Fullon, Lawrence v. Manning, George W. et al. 35 Mo. 271 518/7

The State of Missouri, ss.

The State of Missouri, to the Honorable the St Louis Circuit Court **in said State—Greeting:**

WHEREAS, In the record and proceedings in a certain cause lately pending in the St Louis Circuit Court

wherein Lawrence Fallon was Plaintiff, and George W. Manning was defendant

in an action for claim & delivery of personal property manifest error hath intervened, to the great damage of said Lawrence Fallon, as by his complaint we are informed.

NOW, 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 St. Louis, in the County of St. Louis, in said State, on the first Monday in October 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, ~~WILLIAM S. GRANVILLE~~ Andrew W. Mead, Clerk of our said Supreme Court, at office in the City of Saint Louis, the Eighth day of July in the year of our Lord one thousand eight hundred and ~~fifty-~~ sixty two

A. W. Mead

CLERK.

State of Missouri } In obedience to the within
County of St Louis } writ of Error I hereby send
you certified under my
seal a true and Complete
transcript of the record and proceedings
in the ~~above entitled~~ case of Lawrence Fallon
vs George W Manning - as fully as
the same remains of record in my
office

In testimony whereof I
hereto set my hand and affix
seal of said Court at office
in City St Louis this 4th
day of July A D 1862

S Rice Clk

Know all men by these Presents. That We, Lawrence Fallon as Principal, and Bernard Murphy and Edmund Burke as Sureties, are held and firmly bound unto George W. Manning in the sum of four hundred and fifty Dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, Executors and administrators jointly & severally, firmly by these Presents.

Sealed with our Seals and dated this first day of August A.D. 1862 –

The condition of the above obligation is such, that whereas the said Lawrence Fallon has sued out of the Supreme Court of the State of Missouri Writ of Error, from the Judgment rendered in the St Louis Circuit Court, against him, in favor of the said George W. Manning, for the sum of two hundred and twenty five Dollars together with costs, on or about the 10th day of March A.D. 1862, and an order has been granted by the Supreme Court that such Writ of Error shall stay the execution of such judgment, upon the giving of a Recognizance in conformity to the provisions of the Statute –

Now therefore, if the said Lawrence Fallon, the Plaintiff in Error in such Writ

of Error will prosecute such Writ with effect, and pay the money that shall therein be adjudged against him by the Supreme Court, and otherwise abide the judgment of such Court therein, then the above obligation shall be void, otherwise the same shall be & remain in full force and Virtue -

Taken & approved by me the day and year aforesaid -

Lawrence Fallon (Seal)
Bernard Murphy (Seal)
Edmond Burke (Seal)

Securities sworn
S. M. Buckinridge
Mayor

Archer Whiteside & Co
a firm Composed of
Thomas Archer &
John Whiteside &
James Archer
vs.
Peter Farry &
Caspar Gestung

Summons on a note for $42.95 issued to Constable Manning on the 15th. day of March 1861.
Returnable on the 30th. day of March 1861. Returned Executed.

On the return day of the summons the Plaintiffs appeared the defendants being called came not but made default. The action being founded upon ~~the~~ ~~action~~ an instrument of writing purporting to have been executed by the defendants and not denied by them under oath. Whereupon the Justice considered and adjudged that the Plaintiffs have judgment against the defendants for the sum of Forty four dollars and 96 cents for their debt - interest and protest and also for the costs in this behalf expended and that they have execution thereon according to Law.

fifa & Cou. Manning
April 4-1861
Returned Nulla Bona
May 3d 1861.

Judgment	$44.96
Justice Johnstone	1.10
Const. Manning	1.00

State of Missouri
County of St Louis } SS.
I. John C. H. Cunningham
a Justice of the peace and successor to Peter W Johnstone late Justice of the peace deceased within and for the County

aforesaid do hereby certify that the foregoing is a true transcript of the docket entries in the foregoing ~~Cause~~ case.

Given and Certified this 10-
day of March 1862
John A. H. Cunningham
Justice of the peace
and successor to Peter W. Johnstone
late Justice

Archer Whiteside & Co
vs. Transcript
Peter Farry &
Caspar Gistong

Judgment — $44.96
Justice Johnstone 1.10
Const. Manning 2.00
This transcript due } .75
Justice Cunningham }

Lawrence Fallon } pltff in error
vs
George W. Manning } deft in error

Now at this day comes the said plaintiff in error by his attorney, and files his motion herein, praying the court to make an order directing that the writ of error sued out of the office of the Clerk of the Supreme Court at St Louis in this cause, operate to stay proceedings on the judgment rendered against him, And the Court here having seen and fully considered the said motion, doth order and direct that said writ of error operate as a stay of proceedings on the judgment aforesaid, upon condition that the said plaintiff in error enter into bond to the said defendant in error, to be approved by the Judge of the Circuit Court of St Louis County, according to the provisions of the act of the General Assembly in such case made and provided.

State of Missouri, sct.

I, Walter M. Smallwood Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true, and complete copy of the order of said Court to stay execution in the above entitled cause, entered of record at the July Term thereof 1862, as fully as the same appears of record in

said Court.

Given under my hand and the seal of said Court, at the City of Jefferson this 2d day of August A.D. 1862.

Wm. M. Smallwood Clerk.

SEAL OF THE SUPREME COURT OF MISSOURI

State of Missouri } In the Saint Louis Circuit Court
Saint Louis County } September Term 1861 –

Be it Remembered that on this 25th day of April A D 1861 there was filed in the office of the Clerk of the Saint Louis Circuit Court, a petition which is in the words and figures following – to wit.

State of Missouri } In the Saint Louis Circuit Court
Saint Louis County } September Term 1861

Lawrence Fallon – Plaintiff }
vs
Geo W Manning Deft

Petition

Plaintiff states that heretofore to wit on or about the twentieth day of April one thousand Eight hundred and sixty one, in the County and State aforesaid, Plaintiff was the owner, and in the lawful possession of the following personalty – viz – One brick kiln containing One hundred thousand bricks more or less being the third kiln, north of three kilns, in a brick yard the property of plaintiff said yard situated on Second street, between Mound and Pogy streets, in the City of Saint Louis, in the County and State aforesaid, of the Value of Two hundred Dollars, also fifty loads of sand on said brick yard of the value of twenty five dollars. Plaintiff states that afterwards to wit on the day, in the year and at the place aforesaid, defendant unlawfully took said property, from Plaintiffs possession and hath unlawfully detained and still doth unlawfully detain the same, Plaintiff states that said property is of the value of Two hundred and twenty five dollars, Plaintiff states that by the premises aforesaid, he hath sustained damages to the value of Four hundred dollars Plaintiff prays judgment for the possession of said property and for his damages aforesaid

John B Thompson
Pltff's atty

State of Missouri } Personally appeared the above
Saint Louis County } plaintiff who being duly sworn makes
oath and says that the foregoing
petition and the matters and therein stated he believes to
be true and this deponent further saith, That he is the
owner of the property claimed in said petition and
entitled lawfully to the possession thereof That said prop-
-erty is properly described in said petition, which is
referred to and made a part of this affidavit, viz One
brick kiln containing One hundred thousand bricks
more or less, and a quantity of sand fifty loads, on a
certain brick yard, the property of plaintiff, situate
on Second street between Mound and Foggy Streets, in
the City of Saint Louis, in the County and State aforesaid.
That said property is wrongfully detained by the defen-
-dant in this cause, the said Geo Manning, That the
actual value of said property is Two hundred and twenty
five dollars, That said property has not been seized
under any process execution or attachment against the
property of this deponent - That deponent will be in danger
of losing his said property unless the same be taken out
of the possession of said defendant or otherwise secured
That said property was wrongfully taken by defendant
and that deponents right of action accrued within one
year.

Lawrence Fallon

Sworn to and Subscribed before me April 24th 1861

S Rice Clk

Order Granted April 24th 1861

S M Breckinridge -

"Ord Delivery" On the filing which petition the following order
was made.

In the Saint Louis Circuit Court -

February Term 1861

April 24th 1861 -

Laurence Fallon vs George W Manning } Order for Delivery

The plaintiff come and file a petition and affidavit according to law, — claiming the possession of certain personal property, therein described; wherefore it is ordered that the defendant deliver the property specified in said affidavit to the Sheriff of Saint Louis County, and said Sheriff is hereby directed, if said property be not delivered to him, to take it from the defendant and deliver it to the plaintiff

A true Copy from the Record

Witness Stephen Rice, Clerk of the Saint Louis Circuit Court, with the seal hereof, thereto affixed at office in Saint Louis this 25th day of April 1861

(Seal) Stephen Rice Clk C

There was also on the same day issued the following

"Summons" Summons

The State of Missouri } To the Sheriff of Saint Louis
County of Saint Louis } County — Greeting

We command you to summon George W Manning to appear before the Judge of our Circuit Court on the first day of the next term thereof, to be held in the City of Saint Louis, within and for the County of St Louis on the Last Monday of September next, then and there to answer the Complaint of Laurence Fallon, as set forth in the annexed petition and have you then and there this writ

Witness Stephen Rice, Clerk of our said Court with the seal thereof hereto affixed, at office in City of Saint Louis this 25th day of April in the year of our Lord Eighteen hundred and Sixty one

(Seal) Stephen Rice Clk

4

There is endorsed on said writ the following return of Sheriff

"Sheriffs Return."

Executed this writ in the County of Saint Louis on the 25th day of April 1861 by delivering a copy of the writ and petition as furnished by the Clerk to George W Manning, and by taking the property described in the Plaintiffs petition from the defendant and delivering the same to the Plaintiff

John H Andrews Sheriff
E R Rofs Deputy

The following bond was at the same time given to the Sheriff by the Plaintiff

"Plffs Bond"

Know all men by these presents, That we Laurence Fallon as principal, and Bernard Murphy and Geo Lange as securities, are held and firmly bound unto Geo W Manning, in the just and full sum of Four hundred and fifty dollars, to the payment whereof we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated at St Louis, this 25th day of April A D 1861

The Condition of the above obligation is as follows, Whereas, the said Laurence Fallon has commenced a suit in the St Louis Circuit Court against Geo W Manning returnable to the September Term 1861 of said Court for the recovery of certain personal property described in the petition of said plaintiff, as follows, to wit One Brick Kiln, Containing One hundred thousand brick more or less, situated on Second street, between Mound and Poplar streets in Saint Louis, also about fifty loads of sand in the same place, and an order has been made in said Cause, by the said St Louis Circuit Court requiring the said defendant to deliver the said property, above described, to the Sheriff of the County of St Louis, and if the same be not delivered

5 that the said Sheriff take the same from the said defendant and deliver it to said plaintiff.

Now, if the said Lawrence Fallon, plaintiff shall prosecute the said Action, and shall return the said property to the said defendant, if return thereof be adjudged, and shall pay to the said defendant such sum as may for any cause growing out of the order in the Cause be recovered against the said plaintiff, then this obligation to be null and void; otherwise to remain in full force and virtue

Lawrence Fallon (Seal)
Bernard Murphy (Seal)
George his X mark Lange (Seal)

And on the 5th day of November A.D. 1861 the following answer of defendant was filed.

"Answer of Defendant" The defendant for answer to the plaintiffs petition says that he has no knowledge or sufficient information thereof to form a belief, whether or not Plaintiff on or about the 12th day of April 1861 was the owner of and in the lawful possession of the personally described in plaintiffs petition or whether said personally was or is of the value as is stated in said petition of Plaintiff — Defendant denies however that he on the day and year named in the petition or at any other time unlawfully took said personally or property from plaintiffs ~~petition~~ possession or that he unlawfully detained or does now unlawfully detain said property of Plaintiff by reason of the premises set forth in his petition has sustained damages to the amount of Four hundred Dollars or any other sum. Defendant further answering said that he levied upon a lot of sand and one half of a kiln of brick and seized the same as Constable of St Louis Township in Saint Louis County under and by virtue of an

execution issued by Peter W. Johnstone a Justice of the Peace within and for the County of St Louis and directed to any Constable of St Louis Township in Saint Louis County on a judgment rendered by the said Justice in favor of Archer Whiteside & Co against Peter Fanny & Casper Geslung, that said lot of sand and one part Kiln of brick was levied upon and seized as the property of the said Peter Fanny, he being one of the defendants against whom said judgment was rendered as aforesaid by said Justice, that said lot of sand and one part Kiln of brick, was replevied out of his defendants possession by plaintiff by virtue of the summons and proceedings in this suit but defendant states that he believes and therefore states the fact to be, that said Peter Fanny was at the time of the said levy and seizure the owner of the said sand and brick so by defendant levied on and seized, Defendant states that Plaintiff ought not thereof to maintain his plaintiffs action against the defendant and be hence discharged with his reasonable Costs

P. S. Van Wagoner
Atty for Deft.

George W. Manning defendant in this case being duly sworn says the foregoing answer and the matters as therein stated he believes to be true

G W. Manning

Sworn to And Subscribed before me this 31st day of July 1861 — Peter W. Johnstone
Justice of the Peace

And at the February Term 1862 and on the 10th of March 1862 the following order was made herein

Replevin

Now comes the defendant, by his attorney, but the plaintiff although duly called, comes not; and the

said defendant waiving a jury submits this cause to the Court upon the pleadings and proofs, and the Court having duly heard and considered the same doth find for the defendant, and assess the value of the property in dispute, at the sum of two hundred and twenty five dollars and assess the damages at the sum of One cent; It is therefore considered by the Court, that the plaintiff and Bernard Murphy and George Lange, the securities on the replevin bond, return said property to wit; One brick kiln containing One hundred thousand brick or more or less, situated on Second street between Mound and Poggy streets in St Louis also about fifty loads of sand in the same place, or pay the value aforesaid, as assessed the election of the defendant and also pay the damages aforesaid as assessed and also the Costs of this suit, and that the defendant have execution therefor

State of Missouri } I Stephen Rice Clerk
County of Saint Louis } of the Saint Louis Circuit Court Certify the above and foregoing to be a true and Complete transcript of the record and proceedings in the above entitled Cause as fully as the same remains of record in my office

In testimony whereof I hereto set my hand and affix seal of said Court at office in City of Saint Louis this 9th day of July A.D. 1862

Stephen Rice Clk

40

Index

Petition	Page	1
Ord. Delivery	"	2
Summons	"	3
Sheffs Return	"	4
Plffs Bond	"	4
Judgment	"	5

Lawrence Fallon
Plff in error
Writ of Error
Georg W. Manning
Deft in error
Writ of Error to Supreme Court from Circuit
Filed August 1. 1862
A. M. O'Neal Clk
C. S. Coleman for Plff
Hanmagoner for Deft
$3.00 pd by Plff Cole

$ 34 Oct 1865
October Term 1864

40 paid by Atty

1864 Nov 17. ~~Sub on Brief~~ Continued by Court
1864 Nov 21. Continuance Outside, Cause submitted on D.E. Brief
1864 December 19. Affirmed
Gin filed D$295

Lawrence Fallon
Pltff in Error
vs
George W. Manning
Deft in Error

IN SUPREME COURT,
Oct TERM, 1862
On Error from St Louis
Circuit Court

AND now comes the said Lawrence Fallon and says that in the record and proceedings of the Court below, in the above entitled cause, there is manifest error, and for error said Lawrence Fallon assigns the following, to wit:

1. That said Court admitted improper and illegal testimony offered by
2. That said Court rejected proper and legal testimony offered by
3. That the Court gave to the Jury improper and illegal instructions.
4. That the Court refused to give to the Jury proper and legal instructions offered by
5. That the verdict was against the evidence.
6. That the verdict was against law.
7. That the verdict was against both law and evidence, and against the law under the evidence.
8. That the verdict was against the weight of evidence.
9. That the judgment was rendered in favor of the Defendant in Error when it should have been rendered for the Plaintiff in Error

~~10. That said Court overruled the motion for a new trial, made by~~

2d That the Judgment rendered in favor of the Defendant in Error was not properly ascertained, & was rendered for to large an amount -

3d That it appears by the Record, that the Defendant has only a special interest in the property in question, as a Constable, and Judgment was rendered in his favor, without any ascertainment of such interest for the full value of the property, & without any Nonsuit or dismissal of the suit being entered - L. S. Coleman
August Term 1862 - Atty for Pltff in Error

And now come the said Geo. W. Manning Deft and for joinder in error say, that there is no error in the record and proceedings of said Circuit Court in said cause, as assigned by said L. Fallon Pltff in Error

Van Wagoner & Mangate
atty for Deft

Supreme Court
Oct. Term 1862

Lawrence Fallon
Deft in Error

vs

George W. Manning
Deft in Error

Assignment of Error -

C. S. Coleman
Atty for Deft in Error

Filed August 5th 1862
A. M. Mead
Clerk

Lawrence Fallon Plff in error vs George W. Manning Deft in error	In the Supreme Court of Missouri On error from St Louis Circuit Court –

Sir –

You will please take notice that a Writ of Error has been sued out of the Supreme Court of the State of Missouri, by the above Plaintiff in error, against the above Defendant in error, upon a judgment rendered in the Circuit Court of St Louis County, returnable at the next October Term of this Court; And an order has been granted by the Supreme Court, allowing such Writ of Error to operate to stay the execution of such judgment, on the giving of Bond, which has been done, and filed in the office of the Clerk of this Court, in the City of St Louis –

Yours &c

August 6th 1862 –

To
G. S. Van Wagoner Esq
Atty for Defendant of Record in Circuit Court

C. D. Coleman
Atty for Plff in error

I admit due service of a Notice of which the foregoing is a Copy –

Dated August 6th 1862 –

G. S. Van Wagoner
Atty of Record for Deft in St Louis Circuit Court

In Supreme Court -
of Missouri -
Oct. Term 1862 -

Lawrence Fallon
Plff in Error
vs
George W. Manning
Deft in Error

Notice of Writ of Error &c.

C. D. Coleman
Atty for Plff in Error

Filed August 5th 1862
A. L. Mead
Clk

Lawrence Fallon
Pltff in Error
vs
George W Manning
Deft in Error

Supreme Court of Missouri
8th Judicial Circuit
Error to St Louis Circuit Court

Defendants Statement of case

This was an action of claim and delivery of Personal property, brought by Plaintiff in Error who was Plaintiff below to recover of the defendant in Error, who was defendant below ~~to recover of the defendant~~ the possession of one brick kiln, containing one hundred thousand brick more or less of the alledged value of Two hundred dollars, also fifty loads of sand of the alledged value of Twenty five dollars, all of which property ~~the~~ Plaintiff claimed he was the owner & entitled to the possession on or about the 12th of April 1861. Plaintiff also claimed four hundred dollars damages for the unlawful taking & detention thereof by defendant with costs of suit &c — a writ was sued out in the Circuit Court & The property was taken out of the possession of the defendant and delivered to the Plaintiff who still holds the property.

Defendant by his answer, denies all the Plaintiffs allegations & claims that he was one of the Constables of St Louis Township in St Louis County, Missouri, ~~and~~ that as such constable he levied on and seized said property under and by virtue of an execution in his hands, issued by Peter W Johnstone ~~Johnston~~ a justice of the Peace of St Louis Township, in St Louis County in favor of Archer Whiteside & Co against Peter Farry & Casper Gesting, which execution was issued by said Justice on a judgment obtained by Archer Whiteside & Co against Peter Farry & Casper Gesting, before said

Peter W Johnstone Justice &c.

Defendant claims that the said brick and sand levied on by him was the property of Peter Farry one of the defendants on said execution, at the time of the levy & seizure the following proceedings were had at The February Term 1862, of the St Louis Circuit Court. The case was called for trial on 10th March 1862. the Plaintiff or his attorney did not appear, the defendants attorney appeared & waived a jury, & the Court proceeded to & did hear the defendants proof, the case was then submitted to the Court upon the pleadings & the proof.

The Court having duly heard & considered the same, found for the defendant & assessed the value of the property in dispute at two hundred and twenty five dollars and assessed the defendants damages at 1 ct. & ordered that the Plaintiff & his securities on the Replevin bond return the property, or pay the value as aforesaid assessed, at the election of the defendant and also pay the damages as aforesaid as assessed and also the costs of said suit & that defendant have execution therefore

Pleff on the 8th of July 1862 sued out a writ of Error in the Clerks office of this Court at St Louis.

Pleff obtained from this Court at Jefferson City on the 2d of August 1862 a stay of proceedings on the judgment

Pleff on the 5th of August 1862 filed the following assignment of Errors, to wit

1st. That the judgment was rendered in favour of the defendant in Error when it should have been rendered for the Plaintiff in Error

2d. That the judgment rendered in favour of the defendant in error was not properly ascertained & was rendered for too large an amount

3d That it appears by the record, that the defendant has only a special interest in the property in question as a Constable & judgment was rendered in his favour without any ascertainment of such interest for the full value of the property, without any nonsuit or dismissal of the suit being entered

To which assignment of Errors, Defendant in due time filed his rejoinder in Errors

G. S. Van Wagener
attorney for Deft
in Error

Supreme Court

Lawrence Fallon
P, E
vs
George W Manning
D. E

Defendants Statement

G. L. Van Wagner
atty for D. E.

Filed May 11. 1864
A. W. Mead
Clk

[8]

Lawrence Fallon P.E.
vs
George W Manning
S.E.

Supreme Court

Defendants brief

As to the first error assigned by Plaintiff, Defendants Counsel contends, that the judgment below was correct & rendered for the proper party

There was no exception taken by the Plaintiff to the proceedings of the Court or evidence on the trial below & the record shews none.

The Court will presume that the judgment of the inferior Court is correct unless the record shews the contrary Walter vs Cathcart 18 Mo Rep 256.

The only points (as Defendants Counsel imagines) that will be enquired into in this case, are

First, was the defendants interest in the property in question a special interest, if yea, was the value of that interest properly ascertained & a judgment therefor rendered accordingly.

Answer. By the record & by the Plaintiffs 3d assignment of Errors, it appears & is admitted, that the defendant had a special interest in the property as a creditor, and that the Plaintiff (to say nothing of the evidence) claims the value of the property to be $225.00 in his petition

From the record ~~itself~~, it appears that the Plaintiff was a stranger to the title of the property, this being the case the defendant, as against a stranger to the title,

is entitled to recover the entire value of the property as special owner, & the defendant is answerable over as to the general owner, to the extent of the general owners interest. Dilworth vs McKelvy 30th Mo Rep 149

Second point. Was it necessary to have a nonsuit entered against the Plaintiff on the records of the Court before the defendant could have his damages & the value of his property assessed & the proper judgment therefore given by the Court,

Answer. The mere entering of a nonsuit in this case the party Plaintiff not having appeared, if the plaintiff fail to prosecute his action with effect would have been superfluous

It is the imperative duty of the Court, upon the request of the defendant, & upon proper proof, to have the value of the property assessed, if it appears that the property was in the possession of the Plaintiff, and also the damages for its taking & detention & to render therefore the proper judgment

See Rev stat of Mo for 1855 vol 2, chap 128 art VII. Sec 11, 12 Reed, Guardian &c vs Wilson & Garner 13 Mo Rep 28 - Dilworth vs McKelvey 30 Mo Rep 149.

The Court could no doubt have permitted the defendant to have a nonsuit entered against the Plaintiff, but suppose that had been done, the Court would nevertheless have been obliged (a jury being waived) at defendants request, to make the proper assessments under the proof & to have rendered the proper judgment, Smith vs Winston Mo Rep 299.

The Plaintiff cannot in a replevin suit by a discontinuance of the action or by suffering a nonsuit, prevent a judgment being rendered against him for damages & for return of the property

Smith vs Winston 10 mo Rep 299. Collins vs Hough 26 mo 129. Berghoff vs Hickwolf 26 mo 511

So then if the Plaintiff had suffered or taken a nonsuit or dismissed his action, the result must necessarily be the same to him as if no nonsuit had been entered

There is nothing in the statute governing this case, or in the practice of our courts, that requires a nonsuit to be taken sentence of record, where the Plaintiff fails to prosecute his action with effect, before the defendant is entitled to have the proper assessments & judgment, but on the Contrary in cases like this, the statute is silent as to the first rendering a judgment of nonsuit, and requires the Court, where the Plaintiff fails to prosecute his action with effect, if the Pltff have the property in his possession, or not, to have the proper assessments made & judgment rendered therein, that assessment if the defendants waives a jury must be or can be made by the Court

On inspection of the record will show that the judgment is correct in every particular & that the Court below has committed no error

Defendants Counsel contends that this writ of error has been prosecuted without cause, that the delay caused thereby & the proper enforcement of the defendants judgment has been productive to defendant of injury & damage & asks this Hon Court for an affirmance of said judgment with 10 per ct damages

G. S. Vere Wagoner
atty for Defendant in E

C

Supreme Court

Lawrence Fallon P.E

vs

Geo W Manning D.E

Defendants Brief

Submit on this

Vault

Filed Oct 25. 1864

A.W. Mead Clk

[2]

1

Lawrence Fallon – Pltff in Error vs George W. Manning Deft in Error	In the Supreme Court on Motion for Supersedeas of Execution on Writ of Error – July Term 1862 –

See top of page 10. hereof –

It is objected, that the Supersedeas cannot be granted, for the reason that it appears by the Record, that there was a trial of the issues, in the Court below, and no Motion was made to set aside the judgment, or for New Trial, or in arrest, or the attention of the Circuit Court in any manner called to the errors complained of, so as to enable the Court below to correct them, or afford opportunity to do so –

I. It is claimed, that it does <u>not</u> appear, by the Record, that there was any trial of the issues in the Court below, or any decision or judgment upon those issues –

The Record shows a Submission of the cause on the part of the Defendant to the Court, "upon the pleadings and proofs" and that "the Court doth find for the Defendant and assess the value of the property" &c: but it also shows that the Plaintiff was not present; that "the Plaintiff although duly called comes not", so that if there was any trial, it was <u>ex parte</u> –

What are the issues in the case as appear from the Pleadings?

1. On the part of the Plaintiff that he is the owner of the property, that the Defendant wrongfully detains it, and damages for such detention.

2nd. On the part of the Defendant, a denial of the ownership of the Plaintiff; of the wrongful detention by Defendant; of the damages of Plaintiff; and setting up title to the property in Peter Fany, the recovery of a Judgment against Fany, the issue of an Execution thereon, and the seizure of the property by virtue thereof as Fany's.

Now which of these issues has the Court below passed upon or determined?

Certainly not either or any of them, unless the expression contained in the Record "doth find for the Defendant" can be construed into such a determination thereof.

That such expression is merely formal, and cannot be understood or construed to mean any such adjudication or determination will be apparent, Because.

II. There was no necessity of any such adjudication or determination; the Defendant being in a Situation to protect his rights and interests fully and completely without it — &

3.

III. There could be no trial of such issues in this case; the failure of the plaintiff to appear, was a failure to prosecute his suit, and in such case, the Court is only authorized to assess the value of the property taken, (or in this case the Defendants Special interest therein) and damages for the detention thereof —

Statutes of 1855, page 1245 § 11 —

Dilworth vs McKelvy 30th Mo 149 —

And the Statute which authorizes one party to try the issues, in the absence of the other, makes no difference with this question, as that provides for "a dismissal of the suit, or a verdict, or judgment, as the case may require" —

Now this case did not require any trial of the issues; it merely required a dismissal of the suit, or a Nonsuit, and an assessment of the interest of the Defendant in the property, & a judgment in accordance therewith —

Statutes 1855 page 1262 § 16 —

And a trial, is a "judicial Examination of the issues between the parties" —

Statutes 1855, page 1261 § 11 —

Will this Court conclude that the Court below made a "judicial Examination of the issues", when there was no necessity there for, and when the same could not be done, under the provisions of the Statute?

IV. But, assuming there was a trial of such issues, and a determination thereof, there was no necessity of any Motion in the Court below, to set aside the judgment, or for a new trial, or in arrest, or in any other Manner to call the attention of the Court below, to the Errors committed, so as to afford an opportunity to the Court below to correct them.

The power of this Court to examine into an Error committed by an Inferior Court, does not depend upon the question, whether any Exception was taken in the Court below, or any Motion made there to correct the Error; the only prohibition on the power of this Court to review the judgments of inferior Courts, is, that "No exception shall be taken in an Appeal or Writ of Error, to any proceedings in the Circuit Court, except such as shall have been expressly decided by such Court".

Statutes of 1853 page 1300 § 33.

And such has been the Statute of this State from the organization thereof, and this Court has given construction thereto, frequently.

The only things necessary, to authorize this Court to intervene are,

1st That the question has been "expressly decided" by the lower Court - and

2nd That the Error appears on the Record -

5

"If a final judgment of the Circuit Court is not an express decision within the meaning of the Statute, no error in such judgment could be corrected in this Court; that being the end of all proceedings in that Court — In this case the party could not have redressed himself by Motion in arrest of Judgment" &c: —

Can & Co vs Edwards 1st Mo 96 - Marg. 137 -

And the judgment which shall be rendered either for, or against a Party "is purely a question of law, in which, if the Court err, the party injured has no remedy but by Writ of Error"

See same case and page —

And this Court in that case expressly held, that such an Error as is complained of in the present case, could be taken advantage of in the Supreme Court, although the question was not made in the Circuit Court.

And this proposition will be found to be sustained by the following authorities —

Hempstead vs Stone 2nd Mo 54 Marg. 65 -
Hayton vs Hope 3d Do 39 " 53 -
Maupin vs Triplett 5th Do 422.
West vs Miles 9th Do 169 -
Beckwith vs Boyce 12th Do 440 -
Cox vs City of St Louis 11th Do 431 -

Most of these cases were reversed, because more damages had been allowed than were claimed.

And some of the cases show that Motions were made in the lower Court, and in others no such Motions appear to have been made -

No such Motions were made in

Cambles vs Edwards 1st No 96 - (137)
Hampstead vs Stone 2nd No 54 (65)
Hayton vs Hope 3rd No 39 (53)
Beckwith vs Boyce 12th No 440, and

none could have been made in

West vs Mills 9th No 167.

Although, ~~from~~ in the Statement of the case by the Court it is said "The defendant moved the Court to set aside the judgment and grant a new trial," as the Court says, "but it is argued that a Motion to set aside this judgment in the Court below, was necessary, before the irregularity could be taken advantage of by Writ of Error - The decisions of this Court have been otherwise; and it has been uniformly held, that a final judgment of an inferior Court may be reversed, whether the error of that Court was excepted to below or not", and refers to these cases, and the case fully sustains the head note hereof, (i.e) "The Supreme Court will take cognizance of an erroneous judgment of an inferior Court, although no Motion to set aside such judgment be made in the inferior Court" - And in Hayton vs Hope 3rd No 39 it was a judgment obtained by default, on an appeal from a Justice, after the defendant had succeeded, before the Justice -

7

An objection may be made in the Supreme Court, for the first time, that an Indictment, or a Petition is insufficient to authorize a judgment —

M'Waters vs The State 10th No 167 -
Hammel vs The State 5th No 260 -
State vs Vaughn 26th No 29 -
Andrews vs Lynch 27th No 167 -
Syms vs Indiana 28th do 435 -
Ivory vs Carlin 30th do 142 -

And "the objection is equally fatal, whether the error appear by the declaration, plea, verdict or judgment if it be one which this Court can see, the Court below expressly decided" —

Hampstead vs Stone 2nd No 55 (66) —

And the Court has also held, that, since the enactment of the Code of 1849, it will review for errors committed on the trial & excepted to, although the attention of the Court below was not called to the error, by motion &c: —

Fine vs Rogers 15th No 315 -
Hagner vs Jacoby 26th No 530 -
Prince vs Cole 28th No 486 -

Although it is intimated in these cases, that such was not the rule, prior to that time, it is seen by the cases cited, that such was the rule prior to that time, from the organization of the State.

And these last cases relate to matters incorporated into the Record, by Bill of Exceptions, and not to the Record itself, as errors of Record, may always be corrected —

This case is similar to those cited, in which the Court below rendered judgment for an amount greater than was claimed in the declaration or statement of the cause of action —

In those cases, it appeared from the Record, that the Party had recovered judgment for more than he was entitled to recover under the issues; in this case, the same appears by the Record —

In those cases, no motion or exception was held necessary, to enable this Court to consider the questions, to reverse the judgments, and none can be held necessary in this case —

It appears by the Record in this case, that the Court below, "expressly decided" the question, and in so deciding, committed error, as it would, if the question arose upon the review of the decision of an inferior Court, arising upon a demurrer to a pleading, and in such case, no motion can be, or ever has been, held to be necessary —

Now, it is conceded, that cases will be found in our Court, where it has been held, in substance, that, "to entitle a party to the benefit of objections to any proceedings in the Court below, it must appear, by the Record, that the objections were made in that Court" —

Steamboat Thames vs Erskine & Gore, 7th Mo 213 —

That "A party will not be allowed to urge in the Supreme Court, a point that was not made in

9

the Circuit Court"-

Comalins vs Grant 8th Mo 59-

And "The Supreme Court considers nothing as error which has not been decided on below"-

Alexander vs Hayden 2d Mo 171 (211)-

And others of similar import, but they are decisions concurrent with those relied upon to sustain the motion, and will be found, on examination, not to disagree with them-

And other and more recent cases will be found, deciding, that the Judgment of the Court below will be affirmed in this Court, if there is no Statement, or Bill of exceptions, or error apparent on the Record, and a trial on the merits-

Elliott vs Pogue 20th Mo 263-

Aiken vs Todd 20th " 276-

But it is confidently believed, that no case can be found in our reports, that for an error, apparent from the Record, upon which the Court below has passed, or "expressly decided," any Motion or exception is necessary, to enable this Court to review it, & reverse the judgment-

I have only considered the objection, as it is believed, that error is conceded, and that such error is apparent from the Record-

Respectfully Submitted-

C. P. Coleman

See next Page & Seq-

Owing to the fact that my entire time is occupied with my official duties, I am obliged to submit the foregoing statement, heretofore submitted to the Court on application for Supersedeas, with the following in addition Viz:

V. The answer of the Defendant was insufficient, in not setting forth facts enough to authorize the court to render any Judgment in his favor, for any sum whatever.

1st It does not show that the Justice of the Peace before they whom the Judgment was rendered, had jurisdiction of the Parties therein, or of the subject matter of such action.

2nd It shows, that the Defendant had only a special interest in the property in question in this suit, but fails to show the extent of such interest.

The Plaintiff claims in his Petition to be the owner of the property and entitled to the possession thereof, and his Court cannot regard him as a stranger to the property, or title, or determine that the Defendant is entitled to a Judgment for the full value of the property upon the principle of liability over to the Defendants in the original execution as the general owners thereof.

Indeed the answer of the Defendant does not set up title in the property in question in Peter Fany, but merely says that ~~the same~~ a certain quantity of Brick & Sand "was levied upon and seized as the property of Peter Fany", although he expresses a belief that it was the property of Fany, at the time of the levy thereon but does not allege it to be the same property claimed in the Petition.

The Manuscript of the Justice attached to the Record

11. if it can be considered at all. shows that the special interest of the Defendant in the property was only some forty seven to fifty Dollars costs and all, and he has judgment for $225.00 –

Upon what principle of right or justice can the Defendant claim to recover such an amount?

This Court can determine, judicially, that the Defendant did not have, and could not have, a special interest in the propoperty in question, by virtue of any judgment rendered by a Justice of the Peace, to the extent, or for the amount recovered by him –

And, again, the rule is universal, that a Party cannot recover judgment for more than he shall claim in his pleadings, and, the Defendant, not having set forth the amount of his judgment, or of his special interest, he was only entitled to nominal damages –

And the rule is equally universal, that in the determination of the sufficiency or insufficiency of a Pleading, it is to be construed against the Pleader –

The Judgment should be Reversed, and a new Trial ordered in the Court below –

L. D. Coleman

Nov 25th 1864 –

atty for Aff in Error

C

Lawrence Fallon
Plff in Error

vs

George W. Manning
Deft in Error

Brief of Plff in Error

Filed Nov 26th 1864
A. W. Mead Clk

C. D. Coleman
atty for Plff in Error

Lawrence Fallen Plff in Error

vs

George W. Manning Deft.

This was a suit by Fallen against Manning under the 7th Art. of our practice act to recover possession of a lot of brick and sand claimed by the plaintiff. The property was taken from the defendant and delivered to the plaintiff on the usual order. The petition was in the ordinary form, averring the plaintiff's ownership and right of possession and the defendant's possession and unlawful detention of the property in dispute. The answer ~~denied~~ put in issue the material allegations of the petition; and also alledged that at the time of the institution of the suit the defendant held the property as one of the Constables of St Louis Township in St Louis County in virtue of a previous levy and seizure of the same by authority of an execution issued to him

by a justice of the peace of said County on a judgment rendered by said justice in favor of Archer Whiteside & Co against Peter Farry et. al, and further ~~alled~~ that the defendant "believes and therefore states the fact to be that said Peter Farry was at the time of said levy and seizure the owner of said sand and brick so by the defendant levied and seized". The answer omitted to state the amount of the execution. When the case was called for trial the plaintiff failing by his non-appearance to prosecute his suit, the court at the instance of the defendant proceeded to assess the value of the property taken and the damages sustained by the defendant, and gave judgment for the deft. for the return of the property or for its assessed value viz. 225 dollars, at the defendants' option, and for the damages and costs: And the plaintiff has brought the case to this court by writ of Error—

The plaintiff's counsel contends that the answer in the case was insufficient to justify the court in rendering a judgment for the defendant for any sum whatever, much less for the whole value of the property taken, and calls the attention of this court to several of the supposed defects in the answer. It is enough to say that in actions of this kind the defendant's right to a judgment for affirmative relief in nowise depends upon the shape of his answer, but alone (where the plaintiff has possession of the property) upon the plaintiff's failure to prosecute his action with effect. The extent of the relief depends upon considerations which will (be noticed) hereafter ~~appear~~.

The statute provides that "If the plaintiff fail to prosecute his action with effect and without delay, and have the property in possession, the court or a jury shall assess the value of the property taken," and damages and judgment shall

be given against the plaintiff and his securities for the return of the property or its assessed value with damages and costs. R.L. 1833. p. 1245.
If a plaintiff having got possession of property by means of his suit should before answer filed voluntarily dismiss his suit, can there be any doubt that the defendant would in such case be entitled to have an assessment, ~~of~~ and judgment for the property taken or its ~~[illegible]~~ value?

But upon the supposition that the defendant was entitled to a judgment for any sum, it is insisted by the counsel for the plaintiff that inasmuch as it appears upon the face of the record that the defendant had only a special interest in the property to the extent of the execution levied on it, the court (in giving judgment) was ~~by law~~ limited by law to the value of that special interest, and in support of the

proposition relies on Dilworth vs McKelvey 30 Ala R. 149.-

Dilworth vs McKelvey is a well considered case and instead of overturning sustains the judgment in the case under consideration. That was the case of the acknowledged owner of the property suing the defendant who was in possession claiming a lien for certain salvage services amounting to about one fourth of the value of the property. The owner sued and got possession but failed on the trial. Thereupon the value of the property taken was assessed and judgment was given for the defendant for the recovery of the property or its full assessed value. This the court held was wrong; that and decided that the court or jury ought to have assessed the value only of the defendant's interest ~~of the defendant~~ in the property.

In the case at bar there is no just pretence, so far as the record shews, for saying the

plaintiff had any interest whatever in the property. True in his petition he asserts his ownership; but any advantage that may be supposed to have been gained by his claim of title is lost by his failure to maintain his suit. Looking into the answer it is seen it wholly denies the plaintiff's right; and while it claims only a special interest in the defendant yet it in express terms declares the general ownership to be in Harry the execution debtor. Upon the whole record then it appears that the plaintiff is a stranger to the title, that the defendant has a special interest and that Harry is the general owner. Judge Napton in delivering the opinion of the Court in Dilworth vs McKelvy says "Where the defendant has only a special interest and the plaintiff is a stranger, then the entire value, according to the ancient doctrine of the

common law, may be recovered by the special owner, who is answerable over to the general owner for whatever interest remains after the special claim is satisfied."

Let the judgment be affirmed the other judges concur.-

John D. Dwyer

✓ 63 C

Fallen

v

Manning

Opinion of court

by Dryden

Filed December 19. 1864

A W Mead

Clk

Affirmed

[34]