The State of MO in the Use of Smith, Mosher Jr. V. Bennet, William et al. 1862 477/7

17

HS

Mosher (R) P

Henry Hart (R)

V

Bennett

John Dickey (A) (D)

Abraham Thompson

Hill & Blackwood (A)

Mosher - merchant - in St Louis - replenish goods for Spring Lot

St Louis Commonpleas - Sord

- Reduction of Sheriff & Marshall

March 1862

Bond - $4,000

March 1859

Napton -
Ewing concurred

Affirmed

State of Missouri }
County of St Louis } ss: Be it Remembered that heretofore to wit on the fifth day of September AD 1857. there was filed in the Office of the Clerk of the St Louis Court of Common Pleas within, and for the County aforesaid a Petition which is in the words, and figures following, to wit:

Petition

The State of Missouri to the use of Smith Mosher Junior Plaintiff vs William Bennett. John N. Dickey and Abraham M. D. Thompson Defendants	In the St Louis Court of Common Pleas October Term 1857 St Louis County. ss.

Smith Mosher Jr, plaintiff, states that on the sixteenth day of May AD 1854. he was and is now a merchant doing business at Spring Lake, in the County of Tazewell and State of Illinois, that on the day and year aforesaid, he said Smith Mosher Jr was at the City of St Louis, County of St Louis and State of Missouri, where he had been purchasing goods, with which to replenish his stock in trade at said Spring Lake, that he said Mosher was on the day and year aforesaid in possession of his said goods at said St Louis and the same were being shipped for him to said Spring Lake. That the said goods consisted of the following, to wit: 1 Barrel plantation molasses. 1 Bag choice Rio Coffee. 2 Bags prime Rio Coffee. 17 lb Wells Tobacco. ½ Box T. D. Clays Tobacco. 1 Barrel Smoking Tobacco. 6 Bags drop shot 10. M. D. G. Caps. 2 doz Brooms. 1 doz Brooms. 1 Box clothes pins. 1 Keg Carbonate of Soda. 3 lbs nutmegs. 1 Box of 18 lbs cans ground cassia. 3 lbs cloves. 1 Box family Soap. 1 Box Star Candles. 1 Box Sumento. 1 Box Pepper Sauce Pints. 1 Bundle bar Lead, 1 doz 90 feet Bed Cord. 2 Boxes Tumblers. 2 doz Salts. 2 doz Peppers. 4 Setts W. G. Teas. 4 setts printed. 12 setts common 6 dozen printed plates. 6 doz W. G. Plates. 6 doz. Edge Plates. ½ doz assorted Tea Pots. ½ doz, Assorted Sugars. ½ doz Assorted Creams ½ doz W. G. Dishes, 1 Doz printed dishes. 4 doz Dipt dishes One dozen yellow chambers. 1 Doz plain tea spoons. 1 sett 44 pieces china band tea sett. 1 Sett Tin measures. 1 large tin

2 funnell. 2 dozen pie plates. 2 doz handle and plain tin basins 12 large, dish Kettles. 2 dozen ½ Pint and pint dippers. 1 dozen Scuppers, 1 dozen 2 quart pans, 1 doz tin pots. ⅓ doz each of 3. 4 & 5 quart coffee boilers. 1 Small drainer. 1 doz Misses Calf S.S. Boots. ½ doz Mens Calf French B. long gaiters. ½ doz mens Oxford Ties buttoned. ½ doz mens Cloth and Patent Gaiters. 1 doz mens F. Calf Boots. 1 doz. mens Red Top Kip Boots. 1 do childrens Roans. ½ do womans Congress Gaiters. ½ doz womans fancy colored Gaiters. ½ doz. womans Seg^d Tarodi Boots sewed ½ doz. mens Panama hats. ½ dozen mens Grenada Hats. ½ dozen hats. ½ dozen Curacoa Hats. 1 doz. brown Leghorn hats ½ dozen men's dome leghorn. ½ doz Mens dome Leghorn. ⅓ doz mens Florence. 1 doz Boys palm leaf. 1 doz. ditto. ½ doz Mens Black Cassimere Hung^n Do. 1 Ream blue letter paper. 1 Ream ditto. ½ Ream Gilt Letter do. ½ Ream assorted note do. ⅕ thousand legal envelopes. ½ thousand Buff do. ½ thousand Buff do 1 doz pass books. 1 note book ⅙ doz M & U Arnolds Pint writing ink 1 Bankers Case. 2 Long Indexes. ½ thousand envelopes. 1 doz boxes wafers. 1 doz Faber Pencils. 2 doz. lubins do. 6 doz. accomodation holders 1 Gross No 300 Pens. 1 Gross Quill do. 1 Gross Albata do, 1 Shakespeare Cloth. 1 Webster quarto dictionary. 2 boxes Ink. 1 ps cassimere. 1 Do Do Union. 1 Piece do do. 1 ps Exton Mills Tick 1 Ps Waterloo Do. 1 Ps red Essex ditto. 1 Ps Blue Drill. 1 Ps denims 2 ps Holsen Muslin. 2 Ps. French Beaver Muslin. 2 Ps Harris do 1 Ps. damask. 1 Ps. crash. 1 Ps. ditto bleached. 2 Ps. corset Jeans. 1 ps Washington Stripe. 1 ps Logan do. 1 Ps. Magnolia ditto. 4 Ps Cottonade. 1 Ps. cheple check. 4 Pieces Cambric. 2 Ps Jeans 1 ditto. 1 Ps plaid Cassimere. 1 Ps blue cloth. 1 Ps Black do. 27 pieces Prints. 50 doz Persia Spools. 3 ps Ribbon. 3 dozen standing collars. 1½ doz sets shirt links. 3 Mantillas. 1 Ps nankeen. ⅓ Dozen Belts. ⅓ doz Blk do. 1 doz silk ties. 3 Muslin do. 1 Ps velvet. 2½ doz White shirts. 6 ps dress lawn. 3 pieces chocolate, ditto. 1 dress Corded do, 18 Pieces assorted lawns. 2 Ps Ginghams. 2 Doz. Palm leaf fans, 4 doz lacd. 1 Dozen belts. 1 doz hair bracelets. 1 doz cotton parasols 10 silk ditto. 1 dozen playing cards. 6 lb cotton assorted. 1 ps silk binding 1 ps silk cord. 5 ps bummings. 1 doz embroidered handkerchiefs. 2 doz. linen do. 3 ps serpentine braid, 1 Great gross hooks and eyes. 1 spool Twist. 4 doz puff combs. ½ doz dress combs. 3 doz combs. 3 lb Patent Thread. 6 Packages of Pins. 1 Doz Razors. 10 doz coats spool Thread 40 Ps Musquito Bars. 4 lb Pins. 2 doz Misses white hoze. 3 doz ladies

3

hoze. 2 doz ½ hose. 4 doz gloves. 1 doz spectacles. 2 gross buttons 2 gross Pearl Buttons, 1 Great Gross Agate do. ½ doz German Silver Spectacles. 2 doz Ivory combs. 2 doz horn ditto. 1 Bale batting 1 Bale sheeting. 3 pieces print.

That, on the day and year aforesaid the said defendant William Bennett and one Samuel Russell sued out of the Clerks Office of the St Louis Court of Common Pleas a certain writ of attachment against Pollard Anno. John C. Randolph and Aaron Pollard, which said writ of attachment is numbered 126 of the returns to the October Term 1857 of said Court, and was directed to the Sheriff of said St Louis County and delivered to James Castello then and now Sheriff of St Louis County duly elected, commissioned and qualified as such, that on the day and year aforesaid the said James Castello as such Sheriff by one Edward J. Castello, his deputy acting for and in the name of said James Castello at the request and under the direction and command of said Samuel Russell and William Bennett did wrongfully and illegally and unjustly pretend to execute said writ of attachment aforesaid by levying and seizing upon the personal property of plaintiff above set forth at large, and did under the pretence of executing said writ seize, take and carry away said property of Plaintiff.

That afterwards to wit: and on the nineteenth day of May 1857. plaintiff Smith Mosher Jr served a notice (a copy of which is herewith annexed) upon said James Castello Sheriff as aforesaid, under and in strict accordance with the provisions of the act of the General Assembly of the State of Missouri entitled "An act concerning the duties of Sheriff and Marshall in the County of St Louis, in relation to the levy and sale of such property, under execution or attachment, as may be claimed by third persons" approved March 3d 1855 setting forth his claim in writing verified by his affidavit describing the property claimed, his absolute interest in the whole thereof and that he is in good faith the lawful owner of the same and that the defendants in said attachment had no right or title, directly or indirectly in said property claimed by the plaintiff, and that his said claim was not made in collusion with said defendants in said attachment, cause for the purpose of vexing, hindering, and delaying the said plaintiffs Russell & Bennett in obtaining their just rights. That notwithstanding

4

said notice of said Smith Mosher Junior's claim as aforesaid to wit: on the 20th day of May AD 1857. the defendant William Bennett executed to plaintiff an indemnification Bond under the provision of said act above recited with the other defendants Dickey and Thompson as securities which said Bond is in the words & figures following to wit:

Know all Men by these Presents. That we William Bennett as principal and John N. Dickey and Abraham Thompson as sureties are held and firmly bound unto the State of Missouri in the sum of Four thousand dollars to the payment whereof, well and 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. this Twentieth day of May 1857.

The condition of the above obligation is such that whereas, a writ of attachment has issued from the Clerks Office, of the St Louis Court of Common Pleas being No 12h. returnable to the October Term 1857 of said Court in favor of Samuel Russell and William Bennett and against Pollard Anno. John C. Randolph, and Aaron Pollard directed to the Sheriff of St Louis County and has been delivered to James Castello as such Sheriff, to be executed by him, and the said Castello execute the said writ at the request of the said Plaintiff, by taking as the property of the said defendants the following described personal property to wit: 1 Barrel Plantation Molasses. 1 Bag choice Rio Coffee. 2 Bags Prime Rio Do 17 lbs Wells Tobacco. 1/2 Box F.D. Clays Tobacco. 1 Barrell Smoking Tobacco. 6 Bags drop shot. 10 M. D.G. Caps. 2 Doz Brooms 1 Doz Brooms. 1 Box clothes Pins, 1 Keg Carbonate of soda. 3 lb Nutmegs. 1 Box of 1/8 lbs cans ground Cassia. 3 lb cloves, 1 Box family soap. 1 Box Star candles. 1 Box Semento. 1 Box Peppersauce Pints, 1 Bundle Bar Lead. 1 Doz 90 ft bed cord. 2 Boxes Tumblers. 2 dz Salts. 2 dozen Peppers. 4 setts W. G. Teas. 4 Setts printed, 12 Silk common. 6 Doz printed Plates. 6 Doz w. G. plates. 6 Doz Edge Plates. 1/2 Doz assorted tea Pots. 1/2 dz assorted Sugars. 1/2 Doz. assorted creams. 1/2 Doz. W. G. Dishes. 1 Doz printed dishes. 4 Doz. dipt bowls. One dz yellow chambers. 1 Doz plain tea Spoons. 1 Sett 44 pc. china band tea sett. 1 Sett tin measures 1 large Tin funnell. 2 Doz pie plates handle and plain tin basins. 12 large dish Kettles. 2 doz 1/2 pint and pint dippers

5 1 Doz Scuppers, 1 Doz 2 quart Pans. 1 Doz. Tin Pots 1/3 doz each of 3, 4 & 5 quart coffee boilers. 1 Small drainer. 1 Doz misses Calfes. Boots. 1/2 doz Mens Calf French B. long gaiters. 1/2 doz mens Oxford ties. buttoned. 1/2 Doz. Mens cloth and patent Gaiters 1 Doz. mens F. Calf Boots. 1 Doz mens Red Top Kip Boots. 1/2 Doz mens Gilt top calf Boots. 1 Box children fancy Boots. 1 Doz childrens Loans. 1/2 Doz womans congress Gaiters. 1/2 doz womans fancy colored gaiters. 1/2 Doz womans Pegged Parodi Boots. 1/2 doz womans black Parodi Boots sewed. 1/2 Doz mens Panama Hats. 1/2 doz Mens Grenada Hats. 1/2 Doz. Haiti. 1/2 doz Curacoa Hats. 1 Doz brown Leghorn Hats. 1/2 Doz Mew leghorn. 1/2 Doz mens dome Leghorn. 1/3 Dozen mens Florance. 1 Doz boys Palm leaf, 1 Doz. Ditto. 1/2 Doz Mens black Cassimere Hungarian Do 1 Ream blue letter Paper. 1 Ream do. 1/2 Ream Gilt Letter do. 1/2 ream assorted Note do. 1/5 thousand legal envelopes. 1/2 thousand Buff do. 1/2 thousand Buff do. 1 doz Pass Books. 1 Note Book 1/6 Doz W & W. Arnolds Pint writing Ink. 1 Bankers Case 2 long Indexes. 1/2 thousand envelopes. 1 Doz boxes wafers. 1 Doz Faber pencils. 2 Doz Lubins do. 6 dozen accomodation Holders. 1 Gross No 300 Pens. 1 gross Quill Do. 1 Gross Albata Do. 1 Shakespeare cloth. 1 Webster quarto Dictionary. 2 Boxes Ink. 1 Pc cassimere 1 Do Do Union. 1 Piece do do. 1 Pc Exton Mills Tick. 1 Pc Waterloo ditto. 1 Pc Red Essex ditto. 1 Pc Blue Drill. 1 pc Dennis. 2 pc Holden Muslin. 2 Pc French Beaver Muslin. 2 Pc Norris ditto 1 Pc Damask. 1 Pc crash. 1 Pc ditto bleached. 2 pc corset Jeans 1. Pc Washington stripe. 1 Pc Logan Ditto. 1 Pc magnolia ditto 4 Pc Cottonade. 1 Pc cheple check. 4 pieces cambric. 2 pieces Jeans. 1 ditto. 1 Pc plaid cassimere. 1 Pc Blue Cloth. 1 pc Blk ditto. 27 pc Prints. 50 dozen Persian Spools. 3 pc. Ribbon. 3 doz Standing. 1/2 Doz sets Shirt links. 3 Mantillas. 1 Pc nankeen. 1/3 doz Belts. 1/3 doz Black Ditto. 1 Doz silk ties. 3 doz Muslin Ditto. 1 pc velvet. 2 1/2 dozen white Shirts. 6 pc Dress lawn. 3 Pieces chocolate ditto. 1 Dress corded ditto. 15 Pieces assorted lawn. 2 pc Ginghams. 2 Doz. Palm leaf fans. 4 doz. lace. 1 Doz belts. 1 Doz. hair bracelets. 1 Doz cotton Parasols. 10 Silk ditto. 1 Doz. playing cards. 6 lbs assorted Cotton. 1 Pc silk binding. pc silk Cord. 5 pc trimmings. 1 Doz embroidered Handkerchiefs. 2 Dozen linen ditto. 3 pieces serpentine braid. 1 Great gross hooks and eyes. 1 Spool twist. 4 doz puff combs. 1/2 Doz Dress combs 3 dozen Combs. 8 lbs Patent Thread. 6 Packages of Pins. 1 Dz Magno

10 dozen coats Spool Thread. 40 ps Musquito Bars. 4 pps pins 2 doz misses white hose. 3 dozen ladies hose. 2 doz ½ hose. 4 doz Gloves. 1 Doz Spectacles. 2 gross buttons. 2 gross Pearl buttons. 1 great gross Agate Ditto. ½ Doz German Silver Spectacles. 2 Doz Ivory Combs, 2 Doz Horn Ditto. 1 Bale Batting. 1 Bale Sheeting 2 Pieces print: of the the value of thirteen hundred and fifty two $\frac{13}{100}$ Dollars, and S. Mosher Jr. has claimed said property according to the third section of the act of the General assembly of the State of Missouri entitled "An act, concerning the duties of "Sheriff and Marshall in the County of St Louis in relation to "the levy, and sale of such property under execution or attachment "as may be claimed by third persons" Approved March 3d 1855 and in the manner therein mentioned. Now if the aforesaid plaintiffs will pay to the aforesaid claimant all damages that the said claimant may sustain in consequence of such levy and in consequence of any sale which may be made under or in virtue of such, then this obligation shall be null and void otherwise it shall remain in full force and virtue

Approved of by me this day and year aforesaid
(Signed) James Castello
Sheriff of the County of St Louis

W. Bennett (Seal)
John A. Dickey (Seal)
A. B. M. Thompson (Seal)

And the said Russell & Bennett, to wit on the day of A.D. 1857 did require and demand of the said James Castello as such Sheriff to proceed to sell and dispose of said property of plaintiff before set forth to satisfy said writ of attachment before recited for the use of said Russell & Bennett whereby the same was entirely lost to him the said Smith Mosher Junior that the said goods so taken, seized, carried away, sold and disposed of by said Sheriff under said writ of attachment, and at the request and for the use of said Russell & Bennett, were the lawful property of plaintiff absolutely, that the defendants in said attachment had no right or title directly or indirectly in said property, but that the same were the absolute property of plaintiff and none others, and that at the time of said levy and sale thereof were worth to him, said Smith Mosher Junior at said Spring Lake the sum of twenty five hundred dollars. That said Smith Mosher Jr. plaintiff having laid out a large sum of money in fact mostly all his surplus cash in the purchase of a large part of said goods so levied upon and sold as aforesaid, he was

7 consequently unable to purchase any more, wherewith to replenish his said Stock of Goods, that the goods so purchased by him said Mosher plaintiff, and taken and carried away by said James Castello as aforesaid, were staple goods and altogether necessary, and most wanting to him plaintiff in his said store at said Spring Lake for the purpose of successfully carrying on his said business, but for the reason that plaintiff could not furnish his said Customers with said staple articles he has lost a large amount, of profits, which he would otherwise have derived from the sale thereof, and that his, said Smith Mosher's credit at said St Louis and at said Spring Lake which up to the time of said seizure was good became so much impaired that he can find no one now to credit him with goods. Wherefore Plaintiff says. That by means of said levy, seizure and sale of his said goods as aforesaid he has lost in profits and credit by reason of the same twenty five hundred, dollars, which he claims as damages occasioned by the said levy, seizure and sale as aforesaid by said Castello.

The said Smith Mosher Junior plaintiff further charges that the said Russell and Bennett have failed to pay to plaintiff the value of said goods and damages that he has sustained in consequence of said levy and sale made under and by virtue of said writ of attachment and which he charges as a breach of the condition of said Bond and therefore says that defendants, are liable to him upon the same, and that by reason and means of said premises he has been, damaged in the sum of Four thousand dollars for which he asks judgment.

Henry K. Hart
for Plff.

County of St Louis }
State of Missouri } ss Smith Mosher plaintiff makes oath and says he believes the above petition and the matters as therein stated are true. S. Mosher Jr

Sworn to and subscribed before me this 12th day of June AD 1857. John B. Evans Notary Public (Seal)

And thereupon the following Summons issued

Summons

County of St Louis ss. The State of Missouri. To the Sheriff of St Louis County ~ Greeting. We command you to summon William Bennett, John H. Dickey and Abraham M. Q. Thompson to appear before the Judge of our Court of Common

Pleas: on the first day of the next term thereof to be held in the City of St Louis, within, and for the County of St Louis on the Second Monday of October next, then and there to answer the complaint of The State of Missouri to the use of Smith Mosher Junior as set forth in the annexed Petition and have you then, and there this writ.

Witness, Charles H. Nicks Clerk of our said Court, with the seal thereof hereto affixed at office in the City of St Louis, this 5th day of September in the year of our Lord eighteen hundred and fifty seven

LS

C H Nicks Clerk

I, acknowledge myself bound for all costs that may accrue in the case, of State of Missouri use of S. Mosher against William Bennett &c. Witness my hand and seal, at St Louis, this 4th day of Septr 1857

Thomas Ratcliffe (Seal)

To the foregoing Summons the Sheriff made the following return, to wit,

Sheriffs Return

Executed this writ in St Louis County on the fifth, day of September 1857 by delivering a copy of the writ and Petition as furnished by the Clerk to William Bennett, also by delivering a copy of the writ to Abraham A.B. Thompson, on the Seventh, day of September 1857. by delivering a copy of the writ to John H. Dickey.

James Castello Sheriff
by Geo H. Stevens Deputy

On the sixteenth, day of October 1857 the following Motion was filed, to wit:

Motion to strike out part of plffs Petition

And now comes said defendants, and move the Court to strike out the following parts or clauses of Plaintiffs Petition, for the reason, that the same are in all particulars, altogether irrelevant and redundant; to wit: "That (said goods) were worth to him, said Smith Mosher Junior, at said Spring Lake, the sum of twenty five hundred dollars That said Smith Mosher, Junior plaintiff, having laid out a large sum of money, in fact mostly all his surplus cash in the purchase of a large part of said goods so levied upon and sold as aforesaid, he was consequently unable to purchase, any more wherewith to replenish his said stock of goods, that the goods so purchased by him, said Mosher, plaintiff, and taken and

carried away by said James Castello, as aforesaid were staple goods, and altogether necessary and most wanting to him, plaintiff in his said store at said Spring Lake for the purpose of successfully carrying on his said business; but for the reason that plaintiff could not furnish his said customers with said staple articles, he has lost a large amount of profits which he would otherwise have derived from the sale thereof and that his, said Smith Mosher's credit at said St Louis, and at said Spring Lake, which up to the time of said seizure was good became so much impaired, that he can find no one to credit him with goods, wherefore plaintiff says that by means of said levy, seizure and sale of said goods as aforesaid, he has lost in profits and credit by reason of the same, Twenty five hundred, dollars, which he claims as damages, by the said levy seizure and sale as aforesaid, by said Castello. The parts or clauses of said petition, moved to be stricken out, begun on the eighth and end on the 9th Page thereof.

Cline & Jamison vs Blackwood et al.

And at the October Term 1857. the following further proceedings were had: to wit:

Saturday November 28. 1857

Mo. to strike out parts of Petition sustained

The defendants motion to strike out certain portions of the plaintiffs Petition herein being heard and fully understood by the Court, the Court, doth consider that said motion be sustained.

And on the fifteenth day of December A.D. 1857 the following Answer was filed, to wit,

Answer

And now comes said defendants and for answer to the petition of plaintiff, state, that they deny that. under pretence of executing a certain writ of attachment in favor of Samuel Russell and William Bennett - one of said defendants against Sollard Arno, John C. Randolph and Aaron Sollard issued from the Clerks Office of the St Louis Court of Common Pleas, being No 126. returnable to the October Term 1857 of said Court, and directed to the Sheriff of St Louis County, they wrongfully, or illegally, or unjustly, as averred in said Petition did seize, take or carry away, as belonging to plaintiff, the property therein described, and to which he pretends ownership, they deny ever having at any time heretofore, and in any manner whatsoever either themselves, or by their agents, seized taken or carried, away any property of plaintiff of whatever kind or descrip-

tion, as by him alleged and claimed in said petition; they deny that either in their own persons, or through their authorized agents, they have ever had possession of or now hold in possession any property to which plaintiff is lawfully entitled to; they deny that the property described in said petition is, or ever was the property of plaintiff, and they deny in plaintiff any lawful right, title interest, claim or demand, in and to such property, or any part or portion thereof.

Defendants further state, that the property described in said petition, and attached as aforesaid, was as they had good reason to believe, and do now believe, the property of said Sollard Anno. John Q. Randolph and Aaron Sollard who were largely indebted to said defendants, that said Smith Mosher Jr, was in fact but the agent of said parties in the purchase of the property so attached, and had no right of ownership therein, and that he merely represented them as their agent in their business, at said Spring Lake, they having fraudulently transferred said business to him, and disposed of the property and effects constituting and appertaining to the same, with the view to hinder and delay their creditors

William Bennett. John A. Dickey & Abraham H. B. Thompson, by their attorneys Cline & Jamison & Wm G. Blackwood

William Bennett one of the above named defendants, makes oath and says, that he believes the foregoing answer, and the matters therein as stated, are true W. Bennett

Sworn to and subscribed before me at office in this 15th day of December A.D. 1857. Wm G. Blackwood Notary Public (Ls)

And at the October Term 1858. the following further proceedings were had, to wit,

Tuesday November 9. 1858

Motions for continuance overruled

The defendants file an affidavit herein and move for a continuance of this cause to the next term, which motion is here overruled by the Court.

Monday November 8. 1858

The defendants move for a continuance of this cause to the next term, for reasons set forth in an affidavit this day filed in case No 276 October Term 1857 (which affidavit is by agreement of parties to be considered as filed in this cause also) which motion is by the Court here overruled.

Wednesday November 10, 1858

Jury Trial & verdict for plaintiff

Now, at this day come the parties by their respective attorneys and the defendants thereupon move the Court for leave to file an additional answer, which is by the Court refused, and a jury is thereupon called to wit H. I. Eaton, R. C. Shackelford, Jas Harkness. Joseph Sourcelle John Sutter. Elliott Salton, Wm Palmer, J. F. Wittleberg. Michael Rice. Louis Hessler. Samuel N. Hale, and Adam Kauble twelve good and lawful men who being duly elected, tried and sworn the issues herein joined well and truly to try the trial progressed and being finished the jurors aforesaid upon their oaths aforesaid, say they find for the plaintiff, and assess its damages, at the sum of One thousand four hundred and seventy two dollars and seventy cents, therefore it is considered by the Court that the plaintiff recover of the, defendant the damages aforesaid as assessed, and also its costs herein expended, and have execution therefor.

Tuesday January 4. 1859

No. for New Trial overruled

The Court having duly considered the defendants motion for a new trial doth overrule the same.

On the fifteenth, day of January A.D. 1859 the following Bill of Exceptions was filed, to wit.

Bill of Exceptions

Be it Remembered that on the eighth day of November A.D. 1858. in said term of said Court this cause was called for trial, and the defendants not being ready for trial on account of the absence of George W. Baker a witness for them in the defence of this cause applied to said court for a continuance, and in support of said application filed in said Court and read to the Judge thereof by stipulation and agreement with the Counsel for the plaintiff an affidavit made and filed by Wm Bennett defendant in a cause then pending in said Court wherein Smith Maher Jr was plaintiff and Samuel Russell. Wm Bennett and James Castello were defendants, which affidavit and stipulation is as follows

Affidavit & Stipulation

County of St Louis ss: William Bennett one of the defendants in the above cause being duly sworn on his oath says in support of his motion for a continuance of this cause that George W. Baker who is by occupation a Book Keeper is an absent witness, whose testimony is wanted by the defendants on the trial of this cause That he is a resident of the City of St Louis in the County of St Louis State of Missouri. That his testimony is material in this cause for the defendants. That no other witness is in attendance

or known to affiant whose testimony could have been procured in time, upon which the defendants can safely rely to prove the particular facts that the absent witness is expected to prove And affiant believes he cannot safely go to trial without the testimony of the absent witness, that he is not absent, by the consent connivance or procurement of these defendants. and affiant states that on the fifth day of November 1858. he caused a subpoena to be issued from this Court for the said witness returnable on this day, which was duly placed in the hands of the Sheriff of this County. That he is informed by the Sheriff that he caused a Deputy to go to his place of residence in this City for the purpose of serving said subpoena, but that he was unable to do so for the reason that said witness was sick and confined to his room. And affiant says that he is informed and believes the fact to be that said witness has been in a very low and dangerous condition from sickness arising from a Typhoid Fever for about three weeks past, and so ill that defendants were not permitted to converse with him on business. and preventing the possibility of taking his testimony by means of a deposition

And affiant expects to prove by the said absent witness that the said Smith Mosher Jr, plaintiff was only acting as the agent and clerk of the said firm of Pollard Amno & in the purchase of the goods attached by defendants and sued for in this action and the said goods sued for in this action were in fact the property and effects of Pollard Amno & Co, and not the property or effects of the plaintiff and further facts from conversations of the plaintiff and Aaron Pollard of the firm of Pollard, Amno & Co sufficient to successfully to defend this action And affiant says that he has paid the costs of the last continuance of this cause, and the defendants ask the Court for a continuance of said cause for the reason aforesaid

And affiant says that this application is not made for the purpose of delay, but that justice may be done and the facts of the case brought fully before the Court and he believes that if a continuance is granted defendants, they will be able to procure their testimony in time for a trial at the next term of this Court

W. Bennett

Sworn to and subscribed before me the undersigned a Notary Public within, and for said County, as witness my hand and notarial seal at Office in said County this eighth day of Nov-

13 A.D. 1858 Wm. G. Blackwood Notary Public (L.S.)

It is agreed that the within affidavit shall be considered as filed in the case of The State of Missouri to the use of Smith Mosher Jr against William Bennett and that the same motion for a continuance and exceptions upon the same grounds is made in that case. Henry H. Hart

St Louis Nov 8. 1858 for Plaintiff

And the defendants then insisted upon said application being granted and the Court thereupon overruled the same and refused the continuance asked for, to all of which action of the Court the defendants then and there duly excepted and objected. And the said Court after transacting some further business then pending adjourned until the next day the ninth day of November when the said cause was again called for trial and the defendants not being ready for trial on account of the absence of the said witness George W. Baker, again applied to said Court for a continuance of this cause and in support of said application filed in said court, and read the following affidavit of William Bennett one of the defendants.

Affidavit for continuance

William Bennett one of the defendants in the above case being duly sworn, says, in support of his motion for a continuance of this case that George W. Baker who is by occupation a Book Keeper, is an absent witness whose testimony is wanted by defendants on the trial of this cause, that he is a resident of the City of St Louis. County of St Louis. State of Missouri; that his testimony is material in the cause for the defendants; that no other witness is in attendance, or known to affiant, whose testimony could have been procured in time, upon which the defendants can safely rely to prove the particular facts that the absent witness is expected to prove; and affiant believes that he cannot safely go to trial without the testimony of the absent witness, that he is not absent by the consent, connivance or procurement of these defendants. And defendant states, that on the fifth day of November 1858, he caused a subpoena to be issued from this Court for the said witness returnable on this day, which was duly placed in the hands of the Sheriff of this County that he is informed by the Sheriff that he caused a Deputy to go to his place of residence in this City for the purpose of serving said subpoena, but that he was unable to do so, for the reason that said witness was sick and confined to his room. And affiant

14 says that he is informed and believes the fact to be that said witness has been in a very low and dangerous condition from sickness arising from a Typhoid Fever for about three weeks past and so ill that defendants were not permitted to converse with him on business, and preventing the possibility of taking his testimony by means of a deposition.

And affiant expects to prove by the said absent witness and affiant knows personally that he will prove the following facts from having conversed with the said witness to wit: That the said Smith Mosher Jr. plaintiff was only acting as the agent, and clerk of the said firm of Sollard, Anno & Co in the purchase of the goods, attached by defendants and sued for in this action, and that the said goods sued for in this action were in fact the property and effects of Sollard, Anno & Co and not the property or effects of the plaintiff, and further facts, from conversation of the Plaintiff and Aaron Sollard of the firm of Sollard, Anno & Co, sufficient to successfully defend this action. And affiant says that he has paid the costs of the last continuance of this cause, and defendants ask the Court for a continuance of said Cause for the reasons aforesaid. And affiant says that this application is not made for the purpose of delay, but that justice may be done and the facts of the case brought fully before the Court, and he believes that if a continuance is granted defendants they will be able to procure their testimony in time for a trial at the next term of this Court. A. Bennett

Sworn to and subscribed before me the undersigned this 9th day of November A.D. 1858. C. W. Nicks Clerk

And then insisted upon said application being granted and the Court thereupon overruled the application and refused the continuance asked for by the defendants to all of which action of the Court the defendants then and there duly excepted and objected, and thereupon the Court proceeded to empanell a jury and to try, hear and determine the said cause and a verdict was rendered for the plaintiffs and against the defendants, and afterwards, to wit, at the said term on the 13th day of November 1858. the defendants filed their motion to set aside the verdict in this cause and grant a new trial which motion is as follows.

Motion And now come said defendants and move the

for 15
New Trial

Court for a new trial in this cause, for the following reasons

1 The Court refused to grant defendants a continuance of this cause, on an affidavit filed by them as the ground of an application, and conformably to the law and the rules of practice in this Court.

2 Because by the overruling by the Court of defendants motion for a continuance, defendants were compelled to go to a trial of this cause without their proper testimony.

3 The Court admitted as evidence for the plaintiff, illegal testimony, that was at the time objected to by defendants.

4. The verdict of the Jury in this cause is against evidence, and without evidence.

5. The said verdict is against law.

6. The said verdict is against both law & evidence and the weight of evidence.

7 The Court refused to give to the Jury legal instructions, prayed by defendants, and gave improper & illegal instructions asked for by plaintiff

Nill & Blackwood P.Q.

which motion after being duly considered was overruled by the Court and the defendants then and there excepted and objected to all of the said actions of the Court in the premises aforesaid all of which is made a part of the record as witness my hand and seal this day of January 1859 at St Louis Mo

Sam Leber
Judge of said Court

On the fifteenth day of January 1859 the following Affidavit and Bond for Appeal were filed:

Affidavit for Appeal

A.B.M. Thompson one of the defendants moves for an appeal to the Supreme Court on the part of the defendants and makes oath that said appeal is not made for vexation or delay, but because he believes that the appellants are aggrieved by the judgment or decision of this court in this cause

Sworn to before me this 15th day of January A.D. 1859 C.W. Nickelett

A.B.M. Thompson

Bond for Appeal

Know all Men by these presents, That we Abraham M. B. Thompson as Principal, and Ferdinand Meyer and Samuel H. Bailey as securities, are indebted to the State of Missouri to the use of Smith Mosher Jr in the sum of Twenty

nine hundred and forty six Dollars, for 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 fifteenth, day of January one thousand eight hundred and fifty nine. The condition of this obligation is such that whereas, William Bennett, Abraham M. B. Thompson and John N. Dickey have appealed from the Judgment rendered against them, and in favor of Smith Mosher Jr in the St Louis Court of Common Pleas for the sum of fourteen hundred and seventy two dollars, and seventy cents together with costs. Now if the said, appellants shall prosecute their appeal with due diligence 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 St Louis Court of Common Pleas to give, and if the Judgment of such Court, or any part thereof be affirmed, that they 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 them by the Supreme Court then this obligation to be void otherwise to remain in full force

A. B. M. Thompson (Seal)
Ferdinand Meyer (Seal)
Saml H. Bailey (Seal)

Approved. Attest
C. W. Nicks Clk

And, at the October Term 1858. the following further proceedings were had. Saturday January 15th 1859

Appeal Allowed

The defendants come by their attorney and file a Bill of Exceptions and an affidavit for an appeal, and an appeal is thereupon allowed them to the Supreme Court from the Judgment herein and they thereupon file an appeal bond with Abraham M. B. Thompson as principal and Ferdinand Meyer and Samuel H. Bailey as sureties which bond is approved by the Court.

State of Missouri }
County of St Louis } ss. I, Charles W. Nicks Clerk of the St Louis Court of Common Pleas within and for the County aforesaid, certify the above & foregoing to be a full, true and complete transcript of the record and proceedings in the above entitled cause as fully as the same remain in my Office

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court at Office in the City of St Louis this 11th day of February A.D. 1859

C. W. Nicks Clerk

Index

Petition	page	1
Summons	"	7
Sheriffs Return	"	8
Motion to strike out parts of Plaintiffs Petition	"	8
" " " " " " " " Sustained	"	9
Answer	"	9
Motions for continuance overruled	"	10
Jury Trial and verdict for Plff	"	11
Motion for New Trial overruled	"	11
Bill of Exceptions	"	11
Affidavit and stipulation	"	11
Affidavit for continuance	"	13
Motion for New Trial	"	14
Affidavit and Bond for Appeal	"	15
Appeal allowed	"	16
Clerks certificate	"	16

The State of Missouri to the
use of Smith Mosher Junior
Respondent

Transcript

William Bennett John N.
Dickey & Abraham M. B. Thompson
Appellants

Appeal from St Louis
Court of Common Pleas

E.M.

Filed March 5th 1859.
Wm S Glanville,
Clerk

Henry N. Hart Esq
Atty for Respondent
Nill & Blackwood Esqrs
Attys for Appellant

(Exd) 9 107
Bennett

12 March 21. Agreement to Opinion filed and
Judgment affirmed D.P.G.

The State of Missouri to use of Smith Mosher Jr Pltff Respdts
vs
Wm Bennett, John H. Dickey & A. M. Thompson Defts. Appellts.

In the Supreme Court March term 1859.

The defendants appellants come and assign as errors in this cause the following.

1st The Court below erred in refusing to allow ~~an~~ a continuance upon the affidavit filed & agreed by stipulation to be used as an affidavit in this cause.

2nd The Court below erred in refusing to allow a continuance upon the affidavit filed as an amendment to the first affidavit agreed to be used in this cause & erred in refusing to allow said second affidavit for a continuance to be filed.

3d The Court below erred in refusing to grant the Defendants the motion for a new trial in this cause.

4th The judgment should have been for the ~~plain~~ Defendants instead of the plaintiff Wherefore defendants appellants pray that the judgment be reversed & the cause remanded

D. W. Hill
W. G. Blackwood
Attys for Defts
Appltg

No. ~~[illegible]~~ 9
March term 1859

Supreme Court

State to use of
Moshee pltff
v Respdts

Wm Bennett et al
Defts applts

D. W. Hill
W G Blackwood
attys for Defts
applts

Filed 22 March 1859
W L Glanville
Ck

State to use of
Smith Masher Jr
Respt
by
William Bennett
& others
appts

Supreme Court
of
Missouri
March T. 1859

The respondent now comes & says that there are no errors in the acts, proceedings & judgment of the Court below.

H. L. Hart
for respt.

The State of Missouri
to use of Smith Mosher Jr
resp^t

William Bennett &
others appts.

Joinder in Error

Filed 27 July 1859.
Wm S Glanville Ck.

H L Hart
for resp^t

The State of Missouri to the use of Smith Mosher, Jun'r Respondent vs William Bennett, John N. Dickey, & Andrew M. D. Thompson Appellants.	In the Supreme Court of the State of Missouri. October Term A.D. 1860. Statement of Case by Appellants.

This is an action upon a penal bond taken by the Sheriff of St Louis County, under the act concerning the duties of Sheriff & other officers in St Louis County approved March 3rd 1855.

William Bennett, one of the Appellants, and Samuel Russell sued out of the St Louis Court of Common Pleas a writ of attachment against Pollard Anno, John C. Randolph & Aaron Pollard, returnable to the October Term 1857 of said Court.

The Sheriff, under this writ, by direction of said Bennett and Russell, levied upon certain personal property, claimed by the relator Smith Mosher, and sold the property to satisfy the said writ.

The Relator, Smith Mosher, served the sheriff with the requisite notice, and he took the bond of the Appellants, upon which this action is brought.

On Monday November 8th 1858, the cause was called for trial, when the Appellants, defendants below moved for a continuance, on the ground of the absence of a material witness and to support the motion filed the affidavit of said William Bennett.

The affidavit sets forth.—

That the absent witness was named George W. Baker, a resident of St Louis, a bookkeeper by occupation.

That on the 5th day of November 1858 affiant caused a subpoena for said Baker to be placed in the hands of the Sheriff.

That the Sheriff, by deputy, went to the residence of said Baker to serve the said subpoena, but could not serve the same in consequence of the extreme illness of the said Baker, who had been sick with typhoid fever for some weeks.

That the testimony of said Baker was material.

That no other witness was in attendance, or known to the affiant, whose testimony could have been procured in time, upon which the defendants could safely rely to prove the particular facts that the said Baker was expected to prove.

That the affiant believed he could not safely go to trial without the testimony of the said Baker.

That the said Baker was not absent by the consent connivance or procurement of the defendants.

That the affiant was informed and believed the fact to be that the said Baker had been in a very low & dangerous condition from typhoid fever, for three weeks past, & so ill that defendants were not permitted to converse with him on business.

That the sickness of the said Baker prevented the defendants from taking his testimony on deposition.

That the defendants expected to prove by the said Baker, that the Relator, Smith Mosher, was acting as the agent & clerk of the said Pollards & Ames, in the purchase of the goods attached, and that the goods

were in fact the property of the said Pollard Arno & Co. and not the property of said Mosher. And further facts from conversations of the said Mosher & said Aaron Pollard, of the said firm of Pollard Arno & Co. sufficient to successfully to defeat the action.

That affiant had paid the costs of previous continuance.

That the application was not made for the purpose of delay, but that justice might be done.

That affiant believed that if a continuance were granted the defendants they would be able to procure their testimony in time for trial at next term of the Court.

The Court overruled the motion for continuance on this affidavit. The defendants excepted to the ruling of the Court.

The case did not come on to trial until Tuesday the 9th of November, when the same being called for trial, the defendants moved for a continuance, in support of which the said Wm Bennett made and filed his affidavit, substantially the same with the above named affiant, excepting that he states in addition, that he "expects to prove "by the said absent witness, and affiant knows from "personally that he will prove the following facts from "having conversed with the said witness, to wit:-

"That the said Smith Mosher Jr. plaintiff was only "acting as the agent and clerk of the said firm of Pollard, "Arno & Co. in the purchase of the goods attached by "defendants & sued for in this action, and that the "said goods sued for in this action were in fact

"the property or effects of Pollard, Anns & Co. and not
"the property or effects of the plaintiff, and further facts
"from conversations of the Plaintiff and Aaron Pollard
"of the firm of Pollard Anns & Co. sufficient to
"successfully defend this action."

This motion was overruled. The defendants excepting to the ruling of the Court.

A trial was had, and verdict for Plaintiff.

Defendants made their motion for new trial, grounded mainly on the refusal of the Court to grant a continuance, and the consequence of such refusal.

The motion was overruled. Defendants excepted.

The only question for this Hon Court to pass upon, as gleaned from the transcript, is whether the Court below made a proper exercise of its discretionary power in refusing a continuance, upon the affidavits set out in the transcript

Decker & Voorhis

Attorneys for Appellants

Brief of Appellants.

Due diligence was exercised in attempting to obtain the testimony of Geo. W. Baker, because it appears—

1. That a subpoena was placed in the Sheriff's hands on the 5. for a trial on the 8th day of the month. The witness resided in the City. Darne vs Broadwater. IX. 19. Mo.
2. That the subpoena could not be served on the witness because of his extreme illness.
3. That the witness had been very ill for the three preceeding weeks, in so much that his deposition could not be taken. This was such a contingency as due diligence did not require to be provided against. It was beyond human knowledge or control.
4. That the testimony of the sick witness would have been a complete defence to the action, and would have materially altered the result of the trial. And that no other witness was known to the Appellants, defendants, below, who could prove the material facts.

All this is sufficient cause for reversing the judgment below. McLane vs Harris. I. 700. Mere vs McCullough. VI. 444. Funstale vs Hamilton VIII. 500. McKay vs The State XII. 492. All Mo. Reports.

Decker & Worthis

Attorneys for Appellants

No. 9

The State of Missouri to the use of Smith Mosher Jr.
Respondents.

vs

William Bennett. John N. Dickey & Andrew M. D. Thompson
Appellants.

Statement of Case, and Brief, for Appellants.

Decker & Worthis
Attys for Appellants

Filed 2d Novr. 1860.
W. S. Glanville
Cl.

State of Mo to the use of Mitte Mosher Junr Respt
vs
William Bennett et al appllts

Supreme Court
March Term 1861

The only question presented by the record in this case is upon the ruling of the Court upon the application of the defts below appllts here for a continuance of the cause. We say the Court properly denied the application

1st Because the cause having been continued at a former Term of the Court the applicants under the 22 Rule were required to State in their affidavit the facts which they expected to prove by the absent witness. This was not done

2d Because the defts could not without leave of the Court ~~[illegible]~~ then renew the application upon an amended affidavit of affiant, after the motion had been already passed upon. This however is immaterial as the two affidavits are both defective vide State vs Buckner 25 Mo 168

3d The affidavit does not shew

proper diligence - The cause was set for the 8th of Nov - the Subpoena was issued on the 5th. On the 8th the first application for a continuance was made & overruled - The only facts alleged are that the deputy sheriff in whose hands the Subpoena was placed, called at the house where the witness Baker resided & was informed the witness was sick & did not serve the Subpoena - This is not a sufficient showing to appeal to this Court upon to interfere with the ruling of the Court below - Vide Evans vs Pond
30 Mo 235

4th Because it does not appear by either of said affidavits that the defts used any diligence to prepare for trial - It is not enough that Baker might be sick or absent other witnesses may testify to the same facts - The case falls in this respect within the decision in Freleigh vs The State
8 Mo 606

Hart & McGibbon
For Respt

9

Supreme Court
March Term 1861

State to the use of
Smith Mosher
Respt

v

Wm Bennett et al
appllts

Brief

Filed 19 March 1861.
Wm L Glanville cl.

Hart & McCobbs
For Respt

The State to the use of Mosher
vs
Bennett & others

This cause was heretofore submitted to the Court and an opinion prepared by Judge Napton in which Judge Ewing concurred (Judge Scott being absent) but no judgment was entered. Now the parties have agreed that that opinion shall stand as the decision of this Court.

Therefore in accordance with that opinion, the judgment below is affirmed, all the Judges concurring.

That opinion is as follows:

State to use of Mosher v. Bennett & others

The only question in this case is as to the propriety of overruling the defendants' motion for a continuance. There had, it would seem from the affidavit itself (though the record does not show it) been a previous continuance granted to the defendants, & the rule of Court required in such cases, the facts which the absent witness was expected to prove, to be set out in the affidavit. The facts set out in this affidavit were ~~simply~~ merely a repetition of the facts ~~stated~~ relied on in the answer as a defence to the action - namely, that Mosher the plaintiff was merely the agent of Pollard, & Co. - & had no interest in the goods levied on, & that Pollard & Co. were the real owners. It was further alleged that this witness would relate "facts, from conversations of the plaintiff & Aaron Pollard, of the firm of Pollard, & Co. sufficient ~~to~~ successfully to defend the action." There is nothing ~~special~~ perceived in this statement of the facts which could be regarded as making the affidavit any more specific, than if it had been generally stated, that the witness was expected to prove the defendants' case, or that he was a material witness.

But the affidavit fails to give any explanation of the singular delay & negligence which was manifested by the defendants in relation to securing this witness's testimony. He was not ~~Non~~ subpoenaed until the 5th inst. the case being set for the 8th. The case had been in Court for upwards of a year & it seems no effort was made to secure this testimony until two days before the ~~trial~~ day of trial - & then the witness had been sick with typhoid fever for several weeks. All this seeming carelessness

(4)

may have been consistent with good faith & due diligence, - but it should have been explained.

We cannot say that the Court of Common Pleas exercised its discretion unwisely.

Judgment affirmed

W. B. Napton

Judge Ewing concurs

Judge Scott absent

19.

State use of Mosher

v.

Bennett & others

Opinion of the Court

Napton

Filed March 21. 1862

A W Mead

Clerk

The State to use of
Smith Mosher Jr. Resp-
vs
William Bennett Et al
Appel^ts

In the Supreme Court
of the State of
Missouri
March Term 1862.

The attorneys of record in the above entitled cause hereby agree that the opinion of the former judges of this Court, rendered in said Cause, but not filed in the case, shall stand as the decision of this Court, and be of like effect as if in every way regularly rendered.

Henry W Hack
~~for Appellee~~
Atty for Respondants
R. S. Voorhis
Atty for Appellants

No 19
March Term 1862

State to use of
Smith Mosher Jr. Resp

vs

William Bennette Et al
Appel.nts

Agreement of Counsel
to let opinion of former
Judges stand

Filed March 21/62
A.W. Mead
Clerk

The State of Missouri
to the use of Smith
Moshen Jun Respt
v
Wm Bennett et al
appellants

In the
Sup Court
Oct Term 1860

Statement of the case by respondents Counsel

This was a suit brought in the St Louis Circuit Court by the respondent on a bond executed by said Bennett as principal & the other defts as sureties, pursuant to Statute in such case made on claim of property made by respondent which was before then seized under an attachment sued out by said Bennett & one Saml Russell against one Pollard Anno & others.

The plffs petition avers the property so seized was the property of plaintiff & sets out the proceedings had under the Statute to go the with the bond.

The defts deny that the property was the property of plff & aver that the same was the property of said Anno & others.

The case being at issue the defts on the 8th day

of November 1858 of the Oct Term moved a continuance of the cause until the next Term on the affidavit of said deft Bennett on the ground of the absence of one Baker, which being overruled the defts again on the 9th day of November moved the Court to continue the cause to the next Term upon ~~exactly the~~ an affidavit of said Bennett substantially the same as the first affidavit which being overruled by the Court the defts by their Counsel excepted thereupon the cause being proceeded with the jury found for the pltff - and the defts afterwards moving the Court for a new trial the motion was overruled to which the defts excepted & the cause comes here by appeal on bill of exceptions

Henry N. Hart
Atty for Respt

~~107~~ 9

Supreme Court
~~Oct~~ Term 1860

State of Missouri
to the use of
Smith - Mosher Jr
Respt

v

Wm Bennett et al
Appelts

Statement of
Case by Respt

Henry N Hart
Atty for Respt

(4)