

8728

No. _____

Supreme Court of Illinois

Miles Flinn

vs.

Lucy Barlow

Be it remembered that Miles Almon, one of the defendants, and impleaded before G. W. Bullom Esq. a justice of the peace in and for Crawford County, with Daniel Lippinfield, Daniel Bougher & Michael Bougher, for trespass to personal property by Lucy Barlow, caused an appeal from the decision of the said justice of the Peace to be taken as by law provided, and the following transcript of proceedings in said cause, before said justice to be filed in the office of the Clerk of the Circuit Court for said Crawford County, with his appeal bond &c. to wit,

Lucy Barlow

Assumpsit

Daniel Lippinfield }
 Daniel Bougher }
 Michael Bougher }
 Miles Almon }

February 24th 1852 plaintiff filed her account against said Defendants herein &

J. P. costs		for the sum of \$10.00 whereupon a
Dock	12 1/2	summons issued in this case citing
Summons	18 1/4	defendants to appear on the 6th day of
Subp	18 1/4	March at O'clock P.M. also a subpoena
Subp	18 1/4	for James Eagleton Alexander Eagleton
Subp	18 1/4	Guy Eagleton & Finley Eagleton as mit
Subp	18 1/4	messes for Plaintiff - Feb 24. Spu issu
administering		id for Able Prior by order of Plaintiff
costs	75	Feb 24 also a subpoena for Lessa Higgins
Jud	25	Thomas McCosquin Daniel Seass & John
Boards of		Bougher for Defendants March 6th
Dock	25	Spu issued for John C. Kent Matison
		Kent & Joseph Kent for Defendants Feb
Constables costs	24	all delivered to A McCormick cons
Serivg. dup	\$2.70	table to sever. March 6th 1852 the
Serivg subp	\$4.00	party ^s came and issue being joined
Witness fees	\$6.00	and the cause duly heard It is
		considered that the Plaintiff Recover
		the sum

the sum of One dollar and fifty cents together
with costs of suit

G. W. Cullow J. P.

State of Illinois }
Crawford County }

I hereby certify that the above is
a true transcript of the Record in the above entitled
Cause as had before me all the papers are herewith
Enclosed

G. W. Cullow J. P. (Seal)

which said transcript, and other papers sent up by
the said Justice in said cause on appeal of the
said Miles & Davis remain on file in my office
among the records thereof &c.

And afterwards also further
Be it Remembered, that at the September
Term A.D. 1852 of the circuit Court of Crawford
County, State of Illinois. There was a
Case pending on appeal, wherein Lucy
Barlow was Plaintiff and Moiles Flinn Def-
endant on which the following proceedings
were had to wit

Lucy Barlow

vs

Moiles Flinn et al.

On appeal

Ordered that this
Cause stand continued until the next
term of this Court and that Defendant
have leave to amend appeal bond herein &c

And afterwards to wit at the March
Term thereof, A.D. 1853 the following order was
had.

Lucy Barlow

vs

Moiles Flinn Impleaded
with Daniel Safferfield
Michael Bougher and
Daniel Bougher

On appeal

Now at this day
comes the said Plaintiff by Robt + Kitchell
her Attorneys, and the said Moiles
Flinn, who is appellaut by Constable
& Sterrett his Attornies. Whereupon comes
a jury of twelve good and lawful men
to whom the trial of this appeal is
submitted to wit, William Waggonseller,
Jonah Rice, Charles Morris, John Kendall,
Lindsay Laws John Sheets, William

Brown, William F. Allen, Joseph Moaleone, Richard Willison, John Cunningham and John Templeton" who after hearing the evidence retire to consider of their verdict with instructions only delivered by the Court, to write out their verdict, sign the same severally and deliver it to the officer in attendance upon them then separate, to meet the court on the following morning to answer to their verdict &c

and afterwards to wit, on the second day of said Term the following Order was had

Lucy Barlow	
vs	Appeal
Niles Flint Impleaded	
with Daniel Lappanfield	
Michael Bougler and	
Daniel Bougler	

Now at this day come as the Jury Empannelled herein into Court and present their verdict as follows. We the Jury find a verdict in favor of the plaintiff which verdict not being sufficient in Law, it was moved by the plaintiff that the Jury be again sent, to consider of their verdict - which was objected to by the Defendant upon the ground that they had been virtually discharged &c and asked the Court for a new trial in the premises, upon which motion and Cross motion the Court not being advised took time &c



and afterwards touts, on the same
day of the said term the following
order was had

Lucy Barlow }
vs } Appeal
Miles Filim }

Now again come the
said parties by their attorneys, and the
Court now being advised what Judgment
to render on the Motion heretofore
made. It is considered and adjudg-
ed that the motion of the defendant
for a venue de novo be overruled. It
is further considered and adjudged
that the motion of the Plaintiff be susta-
ined. whereupon again comes the jury
empannelled herein; who under instru-
ctions of the Court again retire to con-
sider of their verdict, and afterwa-
rds returned into Court with the
following verdict. We the jury find
the defendant guilty and assess
the Plaintiffs damages at two doll-
ars. Whereupon the defendant Miles
Filim moved the Court in arrest of
judgment on the verdict so render-
ed and filed the grounds of his said
motion in the Court that the Court
had not jurisdiction of the cause
because Daniel Sappenfield Michael
Bougher, and Daniel Bougher, has
not been made parties to the pro-
ceedings in this Court as required by

Law, Whereupon the Plaintiff Moved
the Court for leave to enter a nolle
Prosequere as to said Sappenfield and others,
and for Judgment upon the Verdict
of the Jury against defendant Miles
Flinn. Whereupon the Court not being
advised took time &c

And afterwards "to wit" on the fift
day of said Term of the Court the foll
owing order was had

Lucey Barlow  Appeal
vs
Miles Flinn 

Now at this day
again comes the plaintiff by her
attorneys and the said Miles Flinn
by his attorneys and the Court now
being advised what judgment to render
on the said motion in arrest of
Judgment, and the said cross motion
for leave &c It is ordered and adjudged
by the Court that the said plaintiff
have leave to enter a nolle Prosequere
as asked, which is done to the said
Daniel Sappenfield, Michael Bougher
and Daniel Bougher, and the Jud
-gment be now rendered on the verdict;
Wherefor it is finally considered and
and adjudged by the Court that the
said Plaintiff recovers of the said defe
-ndant Miles Flinn the said sum of
two dollars her damages aforesaid,
by the Jury aforesaid assessed, together

with the costs and charges about her
suit in this behalf ~~expended~~ as well
before the Justice of the Peace as in
this Court expended and they have
Execution &c.

State of Illinois }
Crawford County } S. William Barbee
Clerk of the Circuit
Court within and for said County hereby
certify that the above and foregoing to
which this is annexed is a true and
correct copy of the Record of the order
and proceedings had in the above
entitled cause

Given under my hand and
official seal office at Robinson
this 20th day of October A.D.
1853

William Barbee
Clerk

County Court of Crawford County

Bill of Costs

September term A.D. 1852

Lucy Bartow
vs
Milo Elm

Appeal

Filing appeal papers	\$	50	
Issuing Writs & filing		40	
Sheriffs fees on same			
Costs before, J. P. (Cullorn)		15 02 1/2	
Taking appeal bond		40	
Doct. & printing out for trial		10	
Issuing Supersedeas		40	
Sheriffs fees on same		80	
Filing process for P'tiff			05
do - do - do Def'dt		05	
Issuing 3 Subs for Def'dt		1 20	
Sheriffs fees on same, (McCombs)		1 5 1/2	
Issuing 3 Subs for P'tiff			1 20
Sheriffs fees on same, (McCombs)			3 7 1/2
Comme do			2 05
Witness fee for depy, John Baker, four days,		2 00	
Able Prior - do do		2 00	
David Sappensfield "		2 00	
Ap'de on same & filing		30	
Ent = order continuing		20	
Making bill of costs		30	
Entry app. P'tiff & atty			15
Entry " Def'dt do		15	

March Term A.D. 1853,

\$26.91 \$7.20

Doct. & printing out for trial		10	
Filing new bond for Def'dt		40	
Entry - order setting aside		20	
Calling & swearing Jury -		15	
Sheriffs fees on same		10	
Entry first verdict of same		15	
Filing same		05	
Entry app P'tiff & atty			15
do do Def'dt do		15	
Carried over			

\$28.20 \$7.35

Amount brot forward	\$2820	- \$7.35
Entry second verdict of jury	15	
Jury fee	300	
Ent order on Tuesday	20	
" " Nolle Prosequi	20	
" Motion in arrest of Judgmt	20	
" Order overruling same	20	
" Cross Motion	20	
" Order Sustaining same	20	
" Final Judgement	25	
" Court taking time &c	20	
" Satisfaction Judgt	15	
Filing 3 papers for Pltff		15
do 4 do Defd	20	
Issuing 3 Subps for Pltff		120
Sheriffs fees on same		200
affes of witnesses & filing (Pltff)		70
Swearing same in Court		35
Witnesses for Pltff, Brooke Barlow 11 days. Sept		200
George & Barlow 4 " "		200
Brooke Barlow, 2 " March		100
George & Barlow 2 " "		100
James Daytton 2 " "		100
Amidly, S. Daytton 2		100
Alex M Daytton 2		100
Witnesses for Defd, Alfred Prior 2	100	
John Sappunfield 2	100	
affes of same & filing	20	
Swearing of witnesses in Court	20	
Filing 3 papers for Defd	15	
Issuing Supersedeas	40	
Sheriffs fees on same	80	
Issuing 3 subps for Defd	120	
Sheriffs fees on same	275	
Making Bill of Costs	30	
Issuing fi fe & filing	40	
Ent Sheriff return & doctt	20	
	\$4195	\$20.75
less as pr Pltff cash Bill		185
Carried over		\$18.90

Amount but over

\$41.95

\$18.90

Lucey Barton

vs

Miles Thim

} Appeals

} P'tff separate cost bill

Filing Receipts &c for P'tff

05

Issuing & Subpe do

80

Sheriffs fee on same

1 00

affde & writs for P'tff & filing

30

Swearing same in Court

15

Witnesses for P'tff, Alex M Waghten & days

1 00

9th April 1853, Issuing fee bill & seal

40

Ent Sheriffs return & doct

20

Copy of proceedings for Supreme Court

2. 00

Copy of Cost bill sealed

45

\$22.80

100

44 41

State of Illinois ss }
Waukegan County } 3

I William Barber, clerk of
the Circuit Court, in and for

said County, do hereby certify, that the foregoing
cost bill, to which this is annexed, is a true and
correct copy of the same in the foregoing entitled
Cause

Witness my hand, and the seal of said
Court here affixed, at Robinson

This 9th day of October Ad 1853.

William Barber Clerk

Luy Badou

or

Miles Plann

Copy of Case
Rice

State of Illinois
1st Grand Sup. Court Division

Supreme Court, Illinois
November Term A.D. 1853

And the said Miles Flinn
Plaintiff in Error herein, by Counsel his attorney,
now here comes, and says that in the proceedings
of the Crawford Circuit Court had herein, ma-
nifest error hath intervened to his prejudice
& injury, and assigns the following as specific
errors therein, among others as in the above record
hereof shown; that is to say;

1st The said Circuit Court erred in entertain-
ing jurisdiction of the said cause, no pro-
cess ever having issued against the said Daniel
Sappingfield, Michael Dougherty & Daniel Bann-
^{of defendants of the said Flinn in the cause before the J. Pepp-}
sher to bring them into the said court, which
was necessary, Flinn alone having appealed
from the judgment of the Justice of the
peace

2nd The court erred in allowing the jury to be
recalled & under instruction to resume
the consideration of their verdict after having
been discharged & in receiving said second
verdict -

3rd The court erred in overruling the motion
in arrest of judgment & in permitting the
plaintiff to dismiss his suit as to the said Sap-
pingfield, Dougherty & Dougherty

4th The court erred in rendering judgment
upon the verdict of the jury -

All of which the said plain-
tiff in error is ready to verify, wherefore
he prays that the foregoing record of the said

proceedings in the said cause, may be in-
spected by this court, and the said errors
all other therein apparent, corrected by
the judgment thereof in due form of
law; and that he may be restored to
all and singular his rights, &c. in the
premises heretofore by the error aforesaid
so wrongfully denied & withheld
as by the law of the land &c. shall be
just & proper

Joinder in Error.

A. Kitchell proff.

Constable, Attorney
for Plaintiff in Error

Let a supersedeas issue on the pet. in Error, with
as surety, entering into bond in the penalty of \$100, pay-
able to deft. in Error, and conditioned as the law directs.

July 12th 1854.

S. H. Treat C.J.
Wp. Court.

Record
48

Miles, Alex

Plaintiff in Error

vs.

Lucey, J. Parlow

Defendant in Error.

Error to Worcester.

Filed 24. Nov. 1854

Hiram & Preston

Att. of Schuster & Co.

Constable, Attorney

Authorities cited

1st Point - That the Circuit Court should have sustained
the motion in arrest of judgment - See Rev. Stat. 1845 -
Chap. IX. Sec. 64. page 324

2nd Point - That the court should not have allowed the Plaintiff
below to have entered a Nolle Prosequi at the time when the
same was done - See Rev. Stat. Chap. XXXIII. Sec. 29. page 417.

Walter Flynn }
Lucy Barlow }

Seates Justice. By the Statute (Rev. Stat. p. 324, sec. 63.) one of several plaintiffs or defendants may appeal from judgments of Justices of the Peace to the Circuit Court whereupon supersedeas shall stay all further proceedings upon the judgment.

By section sixty-four the other parties may be brought into ~~Court~~ the Circuit Court by summons and service at the first term, and if not found, the cause shall be ~~found~~ ^{tried} of the second term: and by section sixty-eight the "rights of the parties shall be the same as in original actions."

Flynn alone appealed from a justice judgment of a justice, rendered against him and three others, in an action of trespass to personal property - No summons ever issued to the others from the circuit court. At the second term a jury was empaneled, and retired under instructions to write and seal up their verdict, and ~~at separate~~, and meet the court the next morning - They found a verdict "in favor of the Plaintiff" which upon being opened and read in court, was deemed informal and insufficient, and the jury were again sent out under instructions to find formally and fully, against the objections of Flynn.

We think the Circuit Court acted properly in sending them out again to complete such a finding and verdict, as would determine the rights of the parties. They returned an amended verdict, "We the jury find the defendants

guilty, and assess the plaintiffs' damages at two dollars."

Hereupon Flinn moved in quest of judgment, because the Court had no jurisdiction of the cause, and because the other defendants had not been brought into Court.

The Court, upon ~~the~~ cross motion of Paulson, allowed her to enter a nonle prosequi as to the other defendants, overruled the motion in quest, and rendered judgment upon the ~~verdict~~.

This is assigned for error, upon the twenty ninth section of the ~~practice act~~ Practice act (Rev. Stat. p 417) which provides that plaintiff shall be debarred from suffering a non-suit, unless he do so before the jury retire from the bar.

There is evidently a misapplication of the meaning of the statute. It can have no application to parties not before the Court for trial. Had a summons issued, and been served, or without service upon the lapse of a term, the court could have proceeded to hear the whole cause, as to all the parties, according to the statute. But without such actual or constructive service, the plaintiff alone, was before the court on trial, and as to him, the defendant could not enter a non-suit after the jury retired.

But the cause stood in court as an original suit; and as such, we think it would not be questioned, that wherefore one is sued in trespass, and service upon one, he may plead and proceed to trial - and that plaintiff may at any time, either before or after judgment against him, enter a non-suit as to the others. But whether the analogy holds further, and defendant can go on and summon the others afterwards, we give no opinion. It may with great plausibility be contended, that proceeding to trial without attempting to summon the others, is itself virtually a non-suit.

Judgment affirmed

I Divison
Nov^r Dec^r Term 1854

Miles Flour

v

Lucy Paulson

Scates

No 48

November 1854

Miles Glinn

vs

Lucy Barlow

Error to Crawford

Opinion by
Scates, J.

87 28

Judgment Affirmed

No 48.

Miles Glinn

vs

Lucy Barlow

Error to Crawford

Opinion by
Scates, J.

Judgment Affirmed