Steele, Joseph B. vs. McCutchen, James

April 1839

1st C. Morgan

139
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(3) Trespass: Aff'd Nonsuit; S. sued for loss of table, clock

Property; Evidence; Nonsuit

State of Missouri }
Morgan Circuit } ss

Plea before the Honorable William Scott Judge of the first Judicial Circuit within and for the State aforesaid and of the Morgan Circuit

Be it Remembered that heretofore towit on the fourth day of November in the year of our Lord Eighteen Hundred and thirty ~~seven~~ came Joseph B Steele by John Wilson Esquire his Attorney and filed in the Clerks Office of said Court his declaration against James McCutchen in the words and figures following towit

State of Missouri. County of Morgan. In the Morgan Circuit Court – February Term 1838

Joseph B Steele by his Attorney complains of James McCutchen of a plea of Trespass &c for that the said Defendant heretofore towit on the twenty fifth day of April in the year Eighteen Hundred and thirty six with force and arms &c towit, at the County of Morgan aforesaid seized and took the Goods and Chattles, towit one Press, one Table and one Clock, of the said plaintiff of great value, towit, of the value of One Hundred Dollars, then and there found and being and kept and detained the same for a long space of time towit for the space of twenty days then next following during all which time the said plaintiff was hindred and prevented from using and disposing of the same as he the said plaintiff chose to do

And also for that heretofore towit on the same day and year aforesaid the said Defendant with force and arms towit, at the County of Morgan aforesaid seized and took other Goods and Chattles towit one other Press, one other Table and one other Clock of the said plaintiff of great value towit of the value of One Hundred Dollars then & there found & being –

and converted and disposed of the same to his own use and other wrongs to the said plaintiff then and there did against the peace and dignity of our said State and to the damage of said plaintiff five Hundred Dollars & therefore he brings his suit &c

J Wilson Atty for plff "

And then on the same day and year aforesaid there was issued by the Clerk of said Court and out of his office and attached to a copy of the foregoing declaration the following Summons in these words and figures towit "

"The State of Missouri

To the Sheriff of Morgan county Greeting We command you to Summon James McCutcheon to appear before the Judge of our Morgan Circuit Court Court at the Court House in Versailles on the first day of the next February Term of said Court to be Holden for said Circuit to answer Joseph B Steele in a plea of Trespass Damage Five Hundred Dollars — And have then there this writ

Witness Thomas Grayson Davis Clerk of our said Court at the Court House aforesaid (with my Seal of office hereunto affixed) on the 4th day of November 1837 and in the 18th year of the State

Thos. G. Davis "

On which said Summons the following endorsement was made and returned by the Sheriff of Morgan County in the words and following towit

"I do Hereby Certify that I Executed the within Declaration and Summons on the 7th Dec 1837 in Morgan (County) Mo by Reading each of them to James McCutcheon — A Woods Sheriff of Morgan Co Mo

And then afterwards towit At a Court Holden for the Morgan Circuit at the Court House in Versailles on Wednesday the twenty the Twenty Seventh day of February in the year of our Lord Eighteen Hundred and thirty Eight the following was made in these words and figures towit.

"Joseph B Steele — Plaintiff
against
James McCutchen — Defendant } In Trespass

This day came the Defendant and filed his plea of not Guilty which was in the words and figures following, towit, "Morgan Circuit Court, February Term 1838, James McCutchen vs Joseph B Steele In Trespass, And the said Defendant by his Attorney comes and defends the force and injury when &c and says he is not guilty of the said several supposed Trespasses and grievances or any or either of them above laid to his charge in manner and form as the said plaintiff hath above thereof complained against him & of this he the said Defendant puts himself upon the Country &c

P R Hayden Atty for Deft

and the cause is continued until the next Term of this Court"

And then afterwards to wit, At a Court Holden for the Morgan Circuit at the Court House in Versailles on Wednesday the twenty sixth day of June in the year of our Lord Eighteen Hundred and thirty Eight the following order was made in these words and figures, towit

"Joseph B Steele — Plaintiff
against
James McCutchen — Defendant } In Trespass

This day came the parties aforesaid by their Attorneys and the plaintiff by his Attorney moved the Court for a continuance of the cause on the

affidavit in these words and figures to wit Steele vs McCutchen
The said plaintiff being sworn maketh oath and saith
that he cannot safely go to trial in the above cause for
want of Benjamin Campbell who is a material witness
in the cause, that said witness has been subponed that
his absence is not by the connivance consent or procurance either
directly or indirectly of said plaintiff, that he knew of
no other person by whom he can prove the same facts and
he believes that he will be able to procure his testimony
by the next Term of this Court. J. B. Steele
Subscribed and ~~and~~ sworn to before me Thomas Grayson
Davis clerk of the Morgan Circuit Court the 26th day of
June 1838 — Thos. G. Davis clk. which motion was ar
gued and by the Court fully understood and overruled
and the said plaintiff being unwilling to further nor does
he further prosecute his suit but takes a nonsuit
It is therefore considered by the Court that the said
Joseph B. Steele take nothing for his writ and for his false
clamour be in mercy &c and that the said James McCut
chen go hence without day and recover against the said
Joseph B. Steele his costs by him about his defence in
this behalf laid out and expended. and that he have exe
cution thereof &c

And then afterwards towit at the Court last afore
said Holden at the Court House in Versailles on Wednesday the
twenty seventh day of June in the year of our Lord Eighteen
Hundred and thirty Eight the following order was made in
these words and figures towit

"Joseph B. Steele — Plaintiff
Against
James McCutchen — Defendant
In Trespass

The plaintiff by his Attorney moved

Affidavit for Continuance

the Court to set aside the nonsuit entered herein against him on yesterday and reinstate the cause on the Docket and continue the same until the next Term of this Court, because this Court erred in overruling the motion of said plaintiff for a continuance this cause until the next Term of this Court which motion the Court doth overrule to which opinion of the Court the said plaintiff by his attorney excepts which exceptions are by the Court signed sealed and ordered to be filed and made apart of this Record in the words and figures following) towit) Joseph W. Steele vs James McCutchen. Be it Remembered that when the above cause was called for trial said plaintiff moved the Court for a continuance in this cause and filed his affidavit therefore in the words and figures following towit)

The said plaintiff being sworn maketh oath and saith that he cannot safely go to trial in the above cause for want of Benjamin Campbell who is a material witness in this cause that said witness has been subpoened. That his absence is not by connivance consent or procurance either directly or indirectly of said plaintiff that he knows of no other person by whom he can prove the same facts, and he believes that he will be able to procure his testimony by the next Term of this Court — J W Steele

Subscribed and sworn to before me Thomas Grayson Davis clerk of the Morgan Circuit Court the 2d day of June 1838. Thos G. Davis CR the Defendant then read a subpoena and the return thereon in the words and figures following, Executed by reading the within subpoena to Benjamin Campbell on this 2d day of June 1838 H D Evans. Henry D Evans appeared before me an acting Justice of the Peace and made oath that he had executed the within subpoena as above stated Given under my hand and seal — H. Bollinger J P

which motion was overruled by the Court to which opinion of the Court the plaintiff excepted and thereupon the plaintiff took a nonsuit in said cause and filed herein his motion to set aside the nonsuit and reinstate the cause upon the docket which motion is in the words and figures towit, (The said plaintiff moves the Court to set aside the nonsuit in this cause and reinstate said cause upon the docket and continue the same until the next Term of this Court because this Court erred in overruling the motion of said plaintiff for a continuance this cause until the next Term of this court — J Wilson atty for Pltff which motion was also overruled by the Court to which opinion of the Court the plaintiff also excepted and prays this his Bill of exceptions to be signed sealed and made a part of the Record in this cause and it is done

William Scott Jud

And then afterwards towit on the same day and year last aforesaid and at the Court aforesaid the following order was made in these words and figures towit

Joseph B. Steele. — Plaintiff
Against
James McCutchen — Defendant
In Trespass

On the motion of the said plaintiff Joseph B. Steele who filed his affidavit as the Law directs in the following words and figures towit Joseph B Steele vs James McCutchan In the Morgan Circuit Court June Term 1838. Joseph B Steele this affiant being sworn maketh oath and saith that he appeals in the above cause from the Circuit to the Supreme Court not for the purpose of vexation and delay but because this affiant believes that he is aggrieved by the Judgement of the Court

J. B. Steele

subscribed and sworn to before me Thomas Grayson
Davis Clerk of the Circuit Court of Morgan County on the
27th day of June 1838 Thos G Davis Clk
an Appeal is granted him on the Judgement of nonsuit
rendered against him at a previous day of this Term to the
Supreme Court of this State on his entering into a recognizance
with two sufficient securities in the sum of One Hundred
and fifty Dollars which is deemed sufficient whereupon
he the said Joseph B Steele with Reuben B Davis and
Joseph M Bernard his securities who was approved of by
the Court and acknowledged themselves to owe and stand justly
indebted to the said James McCutchen in the just and full
sum of One Hundred and fifty Dollars to be levied and
made of their respective Goods and Chattles Lands and Tene
ments and to the use of the said James McCutchen to be
rendered. But upon this condition that if the said Joseph
B Steele the Appellant will prosecute his suit with due dili
gence to a decision in the Supreme Court and that if the
Judgement appealed from is affirmed or his appeal dismissed
he shall pay whatever of the Debt Damages and costs that
have been recovered against him by the Judgement of the
Circuit Court together with the interest that shall grow
due thereon or that he will otherwise perform the Judgement
of the Circuit Court and that he will also pay the costs
and damages that may be adjudged against him in the
Supreme Court upon this Appeal then the above recogni
zance to be void otherwise to remain in full force and virtue

State of Missouri }
Morgan County } Set

I Thomas Grayson Davis clerk of
the Morgan Circuit Court do Hereby certify that the fore
going Seven pages contain a true full and compleate

transcript of the Record and proceedings in the cause lately determined in said Court between Joseph B. Steele Plaintiff and James McCutchan Defendant as the same now remains of Record in my Office

In Testimony whereof I have hereunto set my hand and affixed the Seal of said Court at Office in Versailles on the first day of September A.D. 1838

Thos G. Davis Clk

Apr 7 1839

Joseph B. Steele (3)

Copy

vs Record

James McCutchan

filed 17th November 1838

R P Clark Clk

In the Supreme Court

April Term 1839

Joseph B. Steel
vs
James McCutchen

Appeal from Morgan Cir. Ct.

The said Steel by his attorney comes & says, that there is manifest error in the record and proceedings in this cause; that the said Circuit Court manifestly erred in this, to wit, in refusing to grant a continuance of said cause on motion of said pltff and also in this, to wit, in refusing to to set aside the nonsuit taken in this cause and reinstate this cause upon the docket upon the motion of ~~this cause~~ said plaintiff, and that there are other errors in said record and proceedings — wherefore the plaintiffs prays a reversal of said judgment and that he be restored to all his rights &c —

J Wilson attorney
for Pltff

J. B. Steel

vs { Assignment of Errors

James M'Cutchen

filed 22nd April
1839 — R. P. Clark clk

In the Supreme Court April Term
1839 –

J. B. Steel
vs } Appeal –
Jas. McCutcheon

This was an action of trespass brought by Steel vs. McCutcheon – The plaintiff made his affidavit which is prevailed in the bill of exception and moved the Court for a Continuance of the Cause, the Court overruled his motion, the plaintiff took a nonsuit with leave to move to set it aside, the Court on motion refused to set it aside – The only point presented in this case is the sufficiency of the affidavit – To show that the affidavit is sufficient we refer to Judd's Practice 2nd vol. 709 –

Jwilson atty for Pltff

J. B. Stul

vs } Appeal

Jas. M'Cutchen

Pltffs Brief

By J. Wilson.

2nd Ldd's Practice

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James McCutchon
ads } Upon Appeal from the Morgan
Joseph B. Steel } Circuit Court.

Steel the appellant has brought this Cause into this Court to reverse the judgement of the Circuit Court, because the Circuit Court refused to grant him a Continuance of the Cause upon an affidavit filed therefor, whereby he was forced to become nonsuit —

The Counsel for McCutchon will insist that the Circuit Court committed no Error in refusing the Continuance upon the application of said Steel.

By the 3d Section of the Statute regulating Practice at Law 462. of the Digest, power is given to Courts of record for good Cause to Continue Causes —

By the 4th Section the Statute requires ~~an~~ application for a continuance to be accompanied by the affidavit of the party applying therefor, or the affidavit of some other Credible person setting forth the facts upon which the application is founded — The Statute necessarily contemplates a right in the Court to weigh testimony upon which the application is founded, and to determine therefrom whether the Cause should or should not be Continued — In this Case the appellant did not shew how he had summoned the Witness Campbell, whose Testimony he pretends he wanted — whether summoned or not this Court Cannot see — The Bill of Exceptions does

not Shew that a Subpoenas had ever been
issued or served by any person having either
power to issue or serve the same; And
~~Whether~~ for ought this Court can see from
the face of the record, the very reason why
the Court refused to grant a Continuance,
was because the Court was satisfied that no
Subpoena had been issued by any proper
Officer; or if issued by a proper Officer,
that the same was not served in a
legal or proper manner, or not served at all;
or if served, that it was served too recently
next before the Calling of the Cause —
I Contend therefore that unless from the
face of the Record the Court can see all
the facts stated in the affidavit, which
in Law would authorize the Court to Contin-
-ue the Cause, or to make it the duty of the
Court to grant the Continuance, that
this Court will not disturb the Judgment
of the Circuit Court — Now the said
Fleet in his affidavit affirms that ~~the~~
Benjamin Campbell is a material witness
in the Cause — and that he "has been
Subpoenaed" — Not Shewing whence the
Subpoena emanated — nor When, nor to
whom directed — nor When or at What
Time the Witness was Commanded or direc-
-ted to attend as such in the Cause —
Nor When the Witness resides — Whether the
Summons was served or not was for the
Court to decide — Whether served or not — or
if served or not in due time, and by a

proper officer or person, is alike a question for the Court to decide - And if the facts upon which the decision of the Court was made, had all been shewn, (and not the uncertain conclusion of the affiant as to the question of summoned, or not) this Court could then see whether the Court did, or did not soundly or correctly decide the question - And I hold that it was the duty of the Appellant to have had placed upon the record by his Bill of Exceptions every thing shewing his legal right to a continuance of the Cause; and it is not for the Deft. McCutchen to shew that the plff failed to make out a sufficient Cause for a continuance - It being a sound rule, long since adopted by this Court, that this Court will never presume that the Inferior Court Erred, unless it be shewn by the party complaining that Error was commited by the inferior Court -

I R Haydon
atty for
McCutchen -

M.c Cutchon
adv. & Deft's Brief
J. Steel –

Haydn's Brief –

See Statute 462 –
3 – 4 Sections –

Joseph B. Steele } Appeal from the Circuit
James vs McCutcheon } Court of Morgan County

Opinion of Tompkins Judge

Steele brought his action in the Circuit Court against McCutcheon, where judgment being given against him he appealed to this court

At the second term of the Circuit Court, when by law he was required to be ready for trial or shew cause for a continuance, he prayed a continuance and filed an affidavit in which he stated that he could not safely go to trial for want of a witness who was material, that said witness had been summoned, and was not absent by any contrivance of the affiant either direct or indirect, that he knew of no other person by whom he could prove the same facts, and that he believed he would be able to procure the attendance of the said witness at the then next term of that court.

The Circuit Court refusing a continuance of the cause, the ~~xxx~~ plaintiff took a nonsuit, and then moved the court to set aside the nonsuit because a continuance had been improperly refused. This motion was overruled by the Circuit Court.

The circuit court as it appears to me committed no error in overruling this motion: for it might perhaps have appeared to the court in evidence that it was in the power of the plaintiff to procure the evidence of the witness by taking his deposition. If the witness were to be found in the vicinity of the court he might have procured an attachment to compel his

attendance. We are bound to presume that the Circuit Court had a good reason for its decision till the contrary be made to appear. Such has been the uniform course of this court especially when it has been required to reverse a judgment of that court for refusing to grant either a new trial or a continuance

Its judgment ought then in my opinion to be affirmed and this being the Opinion of Judge Napton it is affirmed

George Tompkins

I concur.

W. B. Napton

Steele
vs. opinion
McCutcheon

Tompkins

April Term
1839