Wilcox, Abraham vs. Daniels, John
Strickland, William
1855 Jefferson
358/11

578/39

Wi sued Daniels for forcible entry + detainer
D failed recognizance (S security)
Scott
W dismissed recog

State of Missouri } Set.
County of Jefferson } At a Term of the Circuit Court within and for the county of Jefferson, begun and held on the fourth Monday of November A D Eighteen hundred and fifty four. the following proceedings were had,

Abrim Wilcox Plaintiff

against

John Daniels and William Strickland defendants

Petition

In the Circuit Court Jefferson County,

Plaintiff States, that on the 11th day of March 1854, he filed in the office of William Foxton, a justice of the Peace of Platin Township in said County, a complaint against John Daniels one of the above defendants, for a forcible detainer of "a certain Farm on Platin creek in said county of Jefferson, the same Farm that I (plaintiff) purchased from Samuel Steel", and that said Justice issued a summons against said Daniels on the same day, returnable on the 25 th day of March 1854, on which day the summons being returned duly executed the parties went to Trial before a jury who returned a verdict in favor of the plaintiff and the justice thereupon "rendered judgment that the said Abrim Wilcox recover and have restitution of the premises and also that he recover of said John Daniels his costs in this suit taxed at $8,00- And afterwards on the 28th day of March 1854, the said John Daniels took an appeal of

said cause to the Circuit Court of said County, and entered into a recognizance to plaintiff in the sum of one hundred dollars, with William Strickland defendant in this suit as his security, conditioned that the said John Daniels, the defendant, should prosecute his appeal with effect and without delay, neither commit nor suffer to be committed any waste or damage on the premises whereof restitution was adjudged, and pay all rents and profits damages and costs that might be adjudged against him and otherwise abide the judgment of the Circuit Court in said cause, then the recognizance to be void, which said recognizance was executed by the said John Daniels and William Strickland under their hands and seals and duly attested and approved by said justice, a copy of which is hereto annexed and made part of this petition, And Plaintiff further states, that at the May Term 1854, of the Circuit Court of said Jefferson County, the said John Daniels voluntarily dismissed his appeal in said cause, and thus evaded a judgment against him of said court for damages for the continued detention of said farm since the appeal, Plaintiff therefore avers that the said John Daniels has forfeited his said recognizance, and that this Plaintiff is entitled to have and recover of the Defendants the penalty of the same, one hundred dollars, for which he asks judgment, Plaintiff further states, that in consequence of said appeal, he was unable to get the possession of said farm until some time in the latter part of June 1854, too late to raise any crop upon

the same during the said year, and that he was thereby deprived of the rents and profits of the same during said year, and has sustained damage by reason thereof and the delay occasioned by said appeal to the amount of one hundred dollars, which is here assigned as a breach of said recognizance and judgment asked for the same, Plaintiff further avers, as a further breach of said Recognizance, that the said John Daniels did not prosecute said Appeal with effect and without delay, nor pay to him the rents and profits and damages arising upon the same, or any part thereof, but that he violated the conditions of said Recognizance in each and all of these conditions set forth, and that the plaintiff has been damaged thereby to the amount of one hundred dollars, for which he asks judgment. A certified copy of the Transcript of said Justice, embracing the complaint filed, the summons, the virdict of the jury, and the judgment thereon, is hereto annexed and made parts of this petition, the original being on file in the office of the clerk of said court, also a copy of the record dismissing said appeal, Abner Green Atty for Plaintiff. Abrim Wilcox Plaintiff, makes oath and says he believes the above Petition and the matters therein as stated are true. Abraham Wilcox. Sworn to and subscribed before me Oct 6th 1854, Tho C Fletcher Clerk pr Ef Honey dept. (Endorsed) Filed Oct 6th 1854, upon which petition a summons was issued as follows. County of Jefferson SS. The State of Missouri. To the Sheriff

Summons

of the County of Jefferson, Greeting; We command you that you summon John Daniels and William Strickland if they be found in your county, that they be and appear before the Hon Judge of our Circuit Court, on the first day of the next Term thereof, to be begun and held at the town of Hillsboro' within and for the county of Jefferson, on the fourth Monday of November next, then and there to answer unto Abrim Wilcox, upon his original petition a copy whereof is hereunto annexed and accompanies this writ, and have you then there this writ. Witness Thos Fletcher, Clerk of our said Circuit Court, with the seal thereof hereto affixed at office in Hillsboro' this seventh day of October AD 1854. Thos Fletcher Clerk Circuit Court

Endorsed thereon is the Sheriff's returns as follows,

I executed the within writ at the county of Jefferson on John Daniels by reading the within writ in his presence and hearing and also by delivering to him a true copy of the accompanying petition as furnished by the clerk and also on William Strickland by delivering to him a true copy of the within writ, and also by reading the accompanying petition in his presence and hearing this the 9th day of October AD 1854. Augustine Wiley Sheriff

Saturday December 2nd 1854.

Demurrer

said Defendants file their Demurrer to the petition of said plaintiffs as follows, to wit,

Abrim Wilcox vs John Daniels and William Strickland

In the Circuit Court of Jefferson County.

Defendants demur to the petition of the plaintiff, because, neither the first, second nor thirdly assigned breach of the bond sued on is a forfeiture of the said bond, nor does either of said breaches state facts sufficient to constitute a cause of action,

That in other respects, the petition does not state facts sufficient to constitute a cause of action, That from the face of the petition in no respects does it appear that plaintiff is entitled to the judgment prayed for or any part thereof.

That the transcript of the proceedings alleged to be annexed to petition and relied on by plaintiff is neither annexed to nor filed with his pleadings, O Pipkin atty for defts,

Judgt on Demurrer.

Abraham Wilcox
vs
John Daniels & William Strickland } On Demurrer.

Now at this day comes the parties aforesaid by their respective attornies, and the demurrer of said defendants to the petition of said Plaintiff, being seen heard and fully understood by the court, it appears to the court that said petition does not state facts sufficient to constitute a cause of action. It is therefore considered that said demurrer be sustained, motion for new trial filed and overruled, to which Plaintiff excepts,

Exception

The said motion for a new trial is as follows,

Abram Wilcox -vs- John Daniels In the Jefferson Circuit Court.

motion for new trial

The Plaintiff by his attorney moves the court to set aside the judgment rendered in the above cause and grant him a new trial, for the following reasons;

1st Because the court erred in sustaining the defendants

demurrer in the above cause and in giving judgment (b)
on the same,
2nd the decision of the court in sustaining said demurrer
is contrary to law,
3d the judgment in said cause is contrary to law,

Abner Speer Attorney for Plaintiff

At the next ensuing term of said court, on Friday the first day of June 1855. the following proceeding was had in said cause,

Appeal. Abraham Wilcox } Suit on Bond.
= vs =
John Daniels & Wm Strickland } Now at this day comes said plaintiff and files his bond, which is approved by the court, and prays an appeal from the judgment and decision of this court in this cause to the Supreme court of the State of Missouri, which is granted, and it is ordered by the court that the clerk of this court make out and send duly certified to the clerk of the Supreme Court at St Louis, a complete copy of the record in this cause,

Bond for Appeal. The bond filed by said plaintiff for appeal is as follows
Know all men by these presents, that I Abraham Wilcox as principal and we James S Brown as securities are held and firmly bound unto John Daniels and William Strickland in the full and just sum of fifty dollars for the true payment of which we bind ourselves our heirs, executors and administrators jointly and severally firmly by these presents, sealed with our seals and date the first day of June in the year A D 1855, The condition of the above bond is, that whereas, the above bounden

Abraham Wilcox, has appealed to the Supreme court of the State of Missouri, from the Judgment of the Circuit Court of Jefferson County Missouri, rendered against him at the November Term 1854. thereof, in an action between Abraham Wilcox plaintiff and John Daniels and Wm Strickland defend: Now if said appellant, on such appeal will pay all costs and damages which may be awarded against him occasioned by such appeal, then this obligation to be void, else to remain in full force, Given under our hands and seals the day and year aforesaid, Abraham Wilcox (seal)
Attest Ef Haney. James S Brown (seal)
Endorsed) "Filed and approved by the court June 1st 1855.
Thos C Fletcher Clk,

I. Thos C Fletcher, Clerk of the Circuit Court within and for the County of Jefferson, do hereby certify that the foregoing is a Complete Copy of the record in the case of Abraham Wilcox against John Daniels and William Strickland as the same remains in my office,

In Testimony Whereof I hereto set my hand and affix the seal of said court at Office July 5th AD 1855,

Thos C Fletcher Clerk.

JEFFERSON COUNTY CIRCUIT COURT SEAL

(8)

Affidavit 5, sent Certiorari for opt. 1.50, postage 6, Contin. 50

(39) 16

Abraham Wilcox
Appellant
March. F. 1856
against
John Daniels and
William Strickland
Respondents.

(appeal from Jefferson County)

Clerk Fletcher $4.25

Filed 14th August 1855
Wm. L. Glanville
Clerk

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Abner Wilcox, plaintiff,
against
John Daniels, and
William Strickland, Defendants,

In the Supreme Court
St. Louis County, Missouri,

Abner Green, counsel for Appellant in the above entitled cause, assigns for Error in the court below the following, to wit,

1st The court committed error in overruling the Demurrer of the Defendant to Plaintiffs Petition; and

2nd In giving judgment against Plaintiff on said Demurrer.

For which error committed by the court below the Counsel for Appellant asks to have the Judgment of said Court reversed and said cause remanded for further trial.

Abner Green
Attorney for Appellant.

The is no Error in this Cause as herein assigned
P. Pipkin
Atty for Respondent

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In Supreme Court
St. Louis County

Simon Wilcox
vs.
John Daniels, &
Wm. Strickland

Assignment of
Errors.

Filed 15th October 1855.
W. J. Glannin
Clk

Abiram Wilcox, Plaintiff,
against
John Daniels &
William Strickland, Defendants.
In the Circuit Court
of Jefferson County.

To the Defendants in the above entitled cause.

You are hereby Notified that I have taken an appeal from the Judgment of said Court rendered in the above cause at the November Term 1854 thereof, to the Supreme Court of the State of Illinois.

Yours
Sep. 29th 1853.

Abiram Wilcox
By A. Green his
Attorney.

A. Wilcox

vs.

Daniels &

Strickland

Notice

I Executed the within Notice on John Daniels by leaving a true copy of the within Notice at his usual place of abode with a free white person of the family over the age of fifteen years This the 4th Day of October A.D. 185[illegible]

Augustine [illegible] Sheriff

Sheriffs fee 50 cts
Fri. 19 October 18[illegible]
W. [illegible]

Abiru Wilcox
vs
John Daniels

In the Supreme Court
Oct. Term 1855

1 The voluntary dismissal of the appeal is no breach of the bond. Revised Code page - 524 sec 30 & 31

2 Before suit can be maintained upon the bond in question the petition must shew, that a trial was had in the circuit Court, & judgment obtained for rents & profits, damages & costs & restitution of the premises, and that Daniels had not abided the judgment. or the petition must shew, that Daniels had committed waste or damage to the premises -

3. It was in the power of Wilcox the appellee of the Justices Court to insist upon a trial, of the case in the circuit Court, and to have had a jury to assess his damages, for the rents & profits, waste and damage if any had accrued. His failing to do this, ~~he~~ is left to his judgment in the justices Court, for the payment of this, ~~he~~ respondent and his security are liable to have execution issued against them, which in fact was done & satisfied.

4 There is no accrument of waste or damage done to the premises since the taking of the appeal, nor of a judgment of the circuit court for rents and profits, damages & costs,

5 Appellant failed to file with his petition or annex thereto a certified copy of the transcript from the justices docket of the original suit between ~~appellant~~ and respondent ~~by the~~ recognizance for the appeal
Art. 7 sec 13 Practice Act page 82.

P. Pipkin atty for Respondent

Abram Wilcox
v
Jno. Daniels

Brief for Respondent
P. Pipkin
atty.

Filed Oct. 19th 1855.
Wm L Glanville
Clk

Abner Wilcox, - Appellant
vs.
John Daniels, and
William Strickland, } Respondents,

In the Supreme Court
of the State of Missouri
Oct. Term 1838.

The Appellant by his Attorney comes & moves the Court, to order that a Certiorari issue to the Clerk of the Circuit Court of Jefferson County, to send up to this Court a certified copy of the Recognizance of Appeal of the Respondents, in a case of Forcible detainer now on file in said Clerk's Office, and also, a Transcript of the Complaint filed before the Justice in said Forcible detainer suit, the summons, verdict, Judgment, and the Record dismissing said appeal

Abner Green
Attorney for Appellant,

State of Missouri
County of St. Louis

Abner Green, Attorney for Appellant in the above entitled cause, being duly sworn, deposes and says, that the Recognizance above described was on file in the Clerk's Office of the Circuit Court of Jefferson County, Missouri when the above case was tried, and that said Recognizance is essential on the trial of the above cause in this Court, and also

the Complaint filed before the Justice in a suit of Forcible detainer, between Appellant, and said John Daniels, and appealed to said Circuit Court, — the summons issued in said cause, the Judgment, verdict, and the Record of said Court dismissing the appeal. All of which papers were on file in the clerk's Office of said Court, when said ~~[illegible]~~ was tried on demurrer.

Sworn to & Subscribed before me this 19th day of October 1855.

Wm. S. Glanville, Clerk
Sup. Court.

Abner Green

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Abram Wilcox
D.
John Daniels & al.
Motion for Certiorari

Filed 19th October 1855.
Wm. S. Glanville
Ck

The State of Mississippi.

The State of Mississippi.

To the Honorable, the Circuit Court in and for the County of Jefferson in said State Greeting:

Whereas it has been represented to our Honorable Supreme Court of the State of Mississippi, that in the transcript of the record and proceedings in a certain cause lately pending in your Honorable Court, wherein Abraham Wilcox was plaintiff and John Daniels and William Strickland were defendants, and which said cause has been brought into our said Supreme Court by appeal; that there is in the said transcript diminution and omission in this, to wit: That said transcript
" does not contain a "copy of the recognizance of
" appeal of the said defendants, in a case of forcible
" ~~entry and~~ detainer, nor a transcript of the com-
" plaint filed before the justice in said cause of
" forcible detainer, the summons, verdict, judg-
" ment and the record dismissing said appeal."

And whereas our said Supreme Court is not satisfied that the said transcript filed herein contains a full, true and complete transcript of the Record and proceedings in said Cause, but that the same is diminished and imperfect, these are therefore to command you that you send up to our said Supreme Court, certified under your seal, a full, true and complete transcript of the Record and proceedings in said Cause, on or before the first day of the next term of our said Supreme Court, to be held at the Court House in the City of Saint Louis on the third Monday of ~~October~~ March next, to the end that our said Court may proceed to administer speedy justice in the premises as the law directs, and have you then there this Writ.

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In testimony whereof I hereunto set my hand and the Seal of said Court at Office in Saint Louis this third day of December A.D. 1855.

Wm. F. Glanville,
Ck.

In obedience to the command of the foregoing writ I herewith return duly certified copies of the papers in said writ mentioned. March 1st 1856 Thos C Fletcher
Clerk Cir Ct Jeff Co.

Abram Wilcox
vs
John Daniells

Jefferson.

We John Daniels as principal and William Strickland Security, acknowledge ourselves indebted to Abram Wilcox the complainant in the Sum of One hundred dollars upon this condition, that whereas, John Daniels has appealed from the Judgment of Wm Foxton a Justice of the peace in an action of forcible detainer, between Abram Wilcox complainant and John Daniels defendant; Now if the said John Daniels the defendant shall prosecute his appeal with effect and without delay neither commit or suffer to be committed any waste or damage on the premises whereof restitution is adjudged and pay all rents and profits, damage and costs, that may be adjudged against him and otherwise abide the Judgment of the Circuit Court, in said Cause, then this recognisance to be void

attest
Wm Foxton Just. of Peace } John Daniels (Seal)
W. M. Strickland (LS)

March 28th 1854. Approved.
Endorsed "Filed May 12th 1854. Tho C. Fletcher clk"

Abram Wilcox. plaintiff
against
John Daniels Defendant } In the Circuit Court
Jefferson County
On Appeal

Amended complaint. by leave of the Court.

Plaintiff States that on the 10th day of March 1853. he rented to John Daniels for one year expiring on the 10th day of March 1854. a cer-

-Tain House and Farm on Plattin Creek in Jeffer-
son County Missouri, containing about twenty acres
of cleared land. and being a part of Survey No. 1854
in Township 40 of Range No. Six East. confirmed
to Jesse Dowlin. containing in the whole tract 200.
acres. and being the same land bought by Plaintiff
of Samuel Skeel. And that Plaintiff notified in writ-
-ing said Daniels some two months before his Term
expired to quit the possession of said premises at the
expiration of his said term, that he could hold no
longer. Plaintiff, States that said Defendant John
Daniels, neglected and refused to quit the possession of
said premises on the 10th day of March 1854. but has
continued wrongfully, and unlawfully to hold the
same. And that said Defendant has wilfully and
without force held over said premises since the 10th
day of March 1854. and that said defendant contin-
-ues. forcibly and unlawfully to hold and detain from
the Plaintiff. the possession of said premises, contrary to
the Statute in such cases made and provided, and
to the damage of Plaintiff. in the sum of Forty dollars

Abram Wilcox

Abram Wilcox Plaintiff makes oath and says, he be-
-lieves the above complaint and the matters therein
as stated are true.

Sworn to and Subscribed before
me May 25th 1854
Tho. C Fletcher clk pr Ef Honey. dept.

A. Wilcox

Endorsed" Filed May 25th 1854 Tho C. Fletcher Clk"

State of Missouri } ss
County of Jefferson } To the Sheriff or Constable of the County of Jefferson. Greeting:

You are hereby command=ed to Summon John Daniels of the County of Jefferson to appear before the undersigned Justice of the peace with=in and for said County at my office in said County on the 25th day of March 1854 at the hour of ten O'Clock in the forenoon of said day, then and there to answer and defend against the complaint of Abrim Wilcox of forcible detainer, made by the said John Daniels upon the lands of the said Abrim Wilcox as by the complaint of the said Abrim, hereto annexed will more fully appear, and have you then and there this precpt with the return of your proceeding thereon. Given under the hand of the said Justice this 11th day of March 1854. Wm" Foxton. J. P.

Endorsed

"I executed the within Summons on the defendant John Daniels, on the 17th day of March 1854. in the Township of Platin in Jefferson County Mo. by leaving a true copy of said Summons and the within complaint at the usual place of abode of the said John Daniels, with a white member of his family above the age of fifteen years, and Ex plaining to her the contents there of. Given under

my hand this 25th of May 1854

Robert M Weaver. Constable

We the Jury find the defendant guilty in the manner and form as charged in the complaint

J. A. Brickey. foreman

It is therefore considered by me the said Justice that the said Abrim Wilcox. recover and have restitution of the premises, and also that he recover of the said John Daniels his cost in this suit taxed at $8.00

John Daniels. the above named defendant prays an appeal in this cause and files an affidavit and bond as required by law.

Wm Fenton. J. P.

In the Circuit Court May 26th 1854

Abraham Wilcox respondent }
John Daniels appellant } Appeal from Justices Court

Now at this day comes said appellant. and says he will not further prosecute his said appeal, but voluntarily suffers the same to be dismissed. It is therefore considered by the court. that said respondent. have and recover of said appellant. John Daniels. and William Strickland his Security in the appeal bond, his costs and charges in this behalf expended.

State of Missouri } ss.
County of Jefferson } I. the undersigned Clerk of the Circuit Court in and for said county do hereby certify that the foregoing is a true copy of the recognizance of appeal of defendants in case of forcible entry and detainer in a case in which Abraham Wilcox was plaintiff and John Danniells was defendant. a transcript of the complaint filed before the Justice in said cause the summons. verdict. judgment and the record disimping said appeal. as the same remain in my office.

In Testimony Whereof I hereto set my hand and affix the seal of said court at office March 1st 1856.

Thos B Fletcher
Clerk

(22)

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Abram Wilcox
vs
John Daniels (and)
Wm Strickland.

Hetcher ck $1.80
Return to Certiorari

Filed March 7, 1856
Wm S. Glanville
Ck.

CIRCUIT COURT SEAL

Abram Wilcox, - Appellant
vs.
John Daniels &
William Strickland Respondents

In the Supreme Court of Missouri
March Term 1836,

Statement of the case,

This is an action brought in the Circuit Court of Jefferson County, on the 6th of October 1834, on an Appeal Bond, previously given by the Respondents to Appellant on an appeal of a suit of Forcible & unlawful detainer brought before a Justice of the peace in which Appellant got judgment for the possession of the premises claimed. At the next Term of the Circuit Court after the appeal was taken, the defendant, John Daniels, voluntarily dismissed his appeal, before it came on for trial; so, that no Judgment was rendered thereon - the Judgment of the Justice remaining in force. This suit was then brought against the Respondents, on said appeal Bond, setting out the Bond & condition in the Petition & claiming one hundred dollars damages. The breaches of said Bond as assigned are, - 1st - That this Appellant (Plaintiff below) was damaged by reason of said appeal, by being kept out of the possession of the Farm claimed, until it was too late to plant a crop for that season, and was therefore deprived of the use of the farm one year, damages $100. - 2nd That the appeal was not prosecuted with effect, & without delay, & 3rd That Defendants - respondents here, did not pay the damages, rents, & profits accruing to Plaintiff, by reason of the

appeal. - To the Petition averring these facts, the Defendants demurred, alleging that Petition stated no cause of action; that the breaches showed no cause of action, and that the papers referred to in the petitions were not filed.

On the argument of the demurrer, the omissions of the papers referred to, was waived, as the original papers were on file, in the Clerk's Office, and the want of copies was deemed immaterial, they being in the same court.

The court sustained the demurrer, and gave judgment thereon, and the Appellant, after one unsuccessful motion for a new trial, brings the cause here by appeal.

Briefs.

A. Green, - Counsel for Appellant, insists;

1st. That the failure to prosecute the appeal with effect, and without delay, is a forfeiture of the Bond; and, the Bond being forfeited, the Respondents are liable for such damages as the Appellant sustained by reason of the appeal. - The direct effect of the appeal, was the deprivation of the Appellant of the use of the Farm for the year 1854. - What remedy then had he left upon the Bond? And will the Respondents say, as the Judge below said, - that the Appellant should have taken judgment against the Respondents, after they had

dismissed their appeal; - Appellants stand in the attitude of Plaintiffs; they can dismiss their appeal at any time, and when they do, they are out of Court, and of course, no Judgment can be rendered against them. - 2nd The Bond filed is such as the Statute required, - see Rev. Code, Art 2, Sec. 18, concerning forcible & unlawful detainer, If no action will lie for the breach of such appeal Bonds, the Statute requiring them is worse than impotent. The intention of the Statute was to afford a remedy for injuries sustained by reason of such useless appeals. - For these reasons, it is contended that the Court below erred in deciding that no action would lie upon the Bond,

2 - The breaches assigned are sufficient, - 1st That Respondents did not prosecute their appeal with effect, and without delay, - 2 That they did not pay the rents and profits accruing to Appellant by reason of their appeal, & 3rd did not pay the damages &c, - But Respondents say, that no damages were adjudged by the Court, - This is a poor subterfuge. Their dismissal of the appeal prevented the Judgment; and shall they be permitted thus to take advantage of their own wrong? The spirit and letter of the Statute, is, that they must prosecute their appeal with effect, and without delay; otherwise, pay such damages as their appeal occasioned to the other party,

The Court therefore erred in its construction of the law upon this point.

3 – There is nothing in the objection, that Copies of the papers referred to in the Petition were not filed in the cause. The originals were in the Clerk's Office on file, and so stated in the Petition. The Respondents then could have access to them – They were in the same Court ready to be used on the trial; and it is common to use papers thus on file in the same Court without being at the expense of Copying them. And the Court dispensed with bring them into Court on argument of the demurrer – and Respondents did not insist upon that point or Copies of such papers would have been furnished before the demurrer was decided. The Court gave no decision on this point but stated that the papers could be furnished on the trial.

For the above reasons the counsel for Appellant contends that the Judgment of the Court below, ought to be reversed.

Abner Greene Clks
Atty Counsel for Appellant

Abram Wilcox ops.

v.

John Daniels & al: rep.

Statement & Brief for Green, atty for appellant

Filed 18th March 1856
W. L. Glanville
Clk

Abram Wilcox
vs
John Daniels & wife
Strickland

In the Supr.
Supreme Court Murch Term 1856
Appeal from the Jefferson
Circuit Court.

The question raised by this record is, whether an ordinary action will lie upon an appeal bond taken in a justices court in a forcible detainer; or whether the appellee is not confined exclusively to the judgment which may be rendered on the appeal in the court to which it may be tried, so that if he fails to obtain an assessment of the damages he has sustained in that manner, he is remediless.

We are not aware of any principle, which excludes the plaintiff from an ordinary action on the appeal bond. It is true, he might have resisted, the dismissal of the appeal, & insisted on his right to have his damages assessed according to the condition of the appeal bond, in the court to which the appeal was taken: But we do not see, that his failure to do this, should entitle the defendant to the advantage, which he seeks to obtain by his defence to this action. The dismissal contemplated by the 30th & 31 sections of Art. 1 of the act concerning forcible entries & detainers is such as is had at the instance of the appellee & not not that which is voluntary.

The act of the defendant in voluntarily dismissing his own appeal, clearly contravened the condition of his bond, that he would prosecute his appeal with effect. We see no difference in principle between this case and that of Cockrill vs Owen 10 Mo Rep. 287. With the concurrence of the other judges the judgment will be reversed & the cause remanded

Wm Scott

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Wilcox
vs
Daniels

Opinion

Filed 7 June 1856
Wm L Glanville
clk

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