BLUMENTHAL, AUGUSTUS A ✓ TORINI, JOSEPH MARCH 1867 COUNTY OF ST. LOUIS
566/6

OLD
656/7 AFFIRMED

OPINION: Vol. 40 Reports, p. 159 ff

1 State of Missouri }
County of St Louis } Be it Remembered that heretofore, to wit; on the twelfth day of January A.D. Eighteen hundred and sixty five, there was filed in the office of the Clerk of the St Louis Law Commissioner's Court within and for the County aforesaid a Petition which is in the words and figures following, to wit;

Petition Joseph Torini vs Augustus A. Blumenthal } In the St Louis Law Commissioner's Court February Term 1865 St. Louis County ss

The plaintiff in the above entitled cause states that on or about the twenty second day of December in the year A.D Eighteen hundred and sixty four, in the City of Carondelet County of St. Louis and State of Missouri, at the special instance and request of the defendant Augustus A. Blumenthal, he the said Plaintiff bargained sold and delivered to said defendant two bay horses and one bay mare

That said horses and [illegible] were reasonably worth the sum of one hundred and fifty dollars, which said sum the defendant though being frequently requested, refused, and still refuses to pay the same to this plaintiff Wherefore the Plaintiff prays Judgement for said sum of one hundred and fifty dol

2 lars with interest and costs of this Suit,

St Louis County Ss. N. A. Mortell
Atty for Plff

Joseph Torini the above named plaintiff being duly Sworn, on his oath Says that the foregoing petition and the matters therein stated he believes to be true Guiseppe Torini

Subscribed and Sworn to before me this 3rd day of January A. D. 1864

Witness my hand and notarial Seal hereunto affixed the day and year last above written

Seal

Nicholas A Mortell
Notary Public St Louis
County Mo.

Summons

Whereupon the following Summons issued, to wit The State of Missouri - To the Marshall of St Louis County - Greeting We command you to Summon Augustus A. Plumenthal to appear before the Law Commissioner's Court, of St Louis County on the first day of the next term thereof, to be held in the City of St Louis, on the first Monday of February next, then and there to answer the complaint of Joseph Torini as set forth in the annexed petition, and have you then and there this writ - Witness W. C. Huffman Clerk of our Said Court with the seal thereof hereto affixed at office in the City of St Louis

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(L S) this twelfth day of January in the Year of our Lord eighteen hundred and Sixty five

W. C. Huffman Clerk

I acknowledge myself bound for all costs that may accrue in the case of Torini against Blumenthal - Witness my hand and Seal this 18th day of February 1865

Louis Cafferatta (Seal)

Upon the back of which the Marshall made the following return, to wit; Executed this writ in St Louis County this 17th January 1865 by leaving a copy of the writ and petition, as furnished by the Clerk, at the usual place of abode of the within named defendant, with a white person, a member of his family, over the age of fifteen years

Marshal's Return

James Coff. Marshall

Afterwards the following answer was filed, to wit

Answer

Joseph Torini plff
v
Augustus A. Blumenthal deft

In the St Louis Law Commissioners Court
February Term 1865

The defendant for answer to the petition filed by the plaintiff in the above entitled cause, says that he, plaintiff, did not, on or about the 22nd day of December 1864 in the city of Carondelet, County of St Louis and State of Missouri at the special instance and request of this defendant

bargain sell and deliver to this defendant, three bay horses and one bay mare - And defendant denies that said horses and mare were reasonably worth the sum of one hundred and fifty dollars.

Jno. N. Stuart for deft

John N. Stuart agent for the defendant in the above entitled cause, makes oath and says, the above answer he believes to be true John N. Stuart

Sworn to and subscribed before me the 30th day of January 1865 - W. C. Huffman Clk

And afterwards to wit; Saturday February 11th 1865 the

Trial Progress

further proceedings were had, viz; The Court having heard the motion for security for costs filed herein doth sustain the same - And afterwards the following to wit - Bond for security for costs filed.

Feb 14th 1865 - Affidavit for continuance filed. Motion for continuance overruled case ordered for this day 3 o'clock P.M. And afterwards the following further proceedings were had; to wit Friday February 24th 1865

1st Judgement

Joseph Torini vs. Augustus A Blumenthal

The parties by attorneys come and also a Jury of six by consent viz; D. D. McEnnis, Joseph Gillam - Wm L Reston, T. W. Harris, M. McEntire and T. B. Read, good and lawful men who being duly elected, tried and sworn the issues herein joined well and truly to try, the trial progressed and being concluded - the Jurors aforesaid, on their oath aforesaid, say they

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find for the plaintiff in the sum of one hundred and forty dollars - It is therefore adjudged by the Court that the plaintiff recover of the defendant the sum of one hundred and forty dollars for his debt and also his costs herein expended, and that execution issue therefor — And afterwards the following further proceedings were had; to wit

Motion for New trial

Saturday Feb 25th 1865 - Motion for new trial filed Saturday Feb 25th 1865. Motion Continued Wednesday March 1st 1865 Additional reasons for new trial filed - The Court being fully advised of the motion herein doth sustain the same on payment of the costs accrued this term by defendant. The Court doth order that both plaintiff and defendant be examined as witnesses in the next trial of the cause - And afterwards the following judgement was given. to wit; Wednesday April 12th 1865

Sustained

2nd Judgement

Joseph Tomi vs Augustus A. Blumenthal

Parties by attorneys appear and also a Jury of six by consent, viz; J. Green Joseph Wengel J. G. Broad G. H. Wolcott R. E. Rannells and Conrad Garring good and lawful men, who being duly elected, tried and sworn, the issues herein joined well and truly to try and having heard the evidence retire and return the verdict upon their oath, aforesaid, that they find for the plaintiff in the sum of one hundred and forty dollars - It is therefore

adjudged by the Court, that the plaintiff recover of the defendant the debt aforesaid and his costs herein expended and that execution issue therefor

Motion for new trial

Motion for new trial filed
Saturday April 22nd 1865 Motion Continued
Saturday April 29th 1865 The Court having heard the motion for a new trial herein and not being fully advised thereof doth take time to consider

Under advisement

Wednesday May 3rd 1865 Now at this day the Court being fully advised of the motion for a new trial doth sustain the same on payment of Costs before the 1st day of the next term

Sustained

Continued

Friday June 9th 1865 on motion ordered for 22nd of June 1865 at plaintiffs cost And afterwards the following proceedings were had, to wit Thursday June 22nd 1865

3rd Judgement

Joseph Trini vs Augustus A Blumenthal — Parties by attorneys appear and also a Jury of six by consent viz; William Fitscherer, John H. Vogt Edwin Martin William Brownfield Oscar Fowler and Henry Willow good and lawful men who being duly sworn, the issues herein joined well and truly to try, the trial progressed and being concluded, the Jurors aforesaid on their oath aforesaid return the verdict that they find for the plaintiff in the sum of one hundred and forty dollars It is therefore adjudged by the Court that the plaintiff recover of the defendant the debt aforesaid and his costs herein expended,

7 and that execution issue therefor. And afterwards the further following proceedings were had to wit

Motion for New trial — Friday June 23rd 1865 - Motion for new trial Saturday June 24th 1865 - Now at this day the Court having heard the motion for a new trial herein and being fully advised thereof doth overrule the Same

Overruled — And afterwards the further following proceedings were had to wit. Saturday July the 1st 1865 Bill of exceptions affidavit and bond filed and approved by Court and appeal to Supreme Court granted

Bill of Exceptions Affidavit and Appeal Bond filed Appeal allowed - Affidavit for appeal is in the words and figures following to wit

Joseph Torini plff
against
Augustus A Blumenthal deft

St Louis Law Commissioners Court June Term 1865

Affidavit for Appeal — Augustus A. Blumenthal the defendant in the above cause being duly sworn states that his appeal from the judgement of the Court in the above cause is not made for vexation or delay - but because he believes he injured and aggrieved by the judgement of the Court in said case Aug. A. Blumenthal

Sworn to and Subscribed before me this 1st day of July A.D. 1865

W. C. Huffman Clk

Appeal Bond — And the Bond as follows, to wit

Know all men by these presents that we Augustus

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A. Blumenthal as principal and I. G. Werner and I. G. Beal as securities are held and firmly bound unto

in the sum of two hundred and eighty dollars lawful money of the United States for the payment of which well and truly to be made, we bind ourselves, our heirs Executors and administrators sealed with our seals and dated this 1st day of July A. D. 1865. The Condition of the above bond is that whereas the above bound has appealed from the Judgment of the Law Commissioner's Court of St. Louis County to the Supreme Court of the State of Missouri in a certain cause wherein Joseph Forine is Plaintiff and the said Augustus A. Blumenthal is defendant. Now if the said appellant will prosecute his appeal with due diligence to a decision in the Supreme Court and shall perform such Judgement as shall be given by the Supreme Court or such as the Supreme Court may direct the Law Commissioner's Court to give, and if the judgement of such Court, or any part thereof be affirmed, that he will comply with and perform the same so far as it may be affirmed, and will pay all damages and Costs which may be awarded against the appellant, by the Supreme Court then this recognizance to be void otherwise to remain in full force and effect.

Augustus A Blumenthal (Seal)

I. G. Werner (Seal)

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J. G. Beal (Seal)

Approved July 1st 1865 R. E. Rimbauer Judge

Bill of Exceptions

The Bill of Exceptions is in the words and figures following to wit.

Joseph Torini pltff
against
Augustus A. Blumenthal deft

St Louis County
In the Law Commissioner's Court June Term A.D. 1865

Be it remembered that heretofore to wit on the 12th day of January A.D. 1865 the plaintiff in the above entitled cause filed in the Clerks office of the Law Commissioner's Court his petition in words and as follows to wit (As found in Page 1 hereinabove) That thereupon on the 30th January 1865 the defendant filed the following answer, to wit; (as found in Page 3 hereinabove) That afterwards on the 12 day of February A.D. 1865 said cause came on to heard and tried on the said petition and answer. a Jury of six competent men were subpoenaed and sworn to try the cause by consent of parties, which having heard the evidence brought in a verdict for the plaintiff in words and figures as follows to wit,

Verdict of 1st Jury

Torini
vs
Blumenthal

We the Jury in the above entitled cause find for the plaintiff in the Sum of $140 One hundred and forty dollars

A. H. Read, Foreman

That afterwards and in due time the defendant filed his motion for a new trial which being submitted to the Court was sustained

10 That afterwards to wit on the 12th day of April A.D. 1865 said cause coming on for trial by consent of parties six men were impannelled and sworn as Jurors to try the same who having heard the evidence brought in the following verdict, to wit;

Forini
vs
Blumenthal

Law Commissioner's Court

2nd Verdict We the Jury in the above entitled cause find for the plaintiff in the sum of $140

T. J. Broad Foreman

That afterwards and in due time - The defendant filed herein his motion for a new trial which was submitted to the Court and was by the Court sustained - That afterwards to wit on the 22nd day of June A.D. 1865 this cause came on for trial and by consent of the parties a Jury of six men were duly impannelled and sworn to try the same, and thereupon the plaintiff in order to sustain the issue herein on his part gave the following testimony, to wit;

John W Allen's Testimony John W. Allen sworn who testified on behalf of the Plaintiff as follows - I live in Carondelet - Know plaintiff and defendant - I know something about three horses owned by plaintiff. Saw them in Major Smiths Stable on the Springtown road This was sometime before Christmas in 1864 about the 8th or 10th of December - These were all the horses plaintiff had as far as I know - I calculated the

11 the three were worth $140 - I considered they were worth that to me. I judged that two of the Colts would be two years old this Spring and one the mare would be four years old this Spring, so far as my judgment goes - I am a farmer have some experience in horses I heard the defendant say he bought these horses and paid their fare across the river. I don't know where it was exactly - Cross Examination
I heard the defendant talk about these colts at the Court House here - He talked some about them to day and also on the day of the first trial of this case as far as I understand he said the horses were diseased when he bought them. Mr Pigeon was present at the first conversation when the defendant said "the horses were not worth the money and he would never pay a cent" This was all the defendant said at that time and he said this when we were going down Plum Street on the day after the first trial to the Sun Mountain Rail Road depot. The other conversation with defendant was to day on the outside of the Court House at the Fifth street door just before dinner between 11 and 12 o'clock when defendant said he had bought and that the horses were diseased at the time he bought them. Defendant did not say what he had agreed to give for them. (Here the witness voluntarily said) I believe I am mistaken in relation to the conversation of to day - The dendant said If I had

offered Terms $140 for the colts I would be very green when I was to give only $40" (upon being further interrogated witness said) That was all he said then. I don't know when the alleged sale took place — Re-Examination

In the conversation on the way down Plum Street to the depot defendant said he would never pay for the colts.

Hyacinth Pigeon's Testimony

Hyacinth Pigeon a witness on the part of the plaintiff testified - I had no conversation with defendant as to the sale of these horses At Defendants house in Carondelet the defendant said he would give the plaintiff the $40 as he had agreed, which the plaintiff refused and defendant said the plaintiff might keep his horses Plaintiff then started off, saying he would sue defendant Defendants son who was present, went after plaintiff and asked him for pay for keeping the horses

Cross Examination

Defendant in this interview said he would still give the plaintiff the $40 as he had agreed - The plaintiff refused to take it and demanded $140. The plaintiff came after me to go with him to defendants house to talk English for him plaintiff — This was all the testimony offered by the plaintiff - The defendant

Augustus A Blumenthal Jr's Testimony

then introduced Aug. A. Blumenthal Jr. as a witness who testified as follows - I am a son of the defendant - I live on a farm in St Clair Co Ills

opposite Carondelet. Plaintiff came to my place near night one day in December last bringing with him two colts. My father accompanied him. It was just before Christmas last. Plaintiff told me one of the colts was back some distance sick. I sent out some of my men and had the colt brought up and put in the stable. My father said if he desired it he would fix some medicine to give to the sick colt. Plaintiff said No, never mind he will be all right in the morning. The next morning the Colt was dead. The colt that died was small for its age and thin in flesh. Two of them were going on two years and the other was going on three, all of them were small for their age and thin in flesh although one was in a little better condition than the others. One of the two was diseased when plaintiff brought them to my farm. It seemed to have the distemper. Matter ran from its eyes and its head and throat didn't seem to be right. It died some time after. The other one is still on my place. The next morning defendant got me to change some money for him so he could pay plaintiff and then offered plaintiff $27 for the two living, it being at the rate of $40 for the three. Plaintiff said, aint you going to pay me for the colts that's dead? My father said no, did you deliver him to me in good condition? I will pay you $27 for the two living, thats at the

of $40 for the three - Plaintiff made no reply but after waiting for some minutes, said, how much were you to give me for the colts only $40 - It was $140. My father said he agreed to give him only $40 and if he wanted $140 he could take his colts and keep them. Plaintiff said if that was all he was going to give him it was no bargain - I then asked plaintiff what he was going to do with his colts and he said he had no feed for them and wanted me to keep them until after the holidays - I then agreed to keep them for eight days without charge - but pltff failed to take them away at the expiration of that time - The farm on which I live is under my own control - My father has nothing to do with it - I was present at the conversation spoken of by Mr. Pigeon who testified for the plaintiff Ferné demanded $140 and my father said even then he was willing to give him the $27, as he had before offered it to him - but plaintiff refused it and said he would ___ him - Pigeon is mistaken when he says father offered plaintiff $40 - He only offered twenty seven dollars -

Herman Blumenthal's Testimony

Herman Blumenthal a witness on the part of the defendant - testified I am a son of the defendant - I live with him a part of the time in Carmelet but most of the time I live

15 with my brother over in Illinois. I was at my brothers place the day plaintiff came there with the Colts It was about 4 o clock when he got there, one of the colts was sick, we had to send out for it and it was carried into the stable on planks. It could not walk. Father proposed to Jennie to make some medicine to give the colt, but Jennie said, no, never mind it would be all right in the morning. The next morning it was dead. One of the other colts appeared to be sick. There was matter running out of its eyes and its head didn't seem to be all right. All of these colts were small for their age and two of them especialy were poor in flesh. I understood the colt that died fell down on the ice while being brought to my brother's place. The next morning my father offered to pay $27.00 for the two colts living. Plaintiff said aint you going to pay me for the colt that died My father refused, saying he would pay him $27 for the two that were living at the rate of $40.00 for the three. Plaintiff hesitated some time, looked at the money repeatedly and finally said. How much were you to give me for the Colts? $40.00 I was to have $140.00 My father denied that he had agreed to give $140.00 but only $40.00 and told plaintiff if that was his understanding he could take his colts. He would have nothing more to do with them. Plaintiff then said it was no

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bargain and I went off. I did not hear anything said about keeping the colts.

This was all the evidence

The plaintiff thereupon asked the Court to give the following instructions, to wit,

Plaintiffs Instruction

If the Jury believe from the evidence that the property in question was sold and delivered to the defendant by Plaintiff in the County of St Louis then from the moment of said sale and delivery the title to t became vested in the defendant and every accident or casualty that took place subsequent to such sale and delivery was at the peril and loss of the defendant and the defendant can not set up such loss or misfortune as an offset to the amount sought to be recovered in this suit. To the giving of which instruction the defendant objected but the Court overruled the defendants objection and gave such instruction to the Jury as asked by the plaintiff to which decision of the Court in giving said instruction the defendant excepted.

Given R

The defendant thereupon asked the Court to instruct the Jury as follows, to wit;

Defendants Instructions

1st The Jury are instructed that an express contract is consummated between parties contracting only when there is an agreement of minds upon a certain proposition and if they find from the evidence that there was a misunderstanding between the parties as to the terms upon which the property

Given R

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in controversy was to be sold without the fault, misconduct or deception of either party, then there was no express contract for the sale of said colts perfected at any time

2nd If the Jury believe from the evidence that the defendant offered the plaintiff $40.00 for the three colts, the plaintiff understood that he was to be paid $140.00 and not $40.00, for said colts and when the parties found that they had misunderstood each other and each party or either of them refused to accept the others understanding of the agreement, the Jury are instructed that no contract existed between them by which either was bound and therefore the plaintiff cannot recover

Given R

3rd The Jury are instructed that in the absence of a contract between plaintiff and defendant as to the sale and delivery of said Colts the plaintiff cannot recover the value of said colts or either of them from the defendant.

Refused R

4th The Jury are instructed that the plaintiff can recover only on a contract of sale and delivery of said colts at a specified price and the Jury can not take into consideration, in making up their verdict, the actual or real value of said colts or either of them or in other words the plaintiff can not recover on a quantum meruit but the Jury can consider the question of the value of the colts in determining whether or not, there

Refused R

was a contract entered into between the parties
The Court gave to the jury instructions numbered 1
and 2 but refused to give instructions marked 3
and 4 as asked by the defendant - to such refu-
sal of the Court to instruct the Jury as asked by
the defendant, the defendant objected, but the
Court overruled the defendants objection and the
defendant excepted.

The Jury thereupon brought in a verdict for the
plaintiff in words and figures as follows, to wit.

3rd Verdict

We the Jury find for the plaintiff one hundred
and forty dollars - J. L. Jones Foreman

The defendant thereupon filed a motion for a
new trial in words and figures as follows, to wit;

Motion for New trial

Joseph Ferrin
vs
Aug A. Blumenthal

Law Commissioner's Court
June Term 1865

And now comes the defendant
and moves the Court to set aside the verdict and
Judgement rendered in the above entitled cause
and grant a new trial and for the following
reasons, viz;

1st Because the verdict and Judgement is against
the Law

2nd Because the verdict and Judgment is against
the evidence

3rd Because the verdict and Judgement is against
both the law and the evidence

19 5th Because the Court erred in refusing the instructions asked by defendant

6th Because the plaintiff having sued in a quantum meruit cannot recover on a contract

Jno N. Shaat and J. G. Beal
Attys for defendant

which motion being by the Court seen and heard the same was overruled by the Court to which decision of the Court the defendant objected and excepted and prays that this his bill of exceptions may be signed sealed and made a part of the record which is done accordingly

R. E. Rombauer (Seal)

Certificate State of Missouri }
County of St Louis } ss. I. W. C. Huffman Clerk of the St Louis Law Commissioner's Court within and for the County aforesaid certify that the above and foregoing is a full true and complete transcript of the record and proceedings in the case of Torini vs Blumenthal as fully as the same remain in my office

In testimony whereof I have hereunto set my hand and affixed the Seal of said Court at office in the City of St Louis this 28th day of September A. D. 1865

W. C. Huffman
Clk L. C. C.

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Augustus A Blumenthal

~~[illegible]~~ Appellant

vs 25 Transcript

Joseph Torini

Respondent

Appeal from St Louis Law

No 31 March Term

Commissioner's Court

Filed Sept 30th 1865

J. A. Willis

Clerk

Jno N Strant & J. S Beal

Counsel for Appellant

N. A. Mortell

Counsel for Respadent

$10.75 paid by defendt

W. C. Huffman

clerk

1866 Mch 26 Assignment of Errors [illegible]

" Nov 26 Stmt & brief of Appellant

1867 Mch 22. Brief of Res filed

" " 25 Sub on brief

" April 1 Affirmed

Augustus A. Blumenthal
appellant
vs
Joseph Torini
Respondent

IN SUPREME COURT,
March TERM, 1866.

AND now comes the said appellant and says, that in the record and proceedings of the Court below, in the above entitled cause, there is manifest error, and for error said appellant assigns the following, to wit:

1. That said Court admitted improper and illegal testimony offered by appellant
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 appellant
5. That the verdict was against the evidence. 11. That there was no evidence at all on which to base the Judgt.
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

Jno. A. Straat
Atty for appelt.

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

Nicholas A Mortell
Atty for
Respondent

No. 196.
Mch term. 1866.

Blumenthal
appelt
vs.
Terrin, Respt.

assignment of errors.

Filed Mch 26 /66
O. T. Fisleback
Clk

Augustus A. Blumenthal, appellant, vs. Joseph Terini, Respondent.	In the Supreme Court. October Term, 1866.

Statement of the Case by Appellant.

At the February Term, 1865, in the Law Commissioners Court of St. Louis County, Respondent brought suit against the appellant, alleging in his petition, that at the "special instance & request of defendant, he, plaintiff, bargained, sold & delivered" to defendant three horses.

Respondent further alleged that said horses were "reasonably worth" $150.

Appellant in his answer denied both allegations.

Respondent attempted to establish his case by the testimony of two witnesses, John W. Allen & Hyacinth Pigeon.

Appellant attempted to show that he was not liable to Respondent by the testimony of two witnesses, Aug. A. Blumenthal, Jr. & Herman Blumenthal.

The testimony of all the witnesses is so brief that it is not deemed necessary to repeat any part of it here.

The Appellant submits the following

Points.

1st. There was no proof whatever entitling Respondent to a Judgment.

2nd. On the contrary, the proof was conclusive showing that the Judgment ought to have been for Appellant.

3rd. The court erred in giving the instruction asked by Respondent, because there was no proof establishing the fact "that the property in question was sold & de-"livered to the defendant by plaintiff in the "county of St. Louis."

4th. The court erred in refusing to give instructions numbered three & four asked by Appellant.

Jno. N. Straat,
Atty for Applt.

First Point.

Let us see what sort of a case the respondent made out. Examine first the testimony of Pigeon, because it amounts

to nothing at all – absolutely nothing at all, & is therefore easily disposed of. Pigeon says he went to appellants house in Baroneldes with & at the request of respondent, to talk English for him, where respondent demanded $140 of appellant, which sum he refused to pay, but said he would still give respondent the $40 as he had agreed, which respondent refused & threatened a suit. This is the pith of the whole of Pigeon's testimony, & what does it amount to? Just nothing at all, & hence needs no further comment.

Now how does the respondent's case stand on Allen's testimony? In his direct examination Allen says: "I heard "the defendant say he bought these horses "& paid their fair across the river. I dont "know where it was exactly." Aside from this statement there isnt one word in the direct testimony of Allen on which to base a judgment for respondent. Although the witness said at first, he ~~couldnt~~ did not know "exactly" where this conversation took place, in the absence of all explanation, the statement might carry some weight with it, but it is hardly worth while to consider whether it is entitled

to any weight or not, because, in his cross examination, Allen dissipates & destroys the whole statement by admitting & saying he was mistaken in what the appellant said. In the cross examination Allen said he heard the appellant talk about the colts on two occasions - once & first on Plum street, while going to the Iron M. R. R. depot, on the day of the first trial of this case, when appellant said "the horses were not "worth the money & he would never pay a "cent." And he further says this was all appellant said on that occasion. The other & second conversation was at the court house door on Fifth street, on the day of the last trial, when & where appellant said "he "had bought, & that the horses were diseased "at the time he bought them." Observe in this connection, that Allen in his direct examination stated, "I dont know where it was exactly," that is, where the conversation spoken of took place; but in his cross examination he locates it at the west front door of the court house on the very day of the last trial, between 11 and 12 o'clock - two or three hours before he testified. This appears to me a most remarkable fail-

ue of memory on the part of Allen. He couldn't remember for the space of two or three hours where this conversation took place! And yet we are asked to believe his statement, & base a Judgment on it for respondent. But when pressed a little on this point, he fixes the time & place with much minuteness. He recovers his memory on the point with as little effort as it cost to state that he did not know "exactly" where it was.

The most remarkable action of the witness, however, occurred right here. He suddenly remembered that he was mistaken in regard to what the ~~witness~~ appellant did say in the second conversation. Instead of saying he had bought the horses, &c. it was: "If I (appelt) offered Serini $140, "for the colts, I would be very green, when "I was to give only $40." And this, says Allen, was <u>all</u> appellant said on that occasion.

And this is all of respondent's case.

Now where is the proof to support a Judgment in his favor. It existed only in the imagination of the Jury. For the testimony of Allen, when sifted, goes for naught. He didn't swear to, & stick to, a <u>single</u> fact by which any liability attached to appellant.

Second Point.

The testimony offered by appellant establishes the fact beyond all reasonable doubt that the parties supposed they had made a contract, but when on the point of executing their agreement, they found they had misunderstood each other as to the price of the colts, & in consequence the contract was rescinded. And when rescinded there was no liability on the part of appellant to pay anything. The testimony does not show how it was the parties misunderstood each other, but the fact is neither of them speak the English language with much distinctness. Pigeon tells us he went along with respondent to speak English for him or appellant's house. This was after the transaction. One has an Italian & the other a German name. We are left to explain the matter as best we can. Still the fact is apparent that they did misunderstand each other, & each refused to accept the others understanding of the agreement. On the point of the real value of the colts, it is but proper to remember that two of them were only a little over one year old, & the other was somewhat over two, all small, thin in flesh, one of them diseased at the time, & one died just as it had been taken across the river & another soon after.

And it costs something to take stock through a winter when feed is high, as it was at that time.

Third Point.

The respondent did not establish the fact by any proof whatever that the colts were sold, much less delivered, in St. Louis County. On the contrary it is apparent that the colts were to be delivered at the farm of the son of appellant in Illinois. If this were not so, why did respondent go with the colts to Jonny Blumenthal's place across the river? And if the delivery of the colts took place on this side of the river, why, when the parties got over to the farm in Illinois, did appellant ask respondent if he should prepare some medicine & give it to the colt that had to be carried into the stable? If the delivery had taken place, & the colts were the property of the appellant, do you suppose he would have asked permission of the respondent to give medicine to the injured colt, his own property? When a man's property is in jeopardy, he will try to preserve it without subjecting himself to the control of an outsider.

Fourth Point.

It seems to me that if respt failed to establish the fact of a sale & delivery of the colts to applt, & the agreement actually entered into between the parties fell through & was rescinded because of their misunderstanding each other, & applt refused, as he certainly did, to receive the colts, he was not liable, & the third instruction asked by him ought to have been given, as it correctly declared the law on that point. It strikes me as rather an unjust proceeding to force a person under such circumstances to take property against his will at a price to be fixed by J. W. Allen or some other person of like character.

And I think the fourth instruction ought to have been given, & that it was error not to give it.

Jno. N. Straat, for applt.

145

Blumenthal, applt.
v
Terini, respt.

Statement of Case,
Points & Argument.

Straat,
for applt.

Filed Nov 26th 1866
O T Fishback Clk
by E M McCarty
Deputy

Joseph Torino
vs
August A 1

In Supreme Court

Respondents submits the following points in answer to appellants

I This case was tried by a Jury three times, each finding of which was invariably for ~~pl~~ respondents and this court is ~~a~~ invoked to reverse their ~~judgment~~ finding for the reason that the "proof was conclusive showing the judgment ought to have been for the appellants"

Nan Allen testified that the horses were worth $140,00, that defendant told ~~a~~ him that he bought the horses & paid their fare across the river, ~~defendant~~ appellant took possession of them in St Louis County & here the respondent ~~followed him~~ accompanied him, but that was to aid him in the transportation of the horses,

II The questions submitted to the Jury were,

I did was then

a delivery to the appellant in St Louis County?

II — Was the price fixed?

Was there a misunderstanding about the price?

The answer to the first question was solved by the testimony of allen, as well as the testimony of defendants witnesses in stating that appellant & respondents both "came across the river" with the horses at the same time that at least he had possession of them in St Louis County or he would not have paid their fare, across, no evidence to maintain the assertion that their delivery in Illinois was a condition precedent to the consummation of the sale,

II — Was there a price fixed?

The whole controversy hinges on this, a misunderstanding about the price. One party said he understood the price to be paid was $40.00, while the other ~~said~~ understood

it to be $140,00, Here is the drift of testimony, Allen says they were worth $140,00, ~~All ago~~ Shewely 3 horses were cheap at the price of $140, at a time when the demand was great by reason of the past war, Yet singular to say no objections to the payment of this sum was urged until one of the horses had died, the appellant found it to be a happy circumstance to evade the payment for the whole

But the Jury has found the ~~fact~~ price, to be for $140,00, and ~~the~~ it was a proper question for their consideration

These questions ~~were~~ cannot now be reopened by this Court, The Jury having heard all of the evidence & judged of the credibility of the ~~parties~~ witnesses,

This Court cannot except in in extreme cases, review or disturb the verdict of a Jury on a question of fact,

~~The court gave gave instructions which were the two~~

The 3 & 4 instructions offered by ~~p~~ appellants, were properly refused, it

The 3d takes the question or inquiry of a Contract from the acts & ~~surrou~~ dings of the parties, out of the hands of the Jury, & throws upon the ~~defendant of~~ Respondent the burden of proving an express contract,

The respondent repeats that this Court has ~~t~~ in a multitude of cases refused to disturb the verdict of a Jury, where there is evidence to support the finding ~~the preponderance of evidence will not~~

N A Mortell
Atty for Resp

Terrie
vs
Blumenthal
Points of
Respondent
N. A. Mortell for Resp

Filed March 22 '67
O T Fishbuck Clk
per Edmund Clk

In the Sup Ct Mo
March T, 1867,

Joseph Torine Res,
vs
A A Blumenthal appltt

Appeal from Law
Comrs Court,

Opinion of the Court -

The only question of law preserved by the record in this case is the refusal of the Court below to give the third and fourth instructions asked by the appellant. The instructions are inconsistent with themselves, and both are erroneous, They are inapplicable to the ~~petition~~ issue as presented by the petition and the evidence as detailed in the cause -

We cannot enter into an examination of the weight of evidence - that is peculiarly for the jury. Whether we would have drawn the same inferences, or rendered the same verdict is not the question - There was

conflicting testimony, and in such a case aside from the impossibility of our interposing, it would be obviously impossible for us to form as correct and intelligent a conclusion as the jury, who have the witnesses before them and can judge of their credibility, by the manner in which they detail their evidence, their apparent candor, or attempts at suppression, and general opportunities for knowing what they depose to. There is not an absence of ~~absence~~ evidence to support the verdict, - and without we knew the credibility to be attached to the respective witnesses, - and so far as the record discloses they are all equally unimpeached - we would have difficulty in telling on which side the weight preponderates.

There is nothing here warranting our interference in this court. Judgment affirmed

The other judges concur.

David Hogeboom

Joseph Torine

vs

A A Blumenthal

Opinion of the

Court Haquer

Filed April 1st 1867

O T Fishback Clk

per E M Cauty Dep

Affirmed