Rector, William v. Mark, Louis May 1823 3rd D. St. Louis 142/10

Debt: Affirmed; Circ. awarded Marks $3051 for balance on note + damages

8

$3051

Contract

STATE OF MISSOURI, }
Third Judicial District. } ss,

The State of Missouri, to the Sheriff of St. Louis *County.* GREETING:

BECAUSE in the record and process, and also in the rendition of judgment, on a certain plaint, which was in our Circuit Court for our county of St. Louis before our Judge thereof, between Louis Marteo ——— plaintiff, and William Rector ——— defendant, in a certain plea of Debt whereof the said William Rector is convict, as it is said manifest error hath happened to the great damage of the said William Rector as by his complaint is alledged. The record and process of which said judgment we have lately commanded should be brought before our Supreme Court, for the District aforesaid, for certain causes of error, AND WE being willing that the error, if any hath been, should be duly answered, and full and speedy justice done to the parties aforesaid, as is reasonable in this behalf, COMMAND YOU, that by good and lawful men of your Bailiwick, you cause the said Louis Marte to know, that he be before our said Supreme Court, to be holden for the third Judicial District, at the town of St. Louis, on the first Monday of May next, to hear the record and process aforesaid, if he shall think fit, and further to do and receive what our said Court shall then and there consider concerning him in this behalf, And have you then there the names of those by whom you shall give him notice, and this writ.

WITNESS THOMPSON DOUGLASS, Clerk of our Supreme Court for the Third Judicial District:

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of office, at office, this Thirtieth day of January in the year of our Lord one thousand eight hundred and twenty three and of the Independence of the United States of America, the forty Seventh

Th. Douglass Clk

Received 30th
January 1823
E. F. Brown
D. Shff

May Term 1823
Wm Rector
vs
Louis Mark } Sci fa

Writ $1.00
Tax 1.00
$2.00

Louis Mark not
found in my
County. 5 May
1823.

Jno K. Walker
Shff

fees $.50 cts

STATE OF MISSOURI, } ss.
Third Judicial District. }

The State of Missouri to the honorable the Circuit *Court of* St. Louis *county*, GREETING:

FOR AS MUCH as in the record and process, as well as in the rendition of Judgment, on a certain plaint which was in our Circuit Court, for our county of St. Louis before our judge thereof, between Louis Master plaintiff, and William Rector defendant, in a plea of Debt as it is said manifest error hath happened to the great damage of the said William Rector as by his complaint we are informed: *We*, being willing that the error, if any there be, should be duly amended, and full and speedy justice done to the parties aforesaid in this behalf, *Command you*, that if judgment be thereupon given, then a transcript of the record of the judgment, with all things touching the same, and this writ, you certify and send to our Supreme Court, to be holden for the Third Judicial District, at the town of St. Louis, on the first monday of May next, that our Judges of our said Court inspecting the record of the judgment aforesaid, may cause to be done therein, for correcting the said error, what to them of right, and according to law, shall seem meet to be done.

WITNESS THOMPSON DOUGLASS, Clerk of our Supreme Court for the Third Judicial District:

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of office, at office, this thirtieth day of January in the year of our Lord one thousand eight hundred and twenty three and of the Independence of the United States of America, the forty seventh

Th. Douglass Clk

May Term 1823

Mr Rector

vs

Louis Mack

Writ of Error

Writ $1.00

Tax 1.00

$2.00

In obedience to the within writ I herewith certify a copy of the record & proceedings in the case Mack vs Rector

A Gamble Clerk

State of Missouri
County of St Louis ss. Be it remembered that on the twenty sixth day of July in the year of our Lord one thousand eight hundred and twenty one Louis Mark by his attorney filed in the office of the Clerk of the Circuit Court his declaration of a plea of debt against William Rector which said declaration is in the words and figures following, to wit: "State of Missouri
"Circuit Court County of St Louis. August Term 1821
Louis Mark complains of William Rector of a plea that he render unto the said Louis the sum of three thousand six hundred and fifteen dollars lawful money of the United States which he owes to and unjustly detains from him: For that whereas heretofore to wit on the Eighth day of October in the year one thousand eight hundred and ten, at Louisville in the State of Kentucky to wit, at St Louis in the State of Missouri the said William Rector by his certain writing obligatory sealed with his seal and now here to the Court shown, the date whereof is the same day and year aforesaid acknowledged himself to be held and firmly bound unto Louis Mark of the City of New York in the State of New York in the sum of three thousand six hundred and fifteen dollars lawful money of the United States to be paid the said Louis when he the said William should be thereunto afterwards requested: Yet the said William although often requested so to do hath not as yet paid

the sd sum of money above demanded nor any part thereof to the said Louis but to pay the same or any part thereof he the sd William hath hitherto wholly refused and still doth refuse to the damage of the sd Louis Mark of one thousand dollars & therefore he sues &c &c." Wash & Carr all fr pltffs." —

And afterwards to wit on the day of the filing of said declaration the said Louis Mark by his attorney sued out of the office of the Clerk aforesaid a writ of summons in ~~the~~ words following. to wit:

"County of St Louis

The State of Missouri

To the Sheriff of said County. Greeting: —

We Command you to summon William Rector that he be and appear before the Judge of our Circuit Court at the next term thereof to be held at the Town of St Louis within within and for the County of St Louis on the third monday of august next then & there to answer unto Louis Mark of a plea that he render unto him the sum of three thousand six hundred and fifteen dollars Lawful money of the United States which to him he owes and from him in=justly detain to the damage of the said Louis Mark of one thousand dollars. & have you then there this writ.

Seal witness Archibald Gamble clerk of our said Court at office this twenty sixth day of July 1821."

Archibald Gamble clerk

And afterwards to wit, on the return day of said writ the Sheriff to whom the said writ was directed returned the same into Court with his return thereon indorsed as follows; to wit; "Executed this writ on William Rector by leaving a copy of the same together with a copy of the declaration at his

dwelling house with William Milburn and by informing him of the Contents thereof in the Township of St Louis August 3rd 1821." "Md Simonds Jr. D Shff".
And afterwards to wit; at the February term of said Court the said defendant by his attorney comes and files his plea to the above declaration in the words following, to wit: "In the Circuit Court February Term 18222. And the said William by his attorney comes and defends the wrong and injury when &c. and says that he ought not to be charged with the said debt in said declaration mentioned – Because he says that on the first day of June in the year one thousand eight hundred and seventeen and before the commencement of this suit at St Louis to wit: in the County aforesaid he did well and truly pay and satisfy unto the said plaintiff the said sum of money in said declaration mentioned with the interest due thereon according to the form and effect of said writing obligatory in said declaration mentioned and this he the said William is ready to verify wherefore he prays Judgment if the said Louis ought to have or maintain his aforesaid action thereof against him." Magnus atty for Deffts".
And the said plaintiff for replication saith that from having and maintaining his action hereof by reason of any thing in the said defendants plea alledged he ought not to be barred &c. because he saith the deffdt did not pay

in manner and form as in his plea he hath alledged & of this he puts himself upon the County. R Wash atty.

And thereupon this cause is continued from term to term till the October term of said Court in the year Eighteen hundred and twenty two at which said term come the parties aforesaid by their respective attorneys aforesaid and neither of the parties requiring a Jury all and singular the premises are by them submitted to the Court which being seen and heard and by the Court here fully understood the Court do find as to the issue within joined between the parties aforesaid that the said defendant did not pay in manner and form as in his plea he hath alledged. Therefore it is considered that the said Louis Mark recover against the said William Rector his said debt of Eighteen hundred and seven dollars & fifty sum cents and also the further sum of twelve hundred and forty four dollars and seventy seven cents for his damages by him sustained by reason of the detention of said debt and also his costs and charges by him about his suit in this behalf expended & that he have thereof execution.

To the foregoing Judgment the said defendant tenders his bill of exceptions which is signed by the Court and ordered to be made part of the record in the words & figures following to wit

State of Missouri
County of St. Louis } to wit. In the Circuit Court October term 1822

Wm Rector
ado
Louis Mark

This cause was an action of debt on a writing obligatory on the trial of the above the plaintiff produced the said Bond which on its face appeared to be

drawn in the year one thousand eight hundred and ten and claimed interest on the same until the present time the defendant produced of John C Sullivan who was the agent of the said plaintiff called on the said defendant in the year one thousand eight hundred and eighteen for payment of said Bond and informed the said defendant that the said bond had been lost or mislaid and could not be produced upon which the said defendant refused payment unless the said bond could be given up to him it was also proved that said plaintiff offered to indemnify said defendant provided he paid the said bond and the amount should afterwards be claimed from him by any other person with proposition the said defendant would not comply no other demand was proved to have been made for payment of said bond nor was it ever produced until immediately before the commencement of this suit the said defendant then asked the Court to instruct the Jury that that interest could not be allowed on said bond from the time when it was admitted to be lost until it was produced before the commencement of this suit Court sometime in the year one thousand eight hundred twenty one which instruction the Court refused to give to which said opinion of the Court the said defendant by his Counsel excepts and prays that the same may be made a part of the record in this cause which is done

R B Tackers

No. 1 (5)

256 256

Louis Mark
vs Transcripts
William Rector

Transcripts ... $1 - 7 1/2
Tax — 1 00
Certificate & seal — 50
$3 - 22 1/2
Clerk Circ Court 6. 61
$9. 83 1/2
Attorney — 2. 00
Sheriff — 1. 40
$13. 23 1/2

Filed 22d April 1823
Thompson Clk

Examined

State of Missouri } ss
County of St Louis }

I Archibald Gamble Clerk of the Circuit Court for the County of St Louis do certify the within to be a correct transcript of the record and proceedings in the case of Louis Mark against William Rector as the same still remains in my Office

Given under my hand and seal of Office at St Louis this fifteenth day of April Eighteen hundred and twenty Three

Archibald Gamble Clerk

William Rector
&
Louis Mark } In Error

In the Supreme Court
Third Judicial District
May Term 1823

And now at this time comes
the said William by his attorney and says
that the Record and proceedings aforesaid and
also the rendition of the Judgment aforesaid
there is manifest error in this Court that
whereas the said Judgment was given for
the said Louis and against the said William
whereas it ought to have been given for
the said William and against the said
Louis — There is also error in this Court
that the said Court directed the said Jury
to calculate interest of said bond during
a period when the said bond was stated to
have been lost and when the said Rector
was willing to have paid the same provi-
ded it could have been produced to him
And the said William prays that the Judgment

and proceedings aforesaid for the errors aforesaid and other errors in the said Judgment and proceedings may be reversed annulled and held for nothing — Magrin & Gray.

Atty for Rector

In nullo est erratum

[illegible]

Atty pg

W. Rector
Lewis Mark
Assl. Assmt
of Errors

Magrin & Gray
Attys
for Rector

filed 5th May 1823
H. Douglass Clk

William Rector
agt
Louis Marh } In Error from St Louis Circuit Court

This was an Action of Debt on a writing obligatory bearing date the 8th Day of October 1810 for the sum of $3615, to which the Defendant pleaded payment Replication non solvit & Issue — neither party requiring a Jury the Cause was submitted to the Court who found that Defendant Rector did not pay and gave Judgment for the plaintiff for the sum of $1807-50 the said debt in the Declaration mentioned and also for $1244.77 damages with Costs

During the trial a Bill of Exceptions was filed which states that the plaintiff produced the Bond and claimed Interest thereon from its Date — The Deft proved by a witness that he as agent for the plaintiff called on the Deft in the year 1818 for payment of the Bond and informed him that the Bond had been lost or mislaid and could not be produced, upon which the Deft refused payment unless the said Bond could be given up to him — It was also proved that the plaintiff offered to indemnify the Deft provided he paid the Bond and the amount should afterwards be claimed from him by any other person, which proposition the Deft would not comply with — no other demand was proved to have been made for payment of the Bond nor was it ever produced untill immediately before the Commencement of the suit — The Deft then asked the Court to instruct the Jury that Interest could not be allowed upon the Bond from the time it was admitted to be lost, untill it was produced before the Commencement of the suit, some time in the year 1821 which Instructions the Court refused to give, whereupon the Defendt excepted to the opinion of the Court — ~~and~~ The Deft below has brought his writ of Error to reverse the Judgment of the Court below & assigned the General Errors, to ~~all~~ which there is a joinder.

~~The Bill of Exceptions~~

We cannot conceive any legal ~~no~~ objections to the Defts recovering Interest on his Bond ~~from~~ for the time intervening between the loss of it having been announced to the plaintiff and the bringing of the suit in the Court below — Had he when payment was demanded of him tendered the Defts agent the amount then due; ~~on the Bond~~ Interest would of course have ceased from that time untill a ~~new demand should be made for such payment~~ subsequent demand of payment — It is not pretended that any tender was attempted to be made; on the contrary the plaintiff ~~said~~ refused making any payment untill the bond ~~was~~ could be given up to him — This it was competent, ~~for~~ perhaps prudent for him to insist on; but as he thought proper so to do and had the Defts money still in his hands, we think he was justly chargeable with Interest on principal sum secured by the Bond, and that the

Court did not err in deciding accordingly —

The Plts Counsel intimated that the Judgment ought to be reversed, on the Ground that the Bond declared on is for $3615 and the Judgment below is for $1807.50 the said Debt together with $1244-77 Damages, and that therefore as there was a material variance between sum demanded in the Declaration and the Judgment, ~~the Judgment~~ it ought to be ~~to~~ reversed.

Had the converse been the Case of the Judgment's being for more the ~~B-sum~~ Debt demanded, there might have been some Grounds for a reversal, as it is there are none, the Error, if such, is for the Benefit of the plaintiff, which he cannot legally take ~~any~~ advantage of —

Let the Judt of the Circuit Court be affirmed with Costs, together with Interest on the amount of such Judgment and two ——— per Cent Damages —

Mathias McGirk
Jno Rice Jones —
Rufus Pettibone
} Judges —

No 7
Rector
vs
Marks
Opinion
Febr 10th May 1823
256