for the following reasons viz) that this cause was set for trial on the day of september 1857 that upon that day the defendant was ready for trial & that his witnesses were in attendance that the Court did not call the case upon the day it was set for trial & passed it. that upon the second day after the case was set for trial this defendant urged a trial that the plaintiff for herself nor by attorney asked for a continuance of the cause & this Court continued it upon its responsibility

~~Felix H~~ Felix Hunton per S.C.

And afterwards to wit at the regular February term of our Benton Cir Cuit court for the year 1859 begun & held at the court house in the city of Warsaw on Monday the 28th day of February 1859

Present Hon Foster P Wright Cir cuit Judge B W Keoun Esqr Sheriff, and Edward T Mayor Clerk

Among other proceedings had were the following to wit

Sarah R McNeely
vs
Felix Hunton
} Civil action

Now at this day comes here into court the parties aforesaid by their attorneys & the Hon Foster P Wright Judge of the Benton circuit court having been of counsel for plaintiff in this cause It is therefore ordered that this cause be sent to the Cir Cuit court of Dade County in the State of Missouri to be tried & it is further ordered that the clerk of this court make out a ful and Complete transcript of the record & proceedings

Had in said cause in this court as well as copies of all the original papers filed in said cause & transmit the same to the clerk of the Dade Cir Cuit court

State of Missouri }
County of Benton } ss

I Edward T Mayor clerk of the circuit court of Benton County do certify that the above and foregoing twenty eight pages of manuscript contain a full and complete transcipt of all the record & proceedings had in said cause in the Benton Cir cuit court as well as copies of all the original papers filed in my office in said cause Except the motion to set aside the verdict & grant a new trial the Bond & Bill of exception upon which an appeal was taken to the supreme court as fully as the same remain of record in my office—

Witness my hand and official seal the 24th day of March 1859

Edward T Mayor Clerk

L S

Sarah R McKely Pl'ff
vs
Felix Hunton Deft
} Civil action

Be it remembered that at a regular term of our Dade circuit court began & held at the court house in the town of Greenfield Commensing on Monday the 16th day of May AD 1859 present Hon John R Chenault Circuit Judge A J Hume Circuit atty, John M Tarrant Sheriff & Adson McDowell clerk

And on the 2nd day of said term present as above stated among others the following proceedings were had to wit:

Sarah R McKely Pl'ff
vs
Felix Hunton Deft
} Civil action

Now at this day comes the parties aforesaid by their respective attorneys & by ~~Consent of said parties~~ their consent of said parties this cause is by the Court continued until the next term of this court

And on the 5th day of the above named same term present as before stated among others the following proceedings

were had to wit:

"Sarah R McNeely Pl'ff
VS
Felix Hunton Deft } Civil action

Now at this day Comes the defendant by his attorney & files herein depositions & also a transcript of a Judgment entitled Felix Hunton VS James Burns jr;"

~~Same~~
~~Against~~ } ~~Civil action~~
~~same~~

~~Now at this day comes the plaintiff by her attorney & filed herein a motion to suppress~~

Which transcript of Depositions & proceedings are in words & Figures following to wit:

"F Hunton to Sarah McNeely Notice ~~to Plaintiff~~

"Mrs Sarah McNeely

You are hereby notified that on Saturday the 14th day of May 1859 between the hours of 7 oclock A M & 6 Oclock P.M. I will proceed to take depositions of Witnesses in the Court room of the court house in the city of Warsaw Mo to be read as evidence on the trial of a cause Now depending in the

Circuit court of Dade County Missouri wherein you are plantiff & I am defendant & you are also notified that on Monday the 16th day of May 1859 between the hours of 7 Oclock in the forenoon & 6 Oclock in the afternoon I will also take depositions of Witnesses at the Tavern house of W C White in the town of Quincy Mo to be read as evidence on the trial of the above mentioned cause & if the taking of the said depositions on the said 16th day of May shall not be completed upon that day I will continue the taking of them from day to day until the same shall be completed when & where you may attend if you think proper

I am Very Respectfully &c
Felix Hunton ??

Upon the back of which is the following Certificate from Sheriff.

I do hereby Certify that I did on the 3rd day of May 1859 serve the within notice on Sarah McKeely by delivering to her a true copy of the within notice done in Benton County

B W Keown Shiff
By W W Cannada Dpty

Deposition of Witnesses produced Sworn

and examined on Monday the 16th day of May AD 1859. between the hours of 7 Oclock AM & 6 Oclock PM of that day at the tavern house of Mc White in the Town of Quincy Hickory County Mo before me an acting Justice of the peace within and for the county of Hickory State of Mo in a certain Cause now depending in the Circuit court of Dade County State of Mo. Wherein Sarah McNeely is plaintiff & Felix Hunton is defendant upon the part of the defendant.

Jacob King being of Lawful age & being produced sworn & examined upon the part of the defendant deposeth & sayth as follows. Question by defts.

State whether or not about the first of March AD 1856 you sold to James Burns a horse & if so state the description of the horse

Ans I sold Mr James Burns a Heorse about the first of March 1856 of the following description to wit- he was a gray horse

Question by the same

State whether or not James Burns told you at that time for what purpose he was purchasing the horse
Answer, he did not tell me for ~~what~~ what purpose, or for who ~~he was buying the horse~~ he was buying the horse for— Question by same. State whether or not he paid you for the horse at the time he bought him. Answer he did not pay me for the horse at the time he bought him
Question by same
State whether or not any other person became the security of James Burns for the payment of the horse & if so state who that person was—
Answer. L B Dozier became security for the payment of the Horse L B Dozier said he would see it paid — Jacob King
Subscribed & Sworn to before
me on the day at the place and within
the hours first aforesaid
Thompson Blair
Justice of the Peace
Not being able to comple the taking of said depositions for the want of sufficient time between the aforesaid hours of 7 Oclock A M & 6 Oclock P M. I adjourn the further taking of them until tomorrow. then

to be continued at the same place & within the same hours mentioned in the annexed notice

Thompson Blair J.P.

Pursuant to adjournment as above stated on the 17th day of May AD 1859 at the tavern house of W C White in the town of Quincy Between 7 Oclock A M & 6 Oclock P.M. I continued the taking of said depositions as follows

Henry Whillow being of lawful age first duly swoon deposeth & saith

Question by defendant—

State whether or not about the first of March AD 1856 you sold to James Burns jr some horses & if so State the description of said horses

Ans I sold him two Horses one of them was a yellow Iron gray the other a sorrel horse Question by same—

State whether or not James Burns told you at the time for what person & for what purpose he was buying the horses.

Ans— Mr Burns come to my house & asked me if I had any horses for sale I told him I had I went with him to the stables

and showed him the gray horse he asked me the price I told him That I asked $125. for him. he said that that price was above his limits but that he would give me his limits for him & that was $115. One hundred & fifteen dollars and that he was buying them for the Government I then told him I would sell him a sorrel horse he said he did not want him - I told him he was a fine horse & that maby I could do better by him by selling him both he went & looked at him & sold him both of them - he Burns remarked that the sorrel did not suit the purpose for which he was buying them for. but that he could keep him for his own use — Question by same

Did or did not Burns tell you at the time why a sorrel horse would not suit the purpose for which he wanted them Ans —

Burns said the sorrel horse would not suit him for the reason that he was buying them for the government

Henry Whitlow

Subscribed & sworn to before me

on the day at the place & within the hours first aforesaid

Thompson Blair
Justice of the Peace

State of Missouri } ss
County of Hickory }

I Thompson Blair an acting justice of the peace within and for the county of Hickory & State of Missouri do hereby Certify that on the 16th day of May AD 1859 between the hours of 7 Oclock AM & 6 Oclock. Jacob King Come before me at the tavern house of W C White in the Town of Quincy Mo who was by me Sworn to testify the whole truth in the matter in Controversy wherein Sarah McCoy is plaintiff & Elix Hunton is defendant that he was examined & that his examination was reduced to writing & subscribed by him in my presence at the time & place between the hours above mentioned & I further Certify that on the 17th day of May AD 1859—

Between the hours of 7 Oclock A M & 6 Oclock P M Henry Whitlow Come before me at the tavern house of W C White in Quincy Mo was by me sworn to testify the whole truth in the matter in controversy wherein Sarah McCady is plaintiff & Felix Hunton is defendant & that he was examined & that his examination was reduced to writing and subscribed by him in my presence at the time and place & between the hours above mentioned

Thompson S Blair
A Justice of the Peace

Justices' fees pd by the Defendant

And upon the back of which are the following words & figures as follows

"Sarah R McCady Vs Felix Hunton Deft's depositions"
Filed May 20th 1859
N McDowell Clerk"

And on the sam day of said Dade Circuit court among others the following proceedings were had to wit.

* See page No 41 for commencement of transcript which was filed at the same time of the depositions of Felix Hunton & William Burns Jr

Sarah R McKely
vs
Felix Hunton } Civil action

Now at this day comes the plaintiff by her attorney & filed herein a motion to suppress depositions which motion was by the Court overruled.

Which motion is in words & figures following to wit

In the Circuit Court
of Dade County Mo

Sarah R McKely
vs
Felix Hunton } Circuit action

Plaintiff by her attorney comes & moves the Court to suppress the deposition of Jacob King & Henry Whitlow taken by Deft in this cause & filed in this Court on the 20th of May 1859.

Because Deft had failed to give full due notice of the time and place of taking said depositions as the law requires

Because deft had

given Plaintiff notice (as shown by the papers filed within the depositions) that he would take the Depositions of Witnesses at Warsaw Mo On the 14th May 1859 & three days had not elapsed from the 14th day of May to the 16th day When the Defendant gave plaintiff notice that he would take depositions in said Cause at Quincy Mo. thereby requireing from the Plaintiff labor & travail not contemplated by the laws of the land

Because as to the deposition of Whitlow that it is manifest from the papers themselves that the deposition of King could have been taken in half an hour that there was plenty of time to complete taking all the depositions in said Cause on the 16th of May between the hours of 7 Oclock A M & 6 Oclock P M & the justice had no right to adjourn the takeing of said depositions on the 16th to the 17th without a good reason & it is manifest from the papers themselves that the reason

assigned by the justice for the adjournment is false — because the Caption of the deposition — the Certificate of the Justice, the questions propounded to the witness as well as the direction to the clerk & all in the hand writing of the defendant to the suit which is contrary to public policy — Because the Justice instead of sending the Depositions to the clerk of the court by the mail or some other unobjectionable mode — Delivered the same to Defendant & they were brought to the clerk by said Defendant

Because the notice is defective

Because the service is defective

Johnson & Ballou
Attys fo Plff

And upon the back of which are the following words & figures following to wit

McKelly
vs
Hunton
} motion to suppress
Filed May 20th 1859 N McDowell clk
By L A McDowell Dept

Which transcript is in words & figures as follows to wit

~~Felix H~~ State of Missouri } ss
County of Benton }
Be it

remembered that at a special adjourned term of the Circuit Court of Benton County held in Continuation of the regular Sept term of said Court for the year 1855 begun & held at the Court house in the City of Warsaw on Monday the 19th day of Nov AD 1855 Present Hon D E Mitt & Ballou Circuit Judge John & Arthur Esqr Sheriff & Edward T Major Clerk

Among other proceeding had at said special adjourned term Were the following to wit

Felix Hunton } Civil action
vs } Petition on notes
James Burns jr }

Now at this day comes the said Plaintiff by his attorney & the said James Burns jr being three times solemnly called

Comes not but makes default nor has he filed his answer herein the said action remains undefended, & it appearing to the Court by the Sheriff's return that said James Burns jr has been duly served with process and the action being founded on two promissory notes the Court here doth find that the said James Burns jr is justly indebted to said Felix Hunton on said promissory notes & the interest thereon in the sum of two Hundred & eighty eight dollars & twenty eight Cents & the Court directs that Judgment be entered accordingly. Therefore it is considered by the Court that the said Plaintiff Felix Hunton Have & recover of the said defendant James Burns jr the said sum of two Hundred & eighty eight dollars & twenty eight Cents, the debt and interest so found due as aforesaid as well as his cost & charges by him in this behalf laid out & expended & that he have thereof Execution.

And afterwards to wit on the 3rd day of March 1856 there was issued

from the office of the clerk of the Circuit Court of Benton County an Execution on the above Judgment directed to the Sheriff of Benton County and against the goods & chattels lands and tenements of the said James Burns jr which said Execution is in the words and figures following to wit.

Benton County Set
The State of Missouri
To the Sheriff of Benton County Greeting
Whereas Felix Hunton Felix Hunton on the 27th day of November AD 1855 at our Circuit Court before our Judge thereof recovered against James Burns jr the sum of Two Hundred & eighty eight dollars & Twenty eight Cents & also cost which to the said Felix Hunton were adjudged as appears to us of record these are therefore to command you that of the goods & chattels lands & tenements of the said James Burns jr in your Bailiwick. You cause to be made the aforesaid debt and costs & that you have the same

before the judge of our said Court on the eighth Monday after the fourth Monday in March 1856 to render to the said Felix Hunton the debt & costs aforesaid & that you certify to our said Judge how you execute this writ

In witness whereof I Edward J Major Clerk of the Benton Circuit court have hereunto set my hand and affixed the seal of said court at the City of Warsaw the 3rd day of March 1856

L S

Edward J Major Clerk of the B.C.C.

Upon which said Execution are the following endorsements & returns to wit:

This Execution came to hand March 3rd 1856
James C Arthur Sheriff B.C.

Levied this execution on the following property to wit six head of horses five grays & one bay as the property of James Burns jr the Defendant in this execution March 3rd 1856
Jno C Arthur Sheriff B.C.

Received on the within Execution three Hundred dollars March 18th 1856 Jno C Arthur Sheriff, B.C.

State of Missouri }
County of Benton } ss

I Edward T Major Clerk of the Circuit Court of Benton County Do Certify that the above and foregoing four pages and a half of manuscript Contains a full and Complet transcript of the judgment rendered by said Court in the above entitled Cause at the time and term above Specified and of the execution issued thereon as well as the endorsements & return entered on said Execution by the Sheriff as fully as the same remains of record in my office

In testimony whereof I Edward T Major clerk of the Circuit Court of Benton County have hereunto set My hand and affixed the seal of said Court the 11th day of May 1859

L S

Edward T Major Clerk

Upon the back of which are the following endorsements to wit,

Felix Hunton vs James Burns jr Transcript Filed May 20th 1859 Nelson McDowell clerk

5th day Sarah R McKely
vs
Felix Hunton } Civil action

Now at this day comes the parties aforesaid by their respective attorneys & took up the motion heretofore filed by the defendant in the Benton Circuit court to dismiss this cause which motion was by the court overruled

And on the same 5th day of said term among others were the following proceedings had to wit

Sarah R McKely Plantiff
Against
Felix Hunton Defendant } Civil action

Now at this day come the parties aforesaid by their respective attorneys and by consent of said parties, It is ordered by the court that the order for the continuance of said cause be set aside & that the case be tried now. Thereupon comes the jury to wit Drewry Edwards, William Y West, C.C. Mallicoat, James Chappell, John Stockton Josiah Stephenson, Isaac Preston,

David V Rankin, Pharoah Cook, Wm Johnson, Benjamin A Cantrell and Lafayette Cantrell, twelve lawful jurors who were duly sworn to well and truly try the issues between the parties, who sat together heard the evidence & arguments of Counsel & received the instructions of the court, retired to consider of their verdict, and returned into Court the following verdict to wit: We the jury find the issue for the plaintiff & assess her damages to three hundred dollars. It is therefore considered by the Court, that the plaintiff recover of & from the said defendant the said sum of three Hundred dollars assessed as aforesaid together with her costs in this suit expended & that execution issue therefor

see page 53 for copy of the jury's verdict

And on the 6th day of said term Present as before stated among others the following proceedings were had to wit

Sarah R McCoely Pltff
vs
Felix Hunton Deft
} Civil action

Now at this day comes the defendant by his attorney & filed herein his motion to set aside the verdict & grant a new trial in this cause which motion was by the court overruled,

Which motion was in words and figures following to wit,

Sarah R McAtely Pltff
vs
Felix Hunton Deft

The defendant moves the. to set aside the verdict of the jury in this case & grant a new trial,

Because the court gave improper instructions for Pltff

Because the court refused the instructions of Deft

Because the verdict of the jury was not authorized by the evidence

Because there was no evidence that plaintiff seized took and led away the horses in Plaintiffs Petition mentioned

Because the verdict of the jury was against the evidence

Grant McLain & Penn
Attys for Deft

Upon the back of which were the following endorsements to wit

Hunto
ats
McSeely
{ motion to set aside verdict

Filed May 21st 1859
A McDowell Clerk

& upon the same 6th day of said term among others the following proceedings were had to wit.

Sarah R McSeely Plaintiff
Against
Felix Hunton Defendant
} Civil action

Now at this day comes the defendant & files herein his affidavit for an appeal to the Supreme Court & entered into recognizance to the Plaintiff with Sebastian M Grant & John C Price as his securities in the sum of Seven hundred dollars Conditioned as follows, That whereas the said Felix Hunton has appealed from a judgment of the Dade Circuit Court in favor of the said Sarah McSeely against

the said
Felix Hunton, Now if the appellant shall prosecute his appeal to a decision in the supreme court and shall perform such judgment as shall be given by the supreme court or such as the supreme court may direct the Circuit Court to give & if the judgment of the Circuit court be affirmed or any part thereof that he will comply with & perform the same so far as it may be affirmed and that he will pay all damages & costs which may be awarded against him by the supreme Court" which recognizance is approved of by the court & ordered to be filed & it is ordered by the court that an appeal be allowed, And by Consent of parties it is agreed that for want of time to write out the bill of exceptions that the said bill of exceptions in this cause be written out signed sealed & filed in vacation

Which affidavit is in words and figures following to wit.

Sarah McKeely
A.

Sarah McSkely } In the circuit court of Dade
vs } County May term AD 1859
Felix Hunton

This affiant Felix Hunton the above defendant appellant, makes oath and says that the appeal in the above entitled cause is not made for vexation or delay, but because he believes that he (the appellant) is agrieved by the judgement or decission of the court

Felix Hunton

Sworn to & subscribed before me this 21st day of May AD 1859

Nelson McDowell
Clerk

Upon the back of which are the following words and figures to wit

Sarah R McSkely } affidavit for
vs } appeal
Felix Hunton

Filed May 21st 1859
A McDowell clerk

Which recognizance is in words and figures as follows to wit

Know all men by these presents that we Felix Hunton as principal and Sebastian M Grant & John C Price as securities acknowledge ourselves indebted to Sarah McSeely in the sum of Seven Hundred dollars.

The condition of the above obligation is such that whereas the said Felix Hunton has appealed from a judgment of the Dade Circuit Court in favor of the said Sarah McSeely against the said Felix Hunton. Now if the appellant shall prosecute his appeal to a decision in the Supreme Court and shall perform such judment as shall be given by the Supreme Court or such as the Supreme Court may direct the circuit court to give & if the judment of the circuit court be affirmed or any part thereof that he will comply with and perform the same so far as it may be affirmed and that he will pay all the damages & costs which may be awarded against him by the Supreme court as witness our hands this 21st May 1859

Felix Hunton
Sebastian M Grant
John C Price

Upon the back of which are the following words & figures following to wit.

Sarah R McKely
vs
Felix Hunton
} Recognizance

Filed May the 21st 1859
Nelson McDowell
Clerk

The following is a true copy of Verdict of jury, to wit

We the jury find the issue for the Plaintiff and assess her damages to three Hundred dollars Wm Y West Foreman

The following is a copy of the bill of exceptions to wit.

Sarah McKely
vs
Felix Hunton
} In the Dade Circuit Court at May term AD 1859

Be it remembered that on the trial of the above cause the following was all the testimony given Viz

James Burns Sworn. Stated that some time in the month of February AD 1856 the plaintiff gave him some money with which she requested him to purchase some horses for her saying at the time she wanted him to purchase for her & for her own use two gentle work horses and if he saw an opportunity of purchasing others upon which he thought she could by selling them to the government agent, make a profit to do so. That he did not now recollect the exact amount, but it was about $500. that he purchased for her one the city of Warsaw and six other horses in Hickory County & in the neighborhood of Quincy that he purchased one of the horses of Jacob King upon a Credit & that B L Dozier became his security for the payment of the purchase money for the horse bought of King that in the purchase of all the horses except the one bought of King that he was acting as the agent of the plaintiff but that he did not disclose that agency to any of the parties of Whom he purchased the horses. that he purchased six horses in the neighborhood of Quincy & one at Warsaw for Plaintiff that he purchased the horse

at Warsaw some ten days before the others in Hickory County & sent it out to her the same day he purchased the same in Warsaw that at the Crossing of the Pomme de Terre on his return from Hickory County & before he got to Plaintiff's residence north of town he met with Judge Alexander & informed Judge Alexander that he purchased the horses either for the government agent or to sell to the government agent, dont recollect which, dont recollect telling Alexander that he purchased the sorrel horse for Mrs McNeely as she wanted a gentle work horse that he took them horses to the farm of Mrs McNeely the Plaintiff & delivered them up to her on Saturday or Sunday & told her to select out such as she wanted & that he would sell the rest for her, that on Monday after he met defendant & Jn C Arthur the Sheriff of Benton County going towards Mrs McNeely's about two miles from Mrs McNeely's that Arthur told him in the presence of Hunton that he was going to Mrs McNeely's to levy on the horses I had taken to Mrs McNeely's that some ten days or two weeks thereafter Arther the Sheriff of Benton County

sold three of the horses in the city of Warsaw. two of the horses sold by Arthur were dark Gray horses & one of them the third a light gray horse that he heard Hunton tell the Sheriff to sell the horses that the horses sold were worth about $100. each that one of the six horses purchased by witness of King in Hickory county and which was claimed by him as exempt from Execution was not sold ~~was not sold~~ under the statute – that a few years before that time he had been engaged in the mercantile business & had failed. that he had since that time compromised with his Creditors & paid off or settled some five or six thousand dollars – that he still owed some $2500. & hoped to be able to settle that – he stated that when he purchased the horse of King. that he had not the money to pay King for the horse & promised Dr Dozier that when he went to Warsaw he would pay the money to Dr Dunn of Warsaw for Dr Dozier that at that time Dr Dozier was owing the witness some fifteen dollars & that some time after that he paid to Dunn the amount for the horse except the amount of about $15. that he is the son in law of Mrs McNeely the plaintiff. Witness states that the three gray horses sold by John C Arthur sheriff of Benton by the

direction of Hunton, were horses that witness had purchased for Mrs McNeely as her agent & that he had paid for the horses with the money furnished to him by Mrs McNeely, that witness a few years previous to that time had been a horse trader that witness had friquently bought & sold property for plaintiff, that Mrs McNeely was a widow & her only son was something like sixteen years old when witness purchased these horses in Hickory and that her son had no experience in trading, that at the request of Plaintiff, the witness got William D Barkley to purchase in for her the three Gray horses - they were sold by the sheriff Benton County.

William McNeely a witness swore that John C Arthur & Felix Hunton came to his mother's house together that they went to the stable & Hunton told Arthur to levy upon the Horses which were there they were the horses that Burns had brought there, neither Hunton nor Arthur took any of the horses away that some time after that that he William McNeely took

the said horses to Warsaw and hitched all them to a rack in Warsaw. that he heard Hunton bid for some of the horses but did not hear Hunton direct Arthur to sell the horses. that he saw his mother give Burns some money Did not see it counted. that he heard his mother say at the time she gave the money to Burns say how much money there was. dont now recollect the amount stated but his best impression is that it was between five & six Hundred dollars. that he heard his mother tell Burns that she wanted him to purchase horses with the money that she wanted two gentle work horses for her own use

Bradford L Dozier a Witness for Defendant stated that Burns purchased of King in Hickory County a horse that Burns bought King's horse on a credit & that witness told King that he would see it paid that Burns purchased a horse from him at ninety or ninety five dollars that Burns owed him at that time some small amount

Dont recollect the amount that he did not owe Burns any thing that Burns paid him for the horse purchased of him & that he loned Burns fifteen dollars to pay Bernard for a horse purchased by Burns of Bernard that Burns paid him for the horse purchased of King Cant state when but it was between six weeks and twelve months thereafter

Defendant prooed by Judge Alexander that he saw James Burns as he Crossed the Pomme de Terre with some horses purchased purchased in Hickory County & that Burns told him that bought the horses to sell to a government agent except the Sorrel Horse which he had bought for Mrs McSeely, that she wanted a gentle work horse.

Defendant then read the depositions of William D Barkley Jacob King & Henry Whitlowe which deposition are in words and figures as ~~heretofore~~ follows ~~inserted~~ (here insert the depositions) to Wit, (See Commensing on page 30 of this transcript to page 37 inclusive

for sd transcript of depositions)

Defendant then read in evidence the transcript of Judment & execution from the Circuit Court of Benton County, in the case of Felix Hunton against James Burns (here insert the transcript) (See Commensing on page No 41 of this transcript to page 45 inclusive for Copy of sd transcript)

The court then gave the following instructions for Plaintiff to the giving of which defendant Excepted (here insert Plaintiff's instructions) ~~If the jury~~

If the jury Believe from the evidence that Mrs Sarah McSeely was the owner of the horses mentioned in the petition at the time therein Specified & further believe from the evidence that the defendant Hunton did cause the horses to be levied upon and sold as the property of James Burns if they will find a verdict for the plaintiff and assess the damages at the amount they may believe from the evidence the horses were reasonably worth at the time they were so sold.

Objected to by Defs

And although the

Objected to by Defendant

jury may believe from the evidence that said James Burns & did purchase yet if he Burns at the time was acting as the agent of Mrs McSeely, the Plff & that Mrs McSeely furnished the money to pay for the horses, they will find a verdict for the Plaintiff

Upon the back of which are the following words & figures to wit

McSeely
vs
Hunton

Instruction

Filed May 20th 1859
N McDowell Clerk

The court then gave the following instruc=tions for Defendant (here insert them)

That if the Horses in Plaintiff's mentioned were the property of James Burns & not the property of Plaintiff the jury will find the issue for Defendant

That if the Plaintiff furnished the money with which the horses were bought & permitted Burns to use it in trading for his own benefit

& if this was done to screen the horses from Burn's Creditors & the jury believe from the evidence that defendant was at the time a Creditor of Burns they ought to find the issues for defendant

Upon the margin of which is written the words following to wit,

Objected to because there is no evidence to base it upon

Upon the back of which are the following words & figures following to wit

McNally
vs
Hunton } Instructions

Filed May 20th 1859
N McDowell Clerk

And Also the following instructions as follows to wit

That if the jury believe from the evidence that the witness James Burns knowingly & corruptly

made any false statement or statements in his evidence permitted by the court to be given to the jury they have a right to disregard his whole testimony

Upon the margine of which was written the words following to wit

Objected to by Pl'ff no evidence to base it upon

Upon the back of which are the following words & figures following to wit

McNeely vs Hunton } Instructions

Filed May 20th 1859
N. McDowell Clerk

The defendant then asked the Court to instruct the jury. That unless the defendant seized took and led away the horses in plantiff's petition mentioned they should find the issues for defendant

which instructions the court refused to give - And defendant Excepted

The jury then found a the issue for Plaintiff and assessed her damages to three hundred dollars. and the defendant filed his motion for a new trial in wood and figures following (here insert the motion) (See page 48 for a copy of said motion for a new trial) which motion was by the court overruled to which opinions of the court in giving Plaintiff's instructions and refusing Defendant's instructions and overruling defendant's motion for a new trial defendant Excepts and prays that this his bill of Exceptions be signed Sealed, Enrolled and made a part of the record in this cause which is accordingly, done

John R Chenault (Seal)
Cir Judge

Upon the back of which are the words and figures as follows to wit.

Sarah R McNely } Bill of
vs } Exceptions
Felix Hunton }

Filed June 9th 1859
A McDowell clerk

The State of Missouri }
County of Dade } ss

I, D C Easton clerk of the circuit court of Dade County in the State aforesaid Do hereby Certify that the above and foregoing sixty four & 1/4 pages contain a full & complete transcript of all the proceedings had in the above entitled cause (entitled Sarah R McNeely vs Felix Hunton civil action) as appears of record & papers filed in this office as fully as the same remains in my office in said cause

In witness whereof I D C Easton clerk of the circuit court of said Dade County have hereunto set my hand & affixed the seal of said court at office in Greenfield This Jan 11th day A D 1860

D C Easton Clerk

making out transcrip
say 12850 words at
15 cents per 100 $19.27
Certificate & seal .50
Postage about .25
20.02

Sarah R McNaly Res
vs
Felix Hunter, applt

This Record is produced in Court here by Respondent. S R McNaly
Johnson & Ballou
her attorneys
Jany 19th 1860

Sarah R McNeely - Respondent
vs
Felix Houston - Appellant
In the Supreme Court
January Term 1860

John F. Rylund one of the Counsel for the Appellant, makes oath and says - That from the record in this case it appears that the Bill of Exceptions was by agreement of parties to be made out in vacation and filed. That the Bill of Exceptions, as appears from the record was filed on 9th of June 1859; and the transcript was sent to the Clerk of this Court and was received by him on 23rd of June 1859; this Court holds its summer Session commencing on 1st Monday of July - The Clerk of this court did not file the record because the ten dollars fee was not sent with the record -

This affiant is informed and believes the information true, that sometime after the July term of this Court - the Clerk of this Court wrote to Mr Houston

the appellant, informing Hunton that there was a case here of his from Newton County, and that the law required the fee of ten dollars to be sent to the Clerk of Supreme Court before the case could be docketed.

Mr Hunton wrote to the Clerk a answer, that he had such a case from Dade County, and if the Record from that court was here, he would send ten dollars and would send it to him: Mr Dunscomb the Clerk then informed Hunton that the case was from Dade, and not from Newton as he first stated.

Mr. Hunton then sent the ten dollars by the Sheriff of Benton County to the Clerk, and the Sheriff said it to Mr Dunscomb sometime about the first of this month: Sheriff stated that he had received the money from Mr Hunton about three or four weeks before: and would

have sent it to the Clerk, had known of its importance, but as he was coming to Jefferson City, he thought it best to bring the money.

This affiant states, that he has no doubt that his client did not know of the new statute requiring the fee of ten dollars to be sent to the Clerk before the case could be docketed in this Court for trial. He states, that his client expected the case to be heard at this term, as affiant learns from a letter sent by his client to Col Ruffington to be handed to this affiant. He this affiant feels confident that his client supposes he has merits in his case; and that this Court will probably reverse the judgment of the Court below.

The action below is not for a money demand but for personal property some three horses.

John F. Ryland

Sworn to and subscribed before the undersigned, Clerk of the Supreme Court of the State of Missouri, this 23rd day of January 1860

Attest Wm E Dunscomb
Clerk

McNeely
v
Hunton

Affidavit
against
Section 57
respondent

filed Jan. 23 1860
Wm E Dunscomb
Clerk

In the Supreme Court

January Term 1860.

Sarah R McNely Resp } Appeal from
against } Jade
Felix Hunton appellant }

Sarah R McNely respondent by her attorneys Now comes here into Court and moves the Court to dismiss the appeal in this Case for the following reasons

1. Because the appeal was taken more than thirty days before the first day of the last July term of this Court, and to which the same was returnable, and appellant failed to file a transcript of the record and proceedings in the Cause at least fifteen days before said July term of this Court.

2 Because the appeal was taken more than thirty days before said July term or the present term of this Court. and appellant failed to file a transcript of the record and proceedings in this Cause at least fifteen days before this present term of this Court. and Respondent files herewith a ~~transcript~~ of the record and proceedings in this Cause, and asks that the Costs of the same to wit twenty dollars and two Cents be taxed against

appellant upon the dismissal of his appeal with other costs.

Johnson & Ballou
attys for Respt

S. R. McNulty Resp
vs
Felix Hunter appl

Motion to Dismiss
Appeal by Respt

No 120.

filed Jan. 23 1860
Wm E Dunscomb
Clerk

Sarah R McNeely - appellee.
vs on appeal from Dade Cut Court
Felix Hunton - appellant

In the Supreme Court, at Jefferson City - July Term 1860

And now at this day comes the appellant Felix Hunton by his attorneys - Ryland & Son, and makes the following assignment of Errors -

1st. From the record & proceedings in this case it appears that judgment below was rendered for the plaintiff, whereas by the law of the land it should have been for defendant in this therefore there is Error.

2nd There is Error also, in refusing to sustain defendant's motion to dismiss the plaintiff's action

3rd There is also an Error in giving the instructions for plaintiff - and in refusing the instructions for defendant

4 - There is Error also in overruling defendants motion for a new trial -

For these Errors therefore and for others apparent on the record, the appellant prays that the judgment below may be reversed and for nought held -

Ryland & Son
attys for appt

57 51

S. R. McMeley

v

Felix Hunton

assignment of Errors

Ryland Brown
attys for apt—

filed July 19th 1840

Wm E Drummond

Clerk

Sarah R McNeely
v.s. appeal from Dade Circuit Court
Felix Hunton Appellant

This was an action against the defendant, ~~in the nature of trespass~~ for the alleged taking and causing away of certain horses the property of the plaintiff and causing them to be levied on and sold by the Sheriff of Benton County. The answer, denied seizing and taking away the horses as charged in the petition, but alleged that the horses mentioned in the petition were the same that were sold under an execution in favor of defendant and against one James Burnes, and that they were the property of said Burnes and not of the plaintiff. The errors assigned, are the giving and refusing instructions and overruling defendants motion to dismiss the cause. The instructions given on the part of the plaintiff presented to the jury, fairly and clearly, the law arising upon the pleadings and evidence. The questions for the jury were whether the horses were the property of the plaintiff, and if so did the defendant cause

them to be levied on and sold as the property of the execution debtor Burmer, ~~and~~ These points were submitted to the jury in the first instruction given for the plaintiff.

The second instruction was based upon evidence touching the agency of Burmer in purchasing the horses in controversy; and declared that although Burmer may have ~~been the~~ purchased them, yet if in doing so, he was the plaintiff's agent, and ~~that~~ the money for that purpose was furnished by her she is entitled to a verdict. This instruction needs no comment: it was obviously correct.

All the instructions asked by the defendant were given except the following namely. That unless the defendant seized, took and led away the horses in plaintiffs petition mentioned they should find the issues for defendant. This instruction erroneously assumes that the ~~A.~~ defendant could not be a trespasser without an actual, ~~and~~ ~~xxxxxxx~~ participation in the act of seizing

and removing the property from the owners possession. It is hardly necessary to say that such is not the law, and that he who directs or assents to a ~~act amounting to~~ trespass is liable equally with him who does the act which constitutes the trespass. If ~~as declared by the first instruction~~ the defendant caused or directed the ~~pro~~ horses to be ~~sold~~ levied on and sold, he was a trespasser, ~~although~~ notwithstanding he may not have actually taken them ~~to~~ from plaintiffs possession or aided in doing so. Although the answer may not be considered as admitting the allegations of the petition that defendant ~~caused~~ directed the property to be levied on and sold, yet there was evidence conducing to show this, and it ~~it was this~~ warranted the instruction that was given for the plaintiff.

As to the other point ~~[illegible]~~ respecting the dismissal of the cause, it is sufficient to say that this ruling was shown to be sanctioned ~~in accordance with~~ by the uniform practice of the Court, and without

passing upon the propriety of such practice, we cannot say that the Court erred in refusing to make the ~~the~~ plaintiff an exception to the rule — a rule with which both parties are presumed to have been equally cognizant ~~of~~ the rule being ~~to~~ not to try a cause reversed & remanded by this Court, until the second term after such reversal, we suppose, ~~it would~~ that at the first term thereafter, the cause would be continued as a matter of course without a formal application therefor by the party. Such we understand was the disposition of this cause in the Court below.

Judgment affirmed the ~~other~~ judges Napton concurring — Judge Scott absent.

E. B. Ewing

51

McCarty & Hunton

Opinion

Affirmed

Ewing

filed Oct 13, 1860

Wm E Dunscomb Clerk

Sarah McNeley appellee

vs } on appeal from Dade Circuit Court

Felix Hunton - appellant

The appellee, plaintiff below brought her action against appellant defendant below, in the Benton Circuit Court in April 1856. charging that defendant seized, took and ~~car~~ ~~ried~~ led away three certain Gray horses, property of plaintiff. of the value each of one hundred Dollars, and of the value altogether of three hundred Dollars, and afterwards caused the same to be sold and converted to his own use - to plaintiffs' damage of three hundred Dollars -

The defendant filed his answer, denying that the horses were the property of plaintiff and stating that he had an Execution for the sum of $288. against one James Burns - that he understood, that Burns had horses at the plaintiffs farm and he directed the sheriff to levy his Execution on the horses as the property of said Burns - and said sheriff sold three of the horses levied on by direction of the defendant

to satisfy said Execution. and defendant states the horses sold were Burney's property and not plaintiff's property.

The plaintiff moved to strike out a portion of this answer. stating the execution against Burnett as redundant & inoperative. The Court sustained this motion & plaintiff filed an amended answer. in which the defendant denies that he seized, took and led away the horses mentioned in plaintiff's petition. He says that the three horses mentioned in plaintiff's petition are the three identical horses which were sold by the Sheriff under the Execution in favor of plaintiff: He says that the three identical gray horses so sold, were the property of James Burney and not the property of the plaintiff in this suit, and denies that said horses were ever belong to the plaintiff.

There was a trial and the jury found for the plaintiff; the defendant served his various objections to the proceedings of the Court below, by his Bill of

Exceptions and brought to this Court the case, which was reversed and sent back see McNeeley vs Hunton 24 Mo. Rep. 281 – This Court reversed the judgment at the January Term 1857 –

At the August Term 1857 of the Benton Circuit Court, the defendant Hunton moved the Court to dismiss plaintiffs suit, which motion the Court overruled see motion at page 21 of the record – and continued the cause – The defendant saved this point in his case by his Bill of Exceptions –

At February Term 1858, defendant filed his motion to dismiss this cause again – The Court overruled this motion and defendant excepted – and he at August term 1858 filed his motion again to dismiss, which was overruled & excepted to – see Record pages 24 and 27 –

At February term 1859, an order was made changing the venue in this case from Benton County to some other Judicial Circuit before Foster P. Wright the judge of Benton Circuit Court, had been of Counsel

for the plaintiff in this case - and the venue was changed to the Circuit Court of Dade County in a different judicial Circuit -

At the May term 1859 of the Circuit Court of Dade County the cause was by consent continued; afterwards this order of continuance was by consent set aside and the cause was tried before a jury and verdict for plaintiff for $ 300. The defendant moved to set aside the verdict and grant him a new trial see motion at page 37 of the record; which was overruled - excepted to - and an appeal prayed for and allowed - and the cause is now by appeal -

The Bill of Exceptions shews that there were only two witnesses for plaintiff, her son in law Barnes and her son William - as their testimony can not be abridged, we prefer to refer to it in the Bill of Exceptions see page 42 for Barnes's & 45 for Wm McNeely's -

The defendant then gave the following evidence see record page 46 - Bradford L Dozier a

witness judge Alexander a witness and also the following depositions see record page 48 – also a transcript of the judgment & execution in favor of defendant Hunton against James Burns.

The Court gave the following instructions for plaintiff, see record page 62 and also the following for defendant page 63 – and the defendant excepted to those given by Court for plaintiff – The Court refused to give the following instruction for defendant see page 64 of record – The Defendant Hunton relies upon the following points to reverse the judgment below –

1st The Court should have granted a new trial in this case, because the verdict is clearly against the evidence –

2nd The Court erred in refusing to give defendants' last instruction as the testimony clearly shews that the plaintiff's son Wm McNeely carried the horses to Warsaw and the

Sheriff took them and sold them there -

The simple act of a plaintiff in execution bidding for property at Sheriff's sale, does not make him a trespasser; and Hunton is sued in this case as a trespasser -

3rd

The Court should have dismissed the plaintiff's suit, for neglecting to prosecute it, as the law required; instead of permitting him to continue it without any cause or any motion therefor or any reason given therefor - an arbitrary continuance -

Ryland & Son
attys for appellt -

S. R. McNeely
vs
Felix Hunton
Statement of the
case & points
& Brief for appt.
Ryland & son

Sarah

In the Supreme Court
July Term A D 1860

Sarah R McNaly appellee
against & appeal from Dade Cr Ct.
Felix Hunter appellant

Johnson & Ballou attys for
appellee

Statement of the Case.

plaintiff below commenced
her suit against appellant
defendant below in the Circuit
Court of Benton Count. on the 18th
day of April A D 1856. Charging
that defendant Seized took and
led away certain horses belonging
to and the property of plaintiff. to
wit one dark gray horse of the
value of $100. one other dark gray
horse of like value and one light
gray horse of like value. all of the
value of $300. that afterwards he
divided and caused them to be
sold. and converted and
disposed of them as his own.
whereupon Pltff sustained damages to
the amount of $300. for which he
asks Judgment.

See record Pages 1 & 2,

Defendant filed his answer May 19th 1856. after some other proceedings in the Court, the at the November Term A.D. 1856 Both parties being ready for trial, a trial was commenced & dept asked leave to amend his answer which was done and motions was filed by plff to strike out & but at last filed his ammended answer (Record P 12) This answer denies that plff ever owned the horses. admits that they were the same horses for which this suit is brought. and were the identical horses which were sold under Facie Executive (See Depts first answer Record Page 5) in which he says he had an Execution against Burns levied on Facie horses and that he went with the Sheriff to the farm of plantiff and directed the Sheriff to buy the Execution on Six horses which were at the farm of plantiff. and the Sheriff levied upon Six horses and sold them, taking the answer of defendant in connection with the proceedings once. they only amount to this that Dept denies that plff was the owner of the three horses

admits the taking of them by the Sheriff by his direction and that Deft believes the horses in Controversy belonged to Burns. after these amendments during the trial, the resulted in a verdict for pltff and her damages were assessed at $300,00 The Deft took an appeal to the Supreme Court the Judgment was reversed and Case remanded to the Bertin Cir Court and at the August term of that Court it being the first term after the Judgment had been reversed, The defendant filed his motion August term A D 1857 to dismiss the Cause, unless it was true at that term the plaintiff insisted that it was not the trial term according to the practice in the Circuit Court. the Court so deciding the defendants motion was overruled & the Cause set for trial at the next term. See Record P 20, 21, 22. at the

Afterwards at the February term 1858 Deft again filed his motion to dismiss said Cause (Record P 23) The motion states that the Cause had been set for trial at the August term which was not true See Record and Evidence (P 24, & 25, & 26 of Record)

which last motion was also overruled

The Case was not reached for trial untill the adjourned August Term 1858. held on the 3d day of January 1859. Held by Judge George W Miller and defendant filed his motion again to dismiss said Suit. which was overruled, afterwards (Record p 35)

afterwards at the Feb term 1859 F. P Wright having been of Counsel for pltff the Cause was sent to the Dade Circuit Court.

May Term 1859 of the Dade Circuit Court Cause Continued by Consent. but afterwards at same term this continuance was set aside by Consent and a trial was had. verdict for pltff for $300. Damages &c (Record p 35 & 36) and Judgment therefor against Deft & Costs.

Same term Deft filed his motion to set aside the verdict and grant a new trial, for the following reasons

X Because the Court refused the instructions of Deft.

Because the verdict of the Jury was not authorized by the Evidence

Because there was no Evidence
X that plaintiff Sergeant took and led
away the horses in plaintiffs
mentioned
Because the verdict of the Jury
is against Evidence

It is not alleged in this motion
for a new trial (of which it is true the
defendant is estopped from Complaining
of) that the Court did not Dismiss
pltff Suit upon some of the various
motions Deft filed for that purpose
He is estopped because he still
made defense, and no injury was
shown thereby, which motion the
court overruled, & Deft Excepted,
The defendant took an appeal
to this Court which stayed all
proceedings upon the Judgment.
Upon the trial Barnes a witness
for pltff proves that plaintiff was the
owner of the three horses that
Deft admits in his answer (first and
last answer) were taken by his
direction, Barnes testimony proves that
they were sold by his Defts direction,
Barnes was furnished with money by
pltff to purchase for him and did

Purchase these and deliver them to her. See his testimony P. 42, 43. 44.

William McNeely witness for plff proves that Dft and the Sheriff comes to his mothers house the horses were at the Slotte, and Hunter went there and demanded the Sheriff to levy upon them which he did they were the same horses Burns had brot there. Witness took the horses to Warsaw ~~Dft~~ demanded the Sale the Sheriff Sold them &c Record P 45. 46.

The testimony proves that the plantff was the owner of the horses that they were taken by Dfts demanders

The Court give some instructions to the Jury on behalf of plantff. See Record P. 62.

The Court give some instructions to the Jury on behalf of defendant See Record P. 63.

The defendant then asked the court to instruct the Jury

" "That unless the defendant
" Sugar took and lee away the horses
" in plantffs petition mentioned
" they should find the issues for Defendant

Johnson & Ballou atty's for appellee
Brief.

1. There is no error in the decree of the Circuit Court, in not requiring the plaintiff to be ready with witnesses to prosecute her suit, at the first term after the judgment of Reversal of it has been filed in the Circuit Court.

The practice has been to the contrary, and it has arisen from the fact that it cannot be known what course will be taken until the first term - the plaintiff may wish to amend he may demur, the issues may have to be changed, and this general rule has been adopted and is known to the attorneys and it has been conformed to. It is not an error that Dft can complain of

2d. The continuance given on the part of the plaintiff put the case fairly before the Jury upon the pleadings and evidence, as the defendant could ask,

The defendant in his answer admitted the Identity of the horses claimed by pliff and that they were taken by his direction in his pleadings and he was estopped from requiring proof of it, the only issue before the Jury was whether or not pliff was the owner ~~or~~ or Burns ~~in whose Defendant~~ ~~alleged in~~ ~~said in~~ ~~his plea he was~~,

3 The instructions given on the behalf of Deft are as favorable and more so than he had a right to ask, and the one that the Court refused on the part of Defendant, is not law, nor had the defendant a right to ask it, first, to make Defendant liable it is only necessary that he should direct or assent to a trespass and he did both — Second, this question was not and could not be an issue before the Jury, whether or not he seized took and led away the horses in plaintiffs petition mentioned, he put in a plea Justifying the taking and in the plea he had to admit the taking of the same horses Juice for and, alledge that they belonged to Burns, and objections

was made to his answer that Dft could not prove property in Burns unless he admitted the taking of the horses, and Dft commenced, till he got an answer that pltff allowed to Flume, and he Dft have all the advantages of it, and by it he admitted the taking of these same horses, and it was unnecessary for pltff to prove it. It was enough for the Jury to decide the sole issue — 28. Mo R 346.

4 This Court should affirm the Judgment. There is no error committed to the injury of Dft.

5. And we insist that the Court should give plaintiff damages in this Case, at 10 per Cent. It has been alleged at defendants instance one whole year in this Court, and the grounds for an appeal is a mere pretense.

Sarah R McNeely
appellee
vs
Felix Huston
appellant

appellees
Statement of
the Case and
Brief