45/15

January 1846 #60

Jacob Stillings
vs.
Benjamin Brown } damages

Ray Co.

assumpsit

Property incld. 1 stud horse

Horses
Property

State of Missouri
County of Ray } Set

Be it remembered before the Honorable Austin A King Judge of the Fifth Judicial Circuit in the State of Missouri in the Circuit Court of the County of Ray aforesaid

Be it remembered that heretofore to wit on the 20th day of February AD 1844 Jacob Stollings by his Attorney filed in the Office of the Clerk of the Circuit Court of said County his Declaration which is in the words and figures following to wit

In the Ray Circuit Court
of March Term 1844

Ray County To wit

Declaration

Jacob Stollings complains of Benjamin Brown of a plea of Trespass on the Case on Promises For that whereas the said defendant heretofore to wit on the 25th day of April in the year of Our Lord 1840 at the County of Ray aforesaid was indebted to the said plaintiff in the sum of Five Hundred Dollars lawful money for so much money by the said defendant before that time had and received to and for the use of the said plaintiff and being so indebted he the said defendant in consideration thereof afterwards to wit on the day and year aforesaid at the County of Ray aforesaid undertook and then and there faithfully promised the said plaintiff to pay him the said sum of money when he the said defendant should be thereunto afterwards requested

And whereas also the said defendant afterwards to wit on the day and year last aforesaid at the County of Ray aforesaid was indebted to the said plaintiff in the further sum of Two Hundred and Fifty Dollars for so much money before that time and then due and payable from the said defendant to the said plaintiff for interest upon and

for the forbearance of divers large sums of Money due and owing from the said defendant to the said plaintiff and by the said plaintiff forbome to the said defendant for divers long spaces of time before then elapsed at the like special instance and request of the said defendant and being so indebted he the said defendant in consideration thereof afterwards to wit on the day and year last aforesaid at the County of Ray aforesaid undertook and then and there faithfully promised the said plaintiff to pay him the said last mentioned sum of Money when he the said defendant should be thereunto afterwards requested

Declaration

Nevertheless the said defendant not regarding his said several promises and undertakings but contriving and fraudulently intending craftily and subtilly to deceive and defraud the said plaintiff in this behalf hath not as yet paid the said several sums of Money or any or either of them or any part thereof to the said plaintiff although often requested so to do: but the said defendant to pay him the same hath hitherto wholly neglected and refused and still doth neglect and refuse to the damage of the said plaintiff of Seven Hundred and fifty dollars and therefore he brings suit &c

Trench & Edwards
Attys for Pltff

Whereupon on the day and year aforesaid to wit on the 20th day of February AD 1844 there issued from the office of the Clerk of the Circuit Court of said County of Ray directed to the Sheriff thereof a Writ of Summons which is in the words and figures following to wit

State of Missouri } S.S.
County of Ray }

The State of Missouri
To the Sheriff of Ray County Greeting

Writ of Summons

You are hereby commanded to summon Benjamin S Brown that he be and appear before the Judge of the Ray Circuit Court at the Court House in the Town of Richmond on the first day of the next Term of said Court it being the 11th day of March next then and there to answer the complaint of Jacob Hollins in an action of Assumpsit Damages Seven Hundred and fifty dollars (as is said) and hereof

Summons

fail not and make due return how you have executed this Writ

Witness Wiley C. Williams Clerk of our said Court with his

(Seal) Private Seal affixed having no Seal of Office provided

at Office in Richmond this 20th day of February 1844

W. C. Williams Clk

By J. Oliver D.C.

Which said Declaration and Writ of Summons are by the Sheriff afore-said returned and by him indorsed in the Words and Figures following To Wit

Shffs Return on Summons

Executed this Writ by leaving a true Copy of the same together with the declaration with Mrs Brown White female over the age of fifteen years and wife of the within named Benjamin S. Brown at Ray County Missouri on this 23rd day of February 1844.

Hardy Hobman

Sheriff of Ray Cty Mo

And afterwards To Wit at the March Term 1844. of the Circuit Court in and for the County of Ray aforesaid and on Saturday the 16th day of said Month were the following proceedings To Wit

Jacob Stillings

vs Assumpsit

Plea of Non Ass.st

Benjamin S. Brown

The defendant files his

Filed

Plea of Non Assumpsit and this cause is continued

Which said Plea of Non Assumpsit is in the Words and Figures following To Wit

In the Ray Circuit Court

March Term AD 1844.

Benjamin S. Brown

Plea of Non Ass.st

Pts Assumpsit

Jacob Stillings

And the said defendant by his Attorney comes and defends the wrong and injury when &c and says that he

did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him and of this he puts himself upon the Country &c.

M. Oliver &
J. M. Dunn
Attorneys for Deft.

And at the same term of said Court were the following proceedings

Jacob Stillings
vs Assumpsit
Benjamin I. Brown

Motion - Files to rule Deft. to give Security for Costs

The defendant by his attorney files his motion to rule the plaintiff to give security for Costs which is granted and bond required to be filed on or before the first day of the next term of this Court.

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

In the Hay Circuit Court
of March Term 1844.

Jacob Stillings
vs Assumpsit
Benjamin I. Brown.

Motion

The defendant by his Atty. moves the Court to put the said plaintiff under the rule requiring him to give security for Costs for the reason that he is notoriously insolvent and wholly unable to pay the costs of the suit

Dunn & Oliver
Attys for Deft.

Afterwards at September Term 1844. of said Court and on the 9th day of said Month were the following proceedings in the cause aforesaid

Pltff files bond for Costs

Jacob Stillings
vs Assumpsit
Benjamin I. Brown.

Now at this day comes the

Said Plaintiff in pursuance of an Order made at the last Term of this Court and files his bond for Costs

And afterwards to wit at the same term of said Court and on the 10th day of said month of September also the following Proceedings in the cause aforesaid

Jacob Stillings
vs Assumpsit
Benjamin T. Brown

Continuance

This cause is continued until the next Term of this Court

And afterwards to wit at the March Term 1843. of said Court on Friday the 17th day of said month of March also the following Proceedings in the cause aforesaid

Jacob Stillings
vs Assumpsit
Benjamin T. Brown

Now at this day come the parties aforesaid by their Attorneys and both parties being ready for trial hereupon comes a Jury to wit Henry McGee William Mills John Smith E. Finley Sampson Curtis William Combs John Hines William Jones Thomas Eddings Edwin Odell John Holstead and Jonathan L. Smith twelve good and lawful men of Ray County who being duly elected tried and sworn well and truly to try the cause between the parties aforesaid and after hearing the evidence in said cause returned into Court the following Verdict to wit We of the Jury find the issue for the plaintiff, and assess the damages to Two Hundred and twenty Seven dollars and Fifty Cents H. McGee Foreman Therefore it is considered by the Court here that the said plaintiff recover against the said defendant as well the said sum of Two Hundred and twenty seven dollars and Fifty Cents in form aforesaid rendered as his Costs and Charges by him about his suit in this behalf expended and that he have execution therefor

Judgment

And afterwards Toll it at the same term of said Court were the following additional proceedings in the cause aforesaid

Deft moves arrest of Judgmt and for New trial Overruled. Deft files his Bill of Exceptions

Jacob Stollings
vs
Benjamin J. Brown
Assumpsit

Now at this day comes the defendant aforesaid by his Attorney and files his motions to arrest Judgment and for a new trial in this cause. Whereupon all and singular the premises being seen and by the Court here fully understood and mature deliberation being thereupon had; it is considered by the Court here that the said Verdict is in no wise insufficient or erroneous and that the same ought not to be set aside and that no new trial ought to be had of the issue aforesaid. Therefore it is Ordered by the Court here that the motions aforesaid be and the same are Overruled. And the said defendant here files by his Attorney his bill of Exceptions which is signed sealed and made a part of the record

Which said motion to arrest Judgment is in the Words and figures following Toll it

Motion to arrest Judgment

Jacob Stollings
vs
Benjamin J. Brown
Assumpsit

And the said defendant by his attorney moves the Court here to arrest the Judgment in this cause for the following reasons

1st. The Court erred in the admission of evidence in the giving instructions and in refusing to give the instructions asked for by the Defendant

2d. The plaintiff misconceived his action and he should have sued upon the attachment bond or brought an action on the case against the defendant as Sheriff

3. ~ From the record Judgment ought to be given for the defendant

Oliver Ewing & Dunn
Attorneys for Defendant

And which said Motion for a new trial is in the words and figures following to wit

Motion for New Trial

Jacob Stollings
vs Assumpsit
Benjamin J. Brown

And the said defendant by his Attorney moves the Court to set aside the verdict in this case and grant a new trial for the following reasons to wit

1st The Court erred in the admission of evidence
2d The Court erred in giving instructions to the Jury
3d The Court erred in overruling the instructions asked for by the defendant.
4th The Verdict is against the evidence
5th The Verdict is against the law.

Oliver Ewing & Mann
Attorneys for Defendant

And which said Bill of Exceptions is in the words and figures following to wit

Bill of Exceptions

State of Missouri } In the Circuit Court of the County of Ray in the
2d Judicial Circuit } State of Missouri March Term AD 1855

Jacob Stollings
vs Assumpsit
Benjamin J. Brown

Be it remembered that upon the trial of this case the plaintiff offered to read in evidence to the jury a transcript of a record of a case wherein Samuel Sogart and James H Bryan were plaintiffs and Jacob Stollings was defendant: by which record the plaintiff proved that on the 4th day of February AD 1839 Samuel Sogart and James H Bryan sued Jacob Stollings in assumpsit with Attachment in the Ray Circuit Court that the writ of Attachment was on that day levied by Benjamin J. Brown the

defendant Sheriff of Ray County upon One Sind Horse (among other property) as the property of Stillings and that at the December Term AD 1839 of the Ray Circuit Court Pogart and Pryan recovered a Judgment against Stillings for $050. and that at the Spric Term AD 1840 of the Supreme Court that Judgment was reversed and the cause having been removed by change of venue to the Caldwell Circuit Court at the March Term AD 1842 of the Caldwell Circuit Court Pogart and Pryan were nonsuited No Order of sale appears in said Record nor does said record show that an Execution issued for the sale of the attached property

To the reading of which in evidence the defendant objected but the Court overruled the objection and permitted it to be read in evidence to which opinion of the Court in overruling the objection and permitting the same to be read in evidence the defendant excepts

Evidence of John Stone

The plaintiff then introduced John Stone as a Witness who commenced testifying as follows — That in the Spring of 1840 he was in the town of Richmond and defendant was crying at public Vendue a certain brown Stallion. Here defendants Counsel interposed and asked witness if said Horse was selling under an execution To this Witness replied that Defendant Was then Sheriff of Ray County and having proclaimed that he would sell the Horse as the property of plaintiff he supposed he was selling him as Sheriff but he saw no Execution nor did he hear in what case he had levied on the horse but he came to the conclusion he was selling him as Sheriff — The defendant then objected to his being permitted to testify further until the plaintiff first produced the Execution under which the sale of the Horse was made: but the Court overruled the objection & permitted Stone to proceed and testify as to said sale — Witness then stated that he purchased said Horse from defendant at said sale for about $175. and then & there paid him said sum of Money for him that he had known the Horse before he was a stout heavy muscled horse brown Stallion; that he knew him when Samuel Pogart owned him and then when Reuben Riggs stood or kept him one season and that season he had bred to him and supposed was the plaintiffs but knew nothing of the ownership of the Horse

And to the introduction of this evidence the defendant objected but the Court overruled the objection and permitted the same to be given to the Jury to which opinion of the Court in overruling the objection of the de-

fendant and permitting the plaintiff to introduce the evidence of said Witness the defendant Excepts

Evidence of Robert L McCuoskrie

The plaintiff then introduced Robert L McCuoskrie a Witness who swore that he knew a certain brown Stallion while owned by Samuel Fogart and afterwards by the plaintiff and that said Stallion was in the possession of Reuben Riggs when the attachment was levied upon him & that Riggs was keeping him for plaintiff & that Witness bought of plaintiff his half of the Accounts made by said Horse for his Services that season after the horse was levied on & that he and Riggs divided said Accounts & he took one half and Riggs the other

This was all the evidence given upon the trial of this case

Plaintiffs Instructions

The Court then on motion of the plaintiff instructed the Jury as follows That if they believe that Defendant sold plaintiffs horse without any legal authority and received the pay therefor that he is liable for the price of the horse and no demand was necessary before bringing this suit

Courts Instructions

And the Court instructed the Jury which instructions cannot now be found To the giving said instructions moved for by the plaintiff as well as the others the defendant objected but the Court overruled his objection and gave the instructions to which opinion of the Court in overruling the said objection and giving the instructions the defendant excepts

Defendants Exception

The Defendant then moved the Court to give the Jury the following instructions

Refused

1st That if they find from the evidence that the Horse (the proceeds of which is sued for) came lawfully into the possession of the defendant then the plaintiff cannot recover without proof of a demand of the money of the defendant before the suit was brought

Refused

2d That if they find from the evidence that said Horse came to the possession of the defendant under and by virtue of the Writ of Attachment specified in the record read in evidence then he came into possession of him lawfully and that the record is evidence of that fact

Refused

3d The plaintiff having waived the tort and brought a suit for the proceeds of the sale of the horse thereby affirms that sale and recognises the

No. To Instruc.

defendant as his agent in making the sale and unless they find from the evidence that the plaintiff demanded the money of the defendant before this suit was brought they will find for the defendant.

Refused.

4th. That if they find from the evidence that the horse was sold before the record of reversal in the supreme Court specified in the record read in evidence was filed in the Clerks Office of the Ray Circuit Court then the plaintiff cannot recover in this action without proof of a demand But the Court overruled the motion of the defendant and refused to give any of the instructions asked for by the defendant - to which opinion of the Court in overruling the motion of the said defendant and refusing to give to the jury the instructions aforesaid the defendant excepts

Afterwards after the Verdict was rendered the defendant filed a motion for a new trial which is in the words and figures following to wit

Jacob Stillings
vs Assumpsit
Benjamin A. Prom

And the said defendant by his attorney moves the Court to set aside the Verdict in this case and grant a new trial for the following reasons to wit

1st The Court erred in the admission of evidence
2d The Court erred in giving instructions to the jury
3d The Court erred in overruling the instructions asked for by the defendant
4th The Verdict is against the evidence
5th The Verdict is against the law

Oliver Ewing & Mann
Attorneys for Defendant

and which motion the Court overruled to which opinion of the Court in overruling said motion the defendant excepts.

And the defendant then filed a motion in arrest of Judgment which is in the words and figures following to wit

Jacob Stillings
vs Assumpsit
Benjamin A. Prom

And the said defendant by his attorney moves the Court here to arrest the Judgment in this case for the following reasons

1st The Court erred in the admission of evidence in the giving instructions and in refusing to give the instructions asked for by the defendant

2d The Plaintiff misconceived his action and he should have sued upon the Attachment bond or brought an action on the case against the defendant as Sheriff

3d From the Record Judgment ought to be given for the defendant

Oliver Ewing & Dunn
Attorneys for Defendant

Which motion the Court overruled To which opinion of the Court in overruling said motion the defendant excepts and he prays that his bill of exceptions may be signed sealed allowed and made a part of the record Which is done accordingly

Austin A King Seal

State of Missouri
County of Ray } Set

I Robert Sevier Clerk of the Circuit Court in and for the County of Ray aforesaid do hereby certify that the above and foregoing is a true (and so far as can now be had) a full and perfect transcript of the Record and proceedings in the above entitled cause wherein Jacob Stillings is plaintiff and Benjamin F Brown the defendant

In testimony whereof I have hereunto set my hand and affixed my private seal (no Seal of Office being provided) at Office in Richmond this 8th day of July AD 1845

R Sevier Clerk

42

(~~47.~~) (~~45.~~ 59.) (60)

Jacob Stillings

vs. Assumpsit

Benjamin S. Brown

Transcript

Filed aug. 4. 1845.

H. L. Boon clk

Ray

STATE OF MISSOURI----Sct.

The State of Missouri....To the Judge of the Fifth —— Judicial Circuit in said State....**GREETING:**

WHEREAS, *In the record and proceedings in a certain cause lately pending in the Circuit Court within and for the County of* Ray —— *in said circuit, wherein* Jacob Stollings was plaintiff and Benjamin I Brown was ——

defendant manifest error, hath intervened, to the great damage of the said defendant —— *as by* his — *complaint, we are informed;*

Now, we being willing that the error, *if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf,* **command you,** *that you send to us certified under your* **seal,** *the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held at the City of Jefferson, in the County of Cole, in said State, on the* Second *Monday in* January *next, so that our Judges of our Supreme Court on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right and according to law ought to be done.*

WITNESS, Hampton L. Boon, *Clerk of our said Supreme Court, at office, in the City of Jefferson, the* fifth —— *day of* August *in the year of our Lord, one thousand eight hundred and forty-* five

H. L. Boon

Jacob Stollings } Error to Ray
B. B. Brown } Circ Court

The said Stollings the deft in error by his attorney comes and moves the Court to dismiss the Writ of Error in this Cause issued

1. Because no notice in writing of the same has been served upon the said Stollings or his attorney of record according to law.

2. Because said Writ of error has not been served or returned according to law.

Stringfellow
atty for
Stollings

Stocking
ats —
Brown

Motion to dismiss
writ of error

Stipulation
for defts error

Filed Jany 22. 1846.
H. L. Boon clk

In Supreme Court of Missouri
July term 1843

Benjamin I Brown plff
agst } Writ Error from Ray County
Jacob Stollings Deft

This was an action of assumpsit brought by Stollings against Brown to which Brown filed his plea non assumpsit and at the trial by jury at the March term of Ray Circuit Court judgement was rendered in favour of Stollings for the sum of $227..50. Brown by his att'ys filed motions in arrest of judgement and for a new trial both of which motions were overruled and bill of exceptions filed. from which it appears that on the trial of this case in the Circuit Court the plaintiff Stollings was permitted to read in evidence to the jury "a "transcript of a record of a case wherein Samuel "Bogart and James H Bryan were plaintiffs and Jacob "Stollings was defendant by which record the plaintiff "proved that on the 4th day of February 1839 Samuel "Bogart and James H Bryan sued Jacob Stollings "in assumpsit with attachment in the Ray Circuit "Court that the writ of attachment was on "that day levied by Benj I Brown the defendant "Sheriff of Ray County upon one Stud horse (among "other property) as the property of Stollings and that "at the December term 1839 of the Ray Circuit Court "Bogart & Bryan recovered a judgement against "Stollings for $650 and that at the April term "1840 of the Supreme Court that judgement was "reversed and the cause having been removed "by change of venue to the Caldwell Circuit Court "at the March term 1842 of the Caldwell Circuit Court "Bogart and Bryan were nonsuited. No order of sale "appears in said record nor does said record

"Show that an execution issued for the sale of the "attached property" — The record referred to is not copied in this case and the bill of exceptions only shows what is here extracted with this addition that the defendant objected to the reading of it — The plaintiff Stollings then introduced evidence going to show that Brown as Sheriff of Ray County had sold said Stud horse for $175 & rec^d the money for him — The Court then on the motion of the plaintiff instructed the jury. "That if they believe that Defendant sold plaintiffs horse without any legal authority and received the pay therefor that he is liable for the price of the horse and no demand was necessary before bringing this suit".
Other instructions were also given but the clerk says in his note that they cannot now be found

The defendant Brown by his atto then moved the Court to give to the jury four different instructions as appears from the record marked 1 2 3 & 4 all of which refused. which was at the time excepted to

The Defendant Brown (plaintiff here) having sued out his writ of Error. ~~and~~ now moves this Court for a supercedeas to stay proceedings upon said judgment of Ray Circuit Court until the proceedings & judgment of said Court can be examined and revised by this Court and now in support of this motion calls the attention of the Court to following points
1st Stollings misconceived his action he ought to have sued upon the attachment bond or brought an action on the case against the Sheriff —
2nd The horse came lawfully into the possession of Brown and the proceeds of the sale of the

horse cannot be received without a demand
3rd The plaintiff having waived the tort and
brought his action of assumpsit for the proceeds
of the sale of the horse thereby recognizes
Brown as his agent in making the sale
and therefore a demand is necessary.
4th The evidence of the sale of the horse
by Brown as sheriff ought not to have been
received until an execution was produced
or its absence accounted for.
5 The court below ought to have sustained
the motion of defendant for new trial

The Court will see from the record that on the
motion of deft the plaintiff was required to give security
for costs which is evidence of his pecuniary circumstances and if the deft is forced to pay this
judgment he may be without remedy even if this
Court should reverse the judgment of Court below
and where there is probable error in the record
& proceedings below the Supreme Court is disposed
to grant supersedeas only so long the plaintiff cannot
be materially injured. he has his debt and
all costs secured to him by bond with approved
security - and by this course justice may be rendered
to both parties.

Dickman
for plff in
error

The record from which an extract is
made was offered by the plaintiff and is

not filed in the office as appears by the Certificate of the Clerk who says the transcript is as full and perfect as can be had. and this of course cannot be the fault of the defendant below. (Brown)

~~The verdict as~~

Strickman

Rey & Brown

We
Have
Ray
Crawt
Cuts

Jacob Stolling

Statement & print of Plaintiff in Error on Motion for a Supercedeas

Strickman