29/9

JULY 1844 #4

JOHN BUNDING & Engel
VS
AUGUST BLUMENTHOUS
ST. LOUIS COUNTY

debt

note for $2,24

Supreme Court addressed (?)
of continuance

Bank of Missouri

Missouri Record #695

State of Missouri; County of St Louis Sct

Be it remembered that on the fourteenth day January Eighteen hundred and forty three. there was filed a petition in office of the Clerk of St Louis Court of Common Pleas which is in the words and figures following

State of Missouri } St Louis Court of Common Pleas February Term 1843
County of St Louis } ss. To the St Louis Court of Common Pleas; Augustus Blumenthal plaintiff states that he is the legal owner of a note against the defendants John Bunding and Louis Engel to the following effect – "$224 00 St Louis December 29 1841 Twelve months after date we promise to pay to the order of Augustus Blumenthal at the Bank of the State of Missouri in St Louis Two hundred twenty four 00/100 Dollars without defalcation and for value received Jno Bunding. Louis Engel. Yet the debt remains unpaid therefore he demands judgment for his debt and damages for the detention thereof together with Costs – Trusten Polk

Summons

County of St Louis ss.

The State of Missouri

To the Sheriff of St Louis County. Greeting

We command you to summon John Bunding and Louis Engel if they be found in your County that they be and appear before the Judge of our St Louis Court of Common Pleas on the first day of the next term thereof, to be held at the City of St Louis, within and for the County of St Louis, on the first Monday of February next then and there to answer unto Augustus Blumenthal of his demand as set forth in the annexed petition; and have you then there this writ;

Seal Witness Nathaniel Paschall, Clerk of our said Court with the seal thereof hereto affixed, at office, in the City of St Louis this fourteenth day of January in the year of our Lord one thousand eight hundred and forty three Nathaniel Paschall Clerk

Return

Executed this writ in the County of St Louis by offering to read it and the petition to John Bunding on the 17 and on the 19 of –

day of January 1843. to Louis Engle which they each refused to hear

William Melburn Sheff
By E W Decker Deputy

Plea filed 21 Feby 1843.

Augustus Blumenthal vs John Bunding & Louis Engel } In the St Louis Court of Common Pleas February Term 1843.

And the said defendants come and defend the wrong and injury when &c and say that they do not owe the said sum of money above demanded or any part thereof in manner and form as the said plaintiff has thereof in his said petition alleged against them and of this they put themselves upon the Country &c

(And the said plaintiff does the like T Polk P.2) filed 13 March 1844

And the said defendants for a further plea to the said petition say that he the said plaintiff ought not to have or maintain his aforesaid action thereof against them because they say that the said plaintiff before at the time of the commencement of this suit to wit on this seventeenth day of January one thousand eight hundred and forty three at the County aforesaid was and still is indebted to the said defendants in a large sum of money to wit the sum of three hundred dollars for divers goods wares and merchandize sold and delivered by the said defendants to the said plaintiff at his special instance and request: Which said sum of money so due and owing to the said defendants as aforesaid exceeds the debt in the said petition mentioned and the interest thereon due and out of which said sum of money so due and owing from the said plaintiff to said defendants the said defendants are ready and willing and hereby offer to set off and allow to the said plaintiff the full amount of the said debt and interest And this they are ready to verify wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them Geo W Callahan Defts Atty

Rep filed 13 March 1844

And said plaintiff says that he was not is not indebted to said defendants in manner & form as said defendants have in their said =

second plea alleged & this he prays may be inquired of by the Country
&c

T Polk P.Q.

Judgment

And afterwards at the February Term of said Court of Common Pleas for the year Eighteen hundred and forty four to wit on Wednesday March 13 1844 the following further proceedings were had in this Cause

Augustus Blumenthal vs John Bunding & Louis Engel } Petition in Debt

And now at this day come the parties aforesaid by their respective attorneys and no Jury being required all and singular the premises are by them submitted to the Court which being seen and heard and by the Court here fully understood: the Court doth find that said Defendants do owe to ~~take~~ the plaintiff the sum of two hundred and twenty four Dollars, and that the plaintiff hath sustained Damages by reason of the detention thereof to sixteen dollars and twenty four Cents in manner & form as said Petition is alleged; and the Court doth further find that said Plaintiff was not nor is he now indebted to said defendants in manner and form as the Defendants have above thereof alleged: Therefore it is Considered by the Court that said plaintiff do recover against said Defendants his debt and damages aforesaid together with his Costs & Charges in this behalf expended & have thereof execution —

Mo: to set aside verdict filed 14 March 1844

Augustus Blumenthal vs John Bunding & Louis Engel } In the St Louis Court of Common Pleas February Term 1843.

And the said defendants move the Court to set aside the verdict herein and grant a new trial for the following reasons 1 Because the — refused to grant the defendants a Continuance 2 Because the Court refused to non suit the said plaintiff. 3 Because the Court rendered judgment against the defendants. 4 Because the Court aught to have given judgment against the plaintiff

Callahan atty for Deptg —

And afterwards at the said Term of said Court of Common Pleas

to wit on Saturday April 6 1844 the following further proceedings were had in this Cause.

Augustus Blumenthal vs Jno Bunding & Louis Engle } And now at this day come the parties aforesaid by their respective attorneys and submit to the Court the motion for a new trial herein which being seen and heard and by the Court here fully understood. the motion ~~motion~~ for a new trial is by the Court overruled.

Bill of Exceptions filed 14 March 1844

Augustus Blumenthal vs John Bunding & Louis Engel } Be it remembered that upon the calling up for trial and the trial of this cause on the thirteenth day of March one thousand eight hundred and forty four being the day next succeeding the one for which said cause had been set and docketed for trial the defendants moved the Court to grant them a continuance for the reason that the said plaintiffs replication had not been filed until the said morning of the thirteenth of March one thousand eight hundred and forty four. But such replication had been filed before said Calling of this Cause & no objections made to such filing until said Calling of said Cause. And that the said motion being overruled the defendants excepted to the decisions of the Court therein. And Be it further remembered that the defendants also moved the Court to non suit the plaintiff for the reason aforesaid to wit; that the said replication had not been duly filed according to the requisitions of the law; And that the Court overruling this last mentioned motion also the defendants excepted to the decisions therein. And be it further remembered that there was no evidence given or offered in the cause other than the note filed herein and embodied in said petition; And be it further remembered that within four days of said trial and the rendition of the judgment in said cause the defendants made and filed a motion to set aside said Judgment aside and for a new trial in the following words and figures to wit; "Augustus Blumenthal vs John Bunding and Louis Engel. In the St Louis Court of Common Pleas February Term 1843. And the said defendants move the Court to set aside the judgment herein and grant them a new trial for the following

reasons 1 Because the — refused to grant the defendants a continuance 2 Because the Court refused to non suit the said plaintiff 3 Because the Court rendered judgment against the defendants. 4 Because the Court ought to have given judgment against the plaintiff

Callahan atty of Defts — which

[illegible]ed last mentioned motion the Court overruled and the defendants excepted to its decision therein. And they now ask that this bill of exceptions be signed filed and made a part of the record. M Blair.

Afft for appeal filed 18 April 1844

Augustus Blumenthal
vs
John Bunding & Louis Engle

The said John Bunding states on his oath that the appeal in this case is not made of vexation or delay but because the affiant believes that he is aggrieved by the judgment or decision of the Court — Subscribed & sworn to this 18 april 1844 N Paschall Clk

Jno Bunding

And afterwards at said term of said Court of Common Pleas on Thursday April 1844 the following further proceedings were had in this cause —

Augustus Blumenthal
vs
John Bunding & Louis Engle

And now at this day come the defendants by their attorney and pray for an appeal to the Court from the Judgment herein rendered and file an affidavit therefor according to law whereupon the appeal is granted. And the said John Bunding as principal and Burchard Voight and Josiah Pape as securities acknowledge themselves each to owe the plaintiffs the sum of four hundred dollars. to be levied of their respective goods and Chattels land and tenements. yet upon the Condition that if the defendants shall prosecute their appeal with diligence to a decision in the appelate Court. and if the Judgment appealed from be affirmed or their appeal dismissed they will pay the Judgment aforesaid and all interest that shall grow due thereon and shall

pay the costs & damages. ~~that shall pay the costs and damages~~ that shall be adjudged against them in consequence of their said appeal then this recognizance to be void else of full force

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State of Missouri }
County of St Louis }

I Nathaniel Paschall Clerk of the St Louis Court of Common Pleas within and for the County aforesaid Certify that the is a correct and Complete transcript of the record and proceedings in the case of Augustus Blumenthal vs John Bunding and Louis Engel as the same remains of record and on file in my office

In testimony whereof I hereto set my hand and affix the seal of said Court at office in the City of St Louis this ninth day of May A D Eighteen hundred & forty four —

Nathaniel Paschall Clerk

~~137~~ (9)

John Bunding and
Louis Engel appelants

vs

Augustus Blumenthal applee

Ex
1 any

Callahan for applt
Polk for applee

Filed 17th June 1844
H. L. Boon
Clerk

Transt $2.27 pd by J Bunding

In the Supreme Court of Missouri
July Term 1844

John Bunding & John Engle
vs
Augustus Blumenthal

And the said appellants defendants below say that there is error in the record and proceedings in this cause 6.

That the court below erred in refusing to grant a continuance

And that the Court below erred in refusing to grant a new trial

Wherefore the said Appellants pray that the judgement of the said Court of Common Pleas be reversed &c

Geo W Callahan
Atty for Appellants
by A Beatty.

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In the Supreme Court
July Term 1844

On appeal from St Louis
Court of Common Pleas

John Bunding &
John Engle
vs.
Augustus Blumenthal

Assignment of errors
by Bunding & Engle
appellants

Filed July 10. 1844
S. L. Born clk

Callahan Atty for Appellants

Bunding & Engel v. Blumenthal

Appeal from Hamilton Court of Common Pleas

This was an action by petition in debt, the writ being returnable to the February Term 1843. At that Term the appellants pleaded nil debet & a set off. The cause was set for ~~the~~ trial on the 12th March 1844, but was not reached until the 13th. On the morning of that day, plaintiff filed replications, and the defendant afterwards (& without having objected to the filing of the replications) moved the court for a continuance, for the reason that said replications were filed out of time. The court refused to grant the continuance & gave judgment for the plaintiff. The error complained of is the refusal of the court to grant the continuance.

The cases of Fisher v. Thomas (1 Mo. R. 740) and Dempsey v. Harrison & Glasgow (4 Mo. R. 270) cited by the appellants, we consider conclusive of their right to a continuance under the circumstances.

In those cases, where a party had abandoned an issue in law, on the day set for trial, and amended his pleadings, by leave of the court, so as to put in issue the merits of the cause, the opposite party was held entitled to a continuance. To force the party into trial, under such circumstances, was considered a surprise upon him, as he could not be presumed ready to establish an issue in fact not presented by the state of the pleadings.

In the present case, the defendants could not anticipate that replications would be permitted

out of time, and though the court undoubtedly had the power to grant such indulgence, a similar indulgence should have been extended to the adverse party, who seeing his pleas unanswered, it is to be presumed, did not come prepared with proof to establish them.*

Judgt. reversed & cause remanded

W. B. Napton

* The failure of the defendant to object to the replications, when they were filed, or his laches in not moving for a judgment of non pros. on the 12th might constitute a very good reason why the defendant should have been precluded from insisting on such a judgment on the 13th when the cause was called; but neither of these could deprive of him of his right to a continuance, if he desired it.

We concur
Tompkins
Scott

Copied V 27.
Completed
Bunding & Engel
v.
Blumenthal
Opinion
W. B. Napton
July Term 1844
filed Oct 7. 1844
A. L. Boon CR

In Supreme Court July Term 1844

Bundlin & Engle vs Blumenthal	Appeal from Common Pleas Court

Blumenthal sued Bundling & Engle who besides others put in a plea of set-off There was no replication until the day of trial. The plaintiff having asked and obtained leave to reply the defendants moved for a continuance which was refused the verdict having been given for the plaintiff A new trial was moved for. This motion was also overruled. The plaintiffs in error defendants below rely upon the following point

Their pleas not having been answered they might consider them as confessed and could not be prepared to sustain them. It operated therefore as a surprise to compell them to go to trial immediately See 1 Mo. Rep. Reshen vs Thomas p. 739 and 4 Mo. Rep. Dempsey vs Harriston p. 270.

A Beatty Atty for Pltffs in error

Bunding & Engle
vs
Blumenthal

Brief of pltffs in error

Beatty

In Supreme Court July Term 1844

Bunding & Engle
vs
Blumenthal

Appeal from Common Pleas Count

Blumenthal sued Engle & Bunding who besides others put in a plea of set-off. There was no replication until the day of trial. The plaintiff having asked and obtained leave to reply the defendant moved for a continuance which was refused. A new trial was moved for the verdict having been given for the plaintiff. This motion was also overruled. The plaintiffs in error defendants below rely upon the following point.

Their pleas not having been answered they might consider them as confessed and could not be prepared to sustain them. It opperated therefore as a surprise to compel them to go to trial immediately. See 1 mo Rep 737 Rosher vs Thomas and 4 mo. Rep. 270 Dempsey vs Harrison.

A Beatty Atty for Pltffs in error

Bundred & Engle
vs
Blumenthal

Brief of pltffs in error

Beatty

In Supreme Court July Term 1844

Bunding & Engle
vs
Blumenthal

} Appeal from Common Pleas court

Blumenthal sued Engle & Bunding who besides others put in a plea of Set off. There was no replication until the day of trial. The plaintiff having asked and obtained leave to reply the defendant moved for a continuance which was refused. A new trial was moved for the verdict having been given for the plaintiffs. This motion was also overruled. The plaintiffs in error defendants below rely upon the following point

Their plea not having been answered they might consider the same as confessed and could not be prepared to sustain it. It operated therefore as a surprise to compel them to go to trial See (1 mo Rep Rether vs Thomas p 739 and 4 mo. Rep. Dempsy vs Hamilton 270

A Beatty Atty for Pltffs in error.

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Bundling & Engle

vs

Blumenthal

Brief of ~~Pltff in error~~

Brief of Appellants

Beatty

John Binding Appellant
vs
Augustus Blumenthal
Appellee

} Supreme Court
July Term 1844

This is an action commenced by petition in Debt to the February Term 1843 of the St Louis Court of Common Pleas. On the 21st February 1843 the Deft. pleaded Nil debet & set-off. The cause was set for trial on the 12th of March 1844 - but was not reached on the trial Docket nor called for trial until the 13th of March. On the morning of said thirteenth & before the cause was reached, or called for trial, the Plff. filed a traverse of said Defendant's second plea, without any objection being made to such filing at the time, & not until said cause was called for trial: on the calling the cause for trial, the defendant moved for a continuance until the next term, for no other reason, than that said traverse had not been filed until the morning of the 13th of March. The court over-ruled this motion, & defendant excepted. The Plff. then gave in evidence the note copied into the Petition to which there was no objection, & obtained judgment for the Principal & interest thereof as debt & damages. The Defendant then within the time prescribed by law, moved the Court to set aside the verdict, & grant him a new trial for the following reasons.

1 Because the Court refused to grant defendant a continuance 2 Because the Court refused to non pros. the Plaintiff. 3 Because the Court rendered Judgment against the Defendant and 4 Because the Court oright to have given judgment against the Plff. This last motion

was also over-ruled by the Court, & defendant excepted & appealed.

The appellee contends in this case, that there is no error in the record & proceedings, & that the Judgment of the Court below is right. And for affirmance of the Judgment of the Court relies upon the following points.

1st The Replication to Defendant's plea set-off, though filed out of time, was yet filed without objection by Appellants, & before any motion was made by them for a non suit or continuance. Then it was too late to move that the Plff. below be non prosd, after the Traverse was filed. See Magehan vs Orme & Speers 7 Mo. R. 4

2d The court below did right to refuse the appellants a continuance - By the Statute See code of 1835 p. 460 § 32 all that the Deft can ask in case Plff fails to file his Replication to Deft's plea in due time, is judgment of non pros. against Plff. He can not ask a continuance for such failure. In this case there was no affidavit, or any other cause shewn for continuance, except the filing the replication out of time. The Statute taking away the ground last referred to, & there being no independant ground shown for the continuance by affidavit or otherwise, the court had no alternative but to over-rule the application & proceed with the trial. There was not even grounds laid for the exercise of Judicial discretion in the case. It was not claimed that there was any surprise. And even in the case of an amendment of the record the court will not grant a continuance for that reason, unless the amendment was such as to produce surprise to the opposite

party. See Jones vs Cox et al 7 Mo. R. 173

3rd The Court being justified, as appears from what is stated above, in proceeding with the trial, the testimony offered by Plaintiff below was sufficient, not merely to authorise the Court to render a judgment in his favor, but to lay it under a legal necessity to do so.

The counsel for Appellee respectfully submits to the Court in this case that he is entitled to ten per cent damages upon the amount due him in this case.

T. Polk Atty for Deft
Appellee

137. —

Supreme Court
July T. A.D. 1844

Augustus Blumenthal
Appellee
vs
John Bunding Appellant

Appellee's Brief
T. Polk for
Appellee