23/1

July 1843 - #1229

H. Austin

vs

Feland, Graves & Graves

Randolph County

Debt - $175

Note assigned to Austin by Wear, William

Feland, Graves & Graves held set off notes against Wear's note for $252

Davis - Atty

J. Scott - Atty

State of Missouri Set.

To the Judge of the Circuit Court in the second Judicial Circuit in said State: — Greeting.

Whereas, in the record and proceedings in a certain Cause lately pending in the Circuit Court within and for the County of Randolph in said Circuit, wherein Henry Austin was plaintiff and James H Graves, Robert Graves and John Teland were defendants, in which Cause judgment was rendered in favor of said defendants, manifest error hath intervened to the great damage of the said plaintiff, as by his complaint we are informed: — Now we being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, do Command you, that you send to us, certified under your seal, the record and proceedings in the Cause aforesaid, as fully as the same remains before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held at the City of Jefferson in the County of Cole in said State on the first monday of July next, that being then and there inspected, we may Cause to be further done thereupon, for Correcting the error, what of right and according to law, ought to be done.

Witness Hampton L Boon Clerk of our Supreme Court aforesaid at office the twentieth day of May One thousand eight hundred and forty three, with his private seal, having no official seal provided.

Hampton L Boon

Supreme Court.
July Term 1843.

Henry Austin
vs Writ of Error.
James H. Graves
Robert Graves &
John Feland.

To Randolph County.

State of Missouri }
County of Randolph }

Pleas in the Circuit Court of Randolph County in the State of Missouri, before the Honorable John D Leland Judge of said Court. Be it remembered that heretofore to wit on the 17th day of May being at a term of the Circuit Court of said County held at the Court house in the town of Huntsville in the year 1842 the followings proceedings in a cause then pending between Henry Austin Plaintiff and James H. Graves, Robert Graves and John Feland defendants were hard, to wit on the 30th day of April in the year 1842 the said plaintiff by his attorney filed in the office of the clerk of the Circuit Court of said County his petition in the words & figures following to wit "State of Missouri County "of Randolph, In the Circuit Court, May Term "1842 To the Randolph Circuit Court Henry Austin, plaintiff, states that he is the legal owner of a note against the defendants John Feland James H. Graves and Robert Graves, to the following effect "On or before the 6 day off January next I promise to pay to William Weare one hundred & seventy five dollars, for value rec^d of him this Jan^th 6 1841. John Feland ⊙
attest James H Graves ⊙
Thomas C. Numelly. Robert Graves ⊙

On which is the following assignment, For value rec^d I assign the within

note to Henry Austin January 28th 1841.
Wm Weare"

By virtue of which the plaintiff has become the owner thereof. Yet the debt remains unpaid therefore he demands judgment for his debt and damages for the detention thereof together with costs R. Wilson atty for Plf"

And thereupon the ~~[illegible]~~ clerk of said Circuit Court issued a writ of summons against said defendant Feland to the County of Randolph in the words following to wit. "State of Missouri County of Randolph S.S. The State of Missouri to the Sheriff of the County of Randolph, Greeting you are hereby commanded to summon John Feland to appear before the judge of our Circuit Court on the first day of the next term of said Court to be held at the Court house in the town of Huntsville for and within said County of Randolph on the third Monday in May next to answer unto Henry Austin of the debt damages and costs in his petition mentioned and have you then and there this writ

Witness Reuben Samuel clerk of said Court with the seal of office affixed this 30th day of April 1842.

Reuben Samuel clerk"

upon which writ is the following return of the Sheriff "I certify that I executed the within writ by reading the petition and

and Summons in the hearing of John
Return Feland on the 30th day of April 1842 in
of Shff. Randolph County Henry Austin Shff"

And the said clerk also also issued a counterpart to said writ to the County of Macon in the words & figures following "
"State of Missouri, County of Randolph SS

The State of Missouri, To the Sheriff of the County of Macon, Greeting, you are hereby commanded to summon James H. Graves & Robert Graves, to appear before the judge of our Circuit Court on the first day of the next term of said Court to be held at the Court house in the Town of Huntsville for and within said County of Randolph on the third monday in May next to answer unto Henry Austin of the debt damages and costs in his petition mentioned and have you then and there this writ

Witness Reuben Samuel clerk of said Court with the seal of office affixed this 30th day of April 1842.

Reuben Samuel clerk"

— upon which is the following return
Writ. "I Jefferson Morron Sheriff of Macon County certify that I executed the within writ by reading the petition & summons in the hearing of James H. Graves, and Robert Graves on the 30th day of April 1842 in the County of Macon & State of Missouri

Jefferson Morron Sheriff
Macon County. Mo.

And afterwards to wit at the term of the said circuit court, before the Hon John D Leland judge of said court, on Tuesday the 17th day of May in the year 1842 the following further proceedings were had to wit. " Now at this day comes into court the defendants aforesaid by their attorney, and by leave of the court file their plea of Nil debet and set off.

And afterwards to wit on Wednesday the 18th day of May in the year 1842, the following order was made by said court, in this cause " The parties by their respective " attorneys appeared and the demurrer heretofore filed to the defendants plea of set off was fully heard and considered by the court whereofore it is considered and adjudged by the court that said demurrer be and the same is hereby overruled

Judgment on Demurrer

And afterwards to wit at the term of said court, on Thursday the 19th day of May 1842 the following further proceedings between the parties aforesaid appear. " Now at this day comes the plaintiff by his attorney and files his motion to reconsider, set aside the judgment on the demurrer of plaintiff to the second plea of defendants I Graves & Robt Graves, rendered in this cause in yesterday and the same being fully heard and considered by the court, wherefore it is considered and adjudged by the court, that the said motion be and the same is hereby overruled "

Motion to reconsider

And afterwards to wit on the day and year last aforesaid the following the proceedings appear,

" Now at this day comes the parties aforesaid by their attornies, and agree upon the following jury to wit Isaac Riley Ambrose H. Medley, Henry Winkler, F M. Estes, William Palmer, B F Wood Charles C. Jennings, Andrew Dunwoodie Elias P. Cunningham, Daniel G. Davis Robert Smith and James Finnemore, twelve good and lawful jurymen who being duly elected tried and sworn well and truly to try the this cause, and after having returned with the instructions of the Court returned, into Court with the following verdict to wit, we of the jury find as in case of non suit" and thereupon the following order appears.

" Now at this day comes the plaintiff by his attorney and moves the Court to set aside the verdict of the jury in this cause for the following reasons

1st. Because the Court give the instructions asked by the defendants,

2nd Because, the Court refused, to give the instructions asked, by the plaintiff

3rd. Because the Court permitted the said defendants to amend their plea, of set off after the plaintiff had submitted his cause and the evidence to support the same to the jury, whereupon the said motion is

continued until the next term of this Court,

And afterwards Court at a term of said Court held on the 21st day of September in the Year 1842 before the said judge, the following further proceedings appear,

" Now at this day the above cause came on to be heard on the motion for a new trial and it is considered by the Court that the said motion be overruled and it is further considered and ordered by the Court that the said defendants recover of the said plaintiff their costs and charges in this behalf laid out and expended and that they have thereof execution

And afterwards Court on the day of year last aforesaid the ~~defendant~~ plaintiff files his bill of exceptions as follows

Bill of Exceptions

Court. " Be it remembered that the defendants by their attorney at the May Term of this Court filed their plea of Nil Debit as follows. " And the said defendants by their attorneys comes and defends the wrong and injury when &c. and says that the said plaintiff should not further have and maintain his aforesaid petition thereof against them because they say that they do not owe the debt in the petition mentioned or any part or parcel thereof and of this they put themselves on the country &c. and the said James H Graves

Nil debit

(3)

and Robert Graves filed plea of offsett in the following words—

And for further plea in this behalf the said defendants Jas H Graves, I Feland and Robert Graves by their attorney comes and defends the wrong and injury when &c. and says that the said plaintiff ought not further to have ~~[illegible]~~ and maintain his said action against them because they say that the said William Wear the assignor of said plaintiff before and at the time of the commencement of this suit towit on the 30th day of December A.D. 1840. at the County and Circuit aforesaid was and still is indebted to them the said James H Graves, I Feland and Robert Graves in divers large sums of money towit the sum of two hundred and fifty dollars of lawful money of the United States for that whereas heretofore towit on the 30th day of December A.D. 1840. The said William Wear, executed to the said James H Graves, his certain promissory note for the payment of seventy five dollars on or before the first day of January then next following which said note is of date the said 30th day of December 1840. and made payable as aforesaid and is here to the Court shewn and is in the words and figures following towit. Dc. the 30th 1840. On or before first day of January the 1841. I promis to pay James

Set off

H. Graves, seventy five dollars for value received off him Wm Wear.
attest
Sampson Waddle, and afterwards to wit and the said 30th day of December A.D. 1840. the said William Wear, was and still is indebted to the said Robert Graves by reason of his the said Wm Wear's promissory note before that time to wit on the 5th day of November A.D. 1840 executed to the said Robert Graves, for the sum of one hundred and seventy seven dollars and due and payable on or before the 1st day of February then next, following after the date of said note, which said last mentioned note is of date the said 5th day of November 1840. and is here to the Court shewn in the words and figures following to wit. "On or before the first day of February next I will pay to Robert Graves the sum of one hundred and seventy seven dollars to be Read in note, or accounts November the 5th 1840.
Wm Wear"
All of which said several sums of money so due and owing from the said William Wear, to the said James H. Graves, & Robert Graves, which said sums of money so due and owing from the said Wm Wear, to the said James H Graves and Robert Graves exceeds the amount of the debt in the petition mentioned and all damages.

that can be sustained by means of the detention thereof, and the said James H. & Robert Graves of the said above sums of money so due and owing from the said William Wear, to the said defendants they the said defendants are willing and hereby offer to set off and allow to the said H Austin assignee of the said Wm Wear as aforesaid the full amount of the debt and damages in the petition mentioned, according to the form of the statute in such case made and provided and this they the said James H. Graves, J Teland and Robert Graves, are ready to verify wherefore they pray judgment if the said plaintiff should further have and maintain his aforesaid petition thereof against them R. W. K. Van Arsdall & Halliburton, for Dfts".

The plaintiff joined issue in the plea of Nil Debit and Demurred to the plea of set off. the demurrer is in the following words Wmt. " And the said plaintiff as to the said plea of the said defendants Jas. H Graves & Robert Graves, by them secondly above pleaded, saith that the same and the matters therein contained in manner and form ~~and form~~ as the same are above pleaded, and set forth, are not sufficient in law, to bar, or preclude him the said plaintiff from having or maintaining his aforesaid action thereof, against the said defendants, and that he the said plaintiff is ready to verify wherefore by reason of the

Demurrer.

insufficiency of the said plea in this behalf the said plaintiff prays judgment and his debt aforesaid together with his damages by him sustained on occasion of the detention thereof to be adjudged to him &c.

And the said plaintiff according to the form of the statute in such case made and provided states and shews here to the Court the following causes of demurrer to the said second plea of the said Graves that is to say the said plea of set off. is pleaded by two defendants and the said claims offered to be off set are not joint demands but the several demands of these two of said defendants pleading said plea and because the said plea does not allege that at the time of the assignment of the note sued upon; by the said Wear, to the said plaintiff that the said assignor was indebted to the said defendants and the said plaintiff prays judgment and his debt aforesaid together with his damages, by him sustained on occasion of the detention thereof to be adjudged to him &c. Wilson, atty for Pl.

Joinder in Demurrer

W. K. Nam Arsdall & Hattiburke.

And the said plaintiff as to the said plea, of the said defendants Leland Graves & Graves, by them first above pleaded and whereof they put themselves upon the country cloth the like &c. Wilson atty for Plaintiff.

The Court overruled the demurrer, and the plaintiff excepted to the judgment overruling said demurrer, The parties on the following day went to trial a jury was called & sworn and the plaintiff introduced a witness who proved the assignment of the note in the petition mentioned and thereupon the said plaintiff read the assignment & note in evidence to the jury. this was all the evidence given by either party, the plaintiff by his attorney then moved the Court to instruct the jury as follows to wit. " And the said

Plfs Inst. Refusd. plaintiff moves the Court, to instruct the jury as follows. 1° That if they believe from the evidence that the note read in evidence by plaintiff was executed by defendants as it purports, and assigned by Wear to the " plaintiff that they must find for the plaintiff.

Which instruction the Court refused to give, but at the instance of the dfts counsel gave the following instruction to wit:

Dfts Inst Given " And the defendants by their counsel ask the Court. to instruct the jury to find as in case of nonsuit, " And thereupon the jury found their verdict against the plaintiff as in case of nonsuit. And thereupon the Court permitted the attorney for the dfts to amend their plea of set off so as to make it a plea by all said defendants.

And thereupon the said plaintiff by his attorney filed his motion to set aside the verdict of the jury & grant a new trial

which motion is in the following words and figures " The plaintiff by his attorney moves the Motion for new trial court to set aside the verdict of the jury in this cause for the following reasons

1st. Because the Court give the instructions asked by defendants.

2nd Because the Court refused to give the instructions asked by plaintiff.

3. Because the Court permitted the said dfts to amend their plea of set off after the plaintiff had submitted his ~~cause to~~ cased the evidence to support the same to the jury. Wilson atty for Plf "

And the Court took the said motion under advisement and at this term of the Court overruled the said motion, to which several decisions of the Court aforesaid the said plf by his attorney excepts and presents this his bill of exceptions which he prays may be signed sealed and made a part of the record which is done accordingly. Jno D Leland Jun

I Reuben Samuel Clerk of the Circuit Court for the County of Randolph in the State of Missouri hereby certify that the foregoing twelve pages contain a true perfect and complete ~~[illegible]~~ transcript of the records and proceedings in a cause lately pend in said Court between Henry Austin of Countiff and John Leland James H. Graves & Robert Graves defendants as the same remains of record in [illegible] office,

In testimony whereof I have set my name and affixed the seal of said Court at Huntsville this twenty ninth day of May in the year of our Lord one thousand eight hundred & forty three,

Reuben Samuel Clerk

Supreme Court 4th
July Term 1843.

1229.

H. Austin
vs. Thurs – Error
Jno Leland
Jas H Graves
Robt Graves

1229

23

Clerks Sec.
for 2500 words and
fragments at 10 [illegible] $2.50
certificate & seal 50
3.00
Rucker Samuel Clerk

Filed June 10. 1843.
H. L. Boon CLR

Randolph

7 Wendell 311

The Earl of Falmouth vs. Penrose
Indebitatus assumpsit will lie for goods & chattels
The defendants were indebted to the plaintiff in divers to wit
100 fish of the value of 8 £ 10. 13 Eng. Com. Rep
205.

Henry Austin
vs
Feland, Graves & Graves

Errors

And the said plaintiff by his attorney comes now here into court and says that in the record and proceedings aforesaid and in the rendition of the judgment aforesaid there is error in this. to wit,

1 That by the record and proceedings aforesaid it appears that judgment was rendered for the defendants whereas the same should have been rendered for the plaintiff

2 Also the Court erred in overruling the demurrer to the special plea.

3 also in refusing to set aside the judgment on demurrer

4 also in giving and refusing the instructions asked in the cause.

5 ~~And~~ also in ~~[illegible]~~ permitting the special plea to be amended after verdict.

6 And also in overruling ~~overruling~~ the motion to set aside the verdict and grant a new trial. And because of the errors aforesaid and others appearing in the record and proceedings aforesaid the said plaintiff prays the Court that the same may in all things be set aside and for naught held

Davis atty &c

Henry Austin
vs Error.
Feland, Graves & Graves

Filed July 12. 1843.
H. L. Boon clk.

A. Austin
vs.
Jno. Heland
Jas. H. Graves
Robt. Graves

Error to the Randolph Circuit Court.

This was an action commenced by petition in debt on a note executed by the defendants & made payable to Wm Wear and by him assigned to the plaintiff Austin

The defendants pleaded jointly nul debet. J. H. Graves & Robert Graves pleaded by way of set off that Wm Wear the assignor of the plaintiff was before and at the commencement of the suit indebted to J. H. Graves one of the defendants by note in the sum of seventy five dollars: and that the said Wm Wear was indebted to Robert Graves another of the said defendants in the sum of one hundred and seventy seven dollars to be paid in notes and accounts. To this plea the plaintiff demurred and the court overruled the demurrer and thereupon the parties went to trial — the & the jury to use their own language found as in case of a non suit: A motion for a new trial was made

by the plaintiff and overruled & he has brought his case here by writ of error.

It is contended by the plaintiff that the defendants could not plead separately, that this being an action ex contractu all the defendants should join in a plea in bar. There are respectable authorities for the position that defendants pleading to the merits in an action ex contractu should join 6 Mass. Rep. 444. But other are against it Moravia vs. Hunter & Glass 2 Maule & Selwyn and Minor & al vs The Mechanics Bank of Alexandria. 1 Peters Rep. Comyn's digest title Pleader 35. However this question might be at common law, it would seem, that the act of Assembly of Feby 13th 1839 permitting plaintiff at will to join as many defendants in actions ex contractu as they please and to recover against one or more of them had changed the law, had it been otherwise. In all actions of tort, it was never questioned but the plaintiff could join several and recover against one or more of them. Hence it was always held that in such actions, defendants could sever in their pleas. Ubi eadem ratio, ibi eadem lex.

It was next objected, that the demurrer to

the plea of set off, should have been sustained, because it was not averred in the plea, that the debt mentioned in ~~the plea~~ it, was due at the time of the assignment of the note. We do not see the ground on which this objection is based. There is no doubt of the general principle, that a set off should be due and owing to the party by whom it is plead at the commencement of the action. Chitty's pleading. 604. Our statute prescribes that the nature of the defence of the obligor or maker shall not be changed by the assignment, but he may make the same defence against the bond or note in the hands of the assignee, that he might have made against the assignor, and that the obligor or maker shall be allowed every just set off and discount against the assignor before assignment. This was debitum in presenti, solvendum in futuro. Whether it could be used as a set off would depend on the plaintiff. If he brought his action against the maker or his assignee before it was due it is clear, it could not have been used as a set off, but delaying his action until it was due ~~his right~~ the defendants right to employ it as a set off was unquestionable.

Another point in the cause is that one of the debts pleaded as a set off was payable in notes or accounts & therefore could not be used as a set off.

It is a general rule, that where indebitatus assumpsit will lie on a simple contract, the debt due by such contract may be plead as a set off. A set off is never admitted in actions ex contractu, if the claim be for uncertain or unliquidated damages as for not delivering goods. Chitty. 604. In the case of Colson vs. Thelth, Espinasse cases, Lord Kenyon held, the statute of set off applies only to mutual debts, that where the plaintiffs demand was on a special agreement a set was never allowed, although it might be where the plaintiff had recourse to the money courts. Debts to be set off must be such as indebitatus assumpsit will lie for. Cowper 56. 6. Term. 488. 2. Burr. 1024. In the case of Gordon vs. Bowne 2 John. R. 150 it was held a set off to an action on a policy of insurance, is inadmissible though the plaintiff claim a total loss. Indebitatus assumpsit would not lie on the note set out in the defendants plea, it would follow therefore, that it could not be used as a set off.

A fourth objection is, that the defendants being sued jointly, they were permitted to set off demands due them separately from the assignor of the plaintiff. There are authorities for the pose

It is a general rule, that when indebitatus assumpsit will lie on a simple contract, the debt due by such contract may be plead as a set off: A set off is never admitted in actions ex contractu, if the claim be for uncertain or unliquidated damages. Chet. 604. In the case of Colson vs. Welsh Espinasse's cases, Lord Kenyon, held the statute of set off applied only to mutual debts, that when the plaintiffs demand was on a special agreement a set off was never allowed, although it might be when the plaintiff had recourse to the money counts. Debts may be set off where indebitatus assumpsit will lie. Coup. 56. 6 Term. 488. 2 Burr. 1024. An action of debt would lie for goods and chattels by the common law. Wherewood vs. Shaw. Yelverton 25. In the case of the Earl of Falmouth vs. Penrose 13. Eng. Com R. 205 it was held that indebitatus assumpsit would lie for goods and chattels. In that case the declaration alleged that the defendants were indebted to the plaintiff in divers to wit one hundred fish of the value of £10. Our statute gives an ~~an~~ action by petition in debt ~~for~~ on notes for the payment of money or property. If then debt or indebitatus assumpsit would lie on the note set out in the defendants plea, it would follow therefore that it could be used as a set off. see 7th Wheat. 211.

A fourth objection is, that the defendants being sued jointly, they were permitted to set off demands due them separately from the assignor of the plaintiff. There are ~~authorities~~ for the posi

him that one of two defendants may set off a demand due ~~him~~ by the plaintiff. 12 Serg. and Rawl. Stewart vs. Coulter. If there is any objection to this it must be technical: It is because it is a matter not between the plaintiff and all the defendants. If a plaintiff sues two in debt one of them may plead payment or a tender with his own money and thereby defeat a recovery, why then, if he will take his own debt & set it off against the plaintiff & thus defeat his action may it not be done? There is no solid distinction between the case of a payment with his own money by one defendant and pleading a set off due him alone. The case would be different if the demand was due two defendants and one of them was not sued or if sued would not join in the plea: So if, in the case before the Court, the ~~demand offered to be set off~~ set off was due by the plaintiff and an other, it would not have been allowed. If we follow the English cases too closely, they will lead us astray. If we will give the statute of set off such a construction

as will prevent the payment of one main debt, with the debt of another without his consent. The law will be satisfied. We must bear in mind, that all joint contracts and promises by our statute are joint and several, and that our mode of doing business by taking security to notes & bonds, may create a necessity for a departure from the English authorities :: The right of set-off in many cases is a right of great importance & is essential in order to do justice between the parties and to prevent one from getting an advantage over another which justice forbids. Courts will ~~look~~ ascertain who is the real creditor & who is really the debtor. If a plaintiff sues a defendant, & the defendant holds a note on the plaintiff in which the plaintiff alone is principal and another is security, if these facts appeared in a plea of set off it would be hard to resist the justice of such a ~~set off~~ demand. So if a defendant were sued on a note to which there was security, even if the security was not joined in the action, where would be the impropriety of allowing the defendant to use a set off he might have

against the plaintiff?

There were some irregularities in ~~judgment reversed &~~ the ~~manage~~ progress of this cause ~~remanded~~ in the Court below, but they were of such a character as ~~[illegible]~~ not to affect its merits, and of which the ~~[illegible]~~ plaintiff cannot complain: When the demurrer to the plea of set off was overruled, the ~~plaintiff the~~ Court should have entered final judgment on the demurrer as the plaintiff did not ask leave to withdraw it and take issue on the plea. ~~Ask~~ ~~has failed to do~~ the plea of set off standing admitted on the record was a bar to the plaintiffs action, & there was no necessity for a trial of the issue on the plea of Nil debet. As to the ~~Court~~ permission given by the Court to the defendants to mend their plea, we cannot see how the plaintiff was injuriously affected by it. It was a matter of form and such amendments in affirmance of judgments may be made at any time

Judgment affirmed

~~[illegible]~~

W Scott

Leonard
[illegible] Loughkins

83.

Austin
vs
Toland
&
al

Opinion

Scott

Filed Oct. 9. 1843.
H. L. Bonnell

Henry Austin
vs
John Feeland,
James H Graves
Robert Graves. This is an action by petition in debt, commenced in the Randolph Circuit Court by Henry Austin as assignee of one William Wear against the three defendants Feland, Graves and Graves. Judgment being given for the defendants in the Court below Austin has brought the case here by writ of Error.

It appears in the bill of exceptions that at the return term of the Circuit Court the three defendants filed their joint plea of nil debet and that at the same time the two defendants Graves & Graves filed their special plea of set off. To the first plea or general issue the plaintiff joined issue, and to the second or special plea, filed by the two Graves he demurred specially & generally and upon the argument upon demurrer the Court overruled the demurrer and gave judgment on the special plea.

On the next day of the Court, the case was called for trial, the only issue to try being upon the plea of nil debet filed by all the defendants, After the jury was sworn the plaintiff called a witness and proved the assignment upon the back of the note by Wear to the plaintiff, and then read the note and assignment in evidence to the jury without objection. and this was all the evidence in the cause.

The plaintiff then moved the

Court to instruct the jury as follows. to wit: That if they believe from the evidence that the note read in evidence by plaintiff was executed by defendants as it purports and assigned by Near to the plaintiff that they must find for the plaintiff.

But the Court refused to give said instruction, and on motion of the defendants instructed the jury to find for the defendants as in case of a non-suit; which being done by the jury the Court then permitted the defendants atty. to amend the special plea filed by the two defendants Graves & Graves and upon which a judgment had been rendered on demurrer on the preceding day, to be amended so as to be the plea of the defendant Toland also. and lastly the Court overruled a motion for a new trial.

The plaintiff insists that the plea of set off is bad and that upon the demurrer the judgment should have been for him.

The plea avers that one of the notes on Near the assignor to plaintiff of the note sued on was to be paid in <u>notes</u> <u>and</u> <u>accounts</u>. 5 Mon 83.

The plea does not show that the demand offered to be offset was due and owing by Near before and at the time of the assignment of this note to plaintiff

The Circuit Court ought to have given the instruction of plaintiffs and it ought not to have given the instruction of Defts. See 4 Mo. Rep. 233.

Damages cannot be set-off under the act 2 John Rep 150 Gordon vs Bourne

Must be due in the same right
See Chitty on Contracts 328—9. 11 Massachusetts Rep. 140. Walker, vs Leighton et al
4 Randolphs Rep 359. Parton vs Nickerson

Henry Austin
vs
Feland Graves and
Graves

Plaintiffs
Brief
Davis.

Filed Oct. 9. 1843.
H. L. Boon clk

STATE OF MISSOURI-----Sct. The State of Missouri----To the Sheriff of the County of Randolph, in said State-----**GREETING:**

Whereas, ~~Henry Austin~~. John Feland, James H. Graves & Robert Graves on the ninth day of October in the year eighteen hundred and forty-three at our Supreme Court for the State of Missouri aforesaid, before our Judges of said Court, recovered against Henry Austin the sum of Seven dollars and seventy eight cents for their costs and charges by them expended in a certain suit wherein the said Henry Austin was plaintiff in error, and the said John Feland, James H. Graves & Robert Graves were defendants in error, which to the said defendants were adjudged, as appears to us of record:== Therefore, we command you, that of the goods and chattels, lands and tenements of the said Henry Austin in your bailiwick, you cause to be made the aforesaid costs and that you have the same before the Judges of our said Supreme Court, on the second Monday in January next, to render unto the said John Feland, James H. Graves and Robert Graves — the costs aforesaid: and that you certify to our said Judges, how you execute this writ, and have you then there this writ.

Witness, Hampton L. Boon, Clerk of our said Supreme Court, at office, in the City of Jefferson the twentieth day of November — in the year of our Lord one thousand eight hundred and forty-three with his private seal, there being no official seal yet provided.

H. L. Boon

I Hancock Jackson Sheriff of Randolph County do Certify That Henry Austin paid to me the full amount of the within execution on the 27th day of November 1843

Shff fee $1.00

H Jackson Sheriff
of Randolph County

57.

Supreme Court.
Jany Term 1844

Feland & Graves
vs 3 exon
Henry Austin

Costs.

R. Samuel	3.00
H. L. Boon . .	4.78
This exon . .	1.00
	$8.78

In the Circuit Court of
Randolph County Mo.

Henry Austen Pl'f
vs } Pe in debt.

James H. Graves }
Robert Graves }
John Leland } Dfts.

The clerk of the Supreme Court will issue a writ of error on the application of the plaintiff

R Wilson
atto for Pl'f.

You will find $2. enclosed.

Henry Austin
vs } Precipe
James H. Graves
Robert Graves &
John Felans

Send Writ of error
to Randolph Co.

Filed 20 May 1843.
H. L. Boon clk