No. 8751

Supreme Court of Illinois

Richard McDonald

vs.

Thomas Brown

71641 7

Thomas Brown who sues for the use of E. G. Whitall and Timothy Rawlings vs. Richard McDonald

Assumpsit

Plea of the May Term of the Pulaski Circuit Court in the year of our Lord one thousand eight hundred and fifty four

Be it remembered that at a circuit court began and holden at Scotts Caledonia the county seat of Pulaski county at the may term thereof in the year of our Lord one thousand eight hundred and fifty four in a certain case wherein Thomas Brown who sues for the use of E. G. Whitall and ~~Timothy~~ Talbert Rawlings was plaintiff and Richard McDonald was defendant, being an appeal from a judgment of a justice of the peace and tried before Dan William R. Parrish Judge of said Circuit Court without a jury by an agreement of parties, at which time the following proceedings were had--

The Plaintiff first introduced William Harbeson as a witness, who after being duly sworn deposes as follows to wit. I was at the house of defendant some time ago, but do not recollect the exact time. I went in company with McDonald and others ~~to enquire of Brown and~~ when Brown was. McDonald said to Brown, that he had robbed Clemsons Trunk, that he must search him, and done so- but found no money- Brown said to McDonald that his money was in his coat pocket- and thereupon McDonald took out of the pocket a pocket book a wallet

[8751-1]

which contained about $107.00 dollars in bank bills.

Upon his cross examination he stated that Brown had been arrested for stealing, breaking open and robbing Clinton's trunk, and taken before Mr Donald a justice of the Peace for examination - went up stairs to search him for the missing articles before the trial came on - understood that the trunk had been found broken open on the other side of the Ohio River and Brown nearly - did not know it of his own knowledge, was not present - Brown said that he took the trunk from this side of the river from the wharf boat - that an other man threatened to kill him if he did not, took it over in a skiff - the other man broke open the trunk. Mr Donald carried the bank bills down stairs in his hand - did not know what became of them - did not know that Brown took possession of it. Brown said all the money was his but 7.28 dlls

Charles Murphy was then introduced by the plaintiff, who being first duly sworn deposed as follows. That he saw an order given by Brown to Mr. Rowlings - the order was then handed to the witness who stated that it was the same, that he signed the same as a witness - the order was in the following words and figures to wit:-

"Richard Mc Donald Esq" - Dear Sir"

"You will please pay the bearer the sum of $107.00
"being the Amount left in your hands by me. as I
"have authorized them to receive it from you and this
"will be your receipt" - (Signed) "Thomas his + mark Brown"

~~Here the Plaintiff rested his Case~~

The Plaintiff then introduced James Leary as a witness, who was sworn and testified as follows I was present and saw Mr Rowlings present the order to Mr Condie - (the same order mentioned by the last witness) Mr Condie said he would not give it up, that Blanton lost money out of his trunk while Brown stole, and that he meant to wait and see Blanton, and learn whether it was his money or not - He refused to give it up.

Upon his cross examination he stated, Mr Condie said in the same conversation that he had not got the money, that Coleman Brown took up the money when it was laying on the table during the trial and said he would take care of it until Blanton came home

Here the Plaintiff rested his Case

The defendant then introduced Noah Brown as a witness who testified as follows - "I was called upon and requested to go in search of a trunk which had been stolen from the Wharf Boat at this place - I went in company with two other persons - went over Arkansas River and there found Brown - One of the party asked him if he was not on board the Wharf boat the night before - he said not - He was then told that he was seen there - he then admitted that he was on the boat, and said if they would not hurt him - he would go and show where the trunk was - He did go and show the trunk - it was broken open

we brought Brown and the trunk on this side of the River - on the way to Mr Donald's office Brown said he had some money which came out of the trunk, that he did not break open the trunk - but another man did and gave him the money. After reading Mr Donald's books - they took Brown up stairs to search him as they said. I did not go up stairs but remained below - soon after Brown, Mr Donald, Coleman Brown and the rest came down stairs - the money was laid down on the table - which they said had been taken from Brown - I think there was about 10 6 or seven dollars - Cant say who laid the money down, Coleman Brown took up the money and put it in his pocket - he said he would take care of it until it was found out who it belonged to - I understood that Coleman Brown had got down the stolen trunk from James Clemson to his wife - do not know any thing about it of my own knowledge.

On his cross examination he stated that he did not know of his own knowledge who the trunk belonged to - did not know whose money it was that he saw supposed it to be that taken from Brown.

The Defendant then called Mrs Clemson who after being duly sworn testified as follows - The trunk brought to Mr Donald's at the time Brown was arrested, and at the same time belonged to my husband James G. Clemson - it had been broken open when brought there - I found in it a letter from my husband to William A. Hughes which contained money - I

I dont know how much - the letter was delivered to Hughes who said it was all right - the trunk was sent to me by my husband, sent down the river by Coleman Boren - he left it on the Wharf boat when it was stolen . . some things were moping out of the trunk - dont know how many -

Upon his cross examination she said - I dont know of my own knowledge whether there was any money in the trunk when it was stolen or not - I only know what my husband wrote to me about it and what he said to Mr. Boren when he sent the trunk by him - I do not know what became of the money taken from Brown - I think Col. Boren took it.

The defendant then introduced as a witness Mrs. Caroline Boren who testified as follows - I was at home - Mr. McDonald's - when Brown and the broken trunk was brought there. It was the same day Brown was tried before Mr. McDonald for stealing the trunk and sent to jail - the trunk was the one which Mr. Clenton sent to his wife I have seen the trunk several times before and know it very well. I saw them take Brown up stairs to search him - they said they were going up for that purpose - It was before the trial commenced. when they came down McDonald had the bills which had been found with Brown in his hand and laid them down on the table - the trial commenced about that time. soon after Coleman Boren took up the money and said he would take care of it - until it was found out

[8751-2]

whether the money was Clemsons or not - or whether it came out of the trunk or not. Mr. Brown, my husband has had it ever since - he never gave it to Mr McDonald afterwards, it was never in Mr McDonalds possession only while bringing it down stairs - my husband thought the money came out of the trunk.

Upon her cross examination she stated that she heard Mr McDonald say that when they searched Brown nothing was found - he said the money was in his coat pocket - and started towards it, some of the others took the money out of his coat - do not remember that he said he took it out - he brought the money down stairs in his hand and laid it down - Mr Parker sat with Mr. McDonald during the trial - a good many others were present - do not know whether it was Mr. Clemsons money or not, only what he said about it. do not know of my own knowledge.

The defendant then introduced Thomas Parker as a witness, who testified as follows to wit: - I was sent for by Mr Donald to sit with him as a justice of the peace in trying a Case of larceny - it was the same day Brown was arrested as I understood. I went there and done so - did not have much to do with the investigation - did not examine any of the witnesses - when the trial was over I signed the docket as a justice of the peace with Mr Donald. I saw some money laying on the table, but do not know who it belonged to or where it came from - heard it was taken from Brown

do not know who took up the money from the table, did not see Robin take it - Supposed Mr. Dewold done so, but did not know any thing about it - Brown was committee.

The foregoing was all the testimony offered in this case and thereupon it was submitted to the jury Court without a jury - Who rendered a judgment against the ~~plaintiff~~ defendant for the sum of ninety eight dollars besides costs of suit

~~The defendant then moved for a new trial for the following reasons to wit:~~

~~First - That the verdict was against the law generally -- That the verdict was against the evidence generally. That the verdict was against the law and the evidence~~ - ~~Which motion was overruled by the Court and judgment according thereto for the amount aforesaid was entered up~~

To the ~~overruling by the Court of the defendants motion for a new trial~~ ~~and~~ rendition of the judgment aforesaid the defendant excepted and now assigns for error, and prays that this, his Bill of exceptions - may be signed, sealed, and become a part of the record in this Cause, all of which is accordingly done. -

William K Parrish (Seal)

[8751-3]

In the Pulaski County
Circuit Court, May
Term A.D. 1854.

Thomas Brown who
sues for the use of E.
G. Whitall and Talbott
Rawlings
vs.
Richard McDonald

Bill of exceptions

Filed 2d Nov 1854
James M Davidson
Clerk

(4th)

Know all Men by these presents that Richard McDonald and James W. Clemson & Hiram Boren of the County of Pulaski in the State of Illinois are held and firmly bound unto Thomas Brown for the use of Lucius Rawlings and Elliot G. Whitall in the penal sum of Two Hundred Dollars lawful money of the United States for the payment whereof well and truly to be made and performed we bind ourselves our heirs executors and administrators firmly severally and firmly by these presents

Witness our hands and seals this 20 day of June A.D. 1854 The Condition of the above obligation is such, Whereas Thomas Brown who sues for the use of the said Lucius Rawlings & Elliot G. Whitall did on the 1st day of June 1854 before the Circuit Court of Pulaski County recover a judgment against the above bounden Richard McDonald for the sum of Ninety three dollars: from which judgment the said Richard McDonald has taken an appeal to the Supreme Court of the State of Illinois in and for the 1st Judicial District

Now if the said Richard McDonald shall make due prosecution of his appeal and in case the judgment of the Circuit Court is affirmed pay the said judgment, costs, interest and damages then this bond to be void otherwise to remain in full force and virtue in law

Richard McDonald (Seal)
W. G. Clemson (Seal)
H. Boren (Seal)

Appeal Bond vs
R. McDonald

(A)

Filed this day of
June 1854
James H. Davis
clerk

Pleas at North Caledonia Pulaski County Illinois, before the Circuit Court for the said County on the 1st Monday in the month of October in the year of our Lord, one thousand eight hundred and fifty three

Be it remembered that heretofore to wit at the said term of the circuit court of Pulaski on the second day of the said term, in the cause-

Thomas Brinkerhoff
Jacob Rawlings and
E G Whitall
vs
Richard McDonald
} Appeal.

the following order was made and entered as of record in said court to wit

"Thomas Brinkerhoff
Jacob Rawlings and
E G Whitall
vs
Richard McDonald
} Appeal

Ordered that this cause be continued for service of process.

And at another day to wit. at a circuit court begun and held in the court House at North Caledonia Co of Pulaski of record. On the 5th Monday in the month of May 1854. and on the second day of the term in the said court of record. the following order and judgment of the court. for and on account of the pleadings, were

made and entered as of record in the said Court.

Order and Judgment

"Appellee's appearance entered by J. Rawlings Esq. an attorney of this court. And thereupon came the defendant. And the issue being joined submitted to the court proofs heard and verdict for the plaintiff for Ninety three dollars judgment is therefor hereby given against the defendant to and for the use of the plaintiff for the sum of Ninety three dollars and costs of suit and execution is awarded the said plaintiff

And afterwards to wit on Wednesday the 30 day of the term of said court last aforesaid in the cause aforesaid the following order was made and entered as of record

Order to Appeal

"Now at this day came the defendant and prays an appeal to the Supreme Court whereupon ordered that the appeal be granted on condition that the defendant do enter into bond with James M. Clemens and Sterling Brown his security in the penalty of Two hundred dollars.

And afterwards to wit at the Rules held in the Clerk's Office of the said Circuit Court of Sumner on the 10 day of June 1854 came Nedham Donald the defendant and entered into the required bond which is here attached as part of the record and marked A.

and thereafterwards to wit at the Rules held in the Clerks Office of the said circuit court aforesaid on the 20 day of November 1854. Came the defendants & filed the annexed "Bill of Exceptions" forming part of the record and marked (B)

State of Illinois
Pike County } I, James M. Davidson Clerk of the circuit court for and within the County of Pike and the state of aforesaid, hereby certify that the foregoing pages contain a true and complete transcript of the orders judgment and proceedings together with the bond marked (A) and "Bill of Exceptions" marked (B) in the above foregoing styled and entitled cause as of record in my office.

In testimony whereof I hereto set my hand and affix the seal of said circuit court at office in Pittsfield on this 20 day of November AD 1854

James M. Davidson Clerk

Thomas Brown who sues for the use of
T. Rawlings & Ellis G Whitall
vs " Henry H Hughes Livingston Co
Richard McDonald.

Appeal

	Pltffs Bill	Defts Bill
Judgment Bill		
Clerks fees Dec ahr & atty 15p	15	
Sev & Sub 80p & bill 4 calls 20	1 00	
Ordr cont 20p aff mtn claim 10p	30	
Bill costs 30p Ind 25p Dec fund 15p	70	
Ordr & exc stat rec & bill 25p Cert 35	60	
Cobs bill of costs	25	
	$3 00	
Sheff. H W Hughes " Serv sub mileage 20	1 25	
Deft Sheff. Blackburn Serv sub mileage 20	1 25	
Witness. Wm Sarbenen 1 day	50	
Costs on juries cont to trial		
Julia Thompson - Dec & 12 sums 1824	31	
Sal 1826 " 2 calls 12 Costs 25	56	
Ind 25p appeal bond 50p Trans 25p	1 00	
Constable Cams fees entries	1 65	
Witnesses. H D Rudd 1 day	50	
Chas Munkley 1 day	50	
Clerk fees - Dec & 2 sums 20p Ent 20p		40
Dec ahr & atty 15p Sums bill 40		55
Alias Sums & bill 40p Sev bill 30p		70
Cobs 25p Appeal 35p		60
Dec & exc stat rec & bill 25p		25
Cobs record certificate & 1.50		1 50
		$4 00
Sheff fees. Rec sums 10. Alias 10		20

Costs After
James McDaniel Clerk.

Richard McDonald
Plff in error
vs.
Thomas Brown who sues
for the use of L. Rawlings &
E. G. Whitset
Defendants in error

Supreme Court of the State of
Illinois November Term A.D. 1844

Action of Assumpsit for money
had and received

And the said Plaintiff in error by Nelson, Jack and Simons his Attorneys and for error in the proceedings operated in the rendition of the judgment aforesaid assigns the following Causes to wit;

First - That the verdict of the jury was against the law

Second That the verdict was against the evidence

Third That the verdict was against the law and the evidence

Fourth That the Court erred in rendering judgment in the case

Fifth That it is manifest from the evidence that the money was taken from Brown in the capacity of Magistrate, that he did not have the money at the time the Order was presented - that no order was presented with he have it, that the money was in the hands of Brown and therefore the Court erred in rendering judgment upon the testimony

Nelson Jack & Simons
Attys for Plffs in error

[9751-4]

Transcript

Ashead

Thos Brown
for use of
Talcott Rawlings
Ellen G Whitall

vs

Richard McDonald

Filed 15. Nov. 1854
Finney D Pusten Clk
By N Johnston D.C.
prepaid $5.00

Richard McDonald v Thomas Brown for use &c

This is an action for money had and received – upon which two questions arise: First will the action lie for money tortiously taken from defendant by plaintiff, by force; and if so whether plaintiff is liable, where the money had passed out of his hands, into another's before action brought

We resolve both propositions affirmatively

The following facts present the two questions. Clemson's trunk was stolen, broken open and money taken from it, though it is not shown how much. Brown, on being arrested on a warrant from McDonald as a Justice of the Peace, and showing the trunk, and confessing that he had six or seven dollars of the lost money, was taken by McDonald ~~and~~ Coleman Boren & others into an upper room at McDonald's house, and searched. No money was found – but Brown stated to them that his money was in his coat pocket in the same room as I understand the bill of exceptions. Thereupon McDonald took a pocket book and wallet from Brown's coat pocket, out of which he took $107.00 or thereabout, carried it down stairs and laid it on the table in the room where the trial or examination took place under the warrant. During the trial or immediately afterwards, Boren took up the money saying he would keep it until Clemson came home to see if it were his money. Boren still holds the money. Before this suit, Brown drew an order upon McDonald for the money, under which it was demanded. He refused to pay it, alledging that he would hold it until Clemson's return – and also that he had not the money – but that Boren had it

[8161-8]

The general rule is well settled that where goods are tortiously taken, and afterwards sold and converted into money, the owner may waive the tort, and recover the money in an action of Assumpsit for money had and received 2 Greenly Ev Sect 117. O'Conley v President & Select men of the City of Natchez 1 Smedes & Marsh R 46 Morrison et al v Rogers 2 Scam R 318 1 Chit Pl 100. 1. 107 & note 4. Jones v Hoar 5 Pick R 290 Lightly v Clouston 1 Taunt R 112. Cummings & wife v Noyes 10 Mass R 435

The only difference perceivable between the case at bar, and those referred to, and many others recognising this rule, is, that these goods were tortiously taken and converted into money; for which money, however, the assumpsit was sustained. The authorities agree that assumpsit will not lie unless there be a conversion into money; and by such form of action the plaintiff, does not recover the value of the goods, but only what they produced upon the sale.

I am not able to make a distinction between a sum of money thus produced by a conversion of goods tortiously taken, and a sum of money tortiously taken. Every reason of the rule will apply, as well as analogy. The money may strictly be considered as received to & for the use of the owner; and he waives only the damages he might be entitled to, as smart money for the tort. It is money that is always recovered, not property. The reason is not applicable to a tortious taking of money, which has a fixed, standard value in law, as to the amount to be recovered, that would apply to property before sale & conversion into money. For in the latter, until conversion, there is no act to be adopted as

in contract, except the trespass or tortious taking
Should he be allowed to waive this alone, it
would in effect, simply convert the tort feasor
into a lawful bailee, and his right would be
to recover the property from him as such, and
not its value; unless it be as in this case already
in money, in which assumpsit is as proper an action.
~~In relation to the second question~~
as trover or replevin would be for goods
I have only to remark in relation to the second
question, that McDonald cannot be allowed
to transfer or discharge his liability either
as a tort feasor, or as in contract, by de-
livery of the property or money to another
Not even, if plaintiff had also the right
to follow the money or property, and charge the
receiver in trespass or assumpsit
It might show a right of election to pursue either
or both seperately, but not a discharge from liability
Judgement affirmed

Richard McDonald
v
Thos Brown for the use &c

Opinion by
Scates J.

Copied

Richard McDonald
Plaintiff in error
vs.
Thomas Brown, who sues for the use of T. Rutlings & E. W. Whitall
Defendants in error

Action of Assumpsit for Money had and Received

Abstract

This was an action of assumpsit, for money had and received commenced by the defendants in error against the Plaintiff in error upon which trial, (which was had in the Pulaski Circuit Court without a jury by agreement of parties at the June Term 1854) at which time the following proceedings were had —

The Plaintiff first introduced as a witness William Jackson who testified in substance that he was present at McDonald's house when Brown - who had been arrested and brought there on a Charge of Larceny, for stealing and breaking open a trunk belonging to James G. Clemson and wife - was brought there and taken up stairs to be searched. McDonald and others were present, at which time McDonald took Browns pocket Book out of his pocket took out the money 105 or 107 dollars and carried it down stairs in his hand. He did not know what was done with the money. —

The plaintiff then introduced as a witness Charles Murphy who testified that he was present when ~~Rutlings~~ Brown one of the defendants in error ~~presented~~ executed the order to McDonald from Brown to pay on the money taken from the pocket Book - which he refused - saying he had not the money but that Coloneu Brown took it and still had it.

The Plaintiff below then introduced James Barnes as a witness who testified that he saw the above order presented to McDonald for payment which he refused saying that

[875-10]

Solomon Brown had the money, that he took it to keep until Clemson returned - who had lost the trunk.

Then the Plaintiff rested his Case

The Defendant then introduced Irwin Brown as a witness who testified that he went in pursuit of a ~~written agreement~~ trunk which had been stolen from a wharf Boat in Galveston - he went with others, on the other of the Olio River and there found the trunk and Brown, he acknowledged that some of the money he had, came from the trunk, Brown was taken back to Ill. side of the River and to Mr Donolds house - was taken up stairs to search him, some time after Mr Donald came down stairs with the money in his hand which had been taken from Brown and laid it down on the table - Brown was present, the trial of Brown for Larceny was commenced, Brown took up the money and put it in his pocket - and said he would take care of it until Clemson came home who owned the trunk

Mrs. Clemson was then called and identified the trunk.

Mrs Brown also identified the trunk, that Solomon Brown got the money taken from Brown and had kept it ever since, that it was never in Mr Donald's possession only while coming down stairs

Thomas Fisher was then called as a witness and testified that he sat with Mr Donald as justice of the Peace upon the examination of Brown - did not know what became of the money -

Upon this testimony the Court rendered a judgment against Mr Donald for 97 dollars and costs

Thereupon he assigns the following Causes of error to wit -

First That the verdict of the Jury was against the law

Second — That the verdict was against the evidence

Third — That the verdict was against the law and the evidence

Fourth — That the court erred in rendering judgment in the case

Fifth — That it is manifest from the evidence that the money was taken from Brown in the capacity of magistrate by Mr Donald, that he did not know the money at the time the order was presented, & that no order was presented which he knew of it, that the money was in the hands of Brown, and therefore the court erred in rendering judgment for the Plaintiffs

Jack & Simons
Plaintiffs Attorneys

Sander on error

Daughtry for defendant in error

[8754-12]

In Supreme Court
November Term 1854

Richard Wm Lowndes
Plaintiff in error

vs

Thomas Brown who
sues for the use of Talbott
Rawlings & C. Whitall
Defendants in error

Taken Yesterday & Sunday
Attorneys for Plff.

Abstract

Appeal
Issued
~~Attachment~~

Thomas Brown
for the use of
Talbott, Rawlings &
Ellis G. Whitall
vs
Richard McDaniel

Subpoenas for
James Harrison
Henry D. Riddle
Presmus W. Stapler
Charles Murphey

[8751-12]

98
140
138

Thomas Brown for
the use of J. Rawlings
& Elis G. Whitall
vs
Richard Mc Donald

The People of the
State of Illinois
To any Constable
of Lewis County
Greeting

You are hereby commanded to
summon Richard Mc Donald
to be & appear before me at my
office on the 17th Inst. at 2 P.M.
the complaint of Thomas Brown
for the use of J. Rawlings & E. G.
Whitall for a feedure to pay him
a certain demand not exceeding
one hundred Dollars & have of make
Return to me
Given under my hand & seal this 8th
9th Aug. 1853

[8751-14]

S M Thompson J. P.

Thomas Brown for
The use of J. Rumlings
J. C. J. Whitell
vs
Richard H. Daniel

Demand $98.00

Justice fee — 31¼

Executed by reading to the within named
This 10th day of August 1843 a true & Lawful
Copy Seen & Filing Court
& Subpoenas $1.00 W. H. Clark Const

Pacific Ins Co
Thomas Brown Owner
J Rawlings & G. Whitall
who sues for the use of
Thos S Appleby
Rebecca McDonald

May term 1854

This deponent says on his oath
he attended Court days in behalf
of the plff in this cause the
present term of Court

Sworn & subscribed 31 day
of May 1854
James M Davidson

Wm Harbison

[8751-15]

Thomas Brown for
the use of J. Rawlings
& E. G. Whitall
vs
Richard McDonald

To Henry D. Ridle
Wm Beerbison
Vernon Scott &
Charles Murphey
Hopkins

you are hereby
commanded to be and appear at my
office on the 15th day of august 1858 at 2 o'clock PM
to testify in a cause wherein Thomas
Brown for the use of J. Rawlings & E. G.
Whitall is Plaintiff & Richard McDonald
is defendant & this you are not to omit
under the penalty of the law
Given under my hand this 9th day of
August 1858

N. McThompson J. P.

[8751-16]

Thomas Bean for
the use of J. Rinking
& C. G. Whitall
US

Richard McDaniel
Subpoena for
Henry D. Ridle Wm
Harlipson Marion
Scott Stephlet

Executed by reading to the
within named this 10th
11th day of August 1853
W H Evans Const

Pulaski COUNTY, ILL., 1854.

to Wm Harbinson & D Ricade, P. W. Stokhill & Chas Murphy &c

The People of the State of Illinois, County of Pulaski

Greeting: We command you that you be and appear before the Circuit Court of said County on the Second day of the term, to be holden in the Court House at North Caledonia for said County, commencing on the 5th Monday in the month of May next, to testify and the truth to say in the behalf of S Rawlings & Co & Whitall in a matter pending in said Court, wherein Thos Brown Pres of Rawlings & Whitall, Plaintiff, and Richard O Donnel, Defendant. And this do not omit under the penalty of the law.

To the Sheriff of Pulaski County to execute and make return of.

Witness, James M Davidge, Clerk of said Court, and the seal thereof affixed at office North Caledonia, 18 day of April A. D. 1854.

James M Davidge, CLERK.

[8751-17]

Box No 6
May Z 1854
Arrest Court

Pltff

Thos Brown
who sues for the
use of
T Rawlings
vs
R McDonald

Wm Harbison
H. D. Riddle
P. W. Stophlet
Charles Murphy

Came to be heard this 1st day of May 1854 before Charles Murphy J.P. M. B. Ashmore Deputy for J. W. Hughes Const

Judgment for 100 Dollars 15 Cts Costs total $1.25

Know all men by these Presents that we Richard McDonald and H Boren are held and firmly Bound unto Thomas Brown for the use of T Rowlengs and E G Whitall in the penal sum of two Hundred and five Dollars Lawful more of the United States for the Payment of which well and truly to be made we bind ourselves our heirs and administrators Jointly and Severally and firmly by these Presents Witness our hands and seal this twenty ninth day of August 1853 the Conditions of this above obligation is such that whereas the said Thomas Brown for the use of T Rowlengs and E G Whitall did on the 15th day of August A D 1853 before S M Thompson a justis of the Peace for the County of Pulaske and State aforesaid obtain and Recover a Judgment against the above bounded Richard McDonald for the sum one hundred dollars and fifty two cents from which Judgment the said Richard McDonald has taken an appeal to the Circuit Court of the County of Pulaske aforesaid and State of Illinois Now if the said R McDonald shall Prosecute his appeal with effect and shall Pay whatever judgment may be rendered by the Court upon dismissal or trial of said appeal then this above obligation to be void otherwise to Remain in full force and effect

Approved by me at my office this 1st day of september AD 1853 S M Thompson JP

Richard McDonald (Seal)
H Boren (Seal)

[8751-18]

Appeal Bond

Filed 12 day
Sept 1853
J. H. Davidson Clk

Thomas Brown for the use of J Rollings and E J Whitall
vs
Richard McDonald Action on account demand $98

Summons Issued on the 7th day of August 1853 Directed to W H Carnes constable Returnable on the 15th day of August A D 1853 at 2 o clock pm which summons was returned Executed August 15th 1853 2 o clock pm the plaintiff appeared the Defendant did not appear the trial of the suit was delayed one hour at which time the account was duly proven it is therefore considered that the plaintiff Recover of the Defendant the sum of Ninety Eight dollars Debt together with his costs of suit and that he have Execution therefor.

N M Thompson J P

State of Illinois } I do hereby certify that the foregoing
Pulaski county } Transcript and papers contain a full and perfect
Statement of all the proceedings had before me in the
~~fore me in the~~ foregoing Entitled Suit Given under
my hand this 1st day of September A D 1853

N M Thompson J P (Seal)

Fee bill.

Docketing suit 12½ Subpoena 18¾ summons 18¾	50
A & oaths 12½ Bond for cost 25 Entering Judgment 25	62½
Appeal Bond 50 transcript 25	75
	$1.87½
Constables cost as per return. }	
Wm H Carnes constable }	1.65
Witness fees	
~~J H~~ H J Riddle George Murphey, 1 day Each	1.00
Total	$4 52½

the falone is a true bill of the costs in the foregoing suit

N M Thompson J P

[8751-19]

Wm J Spence
vs
S Jackard Transcript

Filed 18th Sept
1853
Larrin Davis
Clerk

Richard McDonald
Plaintiff in error
vs.
Thomas Kearse who sues for the use of Talbott Rawlings & Co.
& Whitall
Defendants in error

Action of assumpsit for money had and received

Brief

1st

If the injury complained of be private and distinct from the act of the defendant the remedy in form must be ex delicto. Vide 1 Chitty's Pleading 124 – Trover may be supported 1 Chitty's Pleading 146. 147. 149 & reference m.

2nd

When personal property has been taken tortously, the plaintiff cannot waive the tort and bring assumpsit for money had and received, unless the property has been reduced to money or money's worth – And when Bank bills are taken – before the defendant is liable in assumpsit – the Plff. must show an actual conversion. Willet vs. Willet 3. Watts Rep. 277 – Pritchard vs. Ford 1. Y. & J. Marsh 543 –. Sanders vs. Hamilton 3 Dana 552. Hatchet vs. Watkins 2. Hill & Filens 326. Webster vs Drinkwater 1. N Hampshire 151. King vs McDaniel 4 Call 451. Foster vs. Tucker 3 Grant 458. 2 Scammons Reports – do not recollect Case – page 318

3rd

If after property or money be taken wrongfully, or carrying away rectifies the party injured to his action of Trover. 1 Chitty's Pleading 153. 4. Rickwitt vs. Carroll 3. Bing 444 –. 11 Moore 335

4th

When a party sues in an action of assumpsit for money had and received, he so far confirms the defendants acts that he cannot deny his right to receive it Vide Estwick vs Hugg 1 Doll. 322. Doma vs. Pegg. 1 Blackf 181

5th

The party committing a tort cannot be charged as on an implied assumpsit – the tort being waived, unless some benefit has actually accrued to him. Vide Chitty on Contracts 607. Webster vs Drinkwater 5 Grenl. 319

J. Jack & C. K. Simons
Atty. for Plaintiff in error

In the Supreme Court
November Term A.D. 1854

Richard McDonald
Plaintiff in error
vs.
Thomas Brown who
sues for the use of Talbott
Rawlings & E. G. Whitall
Defendants in error

Brief
Jas K. Simons
Plffs Attorney

[C-1267]

State of Illinois } The people of the State of Illinois
Pulaski County } Sends to the Sheriff of said County
Greeting. We command you that you summon
Thomas Brown who sues for the use of T. Rawlings
and E. G. Wheldon if in your County to be and appear
before the Circuit Court of Pulaski County on the
1st day of the term thereof at the Court House in
Mt Caledonia on the 5th Monday in the
month of May next to answer Richard
McDonald of a plea of law appeal ~~in Debt~~
from the decision of A. M. Thompson Esq
a Justice of the Peace. And have you
then and there this writ.

Witness the Clerk and the Seal
of said Court at Office in Mt
Caledonia January 17th AD 1854
Samuel M. Davison Clerk

[8751-22]

No 6, Continuance
Peremptorily
Mary Term 1854

Summons

Roland McDonald
vs
Thos Brown

The within Summons is not found in the County of
This March 16th 1854 Hill. Blackburn Sheriff
For H. W. Weathers D.S.

Refused Not found

~~The County Court of~~
~~Pulaski County Ark~~

Thomas Brown for use of J. Rawlings & C. F. Whitell

vs

Richard McDonald

~~on behalf in Debt~~

I do hereby enter myself security for costs in this cause, and acknowledge myself bound to pay or cause to be paid all costs which may accrue in this action either to the opposite party or to any of the officers of this court in pursuance of the laws of this State

Dated this 8th day of August A.D. 1853.

Approved August 8th 1853
N M Thompson J P

W W Mayfes

[9251-23]

Thomas Brownfo
vs
Richard McDonald

Aug 9th 1853

Richard McDaniel Dr.

To Thomas Brown to Mary hus &

Recd on the 5th day of July 1853

1.05

To Cash Recd 7.00

leaving Bal due 8.98.00

Ty Rutledge for

Thom Brown

[9751-04]

Act filed
Hon Brown
MS
Richd, McDonald

954
5
103

July 5th 1853

Mr Richard MC Donnell Sir you will Please to let J. Rawlings & Elis Whitall have my Money & Pocket Book that you have in your posesion a bout one hundred & seven dollers as I have gave it to them for a valuable consideration

his
Thomas X Brown
mark

Attest

Charles murphey

[9751-55]

Brown for the use &c
vs
R McDonald

Defts. in error
Authorities.

This was an action commenced originally ~~commenced~~ before a justice of the Peace in Pulaski County & judgment for the pltff below & an appeal by McDonald to the Circuit Court of Pulaski a jury & verdict for for Brown for $ & costs of suit.

The evidence is embodied in a bill of exceptions and shows in substance

That McDonald demanded of Brown his Money Brown told McDonald his money was in his Browns Coat pocket. McDonald took ~~out~~ from the Money of Brown out of his pocket, and carried it down stairs in his own hands away from the person of Brown and retained it.

That the pltff Browns Money amounted to the sum of $105. or 107 of that sum he Brown stated the sum of $8 he retained and was the money by Robinson ~~by watching~~ ~~the Station bounds~~ leaving the balance of $97. which was his own Money which McDonald has in his possession.

That demand was duly made for the Money, and a refusal to pay the same over to the order of Brown pltff

It was contended below by the defendant that the taking was a trespass and this action would not lay. pltff could not maintain the last. if any was committed in taking & converting the Money by Deft McDonald That pltff must sue in Trespass or Trover.

[8751-26]

In answer to this proposition by Defts Counsel
2d denied that it was a trespass that being the point of the fact.
See Greenleaf sec § 117. This action is likened to
a Bill in Equity and may in general be sustained
by evidence showing that the defendant has
received or obtained possession of the money
of the plaintiff which in equity & good Con
science he ought to pay over to the plaintiff
It is a liberal action in which the
plaintiff waives all tort trespass
and damages and claims only the money
which the defendant has actually
received. Mate v. & authorities there cited
But there is no evidence which shows that
the money was taken against the will of Brown
do " § 118. Bank notes is to be regarded as
money for the purposes of this action

See 1 Smedes & Marsh p 31 Overby vs Gatching

When an intruder or trespasser upon a wharf
collects wharfage of steamboats, the owner of
the wharf may waive the trespass and recover the
amount received in assumpsit for money had
and received
1st United States Digest p 180. § 143.

See Chitty on Contracts p 606 Note 1 there need be no privity of
contract except that which results from one more
having another money, which he has not a right
conscientiously to retain, in order to support this
action,

Richard McDonald
vs
Brown who sues
for the use of J Rawlings
error to Pulaski

The Deft in error relies upon the following authorities and points to sustain the Judgment of the Court below

1st where property or money belonging to another has been taken into custody the owner may claim the tort and bring assumpsit for money had and received and all the owner has to do is to prove that the property or money is his 1 Stephens pleading 286

2 If the owner has a right in good Conscience to receive back his money the action will lie In Chitty on Contracts title Money paid received

3 Nonsuit will lie if an improper attachment of a persons estate to extort money from 1 Stephen 334

4 No Motion was made for a New trial Barber settlers 4th Sil 408

R S Robertson for
defendant in error

5th a New trial will not be granted unless for strong and urgent reasons — when submitted to Court Elbings et al vs Huntington 2 Scam 538 See also Webster vs Victor 296
it must palpably appear testimony was witheld Concealed Drummond et al vs Thornton et 354

R S Robertson atty for
deft in error

McDonald

Bonn

Bishop
Arthur
Ezra

Richard McDonald plff in error

vs

Brown administrator

for the use of J Rawlings deft in error

" Error to Pulaski

The plff in error relies on the following points as grounds of a reversal of the Judgment rendered against him in the above styled Cause

1st The Assumpsit for money had & rec when there is no express or implied Contract between the parties & the money or property has been tortuously taken - it is incumbent on the owner to prove a clear & undisputed title to the money or property Lee vs Hunt 1 Bann & Ces 94 1st Stephen on pleading 286

2 It must appear beyond a doubt that the plff had a right in good Conscience to receive the money

3 The mere receipt of money from Brown by McDonald was evidence of an antecedent debt - but the Circumstances attending upon the receipt of the money been unexplained - and the explanation releases McDonald - clearly showing that he was acting as an officer of the Law & only received the money for the purpose of a Judicial examination 1 Stephen on pleading

4th There must be a Conversion of the money to his own use proof upon McDonald Can be made both - by showing that he either disposed of money or having it upon upon demand to to give it up

[8751-28]

5th In action for money had and received the plff must prove what specific sum he is entitled to 5 D, & R 500, 3 B & C 626, R & M 184

6th The plff Brown would himself been liable to a cop action Sampson v Simon 3 Campbell 296 1 Stephen 328

7 That there was at least a Colour of right in Another to the Money in another person viz Clemson or Colman Brown his agent and McDonald received the Money if he received at all under a Colour of right Last the Money of Clemson who took had been broken open & the right of Clemson could not be tried in a suit with McDonald - & Brown had no right then for to sue McDonald, more especially as it clearly appears that McDonald was not in possession of the Money when the suit was brought, & the person who claimed it had actually received it under a Colour of right 1 Stephenson pleading 350

No 32

November 1852

Richard McDonald

vs

Homer Bowen - use &c

Rawlings & Wheatall

Appeal from Sedgwick

8751

Opinion by Scott J.

Judgment Affirmed