No. 8499

Supreme Court of Illinois

People, ex. rel.,Keyser

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vs.

Charles Cugua et al

In the Supreme Court, State of Illinois.

FIRST GRAND DIVISION,

At Mount Vernon----November Term, A. D., 1861.

THE PEOPLE, &C.
for use of Valentine Keyser
vs.
CHARLES CUQUA, et al.

Error to Wabash.

ABSTRACT.

This was an action of debt commenced by plaintiff's against defendant, Cuqua, as principal, and the other defendants as securities, on the official bond of said Cuqua as Sheriff of Wabash County.

5] The declaration sets forth the election of defendant Cuqua, and the 7] execution of the bond in the usual form, and after setting forth that it 8] was the duty of said Cuqua to execute all process, &c., proceeds as follows: "And said plaintiff's further aver, that under and by virtue of the laws of this State it became, and was the duty of said Cuqua, so acting and being such Sheriff as aforesaid, whenever an execution should be placed in his hands to execute and the same should be by him levied upon personal property in his said County, and such property should be claimed by any person or persons other than the defendant or defendants in such executions so levied; that whenever and wherever any such person or persons not defendants in such execution aforesaid should claim such property so by him, Charles Cuqua, levied upon as the property of such person so claiming the same, and should then and there give to him, said Charles Cuqua, notice in 9] writing of his or her claim and intention to prosecute the same, it then and there became his duty, as such Sheriff, forthwith to summon a jury of twelve respectable householders of his County to meet at a place designated by him, the said Charles Cuqua, so acting as such Sheriff as aforesaid, the said time to be before the day appointed for the sale of said property, and then and there proceed to inquire by the oath of said jury whether the right of such property be in such claimant or not. And said plaintiff's aver and charge that heretofore, to wit: on the 13th day of April, 1857, two executions were issued from the office of the Clerk of the Circuit Court of White County,

Illinois, directed to said defendant, Cuqua, so being Sheriff of Wabash County, to execute, the first of said executions numbered 2,196, in favor of Isaac Keen and Cyprian Preston, trading under name, &c., and against Washington Wood and John Albeitz—the record of said executions numbered 2,197, in favor of Charles G. Shaw and others, trading, &c., and also against said Washington Wood and John Albeitz, which said executions came to the 10] hands of said defendant, Charles Cuqua, to execute on the 16th day of April in said year 1857, aforesaid,

And said plaintiff's further aver that afterwards, to wit: on the 21st day of said month of April, 1857, said defendant, Cuqua, so being such Sheriff as aforesaid, unlawfully and wrongfully levied said executions upon a large stock of dry goods, groceries, boots and shoes, hats and caps, hardware, queensware, glassware and woodenware, of great value, to wit: of the value of three thousand dollars, the same then and there belonging to said Valentine Keyser, for whose use the said People sue, of which the said defendant then and there had notice; and said defendant, Cuqua, so being Sheriff of Wabash County, thereupon proceeded to advertise said property of said Valentine Keyser for sale to satisfy said executions against said Wood and Albeitz.

And said plaintiff's further aver that in pursuance of the Statute in such case made and provided, said Keyser, for whom the said People sue, then and there, to wit: on the day and year last aforesaid, and before the day fixed by said Cuqua for the sale of said property, gave to him, the said Cuqua, so being such Sheriff, a notice in writing of the claim of him, the said Keyser, to the property aforesaid, so by him said defendant Cuqua levied on, and said Keyser then and there gave said defendant, Cuqua, a notice in writing of his intention to prosecute such claim to said property according to law.

11] And said plaintiff's further aver that said defendant, Cuqua, so having notice of the claim of said Keyser of his intention to prosecute the same unlawfully and knowingly did then and there refuse to said Keyser a trial of the rights of said property as allowed to said Keyser by law and as it was then and there the duty of said Cuqua to do. Whereby said stock of goods and every part and parcel thereof became, and was wholly lost to said Keyser. By means whereof and by force of the statute made and provided, an action hath accrued to said plaintiff's to demand and have of and from th e said defendants the said sum of ten thousand dollars above demanded for the use aforesaid. Yet the said defendants, although often requested so to do, hath not, as yet, paid the same or any part thereof, but have hitherto wholly neglected and refused, and still do neglect and refuse to pay the same for the use aforesaid or any part thereof."

12] The second count of the declaration sets forth the execution of the bond and duties of the Sheriff's substantially as in the first count, and then proceeds as follows:

"And said plaintiff's aver that heretofore, to wit: on the 13th day of April, 1857, two executions were issued from the office of the Clerk of the Circuit Court of White County, Illinois, and placed in the hands of said defendant, Cuqua, first No. 2,196, in favor of Keen and Preston; the second No. 2,197, in favor of Shaw, Buell and Barbour, and both against Washington Wood and John Albeitz, which said executions came to the hands of said defendant, Cuqua on the 16th day of April, 1857, and said plaintiff's further aver that afterwards, on the 21st day of April, 1857, said defendant, Cuqua, without calling on said defendants in execution for real estate, as the law bound him, unlawfully and knowingly levied said executions upon a stock of dry goods, groceries, boots and shoes, hats and caps, then and there belonging to said Keyser, of great value, to-wit, of the value of three

thousand dollars, of the ownership of which said personal property said defendant, Cuqua, then and there had notice. And said plaintiffs further aver, that said defendant, Cuqua, having so levied upon the personal property of said Kyser aforesaid, then and there proceeded to advertise the property so levied upon for sale. And said plaintiffs further aver, that in pursuance of the statute in such case made and provided, said Kyser gave notice to said Cuqua, so being Sheriff as aforesaid, of his claim to said property, and of his intention to prosecute such claim. And said plaintiffs further aver that said Cuqua, so being Sheriff as aforesaid, and having notice of the claim to said property levied on by him, unlawfully and wilfully did then and there refuse to allow said Kyser a trial of the right of property in and to said personal property so by him levied upon as aforesaid, and as by the statute in such case made and provided said Kyser has a right to. Whereby said stock of goods aforesaid, and every part and parcel thereof, were wholly lost to said Kyser. By means whereof," &c., closing with the usual breach.

21] The defendants demurred to the declaration and assigned the following causes: "That the allegations in said 1st and said 2d counts in said declaration are too general. 2d. Said first and second counts do not state when any notice was given of damages of Keyser, for whose use suit was brought."

22] The Court sustained the demurrer, and entered judgment against plaintiff's for cost.

The only error assigned is:

"The Court erred in sustaining defendant's demurrer to the declaration of plaintiff's.

BRIEF FOR PLAINTIFFS IN ERROR.

It was contended on the argument below, that the liability of the Sheriff should first be established by an action against him alone, before his securities can be made liable. This may once have been the practice; but if so, is now, we think, changed by our statute. Scates Comp. p. 1125, sec. 15. And in *The People* v. *Wardlaw et al.*, 24 Ill. Rep. 570, a declaration against the Sheriff and his securities was sustained.

The first special cause of demurrer is, that the declaration is too general. Under this assignment it was urged that the declaration ought to have described *particularly* each article of goods claimed by Kyser. From the very nature of the property in question, that would be almost an impossibility. It could not be expected that Kyser would know every article in a stock of goods amounting to $3,000. After the levy, the goods were in Cuqua's possession, and Keyser had no means of obtaining any more definite description. Before the levy he could not be expected to know that a levy would be made, and therefore provide himself with a more full description of each article. The declaration describes the property sought to be recovered as fully as he was capable of doing.

As to the second cause of demurrer, its force is not perceived, and we presume it was inserted for form.

JOHN M. CREBS,

EDWIN BEECHER,

For Plaintiffs in Error.

Guardian Office print, Mt. Vernon.

The People,

v.

C. Cuppua et al,

Abstract.

In the Supreme Court, State of Illinois.

FIRST GRAND DIVISION,

At Mount Vernon----November Term, A. D., 1861.

MARY SHERIDAN,
vs.
MARSTON M. DOYLE.
} Error to Hamilton.

ABSTRACT.

This was an action on the case commenced by the defendant in error against the plaintiff in error in the White County Circuit Court, and changed to Hamilton County.

5] The declaration avers that the Little Wabash river is a navigable 6] stream—that said Doyle had, on said river, two flat-boats loaded with 15] hoop-poles, and destined to the most advantageous market on the Mississippi river—that said plaintiff Sheridan had dammed up said Little 16] Wabash river so as to prevent the navigation thereof by flat-boats, &c., —that she suffered it to continue so obstructed and did thereby hinder and prevent the said Doyle from descending said river with his flat-boats aforesaid; and that thereby said boats and poles were lost to said Doyle.

20] Plea, not guilty. On the trial the jury found a verdict for plaintiff below for $1,000, upon which verdict was entered.

18] The bill of exceptions shows that plaintiff below called a witness and offered to prove by him what hoop-poles were worth *on the Mississippi river* at the time of the injury complained of, deducting therefrom the expense of transportation—to which defendant below objected; but the objection was overruled by the Court and the witness allowed to answer; to which decision defendant below at the time excepted.

The defendant below asked the Court to instruct the jury as follows: "That unless Mrs. Sheridan (the defendant) built the dam across the river, or the same was built by her orders, she is not liable under the pleadings in this case, and the jury should find the defendant not guilty," which instruction was refused by the Court and defendant below excepted thereto.

ASSIGNMENT OF ERRORS.

1st. The Court erred in overruling the objection of the said plaintiff in error, and permitting the witness referred to in the bill of exceptions to give in evidence and state what hoop-poles were worth on the Mississippi river in the spring of 1855.

2d. The Court erred in refusing to instruct the jury at the request of said plaintiff in error that unless Mrs. Sheridan (the defendant below) built the dam across the river, or the same was built by her orders, she is not liable under the pleadings in this case.

3d. The Court erred in refusing the instruction asked for by the plaintiff in error, and which is copied into the bill of exceptions.

4th. The Court erred in refusing to set aside the verdict and grant a new trial, and in giving judgment for said Doyle on said verdict.

JOHN M. CREBS, *for Pl'ff in Error.*

BRIEF OF PLAINTIFF IN ERROR.

Under the first assignment of error, it is insisted that the evidence was improperly admitted. The measure of damages was what the hoop-poles were worth at the time and place of the injury complained of, and such necessary expenses as plaintiff below was subjected to by the wrongful act.

The second assignment of error is, we think, well taken, and in support of our views we submit the following propositions and authorities:

1st. Whatever facts are necessary to constitute the cause of action must be directly and distinctly stated in the declaration. Angell on Water Courses, Sec. 413, 412. *Wilbur v. Brown*, 3 Denio, 359.

2d. If there is a variance between the statement in the declaration and the proof it will be fatal. Angell on Water Courses, Sec. 426, 411. Saunders Pl. and Ev. 1234. *Fitzsimmons v. Inglis*, 5 Taunton, 534, (1 E. C. L. Rep. 275.) *Griffiths v. Marson*, 6 Price 1, (2 En. Ex. Rep. 349.) *Wilbur v. Brown*, 3 Denio, 359.

3d. An action for continuing a nuisance cannot be maintained against one who did not erect it, without a previous request to remove or abate it. *Pierson v. Glean*, 2 Green's (N. J.) Rep. 36. *Hubbard v. Russell*, 24 Barbour, 404. *Johnson v. Lewis*, 13 Conn. 303. Angell on Water Courses, Sec. 403. There must then be a material difference in declaring against a person for *erecting* or for *continuing* a nuisance.

4th. But we think it is clear that a declaration for *erecting* would not be sustained by proof of *continuing* a nuisance. 1 Ch. Pl. 392. *Fitzsimmons v. Inglis*, 1 E. C. L. Rep. 275. *Griffiths v. Marson*, 2 Eng. Ex. Rep. 349. *Beavers v. Trimmer & Cole*, 1 Dutcher 101.

If these propositions are true, then it follows that the plaintiff below could not recover under his declaration in this case without showing that the defendant below erected the dam or caused it to be erected, and a refusal so to instruct the jury was a palpable error.

S. S. MARSHALL,
J. M. CREBS,
E. BEECHER,
For Plaintiff in Error.

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In the Supreme Court, State of Illinois.

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E. BEECHER,
For Plaintiff in Error.

Guardian Office print, Mt. Vernon.

In the Supreme Court, State of Illinois.

FIRST GRAND DIVISION,

At Mount Vernon----November Term, A. D., 1861.

ARMSTEAD WARD & DAVID HAMMER,

vs.

STEPHEN MUSGROVE.

} Error to Jasper.

ABSTRACT.

This was a Bill in Chancery filed in the Jasper Circuit Court by the defendant in error against the plaintiff's in error.

2] The bill alleges that Ward purchased a lot of cattle of one Preston—
3] that afterwards Musgrove purchased of Ward a one half interest in said cattle, constituting them partners therein—that nothing was paid by
4] Musgrove—agreed to drive the cattle to Chicago to market—were to share equally in the profits, and reinvest the proceeds in other stock—that
5] after complainant had started with the cattle, Ward came to him and
6] informed complainant that he had sold one half of the cattle to Hammer, the plaintiff in error—avers that said sale to Hammer was made without complainants knowledge, and that it was made for the purpose of defrauding complainant out of his interest in said cattle—that said cattle were sold at a great advance on what they were to complainant when he purchased, and
7] great gains were made thereon—that said Ward and Hammer received the money arising from such sale and refused to account to complainant—that Hammer, at the time of his pretended purchase, knew that complainant owned one undivided half of said cattle, and that he and Ward were partners.
8] Prays that Ward and Hammer be made defendants—that said partner-
9] ship be dissolved—that an account be taken, &c., and that defendants be decreed to pay to complainant one half the profits arising from the sale of such cattle—waives the oath of defendants to the answer.

ANSWER OF WARD.

12] Admits that he proposed a partnership with complainant if complainant would make him secure and furnish one half the expense money in taking cattle to market; that complainant, after endeavoring to do so, entirely failed to give such security or furnish such expense money; that thereupon he sold
13] one half of said cattle to Hammer; that said Musgrove then abandoned all pretence of having any interest in said cattle, and engaged with said
14] Hammer as a hand to assist in driving the cattle to market; that Musgrove was not responsible for his debts; avers that but small profits were made; denies all other allegations.

ANSWER OF HAMMER.

15] Denies all knowledge of sale to complainant; admits that he purchased of Ward one half of the cattle; says the profits were but little if anything; avers that all the time said Musgrove pretends he was in partnership with Ward he was in the employment of Hammer for wages.

17] GENERAL REPLICATION FILED.

28] At October term, 1859 a jury was empanelled by order of the Court to try the following issues, viz:

1st. Whether a partnership did or did not exist between said Ward and Musgrove as charged in complainants bill.

2d. If the jury find for Musgrove on the first issue, that they then find what profit, if any, was realized on said cattle, and how much is due thereon to said Musgrove if anything.

29] The jury roturned the following verdict: "We, the jury, find the first issue in favor of the complainant; and, on the second issue, we, the jury, find for the plaintiff the sum of three hundred and forty seven dollars and fifty cents. The court then ordered that said partnership be considered as closed, "and that the said defendant pay to the said complainant the sum of three hundred and forty-seven dollars and fifty cents, so found as 30] aforesaid, as the nett balance due the complainant from the said defendant on a final settlement of said partnership," and that execution issue, &c., and that defendant pay the costs.

EVIDENCE OF COMPLAINANT.

32] Wm. Gross said: Was employed in spring of 1855, by Musgrove, to 33] help drive the cattle to Chicago; understood from both Musgrove and Ward that they were partners in the cattle; we started about the 16th of May 1856 with the cattle from Crawford County; were about one hundred and eleven head. I went to Chicago. We sold 6 or 7 head on the road at prices varying from $20 to $35. The rest were sold in Chicago market 34] except three lost on the road. They were sold at $25 a head all round except two yearlings which were sold for $10 each. Both complainant and defendants transacted their business together, and were with the drove until sold out. I kept their accounts for them, and by their directions kept an account of the expenses of each on the road.

36] P. Sowers said: I was employed by the parties. Ward asked Musgrove if he would not like to go into a partnership; they then stepped aside and had a private conversation; Ward afterwards said that they had agreed to go into partnership. Musgrove, Ward and witness all started with the cattle; went as far as Cumberland County, when Ward went home, leaving Musgrove and witness with the cattle; Ward returned in three days; Musgrove employed three hands; Musgrove paid hands employed in taking care of the cattle. On cross examination witness said Musgrove and Ward were both present when the three hands were hired and both hired them, and that 37] these hands had been hired before Musgrove saw the cattle; said he could not state certainly that he saw Ward pay these hands, and that he did not see Hammer while with the cattle. Samuel Musgrove said: Was present at the conversation spoken of by witness Sowers; heard Ward ask Musgrove if he would not like to go into a speculation in which he could make $1,000 or $1,500; Ward asked witness to remain until he and Musgrove went to 38] Crawford county to look at the cattle; heard Ward say afterwards that he had taken complainant in as a partner.

R. H. Jones said: After the cattle were sold in Chicago, Ward said he would have to give Musgrove $25, as he had sold the cattle to Hammer; 39] said he went to R. Carr to enter into partnership with him, and that Carr declined, and he then proposed a partnership to Musgrove; that Ward

was to have the selling of the cattle and handling the money as security because Musgrove was not responsible. On cross-examination said that Hammer paid Musgrove $18 per month for all the time Musgrove was gone to Chicago. The payment of said $25 was by crediting an account held by Ward against Musgrove.

H. Dulgar said: I had a conversation with Ward directly after their return from Chicago, and to the best of my recollection he said if they suc-
40] ceeded in collecting their money they would make about $800. That they had sold the cattle on credit, with the exception of the profits which they had taken in store goods, mostly knitting needles.

W. Swick said: Heard Ward say once that he had taken Musgrove in as a partner. On cross-examination said he thought he and Ward might have had a laugh over the idea of a partnership with Musgrove, but can't remember certain.

Perry Songer said: Heard Ward say they had sold out and made a small profit, about $800, if they ever got their money; that they had sold on time; heard Ward say that about the time the cattle were taken off he had sold them to Hammer and in the operation he had made about $25 for Musgrove. Heard Ward say the contract between him and Musgrove was that Musgrove should share half the loss, half the profits and pay half the expense, and in the sale to Hammer, Musgrove would be entitled to $25 as his profits. That Ward was to do the trading, and Musgrove was to stay with the cattle. Said he had sold the cattle to Hammer for fifty cents profit per head. That the profits spoken of by Ward were paid in store goods.

DEFENDANT'S EVIDENCE.

J. Fuller said: The cost of driving cattle to Chicago would be about one dollar per head.

J. E. James said: Had a conversation with Musgrove in Chicago, about these cattle. Musgrove said in the first place he contracted for and was to have an interest in the cattle, but now Ward had took the cattle and sold them he was only a hired hand, and had no interest in the cattle whatever. Just then Mr. Hammer came in and the conversation was interrupted before Musgrove was through.

48] H. H. Massy said: I had a conversation with Musgrove about buying the cattle, much of which I don't recollect. I finally made him an offer for them: he said he had not the right to sell, as *he did not own any*
49] *interest in them*. After he told us he could not sell, he said there was a man at the wagon who could sell them.

53] This was all the evidence. The bill of exceptions shows that the jury returned a verdict in favor of complainant for $350 50. Defendant moved to set aside the verdict and for a new trial, which motions were overruled and judgment entered on the verdict; to which defendant at the time excepted.

ASSIGNMENT OF ERRORS.

1st. The Court erred in refusing to set aside the verdict of the jury, and in overruling the motion for a new trial.

2d. The Court erred in entering a judgment against defendant below, Hammer.

3d. Said record is in other respects informal and erroneous.

[illegible]

1st. The verdict was against the weight of evidence. The admissions of Ward were made before the sale of the cattle, while those of Musgrove were made after the sale. If a partnership had existed Musgrove clearly admits that it was terminated, and that he had no interest in the cattle. The complainant's own testimony shows that he was working for wages, and that he received his pay from Hammer.

2d. But if the Court would not disturb the verdict for this reason, it is clearly erroneous to enter a judgment against Hammer. He had purchased one half of the cattle; and so far as he is concerned it is immaterial whether it was the half alleged to be sold to Musgrove or not. He was entitled to one half of the proceeds of the cattle, and it is not pretended he received more; yet this judgment makes him liable to pay to Musgrove the whole amount decreed to him, in case it can not be collected of Ward, without showing any improper conduct on his part. For these reasons we insist the decision of the Court below ought to be reversed, and a new trial awarded.

E. BEECHER,

For Plaintiffs in Error.

Guardian Office print, Mt. Vernon.

In the Supreme Court, State of Illinois.

FIRST GRAND DIVISION,

At Mount Vernon----November Term, A. D., 1861.

ARMSTEAD WARD & DAVID HAMMER,
vs.
STEPHEN MUSGROVE.
} Error to Jasper.

ABSTRACT.

This was a Bill in Chancery filed in the Jasper Circuit Court by the defendant in error against the plaintiff's in error.

2] The bill alleges that Ward purchased a lot of cattle of one Preston—3] that afterwards Musgrove purchased of Ward a one half interest in said cattle, constituting them partners therein—that nothing was paid by 4] Musgrove—agreed to drive the cattle to Chicago to market—were to share equally in the profits, and reinvest the proceeds in other stock—that 5] after complainant had started with the cattle, Ward came to him and 6] informed complainant that he had sold one half of the cattle to Hammer, the plaintiff in error—avers that said sale to Hammer was made without complainants knowledge, and that it was made for the purpose of defrauding complainant out of his interest in said cattle—that said cattle were sold at a great advance on what they were to complainant when he purchased, and 7] great gains were made thereon—that said Ward and Hammer received the money arising from such sale and refused to account to complainant—that Hammer, at the time of his pretended purchase, knew that complainant owned one undivided half of said cattle, and that he and Ward were partners. 8] Prays that Ward and Hammer be made defendants—that said partnership 9] be dissolved—that an account be taken, &c., and that defendants be decreed to pay to complainant one half the profits arising from the sale of such cattle—waives the oath of defendants to the answer.

ANSWER OF WARD.

12] Admits that he proposed a partnership with complainant if complainant would make him secure and furnish one half the expense money in taking cattle to market; that complainant, after endeavoring to do so, entirely failed to give such security or furnish such expense money; that thereupon he sold 13] one half of said cattle to Hammer; that said Musgrove then abandoned all pretence of having any interest in said cattle, and engaged with said 14] Hammer as a hand to assist in driving the cattle to market; that Musgrove was not responsible for his debts; avers that but small profits were made; denies all other allegations.

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ANSWER OF HAMMER.

15] Denies all knowledge of sale to complainant; admits that he purchased of Ward one half of the cattle; says the profits were but little if anything; avers that all the time said Musgrove pretends he was in partnership with Ward he was in the employment of Hammer for wages.

17] GENERAL REPLICATION FILED.

28] At October term, 1859 a jury was empanelled by order of the Court to try the following issues, viz:

1st. Whether a partnership did or did not exist between said Ward and Musgrove as charged in complainants bill.

2d. If the jury find for Musgrove on the first issue, that they then find what profit, if any, was realized on said cattle, and how much is due thereon to said Musgrove if anything.

29] The jury roturned the following verdict: "We, the jury, find the first issue in favor of the complainant; and, on the second issue, we, the jury, find for the plaintiff the sum of three hundred and forty seven dollars and fifty cents. The court then ordered that said partnership be considered as closed, "and that the said defendant pay to the said complainant the sum of three hundred and forty-seven dollars and fifty cents, so found as 30] aforesaid, as the nett balance due the complainant from the said defendant on a final settlement of said partnership," and that execution issue, &c., and that defendant pay the costs.

EVIDENCE OF COMPLAINANT.

32] Wm. Gross said: Was employed in spring of 1855, by Musgrove, to 33] help drive the cattle to Chicago; understood from both Musgrove and Ward that they were partners in the cattle; we started about the 16th of May 1856 with the cattle from Crawford County; were about one hundred and eleven head. I went to Chicago. We sold 6 or 7 head on the road at prices varying from $20 to $35. The rest were sold in Chicago market 34] except three lost on the road. They were sold at $25 a head all round except two yearlings which were sold for $10 each. Both complainant and defendants transacted their business together, and were with the drove until sold out. I kept their accounts for them, and by their directions kept an account of the expenses of each on the road.

36] P. Sowers said: I was employed by the parties. Ward asked Musgrove if he would not like to go into a partnership; they then stepped aside and had a private conversation; Ward afterwards said that they had agreed to go into partnership. Musgrove, Ward and witness all started with the cattle; went as far as Cumberland County, when Ward went home, leaving Musgrove and witness with the cattle; Ward returned in three days; Musgrove employed three hands; Musgrove paid hands employed in taking care of the cattle. On cross examination witness said Musgrove and Ward were both present when the three hands were hired and both hired them, and that 37] these hands had been hired before Musgrove saw the cattle; said he could not state certainly that he saw Ward pay these hands, and that he did not see Hammer while with the cattle. Samuel Musgrove said: Was present at the conversation spoken of by witness Sowers; heard Ward ask Musgrove if he would not like to go into a speculation in which he could make $1,000 or $1,500; Ward asked witness to remain until he and Musgrove went to 38] Crawford county to look at the cattle; heard Ward say afterwards that he had taken complainant in as a partner.

R. H. Jones said: After the cattle were sold in Chicago, Ward said he would have to give Musgrove $25, as he had sold the cattle to Hammer; 39] said he went to R. Carr to enter into partnership with him, and that Carr declined, and he then proposed a partnership to Musgrove; that Ward

was to have the selling of the cattle and handling the money as security because Musgrove was not responsible. On cross-examination said that Hammer paid Musgrove $18 per month for all the time Musgrove was gone to Chicago. The payment of said $25 was by crediting an account held by Ward against Musgrove.

H. Dulgar said: I had a conversation with Ward directly after their return from Chicago, and to the best of my recollection he said if they suc-
40] ceeded in collecting their money they would make about $800. That they had sold the cattle on credit, with the exception of the profits which they had taken in store goods, mostly knitting needles.

W. Swick said: Heard Ward say once that he had taken Musgrove in as a partner. On cross-examination said he thought he and Ward might have had a laugh over the idea of a partnership with Musgrove, but can't remember certain.

Perry Songer said: Heard Ward say they had sold out and made a small profit, about $800, if they ever got their money; that they had sold on time; heard Ward say that about the time the cattle were taken off he had sold them to Hammer and in the operation he had made about $25 for Musgrove. Heard Ward say the contract between him and Musgrove was that Musgrove should share half the loss, half the profits and pay half the expense, and in the sale to Hammer, Musgrove would be entitled to $25 as his profits. That Ward was to do the trading, and Musgrove was to stay with the cattle. Said he had sold the cattle to Hammer for fifty cents profit per head. That the profits spoken of by Ward were paid in store goods.

DEFENDANT'S EVIDENCE.

J. Fuller said: The cost of driving cattle to Chicago would be about one dollar per head.

J. E. James said: Had a conversation with Musgrove in Chicago, about these cattle. Musgrove said in the first place he contracted for and was to have an interest in the cattle, but now Ward had took the cattle and sold them he was only a hired hand, and had no interest in the cattle whatever. Just then Mr. Hammer came in and the conversation was interrupted before Musgrove was through.

48] H. H. Massy said: I had a conversation with Musgrove about buying the cattle, much of which I don't recollect. I finally made him an offer for them: he said he had not the right to sell, as *he did not own any*
49] *interest in them.* After he told us he could not sell, he said there was a man at the wagon who could sell them.

53] This was all the evidence. The bill of exceptions shows that the jury returned a verdict in favor of complainant for $350 50. Defendant moved to set aside the verdict and for a new trial, which motions were overruled and judgment entered on the verdict; to which defendant at the time excepted.

ASSIGNMENT OF ERRORS.

1st. The Court erred in refusing to set aside the verdict of the jury, and in overruling the motion for a new trial.

2d. The Court erred in entering a judgment against defendant below, Hammer.

3d. Said record is in other respects informal and erroneous.

1st. The verdict was against the weight of evidence. The admissions of Ward were made before the sale of the cattle, while those of Musgrove were made after the sale. If a partnership had existed Musgrove clearly admits that it was terminated, and that he had no interest in the cattle. The complainant's own testimony shows that he was working for wages. and that he received his pay from Hammer.

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The People &c
for the Use of Volentine
Keyser
vs
Charles Cuguas et al
Chas Cuguas

10 Briefs

Nov 7 1861

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