THE STATE OF MISSOURI
TO THE USE OF
McMURRAY, WILLIAM A.

V DOAN, GEORGE P.
HAVENS, JONATHAN C. AND
PORTER, JAMES

1866 ST. LOUIS COUNTY 5521/7

OLD
647/7
AFFIRMED

INVOLVED:
BOND
EXECUTION
LEVY
CLAIM

INCLUDES

-FORRESTER, THOMAS
-FORRESTER, RICHARD
(FORRESTER & BROS)
- JEFFRY & SON

State of Missouri }
County of St Louis } ss.

Be it Remembered that heretofore to wit: On the fifteenth day of January Eighteen hundred and Sixty four a petition was filed in the Office of the Clerk of the St Louis Circuit Court in the words and figures following to wit:

Petition

The State of Missouri
to the use of William
A. McMurray pltff } Circuit Court
St Louis County

George P Doan
Jonathan C Havens &
James Porter } February Term 1864.

Defts.

The plaintiff Says that on the 15th day of January 1861 Thomas Forrester & Richard Forrester of St Louis by their deed of that date duly executed delivered & Recorded Conveyed to him for a valuable Consideration as expressed in Said deed to wit: to Secure the payment to this plaintiff of the notes mentioned in Said deed the following described property then Situated in their Store No 42 Main Street in the City of St Louis Viz. Artificial flowers of the Value of 183$ Laces of the Value of 131$ Tarletons of the Value of 60 dolls,

P. 1. Satins & Silks to the value of 55 dollars, Collars

of the value of six dollars. Straw trimmings of the value of five dollars. Head Dresses of the Value of 27 dollars. Ruches of the value of 100 dollars. Ribbons of the value of 270 dollars. Bonnets of the Value of 200 dollars. Store fixtures Safe & desk of the value of 175 dollars.

That afterwards And on or about the 13 day of February 1861 long after said deed of Mortgage was executed & recorded as required by law the Sheriff of St Louis County levied upon said property by taking the same on an execution issued from the Circuit Court of St Louis County and returnable to the Sept Term 1861 of said Court in favor of John R. Saffery Edward S. Saffery, Richard W Saffery & Arthur W Saffery and against said Thomas & Richard Forrester

That after the said Sheriff had so taken said property and on or about the 13 day of February 1861 the plffs gave written notice to said Sheriff, which notice was signed and sworn to by the plffs. as required by the Act of March 3. 1855, that he claimed to be and was the owner of said property by virtue of said Mortgage And that said Forrestes had no interest in the same except a right of redemption, that said claim was not

made in collusion &c but to obtain his just rights,

That thereupon and afterwards the defendants George P Doan as principal and the said Haven & Porter as Sureties executed and gave their bond to the, a copy of which is herewith filed to the State of Missouri in the penal sum of one thousand dollars reciting that the above named execution issued as above stated in favor of said Jaffreys against said Forresters had been levied upon said property and that the same had been taken by said Sheriff, That said McMurray had claimed the same under the provisions of said Act of March 3. 1855 And further providing that if the said plaintiffs Jaffreys should indemnify said Sheriff against all damages and Costs that said Sheriff might sustain in Consequence of said Seizure and Sale of said property and should moreover pay to and satisfy said claimant, this plff, and any person or persons claiming title to said property, all damages which such person or persons may or might sustain in Consequence of such Seizure, then the said Obligation was to be null and Void, but otherwise it should remain in full force & virtue.

3. The plaintiff says that after said bond

4. bond was given by the defendants and in consequence of the same the said Sheriff sold said property on said execution and paid the proceeds of the same over to said Jaffreys or their Agent, and that this plaintiff has wholly lost said property and the proceeds of the same. And that his said debt against the said Foresters is wholly unpaid, and that neither the said Jaffreys nor the defendants nor any other person or persons have ever paid this plaintiff the damages he sustained by reason of said Seizure and Sale, nor any part of the same, and he avers that he has been damaged by said Seizure and Sale to the amount of Two Thousand dollars. And that the Defts by reason of their said bond are liable to pay him the same, and he asks judgment against the said defendants for the sum of Two Thousand dollars and for his costs.

By Hill & Jewett

D. T. Jewett Attorney for the Plaintiffs on oath says that the above petition and matters therein as stated he believes to be true.

D. T. Jewett

Sworn to and subscribed before me January 15, 1864 Seal Witness My hand and Seal of Circuit Court the date last aforesaid

S. Rice Clk.

And thereupon on the day of the filing of said petition a Summons issued from the Office of said Clerk in terms and form following to wit:

Sum.s

County of St Louis ss.

The State of Missouri

To the Sheriff of St Louis County Greeting

We Command you to Summon George S. Doan, Jonathan C. Havens & James Porter to appear before the Judge of our Circuit Court on the first day of the next Term thereof to be held in the City of St Louis within & for the County of St Louis on the first Monday of February next then and there to answer the Complaint of The State of Missouri to the use of William A. McMurray as set forth in the amended petition, and have you then and there this writ. (Seal)

Witness Stephen Rice Clerk of our said Court with the Seal thereof hereto affixed at Office in the City of St Louis this 15th day of January in the year of our Lord eighteen hundred and sixty four.

Stephen Rice Clk.

On Which Summons the Sheriff made return as follows.

Shff. Rt. 5

"Executed this writ in the County of St Louis on the 16 day of January 1864 by delivering a

6. Copy of the writ and petition as furnished by the Clerk to James Porter and by delivering a Copy of the Writ as furnished by the Clerk to Jonathan C. Havens, George P. Sloan Not found in my County

John C. Vogel Sheriff
By James Owens Deputy.

And afterwards to Wit: On the Tenth day of February 1864 the Defendants filed their answer to the petition aforesaid in the words and figures following to wit.

Answer of Porter & Havens

The State of Missouri
to the use of William A. McMurray Pltff.
"
George P. Sloan
Jonathan C. Havens &
James Porter.

In St Louis Circuit Court.
February Term 1864

The defendants Havens and Porter for Answer to the plaintiffs petition deny that they have any knowledge or information thereof sufficient to form a belief that Thomas Porter & Richard Porter by their deed mentioned in the petition conveyed to the plaintiff the personal property or any of it described in the petition, or of the value alleged, or that said instrument is the deed

of said Forrester or that the same was acknowledged or recorded as alleged in the petition, or that the debt referred to remains unpaid. Or that the Sheriff levied upon the property contained in said deed. Or that plaintiff gave due notice of his true claim as alleged in the petition

Defendants further answering state that upon a prior judgment rendered in favor of one John Mack against Thomas & Richard Forester the Sheriff of St Louis County at the request of the plaintiff therein levied an execution upon certain goods wares and merchandize as the property of said Forrester's and that one Wm A McMurray who is the plaintiff in this suit claimed the property by virtue of a supposed Mortgage therefore executed by said Trustees to said McMurray, and that thereupon said Sheriff took a bond from said plaintiff Mack signed by one Henry A. Hart as principal & Joseph Jecks and Anthony H. Menkens as security to indemnify the said claimant in the sum of seventeen hundred dollars, that thereupon the Sheriff sold said property and the proceeds thereof were applied to the payment of the said judgment in favor of said Mack to the amount of $483.40 & costs of sale.

7. And defendants further say that

8. Said William A. McMurray instituted an action upon said bond against said Henry M. Stout, Joseph Scott & Anthony M. Menkens in the St Louis Court of Common Pleas to recover the whole amount of his said claim and damage for the taking of said goods and that said action is now pending in said Court between said parties, and that said action is brought to recover for the same levy and goods claimed by the said plaintiff in this action.

Further Answering defendants say that after the said Levy and Sale above mentioned, the defendants herein at the request of said Taffey & Sons who were judgment Creditors of said Thos & Richard Fowler specified the bond referred to in the petition and the Sheriff of St Louis County applied the surplus of said sale after satisfying the judgment of said Mack to the payment of the execution in favor of said Taffey & Sons and that the amount of said surplus so applied was five hundred dollars eighty cents and no more and to indemnify the Sheriff for such application of the surplus and all parties who might be entitled to claim the same said bond signed by these defendants upon which this action was instituted was given as is well known to plaintiff

and for no other purpose whatever.

The Defendants deny that the plaintiffs gave written Notice to Said Sheriff as required by Act of March 3. 1855 or any other Notice that he was the owner of any of the property or money levied or taken by virtue of the execution in favor of John R. Jaffrey & als against Thomas & Richard Forrester referred to in the petition.

Defendants deny that after said bond of defendants was given or in Consequence thereof the Sheriff Sold Said property referred to in the petition, but they allege that the Same had been Sold under the execution in favor of said Mack. & the proceeds of Such Sale were applied to the payment of Said execution in favor of said Mack

Further Answering the defendants Say that Said alleged Mortgage to the plaintiff was made in fraud of the rights of Said Jaffrey & Sons & other Creditors of Said Forresters and with the intent to hinder and delay such creditors in the Collection of their debts, And that the Said McMurray was party and privy to Such intent.

Krum & Decker for Defts.

Jonathan A Havens one of the defendants on his oath Says that the above answer

9. and the Matters therein as Stated he believes to

10. be true

Jonathan C. Havens.

Subscribed and Sworn to before me this 10th of February 1864.

Seal. William A. White
Notary Public St Louis Co Mo.

And afterwards to Wit: At the September Term Eighteen hundred & Sixty four the following proceedings were had in said Cause in said Court to wit:

November 28. 1864.

Judgt. The State of Missouri to use of William A. McMurray } On Bond.
George P. Sloan. }
Jonathan C. Havens & }
James Porter }

Now at this day come the parties by their respective Attorneys and the plaintiff dismisses this Suit as to the defendant George P. Sloan, And the parties waiving a Jury Submit this cause to the Court upon the pleadings and proof, And the Court having duly heard and Considered the Same find the issues therein joined in favor of the plaintiff and assess the damages at the sum of Six hundred and

thirty Seven dollars & 21 cents

It is therefore Considered by the Court that the plaintiff recover of the defendants the damages aforesaid in form aforesaid as assessed. And also its Costs & charges in this behalf expended & have execution thereof.

November 30. 1864.

Mo for New Trial Overd. Now at this day Come the parties by their respective Attorneys and the defendants Motion for a New Trial being heard and fully Considered by the Court, It is Ordered by the Court that the Said Motion be overruled.

February 4. 1865

Appeal allowed. Now at this day come the defendants by their Attorney and file An Affidavit for An Appeal And on their motion an appeal is allowed them to the Supreme Court from the Judgment herein rendered. They thereupon file an appeal bond which is approved by the Court.

Which Said affidavit for An Appeal and Appeal Bond are in the words and figures following to wit:

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Aff. for appeal.

County of St Louis }

Jonathan C. Havens one of Defendants in above cause being duly sworn says that the appeal of the defendants in this cause is not made for vexation or delay but because this affiant believes the Defendants are aggrieved by the Judgment of the Court herein

Jonathan C Havens.

Subscribed and sworn to before me this 4 day of February 1865. before me.

J A Schneider Cl.

Appeal Bond.

Know all Men by these presents that we Jonathan C. Havens as principal and John M. Krum as Surety are held and firmly bound to the State of Missouri to the use of William A. McMurray in the sum of fifteen hundred dollars to the payment of which 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 fourth day of February AD 1865.

The Condition of the above obligation is such that Whereas Jonathan C Havens & James Porter have appealed from the judgment rendered against them and in favor

of the State of Missouri to the use of Wm. A. McMurray in the St Louis Circuit Court for the sum of Six hundred and thirty Seven dollars and 21 cents together with Costs.

Now if the said appellants will 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, and such as the Supreme Court may direct the St Louis Circuit Court to give and if the judgment or any part thereof be affirmed will comply with and perform the same so far as it may be affirmed and pay all damages and costs which may be awarded against them by the Supreme Court then this obligation shall be void otherwise it shall remain in full force and effect.

Jonathan Cleaves (Seal)
John M. Krum (Seal)

Approved in Open Court February 4. 1865
F A Schneider Cl.

The following Bill of Exceptions was filed in said cause on the Twelfth day of January eighteen hundred and sixty five to wit:

14

Bill of Exceptions

The State of Mo to
use of Wm Murray
Plff
George P. Doan et al } Circuit Court
Defts

Be it Remembered that on the trial of this cause both parties waived a Jury and the cause was by consent tried by the Court sitting as a Jury

The plaintiff to maintain the issues on his part read in evidence the Bond executed by defendants to the State of Missouri as follows

Bond.

Know all Men by these presents that we George P Doan as principal and Jonathan Stewart and James Foster as Sureties are held and firmly bound unto the State of Missouri in the Sum of One 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 day of

The Condition of the above obligation is such, that whereas a Writ of Execution has issued from the Clerk's Office of the Circuit Court bearing No 71 returnable to

the September Term 1861 of said Court in favor of John R. Laffey Edward S. Laffey, Richard W Laffey and Arthur W Laffey and against Thomas Forrester and Richard Forrester directed to the Sheriff of the County of St Louis and has been delivered to John K. Andrews as such Sheriff to be executed by him and the said Sheriff has executed the said writ at the request of the said plaintiffs by taking as the property of the said Thomas Forrester and Richard Forrester the following described personal property to wit: The goods enumerated and described in Appraisers list attached to execution No 38 in favor of John Mack vs Thomas & Richard Forrester of the value of Eight hundred and fifty five $\frac{90}{100}$ dollars and William A. McMurray 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 Marshal & Sheriff in the County of St Louis, in relation to the levy & sale of such property under execution or attachment as may be claimed by third persons" Approved March 3. 1855 and in the manner therein mentioned

Now if the aforesaid plaintiff shall
15 indemnify said John K. Andrews Sheriff

16. against all damages and costs which he said Sheriff may sustain in consequence of the seizure and sale of the property aforesaid under said cert. and moreover shall pay to and satisfy said claimant and any person or persons claiming title to said property all damages which such person or persons may sustain in consequence of such seizure and sale then this obligation shall be null and void, otherwise it shall remain in full force and virtue

George P. Doan Seal
Jonathan Chavens Seal
James Porter Seal

Also the Execution and Sheriff's Return thereon of Jaffrey vs Forrester No 71 September Term 1861 Circuit Court as follows

Exn Jaffreys Forresters

The State of Missouri

To the Sheriff of the County of St Louis Greeting, Whereas John R Jaffray Edward S Jaffray, Richard W Jaffray and Arthur W Jaffray on the 16 day of February in the year of our Lord one thousand eight hundred and sixty one at our St Louis Circuit Court recovered against Thomas Forrester & Richard Forrester the sum of seven hundred and fifty three dollars and eighty seven cents debt.

together with twelve dollars and fifteen cents for Costs and charges in that behalf expended. These are therefore to Command you that of the goods and chattels and Real Estate of the said Thomas Somerset and Richard Somerset you cause to be made the debt and costs. And that you have the same before the Judge of said Court on the last Monday of September next to satisfy the debt and costs aforesaid. And that you Certify how you have executed this writ. (Seal) Witness Stephen Rice Clerk of Circuit Court with the Seal thereof hereto affixed at Office in the City of St Louis this 16 day of February in the year of our Lord eighteen hundred and sixty one.

Stephen Rice Clk C.C.

Sheriff's Return

Amount applied on this writ after paying costs of sale from proceeds of Sale Made under Execution 71 to September Term 1861. $500.88

No other goods chattels or Real Estate belonging to the within named defendants found in my County whereon to levy and make the balance of debt and any part thereof.

John H. Andrews Shff.

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18. Plaintiff also read execution and Sheriff's Return thereon of Mack vs Forrester No 38 Sept Term 1861 Circuit Court as follows.

Exn.
Mack
vs
Forrester's

The State of Missouri
To the Sheriff of the County of St Louis
Greeting. Whereas John Mack on the 6th day of February in the year of our Lord one thousand eight hundred and sixty one at our St Louis Circuit Court recovered against Thomas Forrester & Richard Forrester the sum of four hundred and fifty seven dollars and thirty nine cents together with twelve dollars & 20 cents for costs and charges in that suit expended. These are therefore to command you that of the goods and chattels and Real Estate of the said Thomas Forrester & Richard Forrester you cause to be made the Debt and costs and that you have the same before the Judge aforesaid Court on the last Monday of September Next to satisfy the Debt and costs aforesaid and that you duly have you have executed this writ. Seal Witness Stephen Rice Clerk of our said Court with the seal thereof hereto affixed at Office in the City of St Louis this 12 day of February in the year of our

Lord eighteen hundred and Sixty one

Clerk CC

Sheriffs Return

Made by the Sale of personal property Levied upon 15th February 1861 under this writ and Sold the 27th March 1861 One thousand and Sixty Six 21/100 dollars which pays this execution and Costs of Sale, leaves a Surplus in my hands of five hundred and twenty one 74/100 dollars.

John St. Andrews Shff
Theodore LaBeaume Deputy.

Plaintiff also read a claim of D. M. Murray given to Sheriff upon the seizure of goods under execution in favor of Mack. vs Forresters and also an appraisal of goods attached to said execution. as follows.

Claim of M. Murray to Property.

To the Sheriff of St Louis County Mo and his Deputies

You are hereby notified that I am the owner as Mortgagee of the property you have this day attached on an execution in favor of. John Mack against Thomas & Richard Forrester, in Store No 42 N. Main Street. in the City of St Louis, that the property was Mortgaged to me by the said Forresters On the 15th day of January AD 1861 as appears by the Records of St Louis County for Deeds

19.

20. Book 250 page 366. wherein said deed of Mortgage has been duly recorded That said goods were Mortgaged to me to secure the payment of the Notes mentioned in said Mortgage amounting to the sum of ~~two~~ about $2000. twelve on the same, That I am in good faith the lawful owner of the interest claimed by me in said goods, That the Defendants Forrestine, have no right or title directly or indirectly in the interest in said property claimed by me as above nor any interest therein except the right to redeem the same, And that this claim is not made in collusion with said defendants for the purpose of evading hindering or delaying the plaintiffs in said vocation from obtaining his just rights. The goods claimed by me under said Mortgage are as follows, Viz:

Flowers	Valued at.	$ 183.00
Laces	" "	132.00
Tarletons	" "	60.00
Satins Silks	" "	55.00
Collars	" "	6.00
Shaw Trimmings	" "	5.00
Head Dresses	" "	27.00
Ruches	" "	100.00
Ribbons	" "	270.00

Bonnetts	"	"	200.00
Fixtures Safe & Desk	"	"	175.00
			$ 1212.00

Wm A. McMurray.

State of Missouri
County of St Louis } ss. On this 13 day of Feb 1861 appeared before me Dr. Wm A McMurray who is personally known to me to be the same person whose name is signed to the foregoing Notice and on oath says the above statement signed by him is true. (Seal)

E. F. Spalding Notary
Public for St Louis County
Mo.

Appraisal of goods attached to Exec in favor of Mack.

John Mack
Thomas Ferrester &
Richard Ferrester } Execution 38 Sept Term 1861 St Louis Circuit Court.

We the undersigned being duly sworn to appraise goods levied on by John H Andrews Sheriff of St Louis County in the above Styed case find the same to be of the value of Eight hundred and fifty five 90/100 dollars.

Jas G. Brown
Morris Rosenheim.
Abr Kramer.

Sworn to and subscribed before me
21. this 27 day of February A.D. eighteen

hundred and Sixty one

E. N. Tracy Clk.

To the reading of which claim the Defendants Objected on the ground that it did not appear that the claim was made in respect to any levy made under the execution in favor of Jaffrays vs Forrester's Nor that the Jaffray execution had ever been levied on the goods, that the date of the claim was prior to the levy of the Jaffray execution and that said claim was wholly illegal irrelevant & incompetent evidence against the defendants but the Court Overruled the objection and permitted said claim and appraisal to be Read as evidence Only to identify the goods referred to in the bond sued on and in the return of the Officer on the Execution of Jaffrays vs Forrester and no further. And the defendant duly excepted.

Plaintiff then called as a Witness Thomas Forrester who testified as follows.

Test of T. Forrester

This Signature to the Mortgage is mine My brother also Signed it, These notes are the Notes of Forrester & Bro.

Mortgage Deed

Whereas We Thomas Forrester and Richard Forrester Copartners under the firm of Forrester & Bro. are indebted to Dr William A.

M. Murray of St Louis Mo. as follows, to wit: for two notes given by us to Francis Whittaker one dated the 15 day of July 1859 for the sum of five hundred dollars payable in one year after date thereof with interest at ten per cent per annum until paid Another dated the 3rd day of February 1860 for the sum of five hundred dollars payable in six months after date thereof with interest at ten per cent per annum until paid, Also one other note given by us to Charles Casey of St Louis dated the 18th day of Sept 1860 payable to our own order and endorsed by us to said Casey for the sum of one thousand dollars payable in six months after date thereof, Which three notes have been assigned to and are now held by said M. Murray And which are still due and unpaid by us, In consideration of the above and as security for the payment of said notes, We hereby assign sell and convey to the said M. Murray all of our stock in trade now in the store occupied by us No 42 North Main Street upstairs in the City of St Louis, Consisting of the following articles viz

Flowers	Valued	at	$ 183.00
Laces.	"	"	131.00
Tarlatans &c.	"	"	60.00
Satins Silks	"	"	55.00
Collars.	"	"	6.00
Straw Trimmings	"	"	5.00
Head Dresses.	"	"	27.00
Ruches.	"	"	100.00
Bonnets Ribbons	"	"	270.00
Bonnets	"	"	200.00
Sixteen Safe & Stock.	"	"	175.00
Total.			$ 1163.00

23.

Also the following bills receivable due us from the following persons to the following amounts.

Mrs Shields.	$ 200.00
Mrs Labike	100.00
Mrs Morgan	200.00
Thomas Cameron	300.00
Mrs Nolan	100.00
Mrs Whipp	173.00
Miss Robinson	100.00
Mrs Tolkins	100.00
Making	$ 1573.00

And a total of goods & Bills Receivable of $2736.00

Now the Condition of this Mortgage is that if the undersigned payer cause to be paid to said McMurray the full amount of said notes with interest & Costs within one year from this date then this mortgage is to be null & void, but otherwise to remain in full force & effect, And after the expiration of said time said McMurray may sell said property and bills receivable at Auction upon giving us 20 days notice of the time & place of sale in writing. Said property to be sold in the City of St Louis, Or the said McMurray may after the expiration of said term proceed to collect said bills receivable (if they are not sooner paid to him) without selling the same at Auction, Witness our hands this 15 day of Jany 1861. Thomas Forrester Seal Richard Forrester Seal

State of Missouri } I E F Spalding a Notary Public duly
County of St Louis } Commissioned & qualified for the City of St Louis do hereby Certify that on this 15th day of January 1861 came before me Thomas & Richard Forrester who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument & separately acknowledged the same to be their act and deed for the purposes therein mentioned. Dated

In Testimony Whereof I Witness My hand & Seal this 15 Jany 1861. E F Spalding Notary P Sheets Co.

State of Missouri } I the undersigned Recorder for said County certify that
County of St Louis } the foregoing instrument of writing was filed for recording
office Jany 15. 1861, & is truly recorded in Book 250. page 366. Witness my hand
& official Seal the date aforesaid (Seal) A C Bernoudy Recorder.

Notes. $500. St Louis 3 July 1860. Six months after date we promise to pay to the order of Francis
Whittaker five hundred dollars for value received, Negotiable & payable without defalcation
or discount with int @ 10 per cent. per annum. until paid Sonneter & Bro. Endorsed
"Pay Wm A M Murray or order without recourse. Francis Whittaker by Hugh Hemphill Atty"
$500 St Louis 15 July 1859. One year after date we promise to pay to the order of
Francis Whittaker five hundred dollars for value received negotiable & payable without defalcation
or discount with int at 10 per Cent per Annum until paid Sonneter & Bro. Endorsed
"Pay Wm A M Murray or Order without recourse Francis Whittaker by Hugh Hemphill atty"
$1000. St Louis Sept 1. 1860. Six months after date we promise to pay to the order of ourselves
One thousand dollars for value received negotiable & payable without defalcation or discount.
for Sonneter & Bro Endorsed "Sonneter & Bro. pay to order of Wm A M Murray. without
recourse Charles Casey"

Testimony of Sonneter Cont. The Stock of goods mentioned in the Mortgage embraced an entire Stock I estimated them in the Values put upon them in the Mortgage at Auction prices And datotal amount at that rate was $1163. The fair Cost of the same goods would be 2300 dollars. The goods were in good Condition, They are the same goods that were taken out of the Store under the execution in favor of Mack by the Sheriff They were Sold by the Sheriff at Auction afterwards, I have received no part of the proceeds of said Sale, The notes read in evidence were given for money used by Sonneter & Bro in their business and to pay creditors, The notes

25

26. were due when the Mortgage was given Dr McMurray bought the notes of the persons to whom they were given.

On Cross Examination Witness Said,

Dr McMurray obtained the notes before the Mortgage was given, he got the notes at my request, We were in failing circumstances at the time, Suits had not been brought against us when the notes were bought, Mack & Laffan's debts were past due, Debt from us to McMurray is still due, The Mortgage was executed 18th January 1861, We kept our Store on Main Street, A coal wholesale business — After the Mortgage McMurray came to the Store daily, the Sales made after the Mortgage went to his benefit, I signed my name as Agent to all bills and receipts after the operation of Mortgage, Dr McMurray at the time of the Mortgage was a practicing Physician, he kept his Office on the Corner of 5th & Washington Avenue in this City, and continued his practice, He employed me in the Store at 75 $ per month.

I valued the Stock turned over to Dr McMurray at (vide Mortgage) $ 300, And the Notes & accounts assigned to him.

1500

Total 1800.00

The Notes and Accounts are put in the Mortgage at their face.

We had no other property except that which was embraced in the Mortgage to Mr Murray, we were unable to meet our liabilities, I saw perfectly well we were unable to proceed in our business without outside assistance. Mr Murray was aware that we were involved when he bought up the notes, the amount of our other indebtedness was between £3000. & £4000. The whole of our indebtedness was £6000. After the Mortgage we continued in the Store, I sold goods when I had a chance, Very few goods were sold, not more than 3 or 4 parcels. The Season was very dull.

On Re Examination Witness said. If I could have been allowed to sell goods in usual course of business I could have realized from 50 to 75 pr ct over the Cost of the goods. The Mortgage was signed in the Office of Hill & Sewell Lawyers in this City. All goods sold after Mortgage were sold as Dr Mr Murray's goods, I have collected three hundred dollars on the notes and accounts assigned to Mr Murray and paid over the same to him, The rest of the notes and accounts are worthless

27.

On Re Cross Examination by Defendants Witness Says.

I Kept most of these notes and accounts in my hands after the Mortgage was executed and collected what I could of them for Mr Murray, One Note that was found was placed by Mr Murray No definite time was fixed for foreclosure of the Mortgage, I don't Know whether the Mortgage fixed any time of redemption No other time was fixed and no other bargain made. — that what appears in the Mortgage.

Plaintiffs then rested.

Defendants then offered in evidence the record and proceedings in the Case of Mack vs Forester, which showed that a Suit was instituted in the St Louis Circuit Court for Debt against Forester & Brother On the day of January 1861, That the Summons in said case was Served on the 16 day of January 1861 and a judgment for the Sum of $ rendered against the Mortgagors Forester & Bro on the 6 day of February 1861

Defendants also proved that the Suit upon the indebtedness of Forester & Bro to Taffray & Sons was brought in the Same

Court on the day of January 1861 That Summons was served on the 15 of January 1861 on the Forresters and that a judgment was rendered against them for the sum of $ — on the 15. day of February 1861

Defendant then offered in evidence the Record and Proceedings in the Case of the State to the use of McMurray against Hart et al in the St Louis Court of Common Pleas, as follows:

Record in Case of State use McMurray vs Hart et al Petition — Sum.s Ans & Judgt.

State of Missouri to the use of William A McMurray Plff. } In the Court of Common Pleas for St Louis County. April Term 1861

Henry A Hart Anthony H. Menkins & Joseph Jecko. Defts. }

Plaintiff — that on the 15th day of January 1861 Thomas Forrester & Richard Forrester Conveyed to the said McMurray in Mortgage to secure the payment of certain notes and liabilities therein mentioned amounting to about the sum of Two Thousand dollars and interest on the same the following described goods then in Store No 42 N Main St in the City of St Louis Viz: Artificial flowers of the Value of $ 183. Laces of the value of $ 131. Tarletons of the value of

29. 60 $ Satins & Silks of the value of $ 55.

30 Collars of the Value of $6. Straw Trimmings of the value of five dollars. Head Dresses of the Value of $27. Ruches of the Value of $100. Ribbons of the value of $270. Bonnets of the value of $200. Fixtures Safe and Desk of the value of $175

That Said Mortgage was duly executed and Recorded in the Registry of Deeds for the County of St Louis in Book 250 page 356

That on the 13th day of February 1861 after Said deed was So recorded the Sheriff of St Louis County Levied upon Said goods and property a Certain execution issued out of the Office of the Clerk of the Circuit Court for St Louis County on a judgment rendered at the February Term 1861 of said Court being No 38 of Sd Term in favor of one John Mack against Said Thomas & Richard Forrester, And that Said Mr Murray after Said levy was So made And on the Said 13th Feby 1861 duly claimed under his Said Mortgage Said property So levied upon And claimed it according to the provisions of the third Section of An Act of the General Assembly of the State of Missouri entitled An Act Concerning the duties of Sheriff & Marshal 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' and approved March 3. 1855. and in the manner therein mentioned.

That on the 14' day of March 1861 the Defendants according to the provisions of said Act gave their bond to the State of Missouri in the penal Sum of Seventeen hundred and twenty dollars, Wherein said Henry A. Hart as principal & said Anthony H Menkens & Joseph Jecko as Securities covenanted and agreed that the said plaintiff John Mack. Should pay to and Satisfy said claimant McMurray and any person or persons claiming title to said property all damages which such persons claimants may Sustain in consequence of the Seizure and Sale of said property.

The plaintiff Says that the said McMurray is in good faith the owner of the interest claimed by him as aforesaid in the property levied upon as aforesaid as the property of said Forresters. That said Sheriff has refused and Still refuses to deliver up to said McMurray the property claimed by him as aforesaid And that the

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32 Said McMurray is injured and damaged in Consequence of said Levy to the amount of Twelve hundred dollars And that the said plaintiff in said execution, has not paid to the said McMurray said damages. nor any part thereof but wholly neglects and refuses so to do.

Wherefore the plaintiff asks judgment against the said Defendants for the said sum of Twelve hundred dollars damages and for his costs.

Hill & Jewett
Attys for Pltff.

The said William A. McMurray on oath says that the above petition and the matters therein as stated he believes to be true.

Wm A. McMurray.

Sworn to and subscribed before me this 16th day of March 1861

Leon L. Papin Clk.

Sum 5. County of St Louis Jo.

The State of Missouri

To the Sheriff of St Louis County Greeting. We Command you to Summon Henry Nr Hart Anthony H Menkens & Joseph Jecko 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 first Monday of April 1861 then and there to Answer the Complaint of the State of Minouri to the use of William A M Murray as set forth in the annexed petition and have you then and there this writ. Seal Witness Leon J. Papin Clerk of our said Court with the seal thereof hereto affixed at Office in the City of St Louis this 16 day of March in the year of our Lord eighteen hundred and Sixty one.

Leon J. Papin Clk.

Return of Shff. "Executed this Writ in St Louis County on the 16 day of March 1861 by delivering a Copy of the Writ and petition as furnished by the Clerk to Henry A Hart and also by delivering a Copy of the Writ as furnished by the Clerk to Anthony H. Menkens & Joseph Jecko.

John H. Andrews Shff
By Geo A. Stevens Deptg.

Answer State of Minouri to the use of William A Murray Plff. } In the St Louis Court of Common Pleas.

Henry A Hart, Anthony H Menkens & Joseph Jecko. } April Term 1861

33.

34 St Louis County Jo.

Defendants for Answer to plaintiffs petition Admits that Thomas Forrester & Richard Forrester Conveyed to Said McMurray on the 15th day of January 1861 in Mortgage to Secure the payment of certain Notes and liabilities therein mentioned Amounting to about the Sum of $ 2000. And interest on the Same, the goods described in his plff's petition, then in Store No 42 North Main St as follows Flowers of the value of $ 183. Laces of the Value of $ 131. Tarletons of the Value of $ 60. Satins & Silks of the value of $ 55. Buttons of the Value of $ 6.00 Straw Trimmings of the Value of $ 5. Head Dresses of the Value of $ 27. Ruches of the Value of $ 100. Ribbons of the value of $ 270. Bonnets of the value of $ 200. Fixtures Safe and Desk of the value of $ 175. but Defts Say that said Conveyance was made in fraud And for the purpose of defrauding hindering and delaying the Creditors of Said Forresters. And further Say that Said deed of Conveyance of said property is fraudulent in itself and void on its face in law,

Defendants Say they have no Knowledge Sufficient to form a belief

of the value or quantity of said goods
but defendants deny that they and
the amounts stated

Defendants admit that on the
13th day of July 1861 the defendant Sheriff
of St Louis County levied upon certain
goods and property as the property of
Thomas and Richard Forrester under
a certain execution issued out of the
Office of the Clerk of the Circuit Court
of St Louis County on a judgment rendered
at the February Term 1861 of said Court
being No 38 of said Term in favor of
John Mack and against said Thomas
and Richard Forrester.

Defendants say that they have
no knowledge or information sufficient to
form a belief as to whether plff McMurray
did or did not on the 13th day of July 1861
duly claim under his said Suffered
Mortgage said property so levied upon
that he claimed it according to the
provisions of the third Section of an
Act of the General Assembly of the
State of Missouri entitled "An Act
Concerning the duties of Sheriff and
Marshal in the County of St Louis in
relation to the Levy and Sale of such
property under execution or Attachment

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as may be claimed by third persons"
Approved March 3. 1855

Defendants admit the making
and execution of the bond mentioned and
described in the plaintiffs petition.

These defendants deny and charge
the allegation in plaintiffs petition to be
false and untrue that he said McMurray
is in good faith the owner of the interest
claimed by him as aforesaid in the property
levied upon under said execution as
the property of said Consters and
defendants deny that said McMurray
is injured and damaged in consequence
of said levy to the amount of $1200.
or any other sum whatever for and
on any account matter or thing whatever
and denies that plaintiff is entitled to
any judgment whatever against defendants.

Defendants for further Answer state
that the property levied on under the writs
of said execution hereinbefore recited was
in fact the property of said Consters
defendants in said execution and no one
else and as such liable for the debts
of said Consters and subject to levy
Sale under said Execution, that the
Mortgage mentioned and set forth in

plaintiffs petition made by said Forrester to said McMurray for the purpose of hindering delaying cheating and defrauding said John Mack and other creditors of said Forrester out of their just claims and demands, And that the same was a fraud in law and never had any binding force or effect whatever, And defendants say that this suit is brought by said McMurray by the advice & consent and for the sole benefit of said Forrester and no one else, And that in fact the said McMurray has no interest whatever in the said suit and is merely acting in said matter for the purpose of assisting said Forrester to hinder delay, cheat and defraud said Mack & other creditors of said Forrester, Wherefore Defendants pray to be dismissed with their costs in this behalf wrongfully sustained.

Hart & McGibbon
for Defts.

State of Missouri }
County of St Louis } ss. Henry A. Hart One of Defendants and Agent for his Co Defendants makes oath and says that he believes the foregoing Answer and the Matters as therein stated are true.

Henry A. Hart.

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38. Sworn to and Subscribed before me this 6th day of April AD 1861 (Seal)

Herman A. Haussler
Notary Public.

May 4. 1864.

Judgt in C Com Plens.

The State of Missouri to the use of William A. McMurray

Henry A Hart
Anthony H Menkins &
Joseph Jecko.

On Motion of said plaintiff by his Attorney this Ordered by the Court that this cause be dismissed as to the said defendant Joseph Jecko, Thereupon comes said plaintiff by his Attorney but said other defendants although duly summoned and called come not, Wherefore on Motion of said plaintiff this cause is Submitted to the Court And the Court having duly heard and Considered the same doth assess the damages of said plaintiff at the Sum of five hundred and Seventy six dollars It is therefore Considered by the Court that said plaintiff recover of said defendants the Sum of overaid in form of overaid as assessed and his Costs and Charges herein expended and have therefor execution.

The Deft also read in evidence the bond upon which the Suit of Dr McMurray was founded in the Com Plens

Court, as follows.

Bond of John Mack. Know all Men by these presents that we Henry A Hart as principal and A H Menkens and Joseph Jacko as Securities are held and firmly bound unto the State of Missouri in the Sum of Seventeen hundred and twenty 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 fourteenth day of March 1861. The Condition of the above obligation is such, That Whereas a Writ of Execution has issued from the Clerk's Office of the St Louis Circuit Court being No 38 returnable to the September Term 1861 of said Court in favor of John Mack and against Thomas Forrester & Richard Forrester directed to the Sheriff of the County of St Louis and has been delivered to John H. Andrews as Such Sheriff to be executed by him And the Said Sheriff has executed the Said writ at the request of the Said Sheriff plaintiff by taking as the property of the Said defendants the following described personal property to wit: The Goods enumerated and

39.

40. described in the Appraisers list hereto attached. of the value of eight hundred and fifty five 90/100 dollars. and William A. McMurray has claimed said property according to the 3rd Section of the Act of the General Assembly of the State of Missouri entitled "An Act Concerning the duties of Sheriff & Marshal in the County of St Louis in relation to the Levy and Sale of such property under execution as may be claimed by third persons" Approved March 3. 1855 And in the manner therein mentioned.

Now if the aforesaid plaintiff shall indemnify said John H Andrews Sheriff against all damages and Costs which he said Sheriff may sustain in Consequence of the Seizure and Sale of the property aforesaid under said writ and moreover shall pay to and satisfy said claimant and any person or persons claiming title to said property all damages which such person or persons may sustain in Consequence of such Seizure and Sale. then this obligation shall be null & void, Otherwise it shall remain in full force & virtue Henry N Hart (Seal)

A H Menkens (Seal)

Jos Decke. (Seal)

Defendant then called as a Witness Bryan Cross who testified

Test of B Cross. I was principal Deputy of Sheriff Andrews in his Office, I drew both of the bonds above Set out, The claim of Dr McMurray annexed to the Mack execution was made in pursuance of the Levy and bond in the Case of Mack against Forester & Bro. Don't Know that he McMurray made any other claim The goods were in the Sheriff's hands, The Deputy Wilkins made the levy.

Defendant then called as a Witness

Test of J S Wilkins J. S. Wilkins Deputy Sheriff under Andrews

I attended to levying executions, I levied the execution of Mack upon the Stock of goods, They were in Store on Main Street, I took the whole Stock — One of the Foresters was in the Store (possession), The Store was open, Levy made in the morning on the Same day of the Levy I took the goods to the Sheriff's Ware house and they remained in the Sheriff's hands until their Sale, The Sale was made under the Mack execution, We did not get the Taffrey execution until after we had removed the goods to the Ware house, I Know

41. of no other claim made by McMurray

than the one above set out and this was made upon the Mack execution and before we received the Saffray execution

On Cross Examination.

Witness said.

D. M. Murray was at the Store when the goods were levied upon on the Mack Exon, I see a pencil memorandum in my hand writing on this Saffray execution. I levied this Saffray execution on the goods after they were already in the Sheriff's hands. I made no formal levy on the goods, the goods were already in our hands, I made this Memo in pencil, I made this Memo the 16 feby 1861 And the exon was placed in the Sheriff's hands on that day, The Memo in pencil is "levied this Exon feby 16. 1861 When I made the levy on the Mack Exon in the presence of D. M. Murray he notified me that the goods were his and that he claimed them

Defendant then called Richard Somerlet.

Testimony of R Somerlet

I was member of firm of Somerlet & Bro. Remember signing the Mortgage to M. Murray, I believe I understood it.

Don't Know how McMurray got the notes, The Notes were given for money that was used by the firm in our business and to pay creditors. McMurray was our friend and. Knew we were embarrassed when he got the notes, We had gone to protest before the Mortgage was executed, Don't Know whether Mack or Saffey had Commenced Suits against us at the time of the Mortgage: After the Mortgage was executed no changes were made in the Store, We had the Same Sign over the door, we had no clerks

This was all the evidence heard in the cause.

The following instructions were given for the plaintiff and defendant.

Plaintiffs Instructions given

(and)

Def's Ins given

Every Conveyance by Mortgage or otherwise of goods and chattels made with the intent to hinder and delay creditors in the Collection or enforcement of their debts by process of law is fraudulent and void and any person accepting such Conveyance with a knowledge of such intent on the part of the vendor obtains no valid title although he may have paid a valuable Consideration for such goods.

If the Court finds from the evidence that Somerset & Bro. were in insolvent circumstances and unable to meet their debts as they matured And that they applied to D. McMurray to obtain assistance from him, And that D. McMurray being aware of their Circumstances purchased the notes read in evidence and took a Mortgage upon their Stock of goods

agreeing to give them as much time as they needed to repay him, And that the object of Sonester & Bro. in making the arrangement was to delay their other creditors for the time being until they could make acceptable terms with them, And if the Court also finds that O'M Murray was aware of these intentions at the time he took the Mortgage read in evidence, then the Mortgage gave him no title to the goods as against Saffray & Son Creditors of Sonester although he may have paid a valuable consideration for the notes and Mortgage.

The Bond Signed by the Defendants and read in evidence by the plaintiff does not estop the Defendant from showing that there was in fact no levy made upon the goods under the execution of Saffray & Son against Sonester Sals. Nor that the plaintiff O'Murray in fact made no claim to the surplus money in the hands of the Sheriff after satisfying the Mack execution read in evidence

The Defendants duly excepted to the instructions given at the instance of the plaintiff.

The following instruction asked by the Defendants was given refused.

Refused. Def's Inst. 45

If the Court finds from the evidence that there was in fact no levy made by the

46. Sheriff upon the goods under the Jaffray execution And that said goods were seized under the execution in favor of Mack against Forester before the Jaffray execution came to the Sheriff's hands And that plaintiff made no other or further claim than the one Read in evidence by plaintiff And that McMurray the plaintiff made no claim or demand for the Surplus in the Sheriff's hands, then the bond executed by the defendants was unauthorized by any Statute and gives the plaintiff no right of Action to the use of William A Murray against the Defendants in this Suit.

To which Defendants duly excepted.

In proper time the Defendants filed the following motion for a New Trial.

Mo for New Trial

The Defendants ask the Court to set aside the verdict herein rendered and for a New Trial for the reasons.

1 That the Verdict is against the evidence and against the weight of evidence

2 That the Verdict is against the Law.

3. That upon the evidence and facts proven the Verdict should have been for the defendants.

4 That the Court erred in refusing proper instructions asked by defendant.

5. That the Court erred in admitting illegal evidence on part of plaintiff and

refusing proper and legal instructions asked by defendants.

Krum & Decker for Deft

Which the Court refused and the defendants duly excepted.

That all the matters aforesaid may become part of the record. the Defendants file this Bill of Exceptions And pray that the Same may be signed which is done.

James C. Moodey
Judge

State of Missouri }
County of St Louis } ss

I the undersigned Clerk of the St Louis Circuit Court Certify the foregoing to be a True Copy of the Record and Proceedings of Said Court in the Case of the State of Missouri to the use of Wm Murray against Jonathan Stevens et al, as the Same remain of record and on file in my Office.

In Witness Whereof I hereto Setting Hand and affix the Seal of Said Court at Office in St Louis the 20th. day of February 1865

F A Schneider Clk.

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63 (1)

October Term 1866

State use of William
A. McMurray Res

vs

George S. Doan, Jonathan
C. Havens & James Porter app

Appeal from Circuit Court

Filed March 3d 1865
A. W. Mead
Clk
Hill & Jewett
Krum & D
$10 pd by J M Krum

Trans 23.80 paid by J M Krum Esq

1865 March 20 Assignment of Errors filed
1866 Novr 8 Arg & Sub. Appt Stmt filed - Stmt
& Brief of Res filed
Nov 9 Apo Br & reply to arg of Res filed
19 [illegible] [illegible]

The State of Missouri to the use of W. Murray

vs.

Geo P. Doan & als
Appellants

IN SUPREME COURT,
TERM, 18

AND now come the said Appellants and say, that in the record and proceedings of the Court below, in the above entitled cause, there is manifest error, and for error said Appellants assign the following, to wit:

1. That said Court admitted improper and illegal testimony offered by Respondent
2. That said Court rejected proper and legal testimony offered by Appellant
3. That the Court gave to the Jury improper and illegal instructions.
4. That the Court refused to give to the Jury proper and legal instructions offered by Appellants –
5. That the verdict was against the evidence.
6. That the verdict was against law.
7. That the verdict was against both law and evidence, and against the law under the evidence.
8. That the verdict was against the weight of evidence.
9. That the judgment was rendered in favor of the Respondent when it should have been rendered for the Appellant
10. That said Court overruled the motion for a new trial, made by Appellant

Krum & Decker
for appellr

And now comes the Respondent and for joinder in error say, that there is no error in the record and proceedings of said Court in said cause, as assigned by said Appellants

Hill & Jennett
for Respondent

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State use of
McMurray
Respdt

v

Doan & al
Appllt

Ass't Errors

Krum & D
for Appllt

Filed March 20 1865
A.W. McCall
Clk

The State of Missouri
to the use of
Dr. Wm A. McMurray
Respondent
vs.
Jonathan C Havens &
James Porter, secur=
ities Appellants

On appeal to
Supreme Court.

In the St. Louis
Circuit Court

Statement by Appellants.

This was a suit brought in the St Louis Circuit Court to the February term 1864 against appellants who are sureties upon a bond pimporting to have been given under the authority of the special "act relating to Sheriffs & Marshalls of St Louis County approved March 3d 1855".-

The petition alleges that on 15th of January 1861 Thos & Richard Forrester by their mortgage conveyed a certain stock of merchandise in their store on Main st. to plaintiff to secure the payment of certain notes mentioned in said mortgage.

That afterwards on the 13th February 1861 the Sheriff levied on said stock an execution in favor of Jaffrey & Co against said Forresters.

That after the Sheriff had so levied the pltff Dr McMurray gave a written notice to the Sheriff signed & sworn to by pltff. as required by said act, claiming that he was the owner of said stock under said Mortgage & that said Forsythes had no interest except the right of redemption & that said claim was not made in collusion with said Forsythes &c &c &c.

That thereupon & afterwards Geo P. Doan as principal & the Appellants as sureties gave their bond to the Sheriff a copy of which is filed with the petition (& which is in the usual form provided by the Statute)

Petition further alleges that thereupon & in consequence of the giving said bond the Sheriff sold said property under said execution and paid the proceeds of said sale to said Jaffrys & that pltff has lost said property.

The Breach alleged in petition is failure of Jaffrys to indemnify the plaintiff & that appellants by reason of said bond &c are liable in the amount of bond. &c.

The defendant Doan who was principal in said bond was not served & the cause of action against him dismissed. (Record p. 10)

Defendants Porter & Havens, the securities were served & filed their answer (Record p. 6) in which they put in issue.

a - the execution & delivery of the mortgage

b - the levy of the Jaffrey execution upon the stock of goods

c - the alleged notice by the plff to said Sheriff in consequence of said levy.

Answer then alleged that upon a prior judgment and execution rendered in favor of John Mack against said Forrester the Sheriff levied an execution in favor of said Mack & that McMurray made his claim under & after said Mack execution & that Sheriff took a bond with sufficient sureties under the Mack execution indemnifying McMurray & that said property was sold under the Mack execution & that plff McMurray instituted suit upon said bond so given by Mack & his securities to recover the whole amount & value of said goods so taken which action was pending at the time of filing the answer.

Answer further alleged that after the Mack execution was so levied

and the goods sold them defendants at the request of said Jaffrays & Sons, who were judgment creditors of said Thos & Richard Forsythe executed the bond referred to in the petition & the Sheriff of St. Louis County applied the surplus of money in the Sheriffs hands to the payment of Jaffrey execution & the amount of the surplus so applied was $500.00 & no more & to indemnify the Sheriff for such application of the surplus said bond was given &c.

Defendants denied that McMurray gave another notice to said Sheriff as required by law, & deny that said stock was sold in consequence of the Jaffrey execution or in consequence of the bond executed by them.

Further the answer avers that the mortgage alleged was made in fraud of the rights of the creditors of Forsythes & that Jaffrays were creditors - that McMurray was party & privy to such fraud.

The cause was tried by the Court, neither party requiring a Jury - all the evidence is preserved in the bill of exceptions (Rec. p 14-to-42.)

It is

It is mainly documentary - and an abstract thereof is as follows:

Plaintiff first read the bond signed by appellants (Rec. p 14) which is in the usual form required by Statute of 1855.

Also an Execution of Jaffray v. Forrester issued 16th February 1861. (p 16) + the Sheriffs return. The Sheriffs return is as follows: "Amount applied on this
" writ after paying costs, from
" proceeds of sale made under exe-
" cution 71 to September Term 1861
" - $5-00. 88. No other goods chat-
" tels or real estate belonging to the
" within named defendants found
" in my County whereon to levy +
" make the balance of debt or any
" part thereof

John H. Andrews Shff"

Plaintiff then read execution No. 38 Sept Term 1861 of Mack v Forrester + Sheriffs return on same showing levy + sale. levy 15th February 1861 sale 27th March 1861 - proceeds $1066.21

Pltff then read the claim he made upon the seizure of the goods under the Mack execution (Rec p 18-19)

and an ex parte appraisement of the goods made by strangers valuing the stock taken under the Mack execution at $855. 2c

to which evidence the appellants duly objected & excepted on the ground that it did not appear that this claim of Mr McMurray was made in respect to any levy under the execution in favor of Jaffrey vs: Forrester; nor that the Jaffrey execution had ever been levied on the goods, that the date of the claim was prior to the levy of the Jaffrey execution & that said claim was wholly illegal irrelevant & incompetent evidence against defendants in this suit - but the Court overruled the objection and permitted said claim & appraisal to be read as evidence only to identify the goods referred to in the bond sued on & in the return of the officer on the Jaffrey execution & no further - to which ruling defendants duly excepted.

Plaintiff then called as a witness Thomas Forrester who proved that he & his brother

signed the mortgage and the notes which mortgage + notes appear (Rec.d p 22 & 25) -

The mortgage is dated 15th January 1861 - recites the execution of three (two of which were past due + the third due in 8 mos) notes unpaid + due to Dr. McMurray, one note dated 15 July 1859 for $500. payable in one year to Francis Whittaker; the second to Francis Whittaker dated 3d February 1860 for $500. due six months after date; the third note for $1000. to Chas Casey dated 1st Sept. 1860 due six months after date. and as security for the payment of said note conveys their stock in trade at No 42. Main st. valued at $1163.00 and assigns accounts and debts due Foresters amounting to $1573.00. The condition of the mortgage "that if the undersigned (Foresters) cause to be paid to said McMurray "the full amount of said notes with interest + costs within one year from this date, then this mortgage shall be void, but otherwise to remain in force and after the expiration of said time said McMurray

" may sell said property & bills receiv-
" able at auction upon giving us
" twenty days notice of the time &
" place of sale in writing. Said
" property to be sold in the City of
" St. Louis. or the said McMurray
" may after the expiration of said
" term proceed to collect said
" bills receivable (if they are not
" sooner paid to him) without
" selling the same at auction."

The notes also read in evidence corresponded with the description given of them in the mortgage — they were all endorsed by the payees to Dr McMurray without recourse."

Forrester testified that the stock of goods mentioned in the mortgage embraced the entire stock in their store;

These further facts were elicited from the witness and were entirely uncontradicted; but were corroborated by his brother, showing the condition of the parties & the circumstances under which Dr. McMurray bought the notes and took the mortgage - these facts

appellants must render the mortgage void as to existing creditors of Forresters.

Plaintiffs witness Forrester testifies - that the Forresters Bros. kept a wholesale store as merchants on Main st. in St. Louis; that Dr McMurray was a practising physician & kept & continued to keep his ~~business~~ office on the corner of 5th & Washington avenue in this City; that Forrester & Bro were unable to meet their liabilities; that they saw perfectly well that they were unable to proceed with their business without outside assistance; that Forresters had no other property except their stock in trade which was conveyed in the mortgage; that the whole amount of their indebtedness was $6000. - due to Jaffrys, Mack, Whittaker, Carey and others; that Dr. McMurray got the notes (embracing $2000. of their indebtedness $1000 of which was past due) at the request of the Forresters; that the Forresters were in failing circumstances at the time; that the debts to Mack and to Jeffrys were past due; that Dr McMurray was aware that they were involved when he bought the notes. -

Richard Forester the brother also says that they were embarrassed and that McMurray was their friend and knew that they were embarrassed when they got the notes. Both brothers continued in the store after the mortgage was given, and ~~were~~ were to receive a salary from McMurray.

Defendants evidence consists of the record of suit and judgment of McMurray against Hart, Jacko + Menkens (Record p 29) showing that plff at Apl Term 1861 Common Pleas Court brought a suit upon the bond given upon the Mack execution in which he sued to recover for the whole value of the property; that all the defendants were personally served in said suit + filed their answer. that on May 4. 1864 said cause was ~~tried~~ submitted to the Court and a judgment in conformity with the petition was rendered for $576.00 - suit being dismissed as to one defendant Jacko -

Deft also read in evidence the bond in which the last named suit was brought.

These further facts appear from the documentary evidence. -

That the suit of Jaffry against Forresters was brought on ~~the~~ January 1861 summons served on the Forresters on the 15th January 1861, (the same day on which the plaintiffs mortgage was executed) & judgment rendered on the 15th of February 1861. by default.

Also that the Mack suit against Forresters was brot & summons served on 16th January 1861 & final judgment against Forresters rendered on the 6th of February 1861.

Defendants then proved by the Sheriffs that the Jeffrys execution was not in his hands until after Sheriff had levied & taken into his possession the entire stock under the Mack execution & that the claim of McMurray was made upon & after the Mack execution & that McMurray never made any other claim - that the goods were taken to the Sheriffs warehouse & Sheff did not receive Jaffrys

execution until afterwards - that all the goods were sold under the Mack execution. - & no claim was made by McMurray after the receipt of Jaffrys execution.

The case was tried by the Court - although no instructions are required by the practice in such cases, ~~yet~~ to save the points made yet the defendant asked certain declarations of law and the action of the Court upon them appears in the record.

1. Every conveyance by mortgage or otherwise of goods and chattels made with the intent to hinder and delay creditors in the collection and enforcement of their debts by process of law is fraudulent and void, and any person accepting such conveyance with a knowledge of such intent on the part of the vendor obtains no valid title although he may have paid a valuable consideration for such goods. If the Court finds from the evidence

that Forrester & Bro were in insolvent circumstances and unable to meet their debts as they matured and that they applied to Dr McMurray to obtain assistance from him, and that Dr McMurray being aware of their circumstances purchased the notes read in evidence and took a mortgage upon their stock of goods agreeing to give them as much time as they needed to repay him, and that the object of Forrester & Bro in making the arrangement was to delay their other creditors for the time being until they could make acceptable terms with them. And if the Court also finds that Dr McMurray was aware of their intentions at the time he took the mortgage read in evidence, then the mortgage gave him no title to the goods as against Jaffray & Son creditors of Forresters although he may have paid a valuable consideration for the notes and mortgage.

2. The bond signed by the defendants and read in evidence

by the plaintiff does not estop the defendant from showing that there was in fact no levy made upon the goods under the execution of Jaffrey & Son against Forrester & als. Nor that the plaintiff McMurray in fact made no claim to the surplus money in the hands of the Sheriff after satisfying the Mack execution read in evidence

3. If the Court finds from the evidence that there was in fact no levy made by the Sheriff upon the goods under the Jaffrey execution and that said goods were seized under execution ~~of~~ in favor of Mack against Forrester before the Jaffrey execution came to the Sheriffs hands, and that plaintiff made no other or further claim than the above read in evidence by the plaintiff; and that McMurray the plaintiff made no claim or demand for the surplus in the hands of the Sheriff, then the bond executed by defendants was unauthorized by

any Statute and gives the plaintiff no right of action to the use of William A McMurray against the defendants in this suit.

The Court gave the first and second instructions and refused to give the third, to which refusal appellants duly excepted.

Thereupon the Court rendered judgment for plaintiff in the sum of $ 637. 21/100.

In proper time defendant moved for a new trial for the reasons:

1. that the verdict + judgment was against the evidence + against the law

that upon the evidence and facts proven the verdict should have been for defendants.

that the Court erred in refusing proper instructions asked by defendant

that the Court Erred in admitting illegal evidence on part of the plaintiff

Which motion being overruled, defendants duly excepted prayed an appeal to this Court filed their affidavit

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State use McMuray
Respondent

vs.

J. C. Havens et al
Appellants

Appellants
Statement

Krum D. & K.
for appeb.

Filed Novr 8th 1866
O. T. Fishback clk
Per E. P. McCarty

and bond and thus bring the case
to this Court. -

State to use of McMurray
v. Resp
Geo T Doan & al,
appellants

Supreme Ct
Oct Z 1866
St Louis Co

Statement

Tho Forrester & Bro January 16th 1861 mortgaged their stock of goods to McMurray to secure certain notes mentioned in said mortgage — About the 13th of Feb 1861 The Sheriff of St Louis Co levied our execution on said goods, in favor of one Mark against said Forrester — Said McMurray was present in said Store when the levy was made & notified the officer that the goods were his & that he claimed them, & also immediately & before the sale of said goods, made his claim to them under said Mortgage in conformity to the 3d section of the act of March 3d 1855 — relating to Sheriffs & Marshalls in St Louis County —

The execution creditor, Mark gave bond according to said act & sold the goods which brought enough to pay Marks execution & leave 500 dollars surplus in the hands of the Sheriff — On the 16th of Feb. 1861 & while the goods were in the hands of the Sheriff & before sale. The Deft Doan & al placed ...

execution in their favor against said Forrester in the Sheriffs hands, which execution the Sheriff also levied on said goods on the said 16th of Feb 1861 - The said McMurray made but one claim in writing under oath to said goods, the one before referred to in Mack's levy, but the officer, before he applied the 500 balance in his hands after satisfying the Mack execution took from the Defts the bond sued upon in this case & then paid over the said 500 dollars to Defts Dorn, as creditor in said execution & endorsed the same as sufficient satisfaction on said execution

The said McMurray sued the bond given in the case of Mack & recovered judgment on that bond for the sum of five hundred & seventy six dollars, but it does not appear that any part of said judgment was ever satisfied - That ~~sum~~ judgment did not amount to more than the amount applied to the satisfaction of the Mack execution & still left the 500 applied to Defts execution untouched by the judgment on the Mack bond - While the suit on the Mack bond was still pending, - this suit was commenced on the bond given by Defts in order to obtain the balance of 500 dollars -

In addition to the above facts. Plff called Jno Forrester, one of the original debtors who testified as to the giving of the mortgage & the consideration of the notes secured by the same - proved the signature to the Mortgage & notes said the goods were worth 1163 dollars at auction prices - that the cost of the same was 2300 - some goods taken & sold on the executions Notes were bought by Mr Murray - That they were in failing circumstances at the time - were indebted at that time ~~between 3 & 4000 dollars~~ about 6000 in all - Mr Murray since they were embarrassed when he bought the notes. Very few goods were sold after the Mortgage was given - A separate account was started & whatever sold were sold in the name of Mr Murray & the notes & accounts assigned to Mr Murray were collected in his name No bargain was made except what appears in the Mortgage & paid to him - Forrester's testimony is found from page 25 to 28 of record.

The foregoing are substantially all the facts in the case - The Plff did not ask any instructions.

The Defts asked one which was given - is very long & found on page 44 & 45 of the record. (read it)

Also one which was refused is found on pages 45 & 46 of the record - (read it)

The case was submitted to the Court

upon the facts, without ajury & the court found for the Plff. In due time Defts filed their motion for new trial, which was overruled. Bill of exceptions filed & appeal taken to this court.

Brief

There does not seem to be any question raised by the case that can be seriously argued in this court, except such as arise under the refusal to give the 2d instruction asked by Defts. The facts as to the paramount intent are settled by the finding of the Judge & the refusal to grant the new trial.

Under the 2d instruction asked the Defts ask the court to assume that the Sheriff made no levy under the Doan execution when the officer testifies distinctly. record page 42 that he did levy the execution in favor of Doan on the goods which in his hands under the Mack levy. & proves his own memorandum made on the execution to that levy to that effect. & further that further an officer who has goods in his hands under one execution cannot levy another upon them.

That a levy was made is clearly proved by the officer & that the officer who has property in his hands under one execution can levy

another execution on the same property is to simple & everyday law & practice to require argument to sustain.

The other point made in the instruction is that unless McMurray made an affidavit of claim in each case of levy or a special demand for the surplus, the officer had no right to take the bond & that the bond is therefore void.

The case of State to use of Goldsall vs Watson 30 Mo p 122 has settled that point. The court there decide that it is immaterial under the act of March 3. 1855 whether the claim to the property levied on is made in conformity to the Statute or not, if the officer chooses to treat it as a valid claim & takes a bond in conformity - he is not liable for the property, but the claimant must resort to the bond -

In this case the Pltff notified the officer when he took it that the property was his & he claimed it - he immediately after made his claim under oath as to the only levy he had notice of, & the Sheriff took this bond for the surplus money after satisfying the execution first levied. According to the case just cited he has no remedy against the officer, because the

officer has taken a bond, though without an affidavit made as to that particular execution. The act of March 3d 1855 under which the bond in this case was taken does not require that a person claiming the property shall make a separate claim in writing for every execution levied upon the property - See the 1st section of said law - It is only necessary, or even contemplated by the act, that he should make one claim, a repetition of the same thing to the same officer would be in absurdity.

The answer of the Defts in this case admits that only a part of the funds were applied to the Mark execution & admits that their principle, Doan, received the balance, 50$, & admits that they gave the bond agreeing to account to all claimants for the amount received by Doan.

This answer does not set up a judgment ~~in~~ against Mark & his bondsmen for the whole amount, but only says a suit is pending for the whole amount, & the facts proved in the case ~~& the~~ judgment against Mark & his bondsmen shows that it was only for the money or goods appropriated

to the Mark execution.

There is no analogy between this case & the old common law doctrine of change of title by a judgment in trespass or trover — This is a proceeding on a Statute bond to recover such damages as Defts have done us by taking our property — Defts have given their bond agreeing to pay such damages as might be done to any claimant of the property taken by them or their principle, Doan, & the Statute authorises any claimant to sue on such bond in the name of the State & his own use, & therefore on this point in the case, nothing but proof that the Pltff had already received the damages he is entitled to, could be a defence. Mark & Doan were separate trespassers & even in trespass at common law — each might be sued for the damage done by each. & nothing short of satisfaction is a defence in this part of the case.

The Sheriff is protected, having taken the bond, from any suit by the Pltff, & the Pltff is without remedy unless he can sue on the bond as provided in the Statute. The Defts, having promised to be accountable for all

damages by any claimant, in order to get the money, & after admitting in their answer, that Mark did not get but part of the money, & that their principle got 500 off, now turn around & ask to be allowed to commit a fraud on the claimant & violate their promise & set up a bald technicality to cover the fraud, & fly in the face of the promise they made.

It does not impeach a judgment to show that it was not rendered for all that was claimed in the petition, & that is plainly shown in this case

But the common law decisions have never gone farther to say that a judgment in trespass de bonis asportatis or trover, & execution taken out, against one person, may be a bar to a suit against a joint trespasser — vide case of White vs. Philbrook 5 Greenleaf, R. (Maine) p 147, where the matter is very fully discussed & yielded to with great reluctance —

In the case at bar, no execution was ever taken out, & therefore even if the law was applicable to the case, the facts do not bring it within the doctrine. But the law is well settled that as against a promissor, nothing but satisfaction bars a suit

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State & use
of the Murray
vs
Doan & al

Statement
& Brief for
Respondents

Filed Nov 9th 1866
O T Fishback clk
Per E McCarty

against another promissor, for the same
cause of action.

Hill & Jewett for
Respondent

State to use of
Dr McMurray
Respondent.
vs.
Jonathan C. Havens
+ James Porter
Appellants.

Supreme Court.

Points by appellants.

1st. When McMurray filed his claim under the Mack execution and levy (which was on the whole stock) and brought his suit (in the nature of an action of trover or trespass de bonis asportatis) to recover the value of all the goods and recovered judgment in said suit — he gave up his right of property in the goods levied on and cannot sue any other subsequent trespasser.

At common law the owner may pursue his goods or the proceeds thereof into whatsoever hands they may come. — the Special Stat. of 1855 does

not deprive him of this right.

The object of that Statute is simply to protect the Sheriff where a claim is made - and the Statute puts the owner upon an election of remedies either to sue upon his common law right the taker or to make claim & then the Statute confines him to action on the bond. Bradly v Holloway 28 Mo 150

The Statute however does not change the principles of the common law on the subject. - the remedies in the Statute are not cumulative.

Appellants insist that judgment on an action on the bond operates like a judgment at common law against a trespasser in trover. It divests the property ~~in~~ out of the owner and gives it to defendants in action.

What effect has a judgment for the value of the goods at common law?

Does not same result follow a judgment for the value on the bond?

Are not the sureties substituted in place of trespassers and entitled to same rights?

If yea, then plaintiff has no

claim on Jeffries or his sureties.

If bond should rule otherwise then it would follow that plaintiff could recover whole value of goods on first bond, & then recover whole surplus proceeds on second bond.

This cannot be –

It is stated in an ~~action~~ work of authority that where seperate actions have been brought against several defendants for the same single act of trespass, the party last sued may plead the pendency of the first in abatement.

And a recovery against one of several parties to a joint tort frequently precludes the plaintiff from proceeding against any other party not included in such action.

1 Chitty Pl. 79.

In an action for asst & battery committed by several a recovery against one may be pleaded in bar to an action for the same battery against another.

Smith v Leighton 2 McMullen 184

So a judgment in trespass de

Execution creditors levying their executions at different times cannot be held as joint trespassers Brewster v Gaines 37 Me.

bonis asportatis not satisfied, is a bar to an action against a cotrespasser.

Campbell v Phelps 1 Pick. 62.
White v Bellbrick 5 Greenl. 147

By a lawful seizure the debtor looses his property in the goods.
4 Mass. R. 402

A judgment in trover or trespass de bonis asportatis for a permanent conversion changes the property.

Brown v Wooton 2 Cro. Jac. 73
Adams v Broughton 2 Str. 1078
Bull. N. P. 49
Sparry's Case 5. Co. 61 (Vol. 3)
Floyd v Brown 1 Rawle R 121
re-affirmed Mauch v Peis 4 " 277
Morell v Johnson 1 Hen & M. 449
Fox v Northern Liberties 3 Watts & S 107
5 Watts & S. 17
Rogers v Morse 1 Rice's S.C.R 60
Carlisle v Bailey 3 Greenl. R 250

and bars plaintiff from asserting his title in any other action.

In Missouri the exact point appears not to have been directly decided, although it is recognized in Polk's adm^r v Allen 19 Mo 467.

The reason of this may be because the Legislature has provided by Statute that in lower - trespass de bonis asportatis the plaintiff recovers the value (as on ~~as~~ a sale), with interest.

See Stat. 1845 p 834 sec. 28

Appellants then insist that by the former judgment in which plaintiff recovered the value of the goods with interest - the property changed & they belonged to defendants in said suit.

Any loss or injury done or suffered is the loss of the new owner, who alone can sue therefor.

In Brewster v Gaines 37 Mo it is held that execution creditors levying at different times are not joint trespassers -

2d

When a judgment creditor levies his execution upon the money of a debtor in the Sheriffs hands, there is no authority for the owner of the money to sue the creditor so levying. And hence there was no warrant for the bond upon which defendants are sued. – it may amount to an indemnity to the Sheriff upon common law principles – but the plaintiff to whom the bond is not made, is not in privity of contract and cannot sue upon the bond.

The Stat. of 1855 is special it relates to executions on personal property only – it does not apply to lands – it does not apply to money singly.

2. – it provides that the owner must make a claim – where Sheriff levies on property

In this case the Sheriff did not levy the 2d execution on personal property – he held it in his hands and

merely applied the proceeds of first ~~[illegible]~~ sale. –

See Sheriffs return –

A levy cannot be shown by parol evidence – the return made by the officer into Court is the only official act of which the Court inter partes can notice. this return does not show a 2d levy, but simply an application of the proceeds.

The plaintiff made no claim at all after the second execution came to Sheriff – the evidence disproves such claim – the bond was without request of plaintiff not for his benefit and he can take no advantage of it.

3d. The facts proved by the plaintiffs witnesses and the circumstances as shown by himself make McMurray a purchaser with notice of a superior claim of Forresters creditors. &

The undisputed and indisputable facts proved by the plaintiffs witness are these:

the Forresters being in business as merchants in St Louis and unable to meet their debts maturing apply to Dr McMurray for aid and request him to

buy up several of their notes <u>past due</u>, given to creditors and make a mortgage of all their property to the Doctor stipulating for one years time to keep off their other creditors to carry on the business - and the Doctor consents knowing their ~~fa~~ insolvent condition to ~~allow~~ purchase their debts so past due & to give them one years time to ~~red~~ redeem. -

Appellants insist ~~that they~~ being prior creditors to McMurray ~~have can have~~ that such an arrangement is in contravention of law and stamps the mortgage with fraud in law.

~~The law has permitted debtors made an assignment~~

~~The Statute of assignment~~

It is an evasion of the Statute on "Assignments" - and the law will not require other creditors to ~~wait~~ look on a whole year ~~or~~ to await the pleasure of the mortgagee or assignee to foreclose his mortgage - to see whether anything is left

McMurray is a creditor to be sure - but he voluntarily & knowingly makes himself the creditor of an insolvent mercantile firm ~~and thus~~ for the purpose of assisting the ~~creditors~~ debtors. It is in effect saying that although our laws subject the debtors property to the payment of his debts, yet it will not enforce this right.

The law has been often laid down to meet a opinion to authorities that creditors have a present right to the satisfaction of their debts out of the property of their debtor, the law subjects it precisely & entirely to the payment of debts; neither can the debtor prevent this; nor can a stranger knowing the failing circumstances voluntarily make himself a creditor to assist the debtor (not to pay his debts) - to delay the payment of debts. Question is ~~for~~ this: where did McMurray assist. Did he assist the ~~creditor~~ creditor to obtain his debts - ~~did he pay away money to~~ or did he assist the debtor to stave

off payment: - if he did the father he is not a bona fide purchaser in morals or in law. ~~for it~~ but it is the same in effect as though the debtor did it himself. and the valuable consideration ~~is no~~ does not shield the intending voluntary creditor from the imputation of having rendered an assistance ~~to~~ where the law will not tolerate it.

1, 2 J J Marshall 226, 213
3 Monroe 1

1 Dessau 223

8 Jno R 449
1 Burrow 474
7 B Monroe 369
4 Ver. 412
18 Ves 180, 181.

The only question left is whether this Court will refuse to correct the palpable error of the trial Court ~~for~~ on the ground that this is a question of fact & this Court refuses to ~~to~~ weigh the evidence. -

Our answer is there is no evidence to be weighed - there is no conflict of testimony whatever - ~~nor~~ it is the plaintiffs own uncontradicted witness. Any testimony which appellant could have had & which he might well refuse to put in could have made the facts no plainer

And the knowledge of the mortgagee of the intent to ~~[illegible]~~ delay his creditors tends to prove that he did make the purchase to favor or further it and is sufficient to avoid the mortgage, unless this inference is repelled by other facts.

Kendall v Hughes 7 B. Monr. 369

approved Knox v Hunt 18 Mo. 174

McMurray
vs.
Haven

Reply to Respondents argument.

1st The action and judgment in favor of Plff against Hart &c. was for the value of the goods mentioned in the petition & this appears was the whole ~~goods~~ stock taken ~~by~~ under the Mach execution.

Respondents argument seeking to avoid this ~~conc~~ fact patent on the record, is that ~~bond~~ damages are not equal to the amount of the goods.

Appellants insist that the judgment speaks for itself - it cannot be impugned collaterally. it professes to be for the whole value (and not a part), the only way in which it could be set aside was by appeal or by direct proceeding to set it aside.

Martin v Barron 37 Mo 304
Reer v Pratt 2 Hill. 64
Wickersham v Wheeler 33 Mo 561

in the last case the question of the conclusive character of the judgt upon the petition is fully decided.

2d By signing the bond the defendants are not estopped from showing that the recital of levy was a mistake ~~there never was a levy under the ex Jeffreys execution~~.

Recitals in official bonds are not estoppels

Stillman v Barney 4 Vert 187

1 Phil. Ev. 453

~~Appeal Taylor Supp 14 Mo. 482~~

The law of estoppels by recitals is discussed in Carpenter v Buller 8 Mees & W. 212 (approved 14 Mo 212) – to be estoppel by recital in writing there must be

1st a particular fact stated distinctly on the instrument

2d a contract made with reference to that recital –

3d an action upon it between parties to the instrument

4th an injury to him in whose favor the estoppel is claimed.

It it recognized in Newman v Hook 37 Mo 218

3d The oral testimony of a Sheriff that he levied the execution cannot be heard - his return upon the execution is conclusive inter partes - this return fails to show a levy ; he might have by leave amended the return, but cannot impeach it orally -

Besides the facts show that there could be no levy, he having already levied under a former execution and having the goods in his possession - a levy is the seizure of goods in defendants possession - how could he seize them when they were out of ~~his~~ defts possession & in his own. -

Crock on Sheriffs p. 172.

Krum Decker & Krum
for Appellants

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State use of
McMurray
v
Havens &c

Brief by applts
&
Reply to Respots
argument

Krum Decker
& Krum
for applt

Filed Nov 9th 1866
O T Fishback Clk
Per E McCarty

State to the use of
Wm. A. Mc Murray
Res.
v.
George P. Doan et al.
Apts.

In the Supreme Court
Oct. T. 1844.

Opinion of the Court.

An execution was levied upon a stock of goods in a store. The plaintiff claimed to be the owner of them. The goods were seized and removed to the sheriff's warehouse, and the return on the execution shows a levy made on the whole property. At a subsequent day, another execution came into the hands of the sheriff against the same defendants, upon which the deputy (as he testifies) made a memorandum in pencil in these words: "Levied this execution July 4, 1841." ~~[but no return of any actual levy upon these goods was then made upon the execution]~~. The goods were sold under the levy of the first execution, and, producing more than enough to satisfy that execution, the surplus money was applied in satisfaction of the other, and then the following return was made therein: "Amount applied on this writ after paying costs of sale from

proceeds of sale made under Execution No. 71 to September Term 1861, $500.88. No other goods, chattels, or real estate belonging to the within named defendants found in my county whereon to levy and make the balance of debt or any part thereof." The plaintiff made his claim in writing before the sheriff under the first execution, according to the statute, and an indemnifying bond was duly executed and delivered to the sheriff by the execution plaintiff. No separate claim was made under the second execution; but the sheriff, before paying over the surplus to the plaintiffs in that execution, required them to give another bond in conformity with the statute as in case of a levy and a claim made. This suit is brought upon the bond so given. It appears also that a suit had been previously brought to the plaintiff's use upon the bond given under the levy of the first execution, and that he had received judgment only for that portion of the proceeds of the sale, which had been applied to the satisfaction of the first execution; and he now seeks to recover in this suit for the remainder. The plaintiff had judgment. The defendants appeal, and assign for error the refusal of their instruction.

It is contended for the defendants that there was no levy. A levy of an execution means the actual seizure of the property by the officer. (Rev. Stat. 1853, p. 753, § 74). But here, the goods were already in the possession and custody of the officer under the prior levy. In such case, no further actual seizure need, or can, be made. The lien of the second execution bound the goods. When a seizure is made, the officer should, properly, make an inventory for the purpose of identifying the goods levied upon; but this is not necessary in all cases. (Haggerty v. Wilber, 16 Johns. 287; 2 Paine & D. Prac. 334). It was done here when the first levy was made. The sheriff having the goods of the defendant in his possession under the prior writ, the goods were bound by the second execution, subject to the first, from the time ~~of the delivery of the~~ of its delivery to the officer, and the first levy, when the second execution was received, was sufficient for both executions. (Brown v. Slout, 17 Johns. 11b; Russell v. Gibbs, 5 Cow., 390; 2 Paine & D., 30b; 335). No further act was necessary to constitute a second levy. (Turner v. Austin, 14 Mass., 181). The surplus arising from the sale under the first execution, in such case, is bound by the second execution, and is applicable for its satisfaction. (Jones v. Atherton, 7 Pann. 56). The testi-

many of the deputy shows that a levy upon this property was intended. An effectual levy is shown, without the aid of his testimony. But one return upon the execution was required, and the return made shows that the surplus was applied to this execution. This was levy enough. By the statute, the bond is to be conditioned for the payment of all damages that may be sustained in consequence of any levy, or sale. This was a levy within the meaning of the statute.

It is said further that no claim was made under this execution. The claim was made under the first levy, when the actual seizure took place. If this gave a sufficient seizure to answer the purpose of a levy of the second execution, it was, in like manner, a sufficient claim made. The claim is made for the purpose of notifying the sheriff, so that he may protect himself by requiring a bond, or by releasing the goods. In Goldsall v. Walson, (30 Mo. 122), a bond was taken by the officer on a verbal claim merely, and it was held that the bond taken was void,

If the goods had been released under the first writ, they would have been held by the second.

and protected the officer. Here, an additional levy is made upon the same goods, which had been already claimed in due form. This was claim enough to notify the sheriff, and the bond given must be considered as authorized by the statute. The owner and claimant had already elected to give up his action against the sheriff, and resort to his bond, or to his action against the execution plaintiffs, for indemnity. The bond that was first given on this claim may have covered the whole trespass and injury; but the second bond, like the second levy, was ~~merely~~ cumulative upon the other.

It is urged further that the former recovery on the first bond was a bar to another ~~action~~. The seizure and sale of the goods of another as the property of the defendants in the executions was a trespass against the true owner, a tortious act, and a conversion of the goods. (Meade v. Smith, 16 Penn., 346; Woodbury v. Long, 8 Pick. 543; Drake on Attach., (3d ed.), 219). The actual sale of the goods taken as the property of the defendant bound the property;

and gave ~~it~~ a title to the purchasers at the sale; for sales made by a sheriff are not to be defeated: no man would buy goods levied upon and sold under an execution, if his title could be ~~defeated and~~ avoided. (Smallcomb D. Cross, 1 Ld. Raym., 251; Blake v. Shaw, 7 Mass., 505). The proceeds of the goods sold are supposed to be the property of the defendant; but if the goods really belonged to another, ~~who is the claimant, he~~ the owner has his action against the sheriff for the bespass and conversion, and may recover the value in damages. If such damages were recovered from the sheriff, the result would be that the money arising from the sale of the goods would belong to him. But, under the statute, the bonds taken are interposed for the protection of the officer against an action, and for the indemnification of the claimant against loss by the conversion of his goods; and then, it may very well be that the proceeds of the sale must belong to the plaintiffs in the executions. The owner is not compelled to prefer

his claim under the statute; but if he does so, and a bond be taken as required, by that act alone he elects to give up his right of action against the sheriff, and to seek his remedy on the bond; and if a sufficient bond be taken, the officer ceases to be liable, and the bond is interposed between him and the claimant. (Bradley v. Holloway, 28 Mo., 150). The claimant must resort to his bond, or to his action against the execution plaintiff. Aside from the statute, it might be true that if the plaintiff recover once in an action of trespass, he cannot again recover in any action which is not a concurrent remedy, and that a recovery in trespass would produce the same bar that is produced by a recovery in trover against another recovery in assumpsit for the price of the same goods. (Floyd v. Browne, 1 Raule, 121). And a judgment for the damages would vest the property in the goods in the defendant. (Marsh v. Pier, 4 Raule, 284; Brown v. Wootton, 2 Bro. Jac., 73; Adams v. Broughton, 2 Str.,

1078). But (as it was said in Floyd v. Browne) a plaintiff, in such case, is not compelled to elect between actions that are consistent with each other; and separate actions against a number of persons who are severally liable for the same thing, or against the same defendant on distinct securities for the same debt or duty, are consistent and concurrent remedies. The plaintiff here has received two distinct sums for his indemnification against loss, not partly by one and the same trespass and conversion (though it would be all the same if it were), but rather, in strictness, by two distinct acts of trespass; for the second levy was an additional trespass and injury, inasmuch as, if the first levy had been for any cause released, the second levy would still have held the goods, or the proceeds thereof; though the whole actual damage ~~[illegible]~~ may have been done by the first levy and sale, so far as the trespass and conversion, and the rights of the owner, were concerned. No action of trespass has been brought; but the plaintiff

has recovered on the first bond, not for the whole value of the goods that were seized and converted (as doubtless he might have done), but only for that portion of the proceeds and that part of the value which was in fact applied to his execution.

The sheriff is not bound to levy upon more goods than may be amply sufficient to satisfy the debt, nor the plaintiff, to sanction an excessive levy; but if they venture to do so, the trespass and injury will extend to the whole actual seizure, and the bond given for their protection of the officer will cover the whole trespass; and there can be little doubt that the plaintiff might have recovered the whole amount of his damages on the first bond. But it is clear also, that these bonds were cumulative remedies; and in such case, the party has the right to pursue each and all until he has obtained full satisfaction; nor would a judgment unpaid in one suit be any bar to an action on another bond against other persons. (Drury v. Drury, 3 h Mo., 281; Burge, Sur.

178; Drake v. Mitchell, 3 East. 258).

We conclude, therefore, that there was no error in refusing the defendants' instruction.

Judgment affirmed.

The other judges concur.

O. W. Holmes

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Vatolen Tun [illegible]

State to the use of
Wm. A. McMurray
v. Res.
George P. Doan
et al. appts.

Opinion
affirmed.
Holmes.

Filed Nov 19th 1866
O T Fishback Clk
By E P McCarty
Dep'y