Ladue, Peter A vs Spalding, Simon F. 1852 St. Louis Co. 310/10

560/4

Gamble / Dism.

Ladue v Chase
(won but jury failed to value the property /
writ issued to Spalding

THE STATE OF MISSOURI, ss.

The State of Missouri, To the ~~Judge of the~~ Law Commissioner of the County of St Louis in said State, GREETING:

Whereas, In the record and proceedings in a certain cause lately pending in the Law Commissioner's Court of St Louis County

wherein Peter A. Sadlue is the relator and Simon T. Spalding is the defendant in the matter of an alternative mandamus to said Spalding directed by you at the instance and on the application of said Sadlue ~~in an action of~~ manifest error hath intervened, to the great damage of the said Sadlue 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~~ St Louis, in the county of ~~Cole~~ St Louis, in said State, on the Third Monday in March 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~~ William S Glanville, Clerk of our said Supreme Court, at office, in the City of ~~Jefferson~~ St Louis, the Twenty Ninth day of November, in the year of our Lord one thousand eight hundred and ~~forty~~ fifty one, with the Seal of our said Court hereto appended

Wm S Glanville
Clerk

SEAL OF THE SUPREME COURT OF MISSOURI

State of Missouri.
County of St. Louis. } ss I, John W. Colvin, The Law Commissioner of St. Louis County — do hereby certify, that the transcript hereto annexed is a true & perfect transcript of all the Record & proceedings, had in the case of P. A. Ladue, vs Simon F. Spalding, as the same remains of Record & file in my office

In Testimony whereof I have hereto subscribed my name & affixed the seal of the Law Commissioners Court, at office this 15th day of March 1852.

John W. Colvin, The Law Comr of St. Louis County.

Filed Dec. 3d 1857.
John W. Colvin,
Law Com.

Writ of error paid by Ladue $1.50

State of Missouri }
County of St Louis } Sct. Pleas held before the Law Commissioner of St Louis County

Be it Remembered that on the 14th day of November A.D. 1851. was filed in the office of said Law Commissioner a petition which is in words and figures as follows to wit:

"To the Hon Law Commissioner, Court.

Your petitioner respectfully represents that he is the defendant in a certain suit brought by one Wm F. Chase, against him before Simon F. Spalding a Justice of the peace within & for the County of St Louis; that the said suit came on for trial on the 3rd day of November and that the Jury rendered a verdict against the defendant for a portion of the property claimed by plaintiff; but did not find the Value of the property; that defendant afterwards moved the court to order an inquiry to determine the same, that Judgment of the Court might be rendered as it should in the Alternative which motion the Court over-ruled. The defendant submits that the Judgment in action for possession of personal property should be in the alternative so that if the property cannot be had its value in money may be had. If deft is correct he submits that this Hon Court will make an order directing said Justice to order an inquiry as to the Value of the property found to belong to plaintiff — Your petitioner also states that the fees of sundry and divers witness have been assessed and taxed by said Justice Agt your petitioner as defendant in said cause who were never supoenaed, never attended and were never sworn in said cause. The said names & fees for said witness thus erroneously taxed as as follows to wit: J. Fisher $1.00, T. Arnold $1.50, J Shields $1.50. A Lapington $1.50 — P. Keating 1.50 E. Labeau $1.50

A E. Bush $1.50. & E Grant $1.00
Your petitioner also says that prior to the trial of said Cause the same had been continued several times although he was on every occasion ready for trial that the fees of several witnesses who appeared on the part of plaintiff are taxed as follows: N Corwin $2.00 L Trask $1.50. J. Craig $1.50 F Bemis $1.50. J Atkinson $1.50
Your petitioner has good reason to believe and does believe that said F Bemis was never supoenaed in said Cause or if so that he attended not more than twice after being served with such Subpoena and that the same is true with respect to said John Atkinson
Your petitioner also says that none of the above witnesses swore to their claim for attendance and submits that unless the claim is made on the day of attendance the same must be sworn to. Your petitioner says he made a motion before said Justice to have said costs so wrongfully assessed against him retaxed but said Justice over-ruled the motion
Wherefore your petitioner prays that an order may issue compelling said Justice to correct the same and to refrain from issuing execution to collect the same & to grant him such other & further relief as the law may direct and Justice require.

P A La Due

P A La Due. being duly sworn says on his oath that he believes the foregoing petition and the matters therein stated are true.

P A La Due

Sworn to and subscribed before me this 15th November 1851.

John W. Colvin Sup Comd
By Edw E. Allen Deputy

Whereupon the following writ of Mandamus is issued to wit:

"St Louis County Set

In the Law Commissioners Court of St. Louis County

The State of Missouri. To Simon F. Spalding Esqr one of the Justices of the Peace of the County of St Louis aforesaid Greeting—

Whereas. P.A. La Due. has this day presented to the Court here his petition verified by his oath, which petition is hereto annexed and made a part of this writ; Wherein he prays this Court to award him the alternative writ of Mandamus to be directed to you. for reasons set forth in the said petition. to which reference is made. commanding you that in a certain suit. heretofore depending before you between William F. Chase Plaintiff and P.A. La Due Defendant. you order an inquiry as to the value of the property found to belong to Plaintiff. that you correct the taxation of costs in the said cause. refrain ~~issuing~~ from issueing execution to collect the same and to grant him the said Defendant such other and further relief as the law may direct and Justice require or show cause thereof to the Contrary.

These are therefore to command you that you do forthwith order an inquiry as to the value of the property found to belong to Plaintiff. that you correct the taxation of costs in the said cause. refrain from issueing execution to collect the same and grant the said defendant such other and further relief as the law may direct and Justice require, in accordance with the prayer of said petitioner, or that you do appear before our said "The Law Commissioners Court of St Louis County" on the 17th day of November 1851. at the hour of 9 O'Clock AM of said day then & there to show cause thereof to the contrary, and in default of your showing cause this writ shall be made peremptory.

Witness John W. Colvin. The Law Commissioner of St Louis County with the seal of the Law

Commissioners Court hereto annexed at office in the City of St Louis this 14th day of Novem=ber 1857.

John W. Colvin Sen Commissioner
By Edw E. Allen Deputy "

Constable's Return.

"Executed this writ by offering to read it and the petition to the within named Simon F. Spalding at St Louis County Nov 14th 1857.

E. S. Clark Constable of St Louis Township
By C. Scheffler Deputy "

And afterwards towit on the 15th day of November 1857 the following proceedings were had in this cause towit,

"P A La Due vs. Simon F. Spalding } This day comes the defendant by his attorney and files his Demurrer to the plaintiffs petition: "

The Demurrer filed on the 15th day of November 1857, with the papers in this cause is in the words & figures following towit;

"P A Ladue vs Simon F. Spalding } In said Commissioners Court
And now at this time comes the said Simon F. Spalding, and says that the petition of the said La Due is not sufficient in Law to have & maintain a Mandamus against him Because the said petition does not state facts sufficient to Authorize the issuing of the writ of Alternative Mandamus

Henry N Hart
atty for Spalding

And afterwards towit on the 17th day of November 1851. the following further proceedings were had in this cause towit;

Peter A. LaDue vs Simon F. Spalding } This day comes the plaintiff in his own proper person and moves the Court to strike out the defendants demurrer and files his reasons therefor, to

The Motion to strike out Defendants Demurrer is as follows towit;

P. A. LaDue vs Simon F. Spalding } Mandamus In the Lake Commissioners Court St Louis County

Now at this day comes the said P. A. LaDue and moves the Court to strike from the Record of this Court the Demurrer of the defendant for the reason that a Demurrer is not at this stage of this cause if at all lawfully pleadable by him and that any attempt to plead the same is without the authority of Law and is in contempt of the command of this Hon Court

P. A. LaDue

And afterwards towit on the 18th Day of November 1851. the following proceedings were had towit;

P. A. LaDue vs Simon F. Spalding } This day comes the plaintiff in his own proper person, and the defendant by his attorney, and the Motion of the plaintiff to strike out the Demurrer of the Defendant to his petition comes on to be heard after hearing the Argument of Counsel and being fully advised thereof, the Court doeth order the said ~~Demurrer~~ Motion to be overruled.

And afterwards to wit on the 18th November 1851. The following order was made to wit:

"P. A. La Due
Simon vs F. Spalding } This day comes the plaintiff in his own proper person, and the Defendant by his attorney, and the Demurrer of the defendant to the plaintiffs petition comes on to be heard, and the Court, after hearing the argument of Counsel and being fully advised thereof, doeth order that the said Demurrer be sustained"

State of Missouri } ss.
County of St Louis }

I, John W. Colvin, Law Commissioner of St. Louis County, do certify the foregoing to be a true and perfect Transcript of the Record and proceedings had in the case of Peter A. La Due vs. Simon F. Spalding as the same remains of Record in my office.

In Testimony whereof I have hereto set my hand and affixed my official seal at my office in St. Louis City and County of St Louis on this the 20th day of March A.D. 1851.

John W Colvin Law Comr
By M Williams [illegible]

(4) 42

October Term 1852

P. A. La Due Appel.

vs

Simon F. Spalding Res.

Transcript

(Error)

Filed 15th March 1852
Wm L Glawson, Clerk.

pd. by atty H. N. Hart Esq

Comd fee 1. $2.15 Paid by Ladue

P. A. Ladue
Plaintiff in error

In Supreme Court of the State of Missouri

Simon F. Spalding
Defendant in error

And now comes the defendant in error & ~~moves the court to present to~~ here shews to the court a transcript of the record of the Law Commissioners in above case and moves the court to affirm the judgment of said Law Commissioner for the reason that the plaintiff has failed to file a record of said case in this Honorable Court as he is required by Law to do

Hugh Haal
for Dft in error

a 114

P. A. LaDue
Plaintiff in error

—

Simon F. Spalding
Deft in error

Motion to affirm

Filed 15 March 1852
Wm H Glanville Clerk

H L Hart
for Deft in error

P. A. Ladlue, relator. } In the supreme
vs. } Court
Simon F. Spalding } Error to the Law
Commissioner's Court
of St Louis County.

And now comes the said relator and says that in the record and proceed-ings aforesaid and in the judgement of said Law Commissioner there is manifest Error in this, to wit.

1. In entertaining the demurrer of defendant and overruling the motion of said relator to strike out said Demurrer.

2. In sustaining the Demur-rer of Defendant

P. A. Ladlue

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State of Missouri
ex rel. P. Adaline

vs.

Simon F. Spalding

Assignment of
Error.

Filed 19th March 1852
W. Glanville Clerk

P. A. Laslue
vs.
Simon F. Spalding

In the Supreme Court
Error to the Law Commissioners Court of St Louis County.

Statement.

In this case a writ of Alternative Mandamus issued from the Law Commissioner's Court of St Louis County, on application of ~~plaintiff~~ Peter A. Laslue, the relator commanding Simon F. Spalding, a justice of the Peace within and for the county of St Louis to correct the taxation of costs alleged to have been erroneously taxed by said Justice against said relator,- to order an inquiry as to the value of certain personal property adjudged by said justice, in an action of "claim and delivery of personal property" in which Wm F. Chase was plaintiff and said Laslue was defendant, to belong to said Chase; and to refrain from issuing execution to enforce his said judgement or to show cause why he should not so do.

Defendant Spalding on whom the said writ was duly served made no return thereto but plead a Demurrer to the petition or application on which the writ of alternative mandamus had issued. which ~~plaintiff~~ the relator Laslue moved the court to strike from the records; which motion the Court over ruled and sustained the Demurrer.- wherefore said relator brings his writ of Error: and says that

In the record and proceedings aforesaid and in the judgement of said Law-

Commissioner there is manifest Error in this, to wit:

1. In entertaining the Demurrer of defendant and overruling the motion of said relator to strike out said Demurrer.

2. In sustaining the Demurrer of defendant.

P. A. Ladue

These points are relied on by relator.

1 In granting an alternative writ of mandamus the court determines that the grounds set forth in the petition or application are sufficient in law to warrant the issuing of the writ; and after the determination upon a rule nisi the question so decided cannot be again discussed until a return has been made to the writ. Stephens Nisi Prius 3 vol. p. 2319 citing Rex. vs. Leicester, justices of, 7 D&R. 708.

2 The writ when issued cannot be disposed of by demurrer to the petition or application on which it issued; but the person to whom the writ issued must make return to it. Rev. Stat. Ch 112 Sec. 1 p. 724. A demurrer to the petition is not a return to the writ.

3. A Demurrer to the petition, even if it could be entertained, does not dispose of the writ of mandamus. That could be reached only by a motion to quash, which could not be entertained until after return made & filed. Bac. Abr. Mandamus B. cited & approved 4 Cow 75. & 10 Wend 25. Stephens Nisi Prius 3 vol. 2323 & cases there cited.

In a return to an alternative mandamus the defendant must either deny the facts stated in the writ, or show other facts sufficient to defeat the relators claim 10 Wend 25. A demurrer, if pleadable at all, ~~before return~~

confesses the facts which the court has adjudged sufficient in law to warrant the issuing of the writ of alternative mandamus and a peremptory mandamus should then go.

P. A. Lahlue

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State of Missouri
P. A. Lahlue, relator
vs
Simon F. Spalding
Statement &
Brief

Lahlue.

Filed 17th March 1852
Wm L Clawson, Clerk

Ladue
vs } copy no statement
Spalding

Ladue filed a petition before the Law Commissioner, alleging that he had been sued by one Chase before Spalding a justice of the peace, in an action for the delivery of personal property, that the jury had found a verdict against him but had failed to find the value of the property; that he had moved the justice to order an enquiry to ascertain the value of the property which motion the justice overruled, therefore he prayed the Law Commissioner to make an order on the justice requiring him to have such enquiry made: the petition further states, that divers witnesses had charged fees in the case who were not entitled to claim fees, and that the petitioner had moved the justice to retax the costs which the justice refused, and the petitioner prays the Law Commissioner to make an order on the justice to retax the costs, and to refrain from issuing execution to collect the costs; and to grant such other and further relief as justice may require - The Law Commissioner issues a writ of alternative mandamus to the justice, commanding him do all the things mentioned in the petition or shew cause. This writ instead of being left with the justice to be returned by him, was taken to the justice by a constable, who returns that he offered to read it to the justice ~~but he would~~. The next entry is, that the justice came before the Commissioner and demurred to the petition, and it appears that the Commissioner sustained this demurrer -

To reduce the case to any thing like form, we must first consider the writ of the Law Commissioner as not served on the justice - A mandamus is served by delivering the writ to the person or officer to whom it is directed, and he makes his return ~~upon~~ to it. The constable offering to read the

writ to the justice, and then keeping it and making his return upon it as he would do on a summons, was no service of the mandamus. The demurrer of the justice to the petition, when he was not served with the writ, is to be considered as equivalent to a motion on his part to quash the proceeding, and the judgment of the commissioner sustaining the demurrer and dismissing the whole proceeding was a judgment equivalent to a refusal of the order which the petitioner asked the commissioner to make. This proceeding was designed to call into exercise the superintending control which the statute confers upon the law commissioner over justices of the peace, and the judgment which he rendered in refusing the order, or, (in the form in which it was given) sustaining the demurrer of the justice to the applicants petition, is not such a judgment in a cause as can be brought to this court by appeal. It not a judgment in any cause.

The constitution has vested the circuit courts with a superintending control over justices of the peace, which is not diminished by the power conferred upon the law commissioner, and that court is one in which such powers are ~~more~~ familiarly exercised and the proceedings are well understood

Let the appeal be dismissed with the concurrence of all the judges

A R Gamble

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Ladue
v
Spalding

Opinion

HRG—

Filed 21st December 1852
Wm. S. Glanville, Clerk.

State of Missouri to use of } In Supreme Court
Simon F. Spalding } Oct. Term.

Points & authorities of appellee

1st The ~~Com~~ Law Commissioner properly ~~[illegible]~~ sustained the demurrer of appeal and dismissed the said Mandamus

2nd The petition of appellant presented to the Law Commissioner praying for a Mandamus did not state facts sufficient to authorise the said Commissioner to grant the prayer of said petitioner and his granting said alternate Mandamus was an impo=vident act and the said Commissioner properly sustained the demurrer to the same

Henry L. Hart
for appellee

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State to use of &c

vs

Simon F. Spalding

Points of appellee

A. L. Stark
for appellee