Neuer, Ernest vs O'Fallon, John 1853 St. Louis Co 323/11

562/15

Attachment on O'Fallon, treas. of

IL Coal Co

Ryland/affim

The State of Missouri, ss.

The State of Missouri, *To the Honorable the* Court of Common Pleas of Saint Louis County, *in said State, GREETING:*

WHEREAS, In the record and proceedings in a certain cause lately pending in the Court of Common Pleas in and for the County of Saint Louis

wherein Ernest Never was Plaintiff and John O'Fallon Guardian of Radford and Mallony, was Defendant

in an action of manifest error hath intervened, to the great damage of the said as by 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 in the City of Saint Louis, in the County of Saint Louis, in said State, on the Third Monday in March ~~next,~~ last, 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, WILLIAM S. GLANVILLE, Clerk of our said Supreme Court, at office, in the City of Saint Louis, the Fourth day of March in the year of our Lord one thousand eight hundred and fifty-three

Wm S. Glanville,

CLERK.

State of Missouri }
County of St Louis } ss. I, Charles W. Hicks
Clerk of the St Louis
Court of Common Pleas in and for said
County hereunto transmit a full and
perfect transcript of the record and proc-
-eedings in the case of Ernest Nener
against John O'Fallon Garnishee
of Bradford & Mallory as the same remain
in my office.

In testimony whereof I hereto
set my hand and affix the Seal
of said Court at office in
St Louis this 8th March 1853

C. W. Hicks Clerk

Ernest Nener
vs.
John O'Fallon, Garn.
&c.
Writ of Error.

$1.50

State of Missouri }
County of St Louis } ss. Be it remembered that heretofore to wit on Eleventh day of April A D 1853 there was filed in the office of the Clerk of the St Louis Court of Common Pleas in and for the County aforesaid a Petition in the words and figures following to wit

Petition

Ernst Neuer plaintiff
against
Bradford
& E. M. Mallary

In the St Louis Court of Common Pleas in & for St Louis County of September Term A. D. 1850

Plaintiffs State that defendants owe him Ninety eight dollars and Sixty nine cents for goods sold and delivered by plaintiff to defendants and that defendants are partners under the name & Style of Bradford & Mallary and were partners under that name when said goods were sold and delivered. The particulars of all which will appear by an account hereto annexed & made part of this Petition, there being no credit thereon. Plaintiff asks judgment for Ninety eight dollars and Sixty nine cents being the amount due to him

C. B. Lord atty for Ernst Neuer

State of Missouri }
St Louis County } ss. Ernst Neuer plaintiff makes oath & says he believes the above petition and the matters therein as stated are true, he further states that the defendants are justly indebted to the plaintiff after allowing all just credits & offsets in the sum of Ninety eight dollars and Sixty nine cents on account of goods sold & delivered by plaintiffs to defendants and this affiant further states that said — Bradford & E. M. Mallary are non residents of nor reside do they or either of them reside within this State

Ernst Neuer

Subscribed & Sworn to before me April 11th 1850

P. Tippett clk.

2.

Account Messrs Radford & Mallory

Bought of Ernst Neuer

1850. Febry 5. To 1 Bbl Whiskey 211 Gal @ 24.		9.84
" 10 lb S H Tea	@ 50	5.00
" " 1 Bag fine salt		30
" " 50 lbs Rio coffee @ 16½ Bag 15		8.40
" " Coffee Sugar & Tea		4.65
9th 1 Bbl 25c Sugar 2 qr 229 @ 5¼		12.28
4 lbs Ground pepper @ 18¾		75
4 Hams 87 lb @ 7		6.09
1 Bag 15 Salt 1 Bushel 62½		77½
6 lbs Dried Beef @ 7		42
12th 1 Box 25 Candles 45 lb @ 10		4.75
10 lb Tea @ 75c		7.50
4 lb Raisins 10c		25
2 lb Mustard @ 37½		75
1 Bbl Whiskey 40½ Gal @ 24		9.82
1 Bag 15 50 lb Coffee @ 17		8.65
1 " 10 36 lbs Rice		2.10
2 Butcher Knives		85
23d 18 lb Sugar		1.00
Bag 10 Alspice 5		15
25 1 Bag 25 75 lb Sugar @ 5¼		4.14
30 lbs of Coffee @ 17		5.10
3 prs pepper @ 5c		15
20 lb Rice		1.10
28th 1 Bag 15 50 lb Sugar @ 5¼		2.77½
1 Bag Salt		30
3 prs pepper 1 alspice		20
St Louis April 11th 1850.		$98.69

State of Missouri }
County of St Louis } Ernst Neuer plaintiff being duly sworn says on his oath that the above account is just & true & that the same is due to him from Bradford & Mallory the defendants.

Ernst Neuer

3

Sworn & Subscribed before me Apl 11th 1850 P. Tippett Clk.

Upon which petition the Clerk issued the following

Summons

Summons. The State of Missouri To the Sheriff of St Louis County Greeting- We command you to attach ——— Bradford and E. M. Mallory by all and singular their lands and tenements goods chattels moneys credits and effects or so much thereof as shall be sufficient to secure the sum of Ninety eight dollars and sixty nine cents, with interest and costs of suit in whose hands or possession soever the same may be found in your bailiwick, and that you summon the said Bradford & E. M. Mallory to appear at the next term of the St Louis Court of Common Pleas before the Judge thereof on the first day of the said term thereof to be holden at the City of St Louis within and for the County of St Louis on the third monday of September next then and there to answer the complaint of Ernst Neser as set forth in the annexed petition. And also that you might summon all and every person in whose hands or possession soever any such lands tenements goods chattels moneys credits or effects may be found and particularly John O Fallon Treasurer of the Illinois Rail Road Company that they be and appear before the Judge of our said Court on the first day of the term aforesaid then and there to answer unto what may be objected against them. and have you then there this writ. (Seal) Witness Philip Tippett Clerk of our said Court with the seal thereof hereto affixed at office in the City of St Louis this 11th day of April in the year of our Lord eighteen hundred and fifty.

P. Tippett Clerk

Sheriffs Return.

Executed this writ in the County of St Louis on the 11th day of April 1850 by declaring to John O'Fallon, Treasurer of the Illinois Rail Road Company that by virtue of this writ I did attach any goods chattels moneys effects

or evidences of debt in his hands belonging to the defendants or either of them and summoned him as garnishee to appear in Court at the return day of this writ to answer unto what may be objected against him on the part of the plaintiff and offered to read this writ to said Garnishee which he refused to hear. No property of defendants found in my county and the defendants not found in my County. Louis. J. Labeaume Shff

St Louis Court of Common Pleas September Term 1850.

Order of Publication

September 23d 1850.

Ernst Neuer vs Bradford & E Mallory } On motion of the plaintiff by attorney that said defendants be notified that a civil action has been commenced against them for the sum of Ninety eight dollars and Sixty nine cents for goods sold & delivered by plaintiffs to defendants under the name & style of Bradford & Mallory, that their property has been attached and unless they appear at the next term of this Court to be begun and held at the City of St Louis on the first monday of February next and on or before the third day thereof answer said petition, the same will be taken against them as confessed, and judgment rendered against them, and their property be sold to satisfy the same, and it is further ordered that a copy hereof be published according to law.

Affidavit & Order of Publn annexed filed

The following affidavit with a true Copy of the above order was filed on the 8th day of February 1851.

State of Missouri }
County of St Louis } Personally appeared before the undersigned a Justice of the Peace within and for the County of St Louis Geo Knapp, who being duly sworn deposeth and saith that the annexed advertisement was published in the Missouri Republican printed in this state, the newspaper of which he is printer for Nine times the first insertion being on the eighteenth day of

5 October and the last insertion on the thirteenth day of December 1851 as follows

Weekly	No 42	Oct	18th	1850
"	" 43	"	25	"
"	" 44	Nov	1	"
"	" 45	"	8	"
"	" 46	"	15	"
"	" 47	"	22	"
"	" 48	"	29	"
"	" 49	Dec	6	"
"	" 50	"	13	"

George Knapp

Sworn to and subscribed before me this 7th day of February 1851. Peter W Johnstone Justice of the Peace.

And afterwards the following proceedings were had to wit

Judgt February Term 1851 Saturday Feby 8th 1851

Ernst Neuer
vs
Bradford & E. M. Mallory

Now at this day comes the plaintiff by his attorney and files proof to the satisfaction of the court that the order of publication herein before made has been duly published according to law but the said defendants although so notified come not but make default wherefore on motion of said plaintiff no Jury being required the court doth assess the damages of said plaintiff sustained by reason of the premises in his petition mentioned at the sum of One hundred and three dollars and fifty cents. It is therefore considered by the court that said plaintiff recover of said defendants the damages aforesaid in form aforesaid as assessed and also his costs herein expended and have thereof execution.

And afterwards the following proceedings were had upon the Garnishment herein as follows to wit

Motion for Judgt on Garnishmt overruled,

September Term 1852 Friday Jany 21st 1852

Ernst Neuer
vs
John O Fallon Garnishee of Bradford & Mallory

Now at this day come the

6.

parties by their attorneys and thereupon plaintiffs motion for Judgment on the answer of said garnishee being heard and the court being fully advised of and concerning the premises. It is ordered that said motion be overruled and that said garnishee be discharged and that he recover of the plaintiff his costs and charges herein expended together with the sum of Ten dollars which the court allows him for answering herein and that execution issue therefor. Bill of Exceptions filed. Jany 21st 1853.

Bill of Exceptions filed

Ernst Neuer
vs
John O'Fallon Garnishee
of Radford & Mallory.

In St Louis Court of Common Pleas

Be it remembered that heretofore to wit on the 15th day of January A.D. 1853 the plaintiffs moved for Judgment in this cause upon the answer of the garnishee filed herein.

Ernst Neuer
vs
John O'Fallon Garnishee
of Radford & Mallory

And now comes the plaintiff and moves the court for Judgment against the said garnishee upon his answer filed herein

C B Lord atty for Pltff

And that upon the 21st day of January the motion came on to be heard, and thereupon the plaintiff read to the court the amended allegations and interrogatories filed herein—

Ernst Neuer
vs
John O'Fallon Garnishee
of Radford & Mallory who were partners and against whom Judgment was obtained in said St Louis Court of Common Pleas by the name of Bradford & Mallory

In St Louis Court of Common Pleas
Sept. Term A.D. 1851
Amended statement & interrogatories by leave &c.

And now comes the said plaintiff and states as the grounds on which he required the said garnishee to answer, that the

7

said garnishee had at the time he was summoned in garnishment in this case in his hands or under his controll a large sum of money to wit the sum of Twelve hundred dollars which belonged to the said Radford and Mallory. Plaintiff further states that the said John O'Fallon garnishee had at the time he was summoned in garnishment in this cause a large sum of money in his hands to wit the sum of Twelve hundred dollars received by him for & to the use and benefit of the said Radford & Mallory. Plaintiff further states that said John O'Fallon as treasurer of the "Illinois Coal Company" had at the time he was summoned in garnishment in this case in his hands or under his control a large sum of money to wit the sum of Twelve hundred dollars which was received by him or placed in his hands or under his control to be paid to said Radford & Mallory or which belonged to said Radford & Mallory or to one of them, or which was held by said John O'Fallon as Treasurer or President or other officer of said Illinois Coal Company to & for the use of the said Radford & Mallory or to be in some way expended for the benefit or in some way appropriated to the use of the said Radford & Mallory or of one of them. Plaintiff further states that he has been informed and verily believes it to be true that before the commencement of this suit said Radford & Mallory had been contractors or subcontractors, having a job or jobs of work upon the Railroad there being built and constructed by the said Illinois Coal Company and that at the time the said John O'Fallon was summoned in garnishment in this case he the said John O'Fallon had in his hands as Treasurer or other officer of said Illinois Coal Company a large sum of money to wit the sum of Twelve hundred dollars belonging to the said Radford & Mallory or received to & for the use of the said Radford & Mallory or which was in some way to be expended for the benefit of or in some way

6

appropriated to the use of the said Radford & Mallory or of one of them. Plaintiff further states that at the time the said John O'Fallon was summoned in garnishment in this case he had in his hands a large sum of money which he had received from the Illinois Coal Company to be paid to the said Radford & Mallory or in some way or manner to be appropriated to the use of the said Radford & Mallory. Plaintiff further states that before the commencement of this suit and before the said John O'Fallon was summoned as garnishee in this case there was a settlement made between the said Illinois Coal Company & the said Radford & Mallory and it was then & there understood & agreed by & between said Radford & Mallory & the said Illinois Coal Company that the said Radford & Mallory should receive from said Company a large sum of money to wit the sum of Twelve hundred dollars which sum was placed in the hands of said John O'Fallon who was then & there President and Treasurer of said Illinois Coal Company, which money or a part thereof was in the hands of said John O'Fallon, when he was summoned as garnishee in this case. Plaintiff further states that he has been informed and believes it to be true, that before the commencement of this suit, and before said John O'Fallon was summoned as garnishee in this case, The Illinois Coal Company had a settlement with said Radford & Mallory or one of them and that upon such settlement the said O'Fallon was directed by said Company to pay to said Radford & Mallory or to one of them, or to their use, or to their order or to the order of one or both of them a large sum of money to wit the sum of One thousand dollars <u>more or less</u>, but that said O'Fallon when he was summoned as garnishee in this case had not paid the said money to said Radford & Mallory or to their use, or to their order or to the order of either of them, but that the whole or some part thereof was still in the hands

9

of said John O'Fallon. Plaintiff propounds the following interrogatories to the said John O'Fallon Garnishee &c and pray that the same may be answered fully & particularly paragraph by paragraph as the same are set down.

1st Whether at the time he was summoned in garnishment in this case he had any money in his hands or under his control belonging to the said defendants Radford & Mallory or to either of them? if so what was the amount thereof

2d Whether at the time he was summoned in garnishment in this case he had any money in his hands or under his control which was in any wise or in any manner or at any time or under any circumstances to be paid to the said Radford & Mallory or to either of them? & if so what was the amount thereof.

3d Whether at the time he was summoned in garnishment in this case he had or has since had or now has any money in his hands or under his control which belonged to said Radford & Mallory or either of them or which under any circumstances was or is to belong to them or to either of them. Or in any wise or in any manner or at any time or under any circumstances has or is to be in any manner applied to their use or to the use of either of them, or which was or is to be paid to them or either of them? and if so what was or is the amount thereof.

4th Whether at the time he was so summoned in garnishment in this case, he had or has since had or now has any money in his hands or under his control as Treasurer or other officer of the Illinois Coal Company belonging to the said defendants Radford & Mallory or to either of them or which was in any manner or at any time or in any wise or under any circumstances to be paid to said Radford & Mallory or to either of them or to be in any way applied to the use of said Radford & Mallory or to the use of either of them? State fully & what was the amount thereof.

5th Whether the said Radford & Mallory had not at some ~~time~~ period of time a job or jobs of work as contractors or

subcontractors upon the Rail Road built and constructed by the said Illinois Coal Company, and whether or not under some arrangement with said Company or with some of the officers thereof there was not a sum of money placed in his hands to be paid to the said Radford & Mallory or to one of them or in some way to be appropriated to the use of said Radford & Mallory or to the use of one of them, or whether he was not directed by the Illinois Coal Company to pay to said Radford & Mallory or to one of them some sum or sums of money? Answer fully & state the amount.

6th. Whether at the time he was summoned in garnishment he had or has since had or now has in his hands either in his private capacity or as treasurer of the Illinois Coal Company or president or other officer thereof or as agent of said Company or otherwise any sum of money which was in any wise or in any manner or under any circumstances to be paid to said Radford & Mallory or to either of them, or which was in anywise to be appropriated to the use of said Radford & Mallory or either of them or which belonged or was at any time to belong to said Radford & Mallory or to either of them?

7th Whether at the time he was summoned as garnishee in this case he had or has since had or now has any sum of money received from the said Illinois Coal Company, or from any other Corporation or Company or person or persons or association of persons or from any source whatsoever which belonged to said Radford & Mallory or to either of them, or which was at any time or under any circumstances to be paid to them or either of them or in anywise or manner to be appropriated to their use or to the use of either of them?

8th Whether before he was summoned in this case there was not a settlement or some arrangement between the said Illinois Coal Company & the said Radford &

money whatever, which belonged to the said Radford & Mallory or which had been received by him for the use of the said Radford and Mallory as alleged in the plaintiffs first and second statements nor had he when so summoned as Treasurer of the Illinois Coal Company or as president or other officer of said Company any money in his hands or under his control belonging to said Radford or Mallory or which had been received by him for their use, or which was in any way or under any circumstances to be appropriated for or paid to or expended for the use of said Radford and Mallory or either of them as alleged in the third of said statements. Nor had this defendant when summoned in this cause either in his private or individual capacity or as an officer or agent of said Coal Company of of any other Company in his hands or under his control any money whatever received by him from said Company or from any other source which was to be paid to or used or laid out or expended or appropriated to or for the use of said Radford or Mallory or either of them under any circumstances whatever as alleged in the remainder of said statements.

The defendant in answer to the first and second of said interrogatories states as before that when summoned as garnishee he did not have in his hands or under his control any sum of money belonging to said Radford or Mallory or either of them or which had been received by him under any circumstances for their use or for either of them or was at any time or in any manner to be paid to them or to be used or applied for their benefit. Nor has he now in his hands or under his control any moneys of said Radford & Mallory or either of them which has ever been received by him under any circumstances whatever for their use or for the use of either of them.

The defendant states that when summoned as garnishee

11

Mallory by which the said Radford & Mallory or one of them was to receive a sum of money from said Illinois Coal Company & how much? and was not said sum of money placed or put into the hands of said John O'Fallon, or has it not since that time been placed in his hands for the purpose of being paid over to the said Radford & Mallory or to one of them or in some way applied to their use or to the use of one of them? Or whether the said John O'Fallon was not as Treasurer or other officer of said Company or in his private capacity or in some way directed to pay to said Radford & Mallory or to one of them, or in some way to appropriate to their use a sum of money? & if so what was the amount thereof & what has become of it, to whom was it paid & when was it paid, state the time particularly & the persons to whom paid & the amount paid to each person, and the amount paid in all. Ernst Neuer.

State of Missouri } ss Ernst Neuer the above named
St Louis County } plaintiff on his oath says that he believes the above allegations & the matters therein as stated are true Ernst Neuer

Sworn to & subscribed before me 1 any 17th 1852
P. Tippett. Clk.

And read to the Court the answer of said garnishee filed on the thirty first day of March 1852.

Ernst Neuer } In the St Louis Court of
vs } Common Pleas
John O'Fallon Garnishee of } February Term 1852
Radford & Mallory } And now comes the said defendant and says that saving and reserving to himself all rights growing out of his objections against answering any of the plaintiffs amended statements and interrogatories heretofore made and filed by him the said defendant in this cause, he answers that at the time he was summoned as garnishee in this cause he did not have in his hands or under his control any sum of

13

he was and still is the Treasurer of said Illinois Coal Company, that said Company is an incorporated body under an act of the Legislature of the State of Illinois as will appear by reference to a certified copy of said act herewith filed marked "A" and that a majority of the persons composing said Company including its President reside in the City or County of St Louis and that legal process of any Court in this County against said Company in its corporate capacity could have been at any time served in this County, that the funds of said Company are kept on deposite in the City of St Louis and ever have been that in point of fact, said funds never have been in the actual keeping or under the control of this defendant, but as the Treasurer of said Company according to its rules and regulations lawfully adopted he could only draw his check for or pay out the money when owed in the manner as he was directed to do by said Company and in no other way. The defendant also states that in the latter part of the year 1849 Reuben Radford & E M Mallory contracted to do certain work for said Company but said Radford & Mallory never completed their contract but abandoned the same and were paid before the service of this garnishment all and more than they were legally entitled to receive, and that their contract had been and was regularly forfeited for non fulfillment before this defendant was served as garnisee and that said Company was compelled to employ other persons at a considerable loss to complete the work commenced by said Radford and Mallory & that said company when this defendant was summoned was not nor has it since been in anyway or under any circumstances indebted to said Radford & Mallory on said contract. The defendant also states that when the contract of said Radford & Mallory was forfeited they were indebted to workmen whom they had employed, and that some time afterwards to wit in the latter part of April 1850

said Coal Company ascertaining that said Radford & Mallory had failed to pay off the hands whom they had employed and fearing that if said hands were not paid some injury to the property of the Company might be caused thereby; at a meeting at which this defendant was not present and in which he did not participate agreed to pay to said Radford & Mallory what was necessary to pay the laborers whom they had employed, that this payment was regarded as a donation as said Radford & Mallory had no legal claim at the time nor did they profess to have any legal claim against said Company. That in accordance with this action of the Company this defendant was authorized and directed and did accordingly on the 27th day of April 1857 pay out of the funds of the Company by giving his check therefor to said Reuben Radford the sum of three hundred and fifty-six dollars and forty nine cents. This defendant claims that the payment of this money as above mentioned was the act of the Illinois Coal Company, that said money was paid for a specific purpose, that he had no other control over said money than to pay out the same when and to whom as directed by the company, and that under no circumstances could any legal liability attach to him as between himself & the said Radford & Mallory or persons claiming under them, and that he is advised & believes that under no circumstances connected with the transaction he could have made liable to the said Radford & Mallory or either of them. He says further in answer to all and singular the plaintiffs interrogatories that excepting the above payment to said Radford in the manner mentioned no money has been paid to said Radford or Mallory or either of them by this defendant on any account since he was summoned as garnishee except a small amount which the Company had previously assumed, and with said exception he had not when he was summoned nor has he since had in his

15

in his possession or under his control either in his individual capacity or as an officer of said Company any moneys whatever belonging to said Radford or Mallory or either of them or which had been received by him for their use or benefit under any circumstances whatever. The defendant claims that he ought to be discharged with his costs because in point of fact the money paid by him was not in his hands nor under his control in any individual capacity, that said money was the money of the Company that it was paid out and receipted ~~for~~ in the name of the Company, and that all the instrumentality of this defendant in the premises was to draw his check for the same as its Treasurer, and because furthermore this defendant claims and insists that he is not bound to answer respecting any matters whatever in the premises referred to in the plaintiffs statements and interrogatories which may have transpired previous to the service of the amended statement and interrogatories, and this defendant states in reply to all and singular said amended statements and interrogatories that when the same were filed he had not nor has since had in his possession or under his control any moneys goods chattels or effects belonging to or received by him for the use of said Radford or Mallory or either of them, or which was in any way or under any circumstances whatever to be paid to or laid out or expended to or for their use or benefit, wherefore and for other matter and thing growing out of the irregularities of the plaintiffs proceedends this defendant claims he is exempt from all liability as garnishee in this cause, & he ought to be discharged with his costs &c C C Simmons atty for deft

State of Missouri }
County of St Louis } ss John O Fallon the defendant makes oath and says that he believes the above answer and the matters and things as therein contained are true

Sworn to & subscribed before me } J O'Fallon
this 31st day of March 1852 }

P. Tippett Clk

16th " The plaintiff then read to the Court the return of the sheriff upon the writ of attachment No 60 to Sept Term 1850 (which is inserted on the ~~third~~ page of this transcript) whereupon the Court overruled said motion, and decided that the plaintiff was not entitled to recover against the said garnishee anything by reason of ~~this~~ said answer & gave judgment in favor of said garnishee, to which opinion & decision of said Court the plaintiff did then & there at the time except, & prays the Court to sign this his bill of Exceptions which is done

Jany 21st 1853 Saml Treat Judge Seal

State of Missouri }
County of St Louis } ss I, Charles W Hicks Clerk of the St Louis Court of Common Pleas within and for the County aforesaid certify the above and foregoing is a true & perfect transcript of the Record and proceedings in the case of Ernst Neuer against John O'Fallon Treasurer of the Illinois Railroad Company Garnishee of Bradford & Mallory, as the same now remains of record in my office

In testimony whereof I hereto set my hand and affix the seal of said Court at office in the City of St Louis this 7th day of March A.D. 1853

Charles W. Hicks Clk

Index.

Petition	1
Account	2
Summons & Sheriffs Return	3
Order of Publn Affs with order of Publn, filed	4
Judgt	5
Mo for Judgt on Garnishees answer overruled	5
Bill of Exceptions filed	6

(15)

83

March T. 1853

Ernst Neuer
Plff. in Error

vs } Transcript.

John O. Fallon
Treasurer of the Illinois Rail
Road Company Garnishee of
Bradford V. Mallory.
Deft. in Error.

Error to Com. Pleas.

Filed 10th March 1853
Wm Glanville
clerk.

608

Ernest Neuer
vs
John ~~Thomas~~ O Fallon,
Garnishee of Radford
& Mallorey

To John ~~Thomas~~ O Fallon or his Attorney of Record
C C. Simmons;

You will take notice that I have sued out a writ of error from the Supreme Court in the above entitled cause; and that said writ is made returnable at the next term of said Court to be holden in St Louis on the third Monday in March 1853.

Yours &c.

C B. Lord
Atty for Plaintiff

83

Ernest Neuer
vs
John ~~Thomas~~ O. Fallon Garnishee
of Radford & Mallory

Notice of Writ of Error

I admit service
of a copy of the ~~above~~
within notice
March 8th 1853
C. C. Simmons
atty for deft

Filed 28th March 1853
Wm Glanville Clerk

Ernest Neuer. pltff in Error
vs
John O. Fallon Garnishee
of Radford & Mallory. deft in Error

In Sup. Court March 1853

and now comes plaintiff in error, and says that there is, in the record and proceedings in this case, manifest error in this to wit -

The court erred in rendering judgment in favor of said defendant against said plaintiff -

The court erred in deciding that the garnishment, in this case did not stop in garnishees hands all moneys ~~to~~ in his hands at the time of the service of the garnishment, which were to be paid ~~to plaintiff~~ said Radford & Mallory or in any wise appropriated to their use.

The court erred in dismissing the garnishment in this case.

Plaintiff therefore prays this court, for the errors aforesaid, to reverse, annul the said judgment & to restore him to all that he hath lost thereby

C. B. Lord
for pltff in Error

The defendant saith that there is no error in the Record and proceedings in the above entitled cause ~~in manner~~ as the said plaintiff hath hereof above alledged and ~~of this he~~ he prays that said judgment may in all things be affirmed

C. C. Simmons
Atty for deft

No. 83

Ernest Neuer
vs
John O. Fallow
Gen. y Radford
& Mallory
Deft in Error

Assignment of Error –

Jonidar filed 1st April 1853

Filed 28th March 1853
Wm. L. Glanville
Clerk

Ernest Neuer - Pltff in Error
vs
John O. Fallon
Gar. of Radford & Mallory - Defendant in Error

In Sup. Court

Statement of Case by Pltff. in Error.

Plaintiff brought a suit by attachment against Radford & Mallory. - O'Fallon was summoned as garnishee. Allegation and interrogatories were filed alleging in substance, that the said O. Fallon at the time he was summoned in garnishment, had in his hands or under his control, either in his individual capacity or as treasurer of the Illinois Coal Company a large sum of money belonging to said Radford & Mallory - or which was to be in somewhat applied to the use of said Radford & Mallory, or of one of them. - Interrogatories were framed & filed tending to draw out from Defendant, the facts and circumstances under which he held the money -

Defendant by his answer, denies generally that he had any money in his hands or under his control, either as Treasurer or in his individual capacity - but he does state that in the year 1849. Radford & Mallory were contractors, doing work for the said Illinois ~~Coal~~ Coal Company, but never completed their contract, but abandoned it

and were paid before the service of the garnishment more than they were legally entitled to recieve, and their contract had been regularly forfeited for non-fulfillment - that when the contract of said Radford and Mallory was forfeited, they were indebted to their workmen, and upon this fact being ascertained by the Coal Company in 1850, and being fearful that if the hands were not paid off, some injury would be done to the property of the ~~plaintiff~~ Company; the Company agreed to pay to said Radford and Mallory, what was necessary to pay the laborers ~~which~~ whom they had employed - that this payment was regarded as a donation to said Radford & Mallory; that in accordance with this agreement, defendant was authorized and directed, and did on the 27th day of ~~April~~ April 1850, pay out of the fund of the Company, by giving his check therefor to Reuben Radford the sum of three hundred and fifty six Dollars & forty nine Cents - * The Court below gave judgement dismissing the garnishee, deciding that the money under the circumstances of this case, could not be stopped by garnishee process, in the hands of O. Fallon -

C. B. Lord
for Pltff in Error

* (add the following) - The said defendant in his answer, further stated, that in point of fact, the money paid by him was not in his hands nor under his control, in any individual capacity; that said money, was the money of the Company; that it was paid out, and receipted for in the name of the Company, and that all the instrumentality of this defendant in the premises, was to draw his check for the same as it's Treasurer - His answer also, stated, that the Company was incorporated and that a majority of the persons composing it including it's President, reside in the County & City of Saint Louis, and that the Company could at any time have been sued with process from any Court within the County of Saint Louis"

83

In Sup. Court

Ernest Neeser
v.
John O. Fallon
Garnishee &c

Statement of
Case

C. B. Lord
for pffs in
Error

Filed 1st April 1853
Wm. L. Glanville
Clerk

Ernest Neuer, vs John O'Fallon, Garnishee &c.

The facts in this case are substantially as follows (here copy Statement made by Mr. Lord, with addition on margin by me)

The only question therefore involves the correctness of the judgment of the Court below in discharging O'Fallon, considering him not liable in this case—

Let us consider this question. The Answer of O'Fallon, which is not excepted to or denied, shews that he was not indebted to the defendants in the attachment— He held in his hands the funds of a Corporation as its Treasurer; these funds were not at his disposal individually: they were received and receipted for in the name of the Corporation; they were paid out only by the orders and directions of the Corporation, through the Checks of their Treasurer O'Fallon: The Corporation was not garnished: In the opinion of this Court O'Fallon was properly discharged—

It seems that the Corporation owed the defendants nothing: they had abandoned their contract: they owed their workmen, and the Company fearing that their workmen, might do some injury, or damage to the property belonging to the Company, resolved to give to the defendants in the attachment suit money enough to pay their hands for the work, in order that the hands might be

satisfied, and not injure the property of the Company, on account of what they might consider bad treatment of the Defendants to them, in not paying for their labor — This sum was a mere donation, on the part of the Company, prompted in self preservation — It was made for the benefit of the workmen — This money was paid to the Defendants through the check of the Treasurer — There are no grounds in which, as appears by the Answer, this process of Garnishment can be maintained against O'Fallon —

The judgment of the Court below must be affirmed — and with the concurrence of the other judges the same is affirmed.

John F. Ryland

Newer
vs
O'Fallon – Garnishee

Opinion
Rylands

Filed 9th May 1853
Wm. S. Glanville
Clerk.

Ernest Heuer, Plaintiff in error
vs
John O. Fallon, Garnishee of
Radford and Mallory deft.
in error

Supreme Court
March Term 1853

Points &c for deft in error

~~The defendant insists~~ C. C. Simmons for defendant in error insists, That the Court below did not err in its judgment ~~over~~ ruling the motion of the plaintiff for judgment on the defendants answer and discharging the Garnishee. The answer is to be taken as true, and fully exonerates the defendant from all liability. 1st Because the Company itself might ~~have been~~ and ought to been garnished, if it was indebted to the defendants in the execution, The defendant who was merely the agent of the Company, was bound to dispose of its funds as directed under its lawful rules and regulations, He was not in any way indebted to Radford and Mallory, nor had he received any moneys for their use or benefit, The Company placed some moneys in his hands, not to be paid to Radford or Mallory but to other persons, and he had no right to divert those funds from the purposes for which they to be particularly applied, He is not liable as Garnishee to the plaintiff unless under the same circumstances he might have been sued in an action for money had and received by the defendants in the execution, The facts ~~would not render him~~ show that ~~the defendants~~ Radford and Mallory had no legal claim against either the defendant or the Company, consequently ~~they~~ the latter could not be made answerable to the creditors of the former,

2 The defendant was summoned as as the

Treasurer of the Illinois Rail Road Company but the interrogatories are filed against him as the Treasurer of the Illinois Coal Company and also in his ~~private~~ individual capacity, It being admitted that in his private capacity he cannot be made ~~be~~ responsible, it is contended that as the officer of our Company he is not liable under any process issued against him as the agent of the other.

Power
vs
O. Fallon,

Brief for
Pont. made by
dept.
C. L. Simmons

Ernest Neuer - Plff. in Error -
v.
John O. Fallon - Deft. in Error
Gar. of Radford & Mallory

In Sup. Court
March Term
1853 -

The question in this case is, whether under the state of facts disclosed by Col. O'Fallon in his answer, the money which he admits to have been in his hands & under his control, could be stopped in his hands, by the garnishee process, and applied to the payment of plaintiffs judgement -

It was money put into the hands of Col. O'Fallon, which equitably belonged to Radford & Mallory & was actually paid to them -

I admit that Col. O'Fallon was not indebted in that amount to defendants, on his own account - but from the moment the money was set apart in his hands to be paid to Radford & Mallory it became either a credit, within the meaning of the 12 - section of the act concerning attachments or it was money of the defendants in the hands of ~~the~~ O'Fallon, and subject to Garnishee process -

Credit is not necessarily the opposite, of debt -

The Garnishee was the

the President and Treasurer of the "Illinois Coal Company" an association doing business out of this State. he was summoned as Treasurer of said Company, and as such Treasurer all the funds of the Company were in his hands, & when the money was set apart by order of the Coal Company, to be paid by their Treasurer to defendants it became, money in his hands subject to the disposition of defendants, or it was a credit which et aequo et bono. belonged to defendants

C. B. Lord

8(3

Ernest Neuer
vs
John O. Fallon
Gov. of Radford & Mallory

Brief & Points

C. B. Lord