Aubuchon, John B vs Wynne, John 1855 St. Louis Co. 360/7

579/15

Scott-
a/c
no error
refusing
instructions

W owned mare $50
A unlawfully took possession of horse
W awarded possession & 1¢

State of Missouri,
County of St. Louis } ss.

Plea held before the Law Commissioner's Court of St. Louis County.

John Wynne, plaintiff.
against,
John B. Aubuchon, defendant.

Be it remembered, that on the twentieth day of January 1855. was filed in the office of the said Court, a certain petition, which said petition is in the words and figures, following, to wit: —

„John Wynne, Plaintiff.
„ vs
„John B. Aubuchon, Deft.

In the Law Commissioner's Court of St. Louis County.
April Term 1855. St. Louis County. Sct.

„ Plaintiff states that on the third day of January, eighteen hundred and fifty five, he was „and still is the owner and was legally possessed of a dark brown mare about fourteen hands „one inch high, one of the hind feet white, a small blaze in the face, a little creese fallen „and marks of a colar upon her shoulders, and of the value of fifty dollars; and being so „possessed as aforesaid, the defendant on the day and year last aforesaid, at the County „and circuit aforesaid unlawfully took the said property out of the possession of the „said plaintiff, and though often requested so to do refused to deliver the said mare to „the said plaintiff and still refuses to deliver her but wrongfully detains her from „plaintiff. Plaintiff further states that the said mare has not been taken for a tax: „assessment, or fine against the plaintiff pursuant to a statute, or seized under an „execution or attachment against the property of the plaintiff – that the said mare „is worth fifty dollars, and that the plaintiff is in danger of losing his said property „unless it be taken out of defendant's possession, or otherwise secured. Plaintiff therefore „asks judgment for the possession of his said property against the defendant, or „Judgment for the value thereof, and fifty dollars damages for the detention of the „same. Blackburn & McLean, attys. for plaintiff.

Petition

„John Wynne, plaintiff makes oath and says that he believes the above petition „and the matters therein as stated are true, that the plaintiff is the owner of the „property claimed and is lawfully entitled to the possession thereof, that the property „is wrongfully detained by the defendant, that the same has not been taken for a tax „assessment or fine against the plaintiff pursuant to a statute, or seized under an

Affidavit

" Execution or attachment against the property of the plaintiff - that the actual value
" of the said ~~house~~ mare is fifty dollars, and that the plaintiff is in danger of losing his
" said property unless it be taken out of the defendant's possession, or otherwise secured.
" Sworn to & subscribed before me this 20th day of January. John Wynne."
" A.D. 1855. John W. Cohrin, Law Com-"

And on the same day an order was made by the Law Commissioner for the delivery of the said property, in accordance with the Statute in that case made & provided, which said order is as follows:

" John Wynne, Plaintiff.
" against
" John B. Aubuchon, Defendant.
} In the Law Commissioner's Court of St. Louis County. In Vacation.

" January 20th 1855.

Order for the delivery of property claimed

" The plaintiff comes and files a petition and affidavit according to law, claiming the possession of certain personal property therein described; wherefore it is ordered by the Law Commissioner, that the defendant deliver the property specified in said petition to the Marshal of St. Louis County; and said Marshal is hereby required, if the said property be not delivered to him, to take it from defendant and deliver it to the plaintiff.
" A true copy of the Order. (Seal) John W. Cohrin, Law Commissioner."

Also, on the same day a writ of summons was issued against the said defendant, which writ, together with the Marshal's return thereon made, is in the words and figures following, to wit: —

Summons.

" The State of Missouri. To the Marshal of St. Louis County - Greeting: -
" We command you to summon John B. Aubuchon to appear before the Law Commissioner's Court of St. Louis County, on the first day of the next term thereof, to be held at the City of St. Louis, within and for the County of St. Louis, on the first Monday of April next, then & there to answer the complaint of John Wynne, as set forth in the annexed petition, and have you then and there this writ: —
" (Ls.). Witness, John W. Cohrin, the Law Commissioner of St. Louis County with the seal of said Court hereto affixed, at office in the City of St. Louis, this 20th day of January in the year of our Lord, one thousand eight hundred and fifty five.
" John W. Cohrin, Law Commissioner of St. Louis County."

Marshal's Return. „ Executed this writ by leaving a true copy of the same and petition at the usual place „ of abode of the within named defendant with a white person over the age of fifteen years „ a member of the within named deft's family and by taking the within described property „ and delivering the same to the within named plaintiff. Done in St. Louis County 20th „ January, 1855. Wm. H. Timberlake, Marshal, By Jas. W. Lintz, Dept."

„ Know all men by these presents, that we John Wynne as principal and William Long- „ -worth as security are held and firmly bound unto John B. Anbuchon, in the just and full „ sum of One hundred dollars, to the payment whereof, we bind ourselves, our heirs, executors, „ and administrators, jointly and severally, firmly by these presents, Sealed with our Seals, and „ dated at St. Louis, this 20th day of January, A.D. 1855.

Plaintiffs bond. „ The condition of the above obligation is such, whereas, the said John Wynne has com- „ -menced a suit in the Law Commissioner's Court of St. Louis County against John „ B. Anbuchon returnable to the April Term 1855, of said Court for the recovery of certain „ personal property described in the petition of said plaintiff as follows, to wit: one dark brown „ mare about 14 hands 1 inch high, one white hind foot, small blaze in the face „ slightly crease fallen, marks of colar on her shoulders, And an order has been made „ in said cause by the Law Commissioner of St. Louis County, requiring the said defend- „ -ant to deliver the said property above described, to the Marshal of the County of St. Louis „ and if the same be not delivered, that the said Marshal take the same from the said „ defendant And deliver it to the said plaintiff. Now if the said John Wynne „ plaintiff shall prosecute the said action, and shall return the said property to the „ said defendant if return thereof be adjudged, and shall pay to the said defendant „ such sum as may for any cause growing out of the order in the cause be recovered „ against the said plaintiff, then this obligation to be null and void, otherwise to „ remain in full force and virtue.

„ Signed in the presence of and approved by „ Wm. H. Timberlake County Marshal, By „ W.W.H. McCamant, Dept.

John Wynne, (Seal)
William Longworth (Seal)."

Afterwards, at the April Term 1855, of the said Law Commissioner's Court, the following proceedings were had in this cause to wit:

3. „ April 5th 1855.

" Answer filed."

Which said Answer is in the words and figures following, to wit:—

" John Wynne, Pff.
" " } Law Commissioner's Court, St. Louis County,
" John B. Aubuchon, Deft. } April Term 1855.

Answer. " Defendant by Garesche & Farish, his attorneys, denies that the property sued for was " plaintiff's and avers that it is his, defendant's property; defendant also denies that " he owes the plaintiff anything. Garesche & Farish. Attys. for defendant."

" John B. Aubuchon, defendant, makes oath & says that he believes the above answer and " the matters therein as stated are true. John his + mark B. Aubuchon.

" Sworn to and subscribed this 1st. of March 1855. before me, Jno W. Colvin, Law Comr."

" April 24th. 1855.

" Now at this day come the parties by their attorneys and thereupon come a jury, to wit: " John Martin, Daniel Harper, R. W. Gibson, John W. Frakes, John Young and Elijah " Grant, six good and lawful men, who are duly elected, tried & sworn well and truly

Judgment. " to try the issue joined between the parties, and after hearing the evidence said jurors " return into Court the following verdict, to wit: "We the jury do find ~~for the plaintiff~~ " that the property claimed by the plaintiff in his petition is the property of the plain- " -tiff, and we do assess the damages sustained by the plaintiff by reason of the de- " -tention thereof at the sum of one cent. Daniel Harper, foreman." Therefore it " is considered by the Court that said plaintiff recover of said defendant, the damages " aforesaid in form aforesaid by the jury assessed, also his costs and charges herein " expended and that Execution issue therefor."

" The defendant by his attorney moves the Court to set aside the verdict & Judgment " and to grant a new trial herein & files his reasons therefor."

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

" John Wynne, plaintiff
" " } In Law Commissioner's Court,
" John B. Aubuchon, defendant. } St. Louis County.

Mo. for new trial " Defendant by Garesche & Farish his attorneys moves the Court to set aside Judgment " in this cause & grant him a new trial for the following reasons.

„ Because the Court refused to give the instructions asked for by defendant.
„ Because the verdict is against evidence. Because it is against Law. Because the
„ verdict and judgment are otherwise illegal irregular & void.
„ Garesche & Marsh, Attys. for defendant."

„ April 28th 1855.

„ Now at this day comes defendant by his attorney, and the motion to set aside the
„ verdict & judgment and to grant a new trial herein comes on to be heard,
„ Whereupon the Court after hearing the argument of Counsel and not being sufficiently
„ advised thereof, takes time to advise."

„ May 2nd 1855.

„ Now at this day the Court being fully advised of and concerning the motion of defend-
Mn. for new trial „ant to set aside the verdict & judgment and to grant a new trial herein, doth consider
Overruled, „ that said motion be and the same is overruled."

„ May 5th 1855.

„ Bill of exceptions filed by defendant's attorney"

Said bill of exceptions is in the words and figures following to wit: —

„ John Wynne, Pff. }
„ vs } In the Law Commissioner's Court, St. Louis County.
„ John B. Aubuchon, Deft. } April Term, 1855.

„ Be it remembered that on the trial of this cause, the following proceedings were had.
„ Dewitt Hubbard, a witness for plaintiff testified, that he knew the mare in con-
„ troversy, she is in color between a brown and a bay, has a blaze in her face, no
Bill Exceptions. „ particular marks about her, in witness's judgment she is not less than twelve
„ years old. Witness also testified that he bought the said mare about the 1st of March
„ 1854. of William Longworth, and sold her to Mr. Wynne (plaintiff) about the
„ last of November 1854, after she was sold to Mr. Wynne, defendant took her
„ out of his possession by virtue of a writ issued by a magistrate.
„ William Longworth, second witness for plaintiff testified, That he knew the
„ mare in question, knew of no particular marks about her, but knew her by her
„ form, owned her for three years, bought her of Neiley Davis in November 1851, sold
5. „ her in the latter part of the winter of 1854 to Mr. Hubbard, and is the same

6 „ mare now in dispute, that was taken by Anbuchon (plaintiff) by writ
„ from Justice of the peace, think she was 12 or 14 years old.
„ **Elemuel Boyd**, third witness for plaintiff testified: that he knew mare in
„ controversy, knew her in the Spring of 1849. she was then possessed by a man by the
„ name of White, who was a trading man: saw her then first in one man's hands
Bill Exceptions „ then in Austin's up to the Spring or summer of 1851, have not seen her from
„ that day until this, when I went through stable & recognized her as same mare,
„ **Enock Rey**, fourth witness for plaintiff, testified: that he knew mare in con-
„ troversy, knew her in 1849, 50, 51, owned her one day in 1849, sold her to Napier
„ White had her a great part of the time in 1849. Traded for her back in 50, traded
„ her to White again in 185[illegible].
„ **Patrick Napier**, fifth witness for plaintiff, testified, that he knew the mare in
„ controversy in 1849. It is the same mare about which in February last, I went up
„ with Longworth to see defendant about. I bought her of White & sold her to Rey.
„ Plaintiff then closed his case, and defendant asked the following instruction,
Deft's instructions, If the jury believe from the evidence that the mare sued for was taken out of plain-
Refused. „ tiff's possession & placed in that of defendant by virtue of a writ issued by a Magis
„ trate, the magistrate ~~without~~ in the absence any proof will be presumed to have acted legally
„ and defendant's possession in consequence legal & plaintiff can~~not~~ only recover against
„ defendant because defendant's possession is illegal. This the Court refused
„ and the defendant then and there excepted.

The defendant then introduced
„ **Joseph Laramie**, who testified, that he had known the mare in contro-
„ versy seven years, she was a colt a week old when he first saw her. she
„ has a star in her face, crease fallen, has the marks of a cut in her right fore
„ leg, which was made by himself with a knife to open a tumour, I recognized
„ all these marks on her when I last saw her. Had her in my possession in
„ 1850. I think, worked her and turned her out because of a sore shoulder
„ was in the habit of feeding her nightly, until one day she strayed as I supposed
„ and have not seen her from that day until found by defendants in Wynne's
„ possession. In that year there were a great many horses stolen from Florissant
„ I lost her about same time. No difference between this mare & the one sued
„ for. I know her to be the same animal which I lost in 1850. when she was stolen

„ Francois Aubuchon, second witness for defendant testified that he knew
„ the mare in controversy well, have known her eight years this Spring, raised her
„ from a colt until three years old, when he gave her to his brother, the defendant, who
„ turned her over to Laramie to work, who turned her out, have not seen her from that
„ day until found in the possession of Wynne, I can always swear the mare in question
„ to be the same mare, because I know her by particular marks; the two fore feet
„ a little white, the right foot not as white as the other; the hind foot has a little
Bill Exceptions „ ring around it, all of which marks she has now and had when she was stolen
„ at which time there were many horses stolen.
„ Thereupon defendant closed his case, and plaintiff introducing no further evidence,
„ Defendant asked the Court to instruct the Jury as follows.
„ Possession of personal property is prima facie evidence of title & the Jury to
Deft's instruction „ find for the plaintiff must believe from the evidence that the mare in question
Refused. „ was unlawfully or without the authority of plaintiff taken from him by
„ defendant.
„ which the Court refused, refusing also to give any instructions whatever, to all
„ which, defendant excepted. The case went to the jury who gave verdict in favour
„ of plaintiff, whereupon, defendant moved the Court to set aside the verdict &
„ judgment in case & grant new trial (See pages 4.5.) the motion was overruled
„ and defendant then files this as his bill of exceptions and prays the Court
„ to sign & seal the same which is done.

John W. Colvin, Law Com. (Seal) "

Afterwards in vaction, to wit: on the 9th day of July 1855. comes the said defend-
Appeal granted, -ant by his attorney and applies to the Law Commissioner for an appeal from
the Judgment herein, to the Supreme Court, and files his bond with security
approved by the Law Commissioner, and an appeal is accordingly granted.
Said Bond is in the words and figures following, to wit: —
„ Know all men by these presents, that we John B. Aubuchon as principal
„ and Alexander J. P. Garesche as surety are held and firmly bound unto John
„ Wynne in the sum of One hundred dollars, for the payment of which, well &
Appeal Bond „ truly to be made, we bind ourselves, our heirs, executors and administrators, jointly
„ and severally, firmly by these presents, sealed with our seals, and dated at St. Louis
7. „ this 25th day of May, A. D. 1855. The condition of the above obligation is such that

8. „ whereas John B. Aubuchon has appealed from the Judgment rendered against
„ him and in favor of John Wynne, in the Law Commissioner's Court of St. Louis (8)
„ County, for the sum of One cent. together with costs.
„ Now if the said appellant will pay all costs and damages, that may be awarded
„ against him occasioned by such appeal, and shall prosecute his appeal and shall
Appeal Bond „ perform such judgment as shall be given by the Supreme Court, and such as the
„ Supreme Court may direct the Law Commissioner's Court of St. Louis County to give,
„ and if the judgment or any part thereof be affirmed, that he will comply with
„ and perform the same so far as it may be affirmed, and will pay all damages
„ and costs which may be awarded against him by the Supreme Court, then
„ this obligation to be void, otherwise to remain in full force and effect.

„ John B. his + mark Aubuchon, (Seal)

„ Alex. J. P. Garesche. (Seal) "

„ Law Commissioner's Court of St. Louis County. In Vacation July 9th 1855.
„ This day, to wit: May 25th 1855. appeared John B. Aubuchon, the principal
„ and on the 9th July, 1855. Alexander J. P. Garesche, the security in the foregoing
„ bond and acknowledged to have executed the same for the purposes therein expressed.
„ (Ls.) In witness whereof, I hereto set my hand and affix the seal of said Court,
„ at office in St. Louis the day and year last aforesaid.

„ John W. Cohin. Law Commissioner. "

State of Missouri. }
County of St. Louis. } Ss. I, John W. Cohin, the Law Commissioner of St. Louis County
do hereby certify, that the above and foregoing is a full, true & complete transcript
of the Record & proceedings in a certain action lately depending in the Law
Commissioner's Court of St. Louis County, between John B. Aubuchon, ~~plaintiff~~
defendant and John Wynne plaintiff as fully and wholly as the
same remains of record in my office.

In witness whereof, I have hereto subscribed my name
and affixed the seal of the Law Commissioner's Court at office
this 24th day of July. A. D. 1855.

John W. Cohin. Law Commissioner.

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William Longworth's " 5. 6.

Wesmuel Boyd's " 6.

Enoch Rey's " 6.

Patrick Napier's " 6.

Defts instruction refused. 6.

Joseph Laramie's " 6.

Francois Aubuchon " 7.

Defts. instruction refused. 7.

Appeal granted and Appeal bond. 7. 8.

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(15)

March. T. 1856

John Wynne, Respt.

vs

John B. Aubuchon, appt.

Transcript.
Law Commissioners Ct.

Blackburn
Goresche & Farish

Filed 20th Septr. 1855
Wm. S. Glanville
Clk.

Fee $4.15 paid by
Garesche & Farish, Attys.

(10)

John Wynne Respondent v. John B. Aubuchon Appellant	In Supreme Court of Missouri - Sitting at St. Louis October 1858 -

Assignment of Errors -

The Appellant assigns as error:
That the court refused proper instructions offered by Appellant -
That the court refused to give any instructions -
That the court refused to grant a new trial -

E. T. Farish
Atty for Appellant

Comes now the said John Wynne, respondent herein and says that there was no such errors as those assigned by the appellant

~~Blackburn~~ & McDonald
Attys for Respondent

89

John Wynne
Respondent
v.
John B. Kubachem
Appellant

Assignment of errors
by Appellant

Filed 29 October 1853
W. S. Glenn
Cl.

John Wynne Respondent
vs
John B Aubuchon, Appellant

In the Supreme Court of the State of Missouri at St Louis.

Appellant's Statement

This is an action commenced before the St Louis Law Commissioner by John Wynne against John B Aubuchon to recover a horse of the alleged value of fifty Dollars.

On the trial the plaintiff in substance proved a title in himself & those from whom he had purchased, tracing it as far back as 1849, when it was purchased of a trading man in St Louis, named White. That plaintiff had had it in his possession until January 1855, when it was taken out of his hands by a writ issued by a magistrate.

The substance of the testimony for the defence was that the defendant had owned the animal from its birth & has had it in his possession until about the year 1850, when it strayed or was stolen, since which time he had not seen it, until he found it in Plaintiff's possession.

The Court refused to give the instructions offered by defendant refused to give any instruction whatever. A verdict was rendered for the plaintiff. Defendant moved for a new trial and the motion being overruled, the cause is brought here by appeal.

The points relied upon by defendant, for the reversal of the judgment of the Court below are

First the refusal of the Court to give instructions

Second the refusal to grant a new trial.

The instructions asked for by defendant, were

If the Jury believe from the evidence that the mare sued for was taken out of plaintiff's possession and placed in that of defendant by virtue of a writ issued by a magistrate, the magistrate in the absence of any proof to the contrary will be presumed to have acted legally, and defendant's possession, in consequence, legal and Plaintiff can only recover because defendant's possession is illegal.

Possession of personal property is prima facie

evidence of title, and the Jury to find for plaintiff must believe from the evidence that the mare in question was unlawfully or without the authority of plaintiff taken from him by defendant.

3° The Court refused to give any instructions whatever either for plaintiff or defendant, though requested by defendant.

— " —

The instructions present this dilemma: either the ~~plaintiff's testimony~~ possession by defendant was lawful, because by virtue of the writ of a proper Court; or if there was no such writ, and the plaintiff's testimony in this regard untrue, then because defendant was in possession, his possession was prima facie title.

If so, then defendant was clearly entitled to recover & the Court erred in overruling his motion for a new trial, because there was no contradiction, between the testimony for the defence & that for the plaintiff. Admit that the testimony of witnesses might vary in their recollection of the date of such a transaction as the loss or finding of a ~~his~~ mare several years previously, and the proof may be summed up in these words: that plaintiff traced his title to the mare back to the year 1849 or 1850 when it was purchased of a trading man name: White in St Louis, and which date was coeval with that when it was stolen or it had strayed from defendant.

Garesché & Harish
Attys of Appellant —

(No 89)

John Wynne
Respondent
v.
John B. Aubuchon
Appellant

Appellant's Brief.

Filed 7th November 1855.
W. S. Glanville Ck.

(19)

Appellee's Statement.

If the mare in question had been taken from plaintiff by defendant "under a writ issued by a magistrate" the writ could have been issued only on or after the bringing of a suit before the magistrate to try the right of property. The only competent evidence of such proceedings would have been a transcript of the magistrate's docket; that being the best evidence and there being no proof that it could not be obtained.

The incompetency of evidence against a party is not removed by the fact that it comes from witnesses introduced by that party; nor is the Court bound to receive and act upon incompetent evidence merely because Counsel fail to except to it or to the questions which bring it out.

But if parol proof of the issuance of a writ &c were admissible – the evidence of that fact in this case was not sufficiently explicit to require the Court below to take notice of it. the name and authority of the magistrate and the name and nature of the writ are matters of inference merely. The writ is not alluded to in the answer or in defendant's evidence – nor is it in any way relied on as a defence.

For these reasons we think that there was no evidence before the court that the mare had been taken from plaintiff by defendant under authority of Law – and that

the first instruction asked for by defendant was irrelevant and properly refused.

The second instruction is evidently improper: the mare might have been lawfully taken and unlawfully detained. The plaintiff alleges an unlawful detention - and this proved would certainly entitle him to a recovery.

If the defendant asked instructions other than those on the record - and they were not given - he should have inserted them in his bill of exceptions. If he did not ask specific instructions he cannot except to a refusal generally: and his objection that the Court refused to give any instructions amounts to nothing.

The plaintiff traces his title to the mare back to the spring of 1849 by the direct and explicit testimony of men who knew her and had owned her. This evidence is utterly irreconcilable with defendant's claim and contradictory of his evidence. The jury gave their verdict on the weight of the testimony. Whether we regard the number of the witnesses - or the directness and clearness of their statements the case on the evidence is certainly with us.

We think therefore that the judgment below should be affirmed.

Nath'l McDonald & ~~Locke~~ for Appellee

Winn

Appellee's
vs Statement

Arbuchon

Filed 25 Febry 1856,
W. S. Glaminee
Ch

McDonald & Locke

John Byrne
vs
J. B. Aubuchon

Appeal from the Saw Commissioners Court.

There was no error in refusing the instruction asked by the defendant, as it assumed the identity of the mare claimed by the plaintiff with that alleged to belong to the defendant. Whether the mare claimed by the plaintiff, was the same mare alleged to belong to the defendant, was the very matter in dispute and the Court properly refused an instruction, which assumed such to be the fact.

Matters of record, cannot be proved by parol. If there was any legal process or proceedings by which the mare was taken from the plaintiff, & put into the possession of the defendant, a copy of such proceedings should have been produced. The declaration of a witness, that there were such proceedings, was no such evidence as would have warranted an instruction or supported a claim founded on them.

The other judges concurring judgment affirmed

W Scott

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Wynne
vs
Aubuchon

Opinion

Filed 7 June 1856.
Wm L Glaviece
Clk