The State of Missouri v Woerner, J.G. 1842 489/7

423/17 33/214

MO - R

V

Woerner R

CD Coleman A

S Voullaire R

Woerner - had exam but not Schaefer

Owed - 500 - lived in Sud.

Grand Larceny

Scire facias

St Louis criminal

March 42

March 1840

Affirmed

Bates

Bay Dryden Carey

1

State of Missouri }
County of St Louis } S.S. Be it remembered that on the Thirteenth day of August in the year of our Lord one thousand eight hundred and fifty nine, there was filed in the office of the Clerk of the St. Louis Criminal Court, a Bond which is in the words and figures as follows, to wit:

Bond

State of Missouri }
County of St Louis } S.S. Be it remembered, that on the thirteenth day of August, in the year eighteen hundred and fifty nine, personally came before James A. Rogers, Judge of the Saint Louis County Court, within and for Saint Louis County Henry Schaefer, and J. Gabriel Woerner, and acknowledge themselves to owe to the State of Missouri, the sum of five hundred dollars, to be levied of their respective goods and chattels, lands and tenements: yet, upon condition, that if the said Henry Schaefer, shall personally appear before the St Louis Criminal Court, on the first day of the next term thereof, to be holden for the County of St Louis on the first Monday in September, eighteen hundred and fifty nine, and from day to day during said term, and on the first day of any future term to which this cause may be continued, then and there to answer an indictment preferred by the Grand Jurors of said County against said Henry Schaefer, for Grand Larceny and shall not depart the said Court without leave thereof, then this recognizance to be void, else to remain in force.

Henry his X mark Schaefer (Seal)
J. G. Woerner (Seal)

Taken and certified the day and year aforesaid.

Jas A. Rogers.
Judge of the St Louis County Court.

Endorsed: Filed August 13th 1859. Fred Kretschmar Clerk

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Monday September 19th 1859.

The Grand Jurors return to the bar, and deliver the following indictment as a true bill, to wit:

State of Missouri } St. Louis Criminal Court
County of St Louis } s.s. September Term 1859.

Indictment.

The Grand Jurors of the State of Missouri, within and for the body of the County of St Louis, now here in Court duly empannelled, sworn and charged, upon their oath present, That Henry Schaeffer, late of Saint Louis, in Saint Louis County, on the twenty seventh day of July, in the year of our Lord one thousand eight hundred and fifty nine at St. Louis, in St Louis County money current by law and usage in this State of the sum and value of Twelve dollars, all of the property of Joseph Lambert, then and there being found feloniously did then and there steal take and carry away, contrary to the form of the statue in such case made and provided, and against the peace and dignity of the State.

J. H. Vail.
Assist Circuit Attorney

Endorsed: A true bill. R. J. Howard, Foreman.
Filed September 19th 1859. Fred Kretschmar, Clerk.

Wednesday September 28th 1859.

Recognizance forfeited

Henry Schaeffer, and J. G. Woerner, having on the Thirteenth day of August last past entered into a recognizance in the sum of Five hundred before James A Rodgers, late one of the Judges of the County Court conditioned that said Schaeffer should personally ap-

pear before this Court on the first day of and from day to day during the present term thereof to answer to an indictment preferred against him for Grand Larceny, and should not depart the Court without leave thereof, and the said Schaeffer being this day solemnly called to come into Court and save his recognizance comes not but makes default and the said Woerner being demanded to bring here into Court the body of the said Schaeffer and save his recognizance comes not but makes default, and fails therein therefore it is considered by the Court that the recognizance as well of the said Woerner, as of the said Schaeffer, be forfeited, and it is ordered by the Court that a Writ of Scire facias issue against them and that Capias issue for said Schaeffer.

Which Writ of Scire facias is in the words and figures as follows, to wit:

Writ of Sci fa

State of Missouri } In St Louis Criminal Court.
County of St Louis } ss. September Term 1859.

The State of Missouri.

To the Marshal of the County of St Louis - Greeting:

Whereas, on the Thirteenth day of August in the year of our Lord, one thousand eight hundred and fifty nine, at the City and County of Saint Louis, before James A. Rogers, then a Judge of the County Court, within and for the County of Saint Louis Henry Schaeffer, and J. G. Woerner, in their own proper persons, personally appeared, and acknowledged themselves each to owe the State of Missouri the sum of Five hundred dollars, to be levied of their respective goods and chattels, lands and tenements, yet upon condition that if

the said Henry Schaeffer, should appear at the then next term of our Saint Louis Criminal Court, to be holden at the City of Saint Louis aforesaid, within and for the County of Saint Louis aforesaid, on the first Monday of September then next, and from day to day thereafter during said term, and on the first day of any future term thereof, to which the cause should be continued, then and there to answer to an indictment preferred against him for Grand Larceny, and should not depart the said Court without leave thereof, then the said recognizance to be null and void, else to remain in full force (as by the said recognizance now remaining of record in our said Court, manifestly appears;) and whereas afterwards, to wit: at the said September term of our said Court, begun and holden at the City and County of Saint Louis aforesaid, within and for the County of Saint Louis aforesaid, on the first Monday of September, in the year of our Lord, one thousand eight hundred and fifty nine on the twenty eighth day of September in the year last aforesaid, at the City and County of Saint Louis aforesaid, before our Saint Louis Criminal Court, holden as aforesaid, the said Schaeffer, although then and there solemnly demanded by our said Court to come into Court, according to the condition of his said recognizance, come not, but made default and failed therein; and the said Woerner, although demanded then and there by our said Court to bring into Court the body of the said Schaeffer and save his recognizance, came not, but failed therein; wherefore it was considered by our said Court that the recognizance, as well of the said Woerner, as of the said Schaeffer be forfeited, as by the record and process thereof likewise remaining in our said Court fully appears - and yet the said sum of Five hundred dollars, by the said Schaeffer, and the said sum of Five hundred dollars by the said Woerner, acknowledged as aforesaid from them the said conusors, remain to be levied - therefore we command you to make known to the said Schaeffer, and Woerner,

according to law, that they appear at the next term of our said Court, to be begun and held at the City of St Louis, on the first Monday of November next, then and there to show cause, if any they have or any thing can say, why the State of Missouri should not have execution against them of the debt aforesaid, in form aforesaid by them acknowledged to be due, according to the force of said recognizance, if it shall seem expedient so to do; and have you then and there this writ, with your return thereon how you execute the same.

Seal

Witness, Frederick Kretschmar, Clerk of our said Court, with the seal thereof hereto affixed at office in the City of Saint Louis, this 8th day of October eighteen hundred and fifty nine.

Fred Kretschmar. Clerk

Upon which writ the Marshal made the following return to wit:

Marshal's Return

Executed this writ by reading the same to the within named J. G. Woerner, Henry Schaeffer, not found in my County. St Louis County Novbr 7th/59.

P. Wegman. Marshal.

Friday January 13th 1860

The State of Missouri
" impl'd
J. G. Woerner

Scire facias on forfeited recognizance.

Judgment

Now comes the Circuit Attorney who prosecutes for the State but the said defendant although duly summoned and called comes not but makes default nor hath he any cause shown why the State of Missouri should not have execution against him for her debt of Five hundred dollars, in form aforesaid by him acknowledged to be due according to the force of the

recognizance by him entered into on the thirteenth day of August last past; therefore it is considered by the Court that the State of Missouri have execution against said defendant for her debt of Five hundred dollars aforesaid and for the costs herein accrued.

Saturday January 14th 1860

Motion in arrest filed

The State of Missouri
vs inpl'd
J. G. Woerner

Scire facias on forfeited recognizance. Motion in arrest of judgment filed by defendants counsel.

Tuesday January 31st 1860

The State of Missouri
vs inpl'd
J. G. Woerner

Scire facias on forfeited recognizance

Now comes the Circuit Attorney who prosecutes for the State and also the said defendant in his own proper person and by counsel learned in the law. and thereupon the Court here having duly heard and considered the defendants motion in arrest of judgment herein. and being thereof fully advised, doth order that the same be overruled: Whereupon the defendant files a Bill of exceptions, and prays an appeal to the Supreme Court, from the judgment of this Court rendered against him, and the Court here being of opinion that there is probable cause for said appeal doth grant the same and doth order that said appeal operate as a stay of proceedings on the judgment herein: thereupon J. G. Woerner, as principal and Leyrenius C. Simmons, and Charles D. Coleman, as his security here in Court each acknowledge themselves to owe the State of Missouri, the sum of one thousand dollars

Mo in arrest Overruled

Appeal

Appeal Bond

to be levied of their respective goods and chattels lands and tenements. Yet upon condition that if the said Woerner shall appear before the Supreme Court of this State at the next term thereof to be begun and held at the City of St Louis on the third Monday of March next to receive judgment on the appeal herein taken and shall also appear before this Court at such time and place as said Supreme Court shall direct and shall render himself in Execution and obey every order and judgment that shall be made in the premises then this recognizance to be void else of full force and effect.

Bill of Exceptions

State of Missouri } In the St Louis Criminal Court.
vs } January Term 1860.
John G. Woerner }

Bill of Exceptions

Be it remembered, that on the fourteenth day of January A.D. 1860, the defendant John G. Woerner, files his motion in arrest of judgment in this cause in the words and figures following, to wit:

State of Missouri } In the St Louis Criminal Court.
vs } January Term 1860
Frederick Schaefer & } Scire facias on recognizance.
J. G. Woerner }

Motion in Arrest of Judgment

And now comes the said John G. Woerner, and moves the Court to arrest the judgment in this cause for the following reasons.

1st Because this Court has no power to issue a Scire facias upon a recognizance not taken in this Court.

2d Because the plaintiff in this Court has no power under the Statute creating it, or otherwise to sue on a recognizance by Scire facias.

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3d Because this Court has no power to render the judgment which has been entered up in this cause.

4th Because all the proceedings are irregular and the judgment against this defendant is absolutely null and void.

C D Coleman. atty for Deft.

that afterwards to wit: on the 31st day of January A.D. 1860, the Court overruled said motion to which said defendant excepts, and prays the Court to sign this his bill of exceptions, which is done.

H. A. Clover. (Seal)

State of Missouri
County of St Louis } S.S. I. Frederick Kretschmar, Clerk of the St Louis Criminal Court, within and for the County aforesaid certify the foregoing to be a true and correct copy of the record and proceedings in the case of the State of Missouri against Henry Schaeffer. as fully as the same now remains of record and on file in my office.

In testimony whereof. I hereto set my hand and affix the seal of our said Court at office in the City of St Louis this 29th day of February A.D. 1860.

Fred Kretschmar
Clerk

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(17) ~~[illegible]~~ ~~[illegible]~~ ~~136~~ ~~[illegible]~~ ~~[illegible]~~

73.

March Term 1862

The State of Missouri

vs Transcript

J. G. Woerner.

Appeal to the Supreme Court

From St Louis Criminal Court.

M. E.

Filed March 3d 1862.

Wm. G. Gleason

Clk

Transcript $4.10

$4.10

1862 May 16. Motion for certiorari sustd Dp 67

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1862 May 27. Affirmance set aside Dp 67

1862 Oct 24 Sub & Judgment affirmed Dp 87

State of Missouri vs. J. Gabriel Woerner } In the Supreme Court of the State of Missouri March Term 1862.

Now at this day comes the Circuit Attorney who appears on behalf of the State of Missouri; and says, that the record of the above entitled cause filed in this Honorable Court, does not contain all the record and proceedings of said case had in the St. Louis Criminal Court and on file in said Court. and making part of the record of said case; but that the same, is diminished in this; that certain papers of record marked "Filed August 13th 1859. Fred. Kretschmar Clerk" containing an examination had before the City Recorder, Thomas L. Daily in the Case of one Schaeffer on the charge of Grand Larceny, the order of Commitment and the commitment of said Schaeffer to jail in default of bail of five hundred dollars, are not recited and set forth in the record of said case in this Honorable Court, and not certified to by the Clerk of the St. Louis Criminal Court.

Therefore, said Circuit Attorney, on behalf of the State of Missouri, prays, that this Honorable Court directs the Clerk of the St. Louis Criminal Court, to more fully make and certify a full and correct transcript of the record and proceedings of said case

in the Court below, by further reciting and setting forth in said transcript the papers of record herein specified, and that he transmits the same to this Honorable Court.

Seymour Foullaire
Cirt. Atty.

Supreme Court

State of Mo
vs
I. Gabriel Woerner

Motion suggesting
Diminution of Record &c.

S. Foullaire
Cirt. Atty.

Filed April 26. 1862
A.W. Mead
Clk

State of Missouri.
County of St. Louis. } ss Be it Remembered that on the Thirteenth day of August one Thousand eight hundred and fifty nine, there were filed in the Clerk's Office of the Saint Louis Criminal Court, certain papers in the Case of the State of Missouri vs Henry Schaffer, which papers are in the words and figures following to wit:

State of Missouri } In Recorder's Court.
vs. } Charge
Henry Schaffer. } Larceny

Jos Lambress, being duly sworn on his oath says, I live on Geyer avenue near Gravois Road, I am a butcher at South Market; yesterday morning about nine O'clock, twelve dollars in paper money was stolen from my money box, behind my stall at the market house; the money now shown me is the same and belongs to me; all this took place in the City and County of St Louis and State of missouri.

Johann George Lombrift.

Sworn to and subscribed before me this 26th day of July A. D. 1859.

Thomas J. Dailey Recorder.

George Reinhardt being duly sworn on his oath says; I live on Victor street near Second; I have a stall No. 5. at the south market; yesterday morning I saw defendant go behind Mr Lumbres's stall at the same market, and take some money out of the money box; I ran after him and Caught him, and he threw the money

away; I saw my brother pick the money up; it is the same now produced in Court, and identified by Mr Lambress.

George Rumfordt.

Sworn to and subscribed before me this 26th day of July A. D. 1859.

Thomas J. Dailey
Recorder

Witness officer Fine.

Defendant, being duly informed of his rights and examined apart from the witness, says: "I took the money; I saw it exposed and yielded to a sudden impulse to take it, without any previous intention to do so.

Given before me this 26th day of July 1859.

Thomas J. Dailey Recorder

I Thomas J. Dailey, Recorder of the City of St Louis, Certify the above and foregoing examination was this day had before me and reduced in writing in presence of the defendant, who made no statement and introduced no evidence which he wished to have committed to writing. Releiving that the offence above charged has been committed, and beleiving, moreover that there is just cause to suppose the above named defendant guilty as charged, I have caused him to be committed to Jail in default of bail in the sum of $500. to await his trial at the next term of the St Louis Criminal Court.

Given under my hand this 26th day of July 1859.

Thomas J. Dailey
Recorder City of St Louis.

City and County of St Louis,
State of Missouri. } S.S.

The State of Missouri.

To the Keeper of the Jail of the County of St Louis, Greeting:

Whereas Henry Schaffer hath this day been brought before me Thomas J. Dailey. Recorder of the City of St Louis in the State of Missouri. charged with Larceny, and whereas from the examination here attached, which was on this day had before me, and reduced to writing in presence of the said defendant, there appears to me probable Cause to believe the said defendant guilty as charged. These are therefore to Command you, the said Keeper of the said Jail, in said County, to receive the said defendant, and him safely Keep in your Custody in said Jail, to answer the charge aforesaid, or until he shall be discharged by due Course of law; and the City Marshal is hereby Commanded to deliver the body of the said defendant in your Custody.

Given under my hand, in the City of St Louis this 26th day of July 1859

Thomas J. Dailey
Recorder of the City of St Louis.

Executed the within writ in the City and County of St Louis by delivering the body of Fred Schaffer, the within named defendant into the Custody of the Jailor of St Louis County, this 26th day of July 1859.

D. A. Rawlings. City Marshal
By Patrick Lanigan
Deputy Marshal

Fee 75¢

State of Missouri.
County of St Louis. } ss. I Fred Kutschmar. Clerk of the St Louis Criminal Court. Certify the foregoing to be a true Copy of the proceedings had before the Recorder of the City of St Louis in a Certain Cause wherein the State of Missouri was plaintiff and Henry Schaffer defendant as fully as the

Same is now on file in my office.

Witness my hand and the seal of said Court hereto affixed at office in the City of St Louis this 16th day of May A.D. 1862.

Ted Kutschmar
Clerk

" " "

State of Missouri vs J. Gabriel Woerner } In the Supreme Court of the State of Missouri March Term 1862.

Respondent's Brief.

The recognizance taken by Rogers Judge of the St. Louis County Court, is legal and correct and said Judge had authority to take the same. 2d Vol. Mo Statutes 1855 p 1165. Secs. 34, & 35 — 1. Vol Mo Statutes 1855 p 536 Sec. 23. — 1 Vol Mo Statutes 1855 p 833 Sec. 2 — 22 Mo. p. 467 State vs Zwifle —

The St Louis Criminal Court had power to issue a Scire facias upon a recognizance in the present case ~~Court~~ and had power to render judgment upon said Scire facias. 2d Vol Mo Statutes 1855 p 1589 Secs 1, 2, 3 & 12 — 23 Mo p 327. State vs Ramsey — 22 Mo p 467 State vs Randolph, and authorities therein cited.

Seymour Foullaire. Cit. Atty for State-Respondent —

Supreme Court
State of Mo
vs
J. Gabriel Overner

Respondent's
Brief

S. Guillaume Cir. Atty
for State - Respondent

Filed May 21. 1882
A W Mead
Clerk

The State of Missouri
vs
J. Gabriel Wormer

In Supreme Court.
March Term 1862

And now at this day comes the Appellant, J. Gabriel Wormer, and moves this Court to set aside the Judgment of affirmance in this cause, and allow him to file an assignment of errors herein or for such other or further order or relief in the premises as to the Court may seem proper, upon the grounds stated and set forth in the annexed affidavit.

C. D. Colman
atty for Appt

St Louis County ss:

Charles D. Colman being duly sworn deposes and says, that he is the attorney of the appellant in this cause, and has had the sole charge of the case, on the behalf of the appellant; that this affiant, a long time since, prepared an assignment of errors to file in this cause, but upon speaking with Seymour Toulaine Esq. the Circuit Attorney of St Louis County, in relation thereto, said Toulaine informed this affiant that it was not the practice or custom to file an assignment of errors in such cases, and stated to affiant that no such assignment was necessary and affiant, relying upon such information and statement of said Toulaine, did not file such assignment of errors, in good faith believing that it was not necessary or proper to do so, or he would have done so;

affiant further says, that on or about the 16th day of May inst, a Motion for a Writ of Certiorari, in this cause, was sustained on Motion of the District Attorney, upon an allegation of diminution in the Record, directed to the St Louis Criminal Court, and affiant supposed and believed that the issuing of such Writ, would operate as a continuance of the cause over the Term, and such has been the ordinary practice, so far as the same has come to the notice or knowledge of affiant, and affiant received no notice or information from the District Attorney, or otherwise that any return had been made to such Writ of Certiorari, nor did it appear by the endorsement on the Record in this case that any such Return had been filed, and no such Return appeared in the Papers, but upon inspection since the affirmance affiant finds that such return is annexed to the original Transcript in the cause, affiant having examined the Papers only a few days ago, with a view of ascertaining whether any such return had been filed, and did not then discover the same; that affiant in good faith believes that the appellant has a good and meritorious defence on the merits to the Judgment recovered in this cause against him and that in case such affirmance shall be allowed to remain, that he will be deprived of the benefit of such defence and will be compelled to pay and satisfy an illegal and unjust judgment, through

no fault or neglect upon his part, but in consequence of a misapprehension on the part of his counsel as to the proper practice in the case, under the circumstances hereinbefore set forth; that affiant learned this morning, that said cause was called on yesterday in this Court, and affirmed, for want of an assignment of errors therein; that this affiant did not file any Statement of the case, or Brief, for the reason that he did not know that the Record had been completed, so as to enable him to do so understandingly, as also because he supposed the case would not be heard at this Term of the Court, and had he have known or believed that the Record was completed, or that the cause would be heard, he could and would have prepared and filed such Statement and Brief, and he now desires to do so, and will do so, and submit the cause at the present Term of the Court, if such affirmance shall be set aside and the Court shall desire or require the same to be thus submitted at this Term and further affiant says not -

Subscribed & Sworn to before me this 27th day of May 1862 - } C. D. Colman

A W Meadows

No 131

Supreme Court

State

vs

J. Gabriel Worner

Motion & affidavit to set aside affirmance.

C. D. Colman
atty for Appt.

Filed May 27/62
A. W. Mead
Clk

The State of Missouri Respondent vs I. Gabriel Wormer Appellant	In the Supreme Court of Missouri – March Term 1862 – Statement of Case –

From the original Manuscript, it appears that on the 13th day of August A.D. 1859 one "Henry Schaefer" and the Appellant entered into a Recognizance, in the sum of five hundred dollars, before James A. Rodgers, as Judge of the St Louis County Court, "Yet upon condition, that if the said Henry Schaefer shall personally appear before the St Louis Criminal Court on the first day of the next term thereof, to be holden for the County of St Louis on the first Monday in September eighteen hundred and fifty nine, and from day to day during said term, and on the first day of any future term to which this cause may be continued, then and there to answer an indictment preferred by the Grand Jurors of said County against said Henry Schaefer for Grand Larceny, and shall not depart the said Court without leave thereof;" that such Recognizance was "Taken and certified the day and year aforesaid, Jas A. Rogers, Judge of the St Louis County Court," and "Filed August 13th 1859. Fred Kretchmar Clerk" –

It further appears that on the 19th day of September 1859, there was found and filed in the St Louis Criminal Court, an Indictment for Grand Larceny, against one "Henry Schaffer", and on the 28th day of September A.D. 1859 "Henry Schaffer and I. G. Wormer" were called upon the Recognizance, and the same was forfeited for the Non-appearance of Schaffer, and a Nisi of Scire Facias ordered to issue against them, and a Capias against said Schaffer; Afterwards, and on the 8th day of October 1859, a Nisi of Scire Facias was issued against said Schaffer and Wormer

out of and under the Seal of the Clerk of the St Louis Criminal Court, returnable on the 1st Monday of November A.D. 1859; that such Writ was served on said Norner November 7th 1859, and Scharffer returned Not found; On the 13th of January 1860, we find any dismissal of the proceedings upon the Scire Facias against Scharffer, an execution was awarded in said Criminal Court, against Norner, and but no formal, or final Judgment was rendered ordered to be issued, by default; On the 14th day of January 1859 said Norner filed a Motion in arrest, upon the following grounds, viz:

"1st Because this Court has no power to issue a Scire
" Facias upon a recognizance not taken in this Court –
" 2nd Because the plaintiff in this Court has no power under
" the Statute creating it, or otherwise to sue on a recognizance,
" by Scire Facias –
" 3rd Because this Court has no power to render the judgment
" which has been entered up in this cause –
" 4th – Because all the proceedings are irregular and the
" judgment against this defendant are absolutely void
" and void" – which was overruled by the Court, on the 31st day of January 1860, and a Bill of exceptions signed by the Judge incorporating such Motion, an Exception to the overruling thereof, and filed, and an appeal taken to this Court.

The Transcript was filed in this Court March 3rd 1860; On May 16th 1862, upon an allegation on the part of the District Attorney of St Louis County of a diminution in the Record, this Court ordered a Writ of Certiorari to be issued to the Clerk of St Louis Criminal Court, but it does not appear that any such Writ issued, or that any return was made thereto, but we find attached to the original Transcript, a paper, certified by the Clerk of the St Louis Criminal Court, under date of May 16th 1862, what purports to

be a transcript of certain proceedings had before the Recorder of St Louis County, on or about the 26th day of July 1859, against one Henry Schaffer for an alleged larceny, and showing that said Schaffer was committed to the custody of the Jailor of St Louis County, on that day; and that such Papers were filed in the Clerks office of the St Louis Criminal Court, on the 15th day of August 1859, certified by the Clerk of the Criminal Court to be a true copy of the proceedings had before the Recorder, as fully as the same remains on file in his office, he having previously certified, under date of February 29th 1860, that the original transcript as filed March 5th 1860, in this Court, was a true and correct copy of the record and proceedings in the case against Henry Schaffer —

C. S. Colman
Atty for Appellant.

The State of Missouri
Respondent.

vs

I. Gabriel Woerner
Appellant.

Statement of case.

C. D. Colman
atty for appln.

Filed June 14, 1862
A. W. Mead
Clk

The State of Missouri Respondent vs J. Gabriel Warner Appellant	In the Supreme Court of Missouri March Term 1862. Brief &c of Appellant.

I. The amended transcript constitutes no part of the Record or files in the case, and this Court cannot properly refer thereto, in determining the rights and liabilities of the Appellant.

1st. Such amended transcript is not properly before this Court, the same not in any manner appearing to be filed in answer to any Writ or order of this Court, or by any authority whatever.

2nd. The Statute does not make the examination or commitment of the the committing Magistrate a part of the Record or files in the case.

Statutes 1855, page 1164 § 28.

See 16th Ohio 267. 20th Ill 381.

3rd. And where the Prisoner is committed, the Statute does not seem to contemplate the filing of such papers in the Clerks office, but requires them to accompany the Warrant of commitment, and be delivered to the Jailer, and is silent as to their further disposition.

Statutes 1855, page 1164 § 28.

And it is submitted, that the only legitimate way, in which such Examination and papers could be incorporated into, or form a part of the record or files in the case, would be, by offering them in evidence, on the trial of the cause, and inserting them in a Bill of Exceptions, which would not be admissible in the present case, as the Scire Facias does not allege any such Examination or Commitment –

See Scire Facias page 3 original transcript –

II. If correct in the foregoing proposition, then the Judge of the St Louis County Court had no power or authority to take such recognizance, & the same is void –

1st Such recognizance was voluntary, being entered into by the Appellant, and taken by the officer, without any authority of law –

2nd – There was neither an indictment pending against the Prisoner, at the time the recognizance was entered into and taken, such indictment having been found at the September Term of the Criminal Court A.D. 1859 and filed on the 18th of September 1859, more than a month after the recognizance had been given; Nor was the Prisoner committed to Jail on a Warrant –

Statutes 1855 page 1179. §§ 33. 34 & 35 –

" " " 1165 § 34 –

III. The undertaking executed by the Appellant in this case, cannot be regarded as a recognizance in the strict sense of the term, notwithstanding the Statute gives it that name –

1st A recognizance, in the strict sense of the term signifies a record, which imports verity, and cannot be contradicted or impeached, except upon the same grounds, on which a judgment of a Court can be –

But most certainly this cannot be regarded in that light, as the instrument is required to "be subscribed by the Parties to be bound thereby", and the execution of the instrument by such "Parties", may come in question, and require to be proved –

Statutes 1855, page 1209, §16 –

And our own Court has held, that such a recognizance does not impart verity, and that it could be shown, that it was not executed and certified as upon its face it purported to have been –

State vs Randolph 26th Mo 213-216 –

2nd There does not appear to have been any entry or memorandum, made of record in the St Louis Criminal Court, making it a record of said Court, beyond the filing thereof –

3rd – As before stated, the Statute not authorizing the taking thereof, under the circumstances, the same could not become a Record –

4th "Nor is the Paper" in the form prescribed for that purpose"—

Statutes 1855 page 1164 § 25—

22nd Ohio page 478— 26th Ohio page 216—

IV. The undertaking entered into, is not such an one, as the Prisoner was required to enter into, or such as the Officer was authorized to take—

1st It imposes on the Prisoner, before the appellant as his security, obligations of an onerous character, not authorized by the Statute, and which could not be required—

Statutes 1855, page 1164 § 25—

A prisoner and his security might be very willing to enter into an undertaking, that the Prisoner would appear "on the first day of the next term thereof, and not depart such Court without leave", and not be willing (particularly, the surety) to give one with the addition "and from day to day during said term, and on the first day of any future term to which this cause may be continued"—

It should have been left to the security to determine, when the proper time arrived, whether or not, he would continue to remain bound for the appearance of the Prisoner, and to the criminal Court, whether the security should be continued—

"2nd The undertaking so entered into and taken, is not" in the form prescribed for that purpose"

Statutes 1855 page 1164 § 25 -

22nd Mo 478 - 26th Mo 216 -

Where a recognizance contains provisions in it, not authorized by law, or imposes obligations on the sureties, they are not required to enter into, it is void, & cannot be enforced -

See 12th Pick 1 - 7th Pick 232 - 7th Conn 236 -

V. The Recognizance, upon the face thereof, does not show a case in which a Judge of the County Court was authorized to take it; it does not show that any charge existed against Schaefer, or that any examination had been had, and he had been committed to Jail, or that any indictment was pending against him, or any other fact, to show his right to take it -

It would seem that this was necessary to constitute a complete and valid record -

People vs Kane 4th Denio 530-542 -

People vs Korbee 7th Hill 39 & cases cited -

People vs Young " " 44 -

But it is conceded, that if the case of State vs Randolph 22 Mo. 474, is good law, and is applicable to this case, such matters need not so appear -

And in so doing, I do not consider it necessary to attack the authority of the case of State vs Randolph 22nd Mo. 474 & following —

I am willing to concede, that the proceeding "is not a civil action within the meaning of the
" new Code", but most tremuously insist, that such proceeding is "to enforce the collection of
" a debt confessed"

State vs Randolph 22d Mo 482 —

The State "commences proceedings to recover
" the penalty", after forfeiture, before which "no right
" of action accrues", and "there is no suit or ~~action~~
" matter of controversy over which jurisdiction
" could be exercised" —

State vs Hopkins 30th Mo 404-5 —

Neither of the Judges in the cases referred to, characterize the proceedings as criminal, but on the contrary, their language, in both cases, shows them to be civil —

See also 3rd Gilman (supra) 82 —

There is no prohibition as to imprisonment, except "on any mesne process or execution, foun-
" ded upon any civil action whatsoever" —

Is it not a matter beyond controversy or cavil, that the Appellant could not be imprisioned, upon an execution in this case?

Then, is not the proceeding, as a sequence, civil and not criminal in its character —

Statutes 1855, page 853, 21 —

A very different question arises in this case, from those presented in the case of the State vs Randolph, supra; that was a proceeding in the "Gallaway Circuit Court," possessing both civil and criminal jurisdiction; in fact, the proper, and only Court, in which the proceeding could be had; the St Louis Criminal Court, has jurisdiction "in criminal cases" only; and however proper and right it would be, "to enforce the collection of the debt confessed," "to recover the penalty," in the Gallaway Circuit Court, such enforcement and recovery could not be had, in the St Louis Criminal Court —

I am not aware of this question having been raised, in but one case, that ever reached this Court, and that was disposed of, in a manner, which prevented any decision of it —

I refer to the case of the State vs Pride No. 235 October Term 1859, of this Court —

The point was raised in that case, by the counsel for the appellant, in the Court below, by demurrer, and Motion in arrest, and in this Court, in the assignment of Errors —

The Counsel in that case was one, upon whose legal opinions, we have all been accustomed to rely, and whose standing as a jurist, entitles it to great weight, and as the question, as I consider it, is a new one, and undetermined,

I most respectfully refer the Court to the Demurrer, Motion in arrest of Judgment, and Assignment of Errors in that case, not as authority, but as being entitled to consideration by this Court, in the determination of the question at bar —

VII. The St Louis Criminal Court, even if it had authority to entertain the proceedings, erred in rendering a Judgment, awarding an Execution, against the Appellant alone, under the circumstances —

1st The recognizance, so called, is made out in the name of, and signed "Henry Schaefer", while all the other proceedings in the case, give the name as "Henry Schaeffer" —

2nd. The record shows, that the forfeiture of the recognizance was taken as to both Principal and Security, and both ordered to be prosecuted, and both prosecuted, the Scire Facias returned executed as to the Appellant, and not found as to Schaeffer, and a Judgment by default against the Appellant alone, without any dismissal as to Schaeffer, or any other Process against him

Such judgment or award of Execution was given at the return term of the Scire Facias, and no "Nihil" was issued and returned.

It is only after a "Nihil" has been issued and returned against the Principal, that judgment, or award of Execution can be given against the Security in the recognizance.

See 13th Ill 9-14 - 3rd Gilman (Ill) 327 to 406.

And conceding the proceedings might have been instituted against the Appellant alone, still as they were, in fact, instituted against both, the record should show what disposition the Court made of both.

The Appellant has the right to an award of Execution against the principal, and to have such Execution issued, to enable him to point out & have sold, the property of the principal, to satisfy the obligation, "the debt confessed," and has the right to complain of the error of the Court below in failing to take the proper and necessary steps to obtain such Execution.

It will be observed by the Court, that there is no judgment, in form, against the Appellant, but merely an award of Execution against him.

Although our Statute is silent, in reference to the manner in which a forfeiture of a recognizance shall be taken, the prosecution thereof, or the judgment to be rendered, in a

case situated like the present, the first Article of the same chapter, under which the proceedings in a case like the present are provided for, as far as they are provided for, provides, that in case the person entering into a recognizance, shall fail to appear "the court shall forfeit his recognizance, and order it to be prosecuted" —

Statutes 1855 page 1159 & 9 —

And it would seem that the Statute contemplates, not only a prosecution but a judgment after forfeiture, and not a mere award of Execution, as it provides that bail, in a case like the present, "at any time before final judgment against him, upon a forfeited recognizance, may surrender his principal" and "be discharged from any further liability upon the recognizance" —

Statutes 1855 pages 1179-80, & 59 —

Finally — If it shall be maintained that the case of the State v. Randolph is good authority, as applied to proceedings had before a Justice of the Peace, upon a Warrant issued upon affidavit, setting forth the time, place and circumstances of the offence, can it be maintained, that it shall apply to proceedings had before the Recorder of the City of St. Louis, in a case like the present?

It is submitted that it cannot so apply —

Can it be claimed, that the St Louis Criminal Court could, or that this Court can, look into the examination of witnesses before the Recorder, to ascertain whether or not the Recorder had authority to examine into the offence, and commit the accused for want of Bail?

It is only from such examination, that it can appear, that the Recorder had jurisdiction.

Amended City Charter of 1851, Art 4, § 18.

The Judgment of the Court below should be reversed, and Judgment rendered in this Court, in favor of the Appellant.

C. S. Coleman
Atty for Appelt.

No 131
March Term 1862
In Supreme Court.

The State
vs
J. Gabriel Thomas

Brief for Appellant.

C. S. Coleman
Atty for Appelt.

Filed June 1, 1862
Clerk

The State of Missouri
vs
J G Woerner

On the 13th of August 1859 Henry Schaefer and the defendant Woerner before a judge of the St Louis County Court entered into a recognizance, conditioned for Schaefer's appearance before the St Louis Criminal Court on the first day of the next term and from day to day during the term and on the first day of any future term to which the cause might be continued to answer an indictment preferred against Schaefer for Grand Larceny, and that he should not depart the Court without leave thereof.

There was then no indictment against Schaefer but on the 19th of September following an indictment against him was returned by the Grand Jury into the Criminal Court.

On the 28th September the recognizance was forfeited and scire-facias ordered against Schaefer and Woerner. The scire-facias was issued on the Eighth of October and served on Woerner on the Seventh of November, and a return was made that Schaefer was not found.

Neither of them appeared or pleaded to the Scirefacias and on the 13th of January 1860,

execution was awarded against Woerner.
It does not appear that anything further was done as to Schaefer.
On the next day Woerner filed a motion "to arrest the judgment for the following reasons
1st Because the Court has no power to issue a scire-facias upon a recognizance not taken in this Court.
2d Because the plaintiff in this Court has no power under the Statute creating it, or otherwise to sue on a recognizance by scire facias.
3d Because this Court has no power to render the judgment which has been entered up in this cause.
4th Because all the proceedings are irregular and the judgment against this defendant is absolutely null and void."

The Criminal Court overruled the motion and Woerner appealed to this Court.

We can only review questions made in the Court below. The defendant having failed to plead to the scire-facias, we can only look to such questions as arise upon his motion in arrest of judgment. Strictly speaking there is no judgment in the case. The recognizance is a debt confessed to the State, (which may be avoided upon the conditions stated) and when forfeited is said to be equivalent to a judgment, but no execution against the cognizors is awarded until after the return of a scire-facias, so that for practical purposes the decision of the Court upon the issues made upon the scire facias or the confession of its truth, by default or otherwise may be regarded as the final judgment in the case, from which an appeal will lie and to arrest which a motion may be made.

We conceive that there are only two questions arising upon this record to be determined. The first is as to the jurisdiction of the St Louis Criminal Court over the proceedings upon forfeited recognizances. The St Louis Criminal Court has "all the original and appellate jurisdiction in criminal cases vested in the several circuit Courts of this State" The scire-facias upon a recognizance - is in its nature a civil proceeding as distinguished from a criminal proceeding, but it so grows out of the criminal proceedings and is so necessary

to the exercise of the jurisdiction vested in the Criminal Court that we must believe it to be included among the powers vested in that Court. It cannot be doubted that that Court may take recognizances and that recognizances taken by other courts or officers must be returned into that Court; and if it can do nothing of a civil nature in regard to the prosecution of the recognizances, it cannot even forfeit them and as no other Court can, all recognizances would be as ineffectual as if actually void. The Criminal Court had power to issue the scire-facias and award execution upon it. Secondly we proceed to inquire whether there was any irregularity amounting to error in awarding execution against Woerner when there had been no service of the scire-facias upon Schaefer and no further proceedings against him. We think that execution may be awarded against one though the other be not summoned. Bac Abr tit Execution G — 2d Tidd's Prac. 1126 — Sears v The People 3 Gilman 327 — Grisman v The People Ibid 351 & Parfield v The People Ibid. 406. McFadan tal v The People 13 Illinois Rep 14.

Judgment affirmed.

Denton J. Bales

Judges Bay & Dryden concur.

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The State of Missouri

v. Ss

J G Waerner

Opinion

Bates

Affirmed

Filed October 24. 1862

A W Mead

Clk