78/5

March 1849, #22
Adam Tempe
vs.
Charles Streiblein
St. Louis County

} debt

for work + labor
Contract ø fulfilled
To Germany to get
defendant's son

Merchants
contracts
Immigration

State of Missouri } ss.
County of St Louis }

Be it remembered that heretofore to wit; on the first day of April A. D. 1848 there was filed in the office of the Clerk of the St Louis Court of Common Pleas in and for the County aforesaid a declaration in the words and figures following viz:

Declaration

St Louis Circuit Court April Term 1848.

St Louis County ss. Charles F. Streibglin by his attorney C. Gibson Complains of Adam Lenk of a plea of trespass on the case on promises. For that heretofore to wit on the twenty fifth day of March in the year Eighteen Eighteen hundred & forty Eight at said County said defendant was indebted to said plaintiff in the sum of fifteen hundred dollars for the work & labour care & diligence and the necessary & proper Expenses & outlays of said plaintiff by said plaintiff done, performed bestowed laid out & Expended in & about the business of said defendant, at his special instance & request in making a journey from said County to Hesse Cassell & Eschwege in Europe and back again to said County, and also for that said defendant was heretofore to wit at the time & place aforesaid indebted to said plaintiff in the sum of fifteen hundred dollars for the work & labour care & diligence of said plaintiff before that time done performed & bestowed by said plaintiff in & about the business of said defendant & at his special instance and request, and also for that said defendant was at the time & place aforesaid indebted to said plaintiff in the further sum of fifteen hundred dollars for money by said plaintiff before that time laid out & Expended in & about the business

2) &c for said defendant & at his like special instance & request, and also in the further sum of fifteen hundred dollars for money by said defendant before that time had & received to &c for the use of said plaintiff, and being so indebted the said defendant in consideration thereof afterwards to wit at the time & place aforesaid undertook & then & there faithfully promised said plaintiff to pay him said several sums of money when he said defendant should be thereunto afterwards requested, Yet said defendant not regarding his said several promises & undertakings hath not yet paid said several sums of money or either of them or any part thereof to the said plaintiff tho' often requested so to do. but said defendant to pay him the same hath hitherto wholly neglected & refused & still doth neglect & refuse, to the damage of said plaintiff of fifteen hundred dollars wherefore he brings his suit &c.

C. Gibson p.q.

Summons } The State of Missouri

To the Sheriff of St Louis County - Greeting.

We command you to summon Adam Lemp to 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 third Monday of September next then and there to answer Charles F. Steinbeiss of a plea of trespass on the case upon promises to the damage of said plaintiff fifteen hundred dollars and have you then there this writ. Witness Philip Tippett Clerk of our said Court with the seal thereof hereto affixed at office in the City of St Louis this 1st day of April in the year of our Lord one

3) thousand Eight hundred and forty Eight

R Tippett Clerk

Shff return's Executed this writ in the County of Saint Louis on the 1st day of April 1848 by offering to read it and the declaration to Adam Lemp the defendant which he refused to hear Samuel Conway Shff

By John Mc Cluny Deb.

The following plea was filed September 19th 1849

plea The defendant comes and defends the demand of the plaintiff

Primm & Whitelaw atty's p.d.

And afterwards the following proceedings were had

September Term 1848 October 31st 1848

Jury & Trial Now at this day come the parties by their Attornies and thereupon came also a Jury to wit James F Little James G. Maxwell John A. McClelland Hugh Miller William Maloy Oliver H. Mc Mullen Henry Blakely David Adams Richard B Dallam Thomas Murphy William K. Barton and James Madden twelve good and lawful men who being duly elected tried and sworn well and truly to try the issue joined between the parties aforesaid the trial progressed and being finished the Jury retire to consult of their verdict.

And afterwards the following proceedings were had

September Term 1848 November 1st 1848

Judgment Now at this day come again the parties by their attornies and the Jury empannelled and sworn herein also come and being agreed upon their Verdict upon their oaths aforesaid find the issue within joined between said parties in favor of the plaintiff and assess the damages of said plaintiff sustained by reason of the nonperformance of the promises and undertakings in the declaration mentioned at the sum of seventy five dollars. It is therefore considered by the Court that said plaintiff recover of said defendant the damages aforesaid in form aforesaid by the Jury assessed and also his costs and charges herein Expended and have thereof Execution. The defendant files a Motion for a new trial herein

And afterwards the following proceedings were had to wit

4 September Term 1848. December 12th 1848.

New trial refused

The motion of said defendant for a new trial herein being heard and the Court being fully advised of and concerning the premises it is ordered that the same be overruled.

And afterwards the following proceedings were had viz:

September Term 1848. December 14th 1848.

appeal allowed

Recognizance

Now at this day comes the defendant by his attorney and files an affidavit herein and on his motion an appeal is granted him from the decission herein to the Supreme Court and thereupon Adam Lemp as principal and Louis Neivergelder and Louis Bach as securities severally acknowledge themselves indebted to Charles F. Streibelin in the sum of two hundred dollars to be levied of their respective goods and chattels lands and tenements. Yet upon condition that Adam Lemp shall prosecute his appeal now taken with due diligence to a decission in the Supreme Court, that if the judgment appealed from is affirmed or his appeal dismissed he will pay the damages and costs that have been recovered against him by the judgment of the St Louis Court of Common Pleas together with interest that shall grow due thereon and that he will also pay all costs and damages that may be adjudged against him in the Supreme Court upon his appeal then the recognisance to be void otherwise to be and remain in full force and virtue. Defendant files a bill of exceptions herein.

The following is the affidavit for appeal.

affr to appeal

Adam Lemp being sworn upon his oath says that the appeal prayed for in this case is not made for vexation or delay but because he believes himself aggrieved by the judgment and decision of the Court.

Sworn to & Subscribed
this 14th Decr 1848 Adam Lemp
P. Tippell Clk

The following is the bill of Exceptions.

Be it remembered that this case came on for trial in the Court of Common Pleas on the 31st day of October 1848.

5) The plaintiff called

Witness J. Prill } Jonothan Prill. I was bar Keeper at Semps I herd a conver=sation between plaintiff and Semp. Plff said he was going to Pittsburg and thence to Europe to bring out his family. and Semp said bring out my son and I will pay you one hundred dollars. for your trouble, and all his expenses and will also furnish you beer to sell, this was about 2½ Years ago in Summer of 1846. Plai=ntiff said he was going for his family and Semp said bring my son and I will present you one hundred dollars. I understood from what plaintiff said that plaintiff went for his family.

Cross ex. Streeblin did not bring defendants son. plff had been in Texas and said he was going for his family and Semp said in case he plaintiff would bring my son and I will pay $100 and my sons expenses.

Witness G. Schildroth } George Schildroth called by plff. was in Germany at at time Streblin came he went to Eschwoge with me saw Semps son at a beer house I lived in Cassel it is 8 hours walk from Cassel to Eschwoge. went to Albury about one hour from Plaintiff had a Sister in Eschwoge ~~a days travel~~ Plaintiffs son was with him when he went to Eschwoge a days travel each day on foot. Semps son was in Eschwoge with his Mother.

Cross examined, Saw Plaintiff six or sever times in Albourn I left Germany before Plaintiff.

Witness C. Streiblin } Cornelius Streiblin. Streiblin came home October 6. 1846 I went with my father to Eschwoge. to get Semps son father tried to get Semps son. went to Eschwoge and back to Cassel seven or 8 times we went in a carriage. Plaintiff has a Wife and six daughters in Cassel has a Sister in Albourn. father brought none of his family to this country but myself.

Witness L. Schreiber } Lewis Scheiber It costs about $100 to go to Germany and same to come back,

Plaintiff then offered a power of attorney of which the following is a translation (This cannot be inserted here for the reason that the same has not been furnished to the clerk)

Witness F. Kretschmar

6) Plaintiff then offered a power of attorney of which the following is a translation (here insert the translation,

Fred. Kretschmar. The word translated "convey" should be translated bring and deliver "or fetch" every German would put that construction upon it.

Witness Kehr

Chas. Gibson the word suscipinem means to convey to or bring to Plaintiff here closes his case & defendant calls Adolphe Kehr - Knew Plaintiff in Germany and in St Louis in Summer of 1846 met him in St Louis & he went with me to the Country and spent a week with me - He said he was going to Pennsylvania to get money to go home to Germany to get his family & to bring them to St Louis - I gave him an order on Lemp for $4½ - He told me several times he was going to Germany for his family - We went to Lemps house together -

Witness Eggers

Edward Eggers knows Lemp - in March 1847 Lemp wrote through us to provide a cabin passage for his son. - The evidence was here closed and the defendant then asked the following instructions -

Defts Instructions refused

"The Jury are instructed that under the evidence introduced by the plaintiff, he is not entitled to recover in this action"

"The plaintiff cannot recover in this action unless he show that he has complied with the contract made with the defendant"

"If the Jury believe from the evidence that the contract between the parties in this suit was reduced to writing and signed by the defendant" the Jury will find for the defendant"

If the Jury believe from the evidence that the contract between the parties was that the plaintiff

7 Should bring and deliver the defendant his Son then unless the plaintiff shows that he has delivered to the defendant his Son, or that he was prevented by the defendant from So doing, they will find for the defendant"

"If the Jury believe from the evidence that the defendant Specially promised the plaintiff to pay the Sum of One hundred dollars if the plaintiff brought and delivered to the defendant his Son then they will for the defendant"-

Which Said instructions asked by the defendant the Court refused to which refusal the defendant then excepted - The plaintiff then asked the following instruction which the Court refused.

pltffs Instruction Refused

"If the Jury believe from the evidence that plaintiff did under a contract with deft go to Europe as well to get his own family as to get Lemp's Son and after due diligence failed to obtain the Son they will find for pltff for what proportion his Services for Deft bore to the whole affair"

The Court then gave the following instruction

Instruction Given

"If the jury believe from the evidence that the defendant Specially promised the plaintiff to pay the Sum of one hundred dollars if the plaintiff brought and delivered to the defendant his Son they will find for the defendant provided the Jury Should believe from the evidence that the personal expenses of the plaintiff in going to Germany and returning are not the expenses contemplated by the writing given in evidence and this depends upon the question whether the plaintiff went Specially on the defendants business or whether it was merely incidental to his own"

8 to the giving of which the defendant by his counsel excepted - and on the first day of Nov. 1848 the defendant filed his motion for new trial -

Motion for a new trial

The defendant by his Counsel moves the Court to set aside the verdict and judgment in this case and to grant a new trial for the reasons following to wit:

1. The verdict is against law -
2. The verdict is against evidence
3. It is against the instructions of the Court
4. The Court refused the instructions asked by plaintiff illegally
5. The Court gave illegal instructions
6. The verdict is against the weight of evidence
7. The contract offered in evidence was not declared upon.

Primm & Whitesides
attys for Defts.

which the Court on the 13th Inst. overruled to which overruling the defendant excepted -

Wherefore defendant prays the Court to sign and seal this bill of exceptions which is done.

M. Blair Judge.

State of Missouri
County of St Louis } ss.

I, Philip Tippett Clerk of the St Louis Court of Common Pleas within and for the County aforesaid certify the foregoing to be a true and com-

9 plete Transcript of the record and proceedings in the case of Charles F. Streibelein against Adam Lemp as the Same remain in my office

In Testimony Whereof I hereto Set my hand and affix the Seal of Said Court at office in the City of Saint Louis this Fifteenth day of March A. D. 1849.

Philip Tippett Clk

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50.

March. T. 1849

Chas. F. Streibelin

v. Z. Transcript

Adam Lemp. apt.

Filed March 9. 1849
H. L. Boon Clk.

Exd.

$3.30 pd by atty Whittlesey

Supreme Court

March Term 1849

Adam Semp }
C. F. Streibein } The appellant by Whittelsey his counsel comes and says that the Court below erred

1st In refusing the instructions asked by the defendant
2nd In giving the instruction on its own motion
3rd In refusing the motion for a new trial

Whittelsey
Counsel for Appt.

Adam Semp }
vs
C. F. Streibelein } The defendant in error says there is no error in the proceedings & record aforesaid &c

S. Gibson
for d. in error.

Supreme Court
March Term 1849

Adam Lemp

vs

C. F. Stieblein

Assignment of Errors

Whittelsey
Counsel for Appt.

Filed March 22. 1849
H. L. Boon clk. p. t.

Lemp
vs
Streibelein

Supreme Court Mar. T 1849

The Deft in ~~this~~ Court makes these points
The word "zuzufüren" was properly translated, and was so decided by the jury in giving their verdict
The action was properly brought. The Power of Attorney given in evidence, was not a contract between the parties It was a mere power to Streibelein to go for Lemp's son & bring him from Germany here. Streibelein ~~was~~ could not be liable to an action for not fulfilling the power.
There was conflicting evidence as to the object of Streibelein's visit to Hesse Cassell, & the jury decided that he did not go there for Lemp's son. This is evident from the amount of the verdict 75¢. This small amount could have been given only for Streibelein's services in going for Lemp's son from Hesse Cassel to Eschwege a small town about 2 days journey off. A journey to Europe costs as was proved several hundred dollars. From these facts, I think, it is clear that the verdict was founded on the testimony & not on the Power of Attorney.

R Gibson
for Deft

Supreme Court

Lemp

vs.

Streibelein

Brief of appellee

Supreme Court
March Term 1849

Streiblein
ass
Adam Semp

This was an action of indebitatus assumpsit for services and work and labor. At the trial of the cause, the first witness for the plaintiff proved, that the plaintiff intended to go to Europe to bring over his family to this country, and the defendant promised the plaintiff that if the plaintiff would bring with him the defendants son from Germany, that he the defendant would pay the plaintiff One hundred dollars for his trouble, and the expenses for his son. The plaintiff did not bring the defendants son, although he saw him at Eschwage two or three times the boys mother refusing to let him leave. The distance from Cassel the place where plaintiffs family resided to Eschwage was about eight hours walk. The plaintiff also offered in evidence a power of attorney from Semp to Streiblein authorising the plaintiff to take the boy and "fetch" him to America. There was some dispute between the witnesses as to the meaning of the word sutzfeerein, one testifying that it meant to "fetch", including in it the idea of delivery, the other that it meant "to convey". The power of attorney also contained an agreement to refund the expenses of bringing the boy over.

The defendants witnesses testified, that Streiblein told them that he was going to Europe for his family.

Upon the evidence the defendant asked of the court the following instructions, to the refusal of which and the overruling the motion for new trial, the defendants excepts for error.

The jury are instructed that under the evidence introduced by the plaintiff he is not entitled to recover in this action

The plaintiff cannot recover in this action unless he shows that he has complied with the contract made with the defendant.

If the jury believe from the evidence that the contract between the parties to this suit was reduced to writing and sign-

ed by the defendant, the jury will find for the defendant.

If the jury believe from the evidence, that the contract between the parties was, that the plaintiff should bring and deliver to the defendant, his son, then unless the plaintiff shows that he has delivered the defendant his son, or that he was prevented by the ~~plaintiff~~ defendant from so doing they will find for the defendant.

All which instructions the court refused, and gave the following. If the jury believe from the evidence that the defendant specially promised the plaintiff to pay the sum of One hundred dollars if the plaintiff brought and delivered to the defendant his son, they will find for the defendant, provided the jury should believe from the evidence that the personal expenses of the plaintiff in going to Germany and returning are not the expenses contemplated by the writing given in evidence, and this depends upon the question whether the plaintiff went specially on the defendants business or whether it was merely incidental to his own

To the giving of which instruction and the refusal of those asked by the defendant and the overruling the motion for a new trial the defendant excepted and assigns the same for error.

Statement of the case

Whittelsey

Counsel for Appellant.

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Supreme Court
March Term 1849

Adam Lemp

vs

Chas. H. Streiblein

Statement of Case

Whittelsey
Counsel for Appt

Adam Lemp
to
Streiblein

Supreme Court
March Term 1849

The main questions involved in this case as presented by the defendant are

1st Can the plaintiff, when a special contract has been made, the terms of which have not been complied with on his part, set that contract aside and sue in indebitatus assumpsit on the common counts, or must he specially declare upon his contract? It is not questioned that where there is a special contract which has been complied with by the plaintiff, and nothing remains but the payment of money by the defendant, that the plaintiff may sue on the common counts, and give the special contract in evidence to show the quantum of damages. But this is not that case. By the plaintiffs own showing, there was a special contract by which the plaintiff was to receive one hundred dollars if he brought the defendants son, and he could not recover if he had declared upon that contract specially, but by showing that he had complied with its terms, or that he had been prevented by the defendant from its performance, or that he was released by the defendant.

The doctrine laid down in Cutter vs Powell 6. T. R. 320 settles the principle of this case. That is considered as a leading case in the Law, and is so given in 2 Smiths L. Cases 1. quod vide & the notes attached. In that case after a c. a. v. the court decided, that if a sailor hired for a voyage make a special contract for a sum certain, provided he proceed continue and do his duty on board for the voyage & before the arrival of the ship he dies, no wages can be claimed either on the contract or on a quantum meruit, and the court there say, that wherever there is an express contract, the parties must be guided by it, and one party cannot relinquish or abide by it as it may suit his advantage. And where the parties have come to an express contract none can be implied, has prevailed so long as to be reduced to an axiom in the law.

See Brooms Maxims. To the same point see also the case in Salk. R. 65 cited by Justice Laurence in giving his opinion in the case of Cutter v Powell. No action of indebitatus assumpsit or upon a quantum meruit can be brought for any thing done under a special agreement which remains open. Hulle v Heightman 2 East 145. A party cannot recover on a special contract unless he has complied with its terms, nor upon the common counts, because he is bound by his agreement. The case of Helm v Wilson 4 Mo R. 41 covers this point, and the decision in that case lays down the only principle that is consistent with true reason, sound logic and good law. All the terms of the contract must be complied with, before the party can recover at all, unless prevented by the other party, or excused by him, or the terms altered by consent of both. For the same principle see Fagan v Meredith 4 Mo R 514. See also the cases. Chambers v King and Tunstall 8 Mo R 517 Perry v Cooper 8 Mo R. 205. Posey v Garth 7 Mo R. 94. In the case before the court the defendant has received no benefit of any kind, neither did he prevent the plaintiff from performing his agreement, neither was the plaintiff prevented by the act of God, so that in no way has he shown any right to recover.

See Read v Rann 10 Brb. 439 Broad v Thomas 7 Bing R 99 Sinclair v Bowles 9 Brb 92. Weston v Downes Doug R 23 Ellis v Hamlin 3 Taunt R 52 Tayon v Mansfield 2 Mass R. 147 Stark v Parker 2 Pick R. 267 McMillan v Vanderlip 12 John R. 165 Jennings v Camp 13 J R. 94.

If this view of the law of the case be correct, the court erred in refusing the first, second and fourth instructions asked by the defendant, for the plaintiff was not entitled under the declaration and evidence, for the declaration was indebitatus assumpsit, and the evidence showed a special contract, so that the evidence did not support the declaration, but varied from it entirely; and if the plaintiff had declared on the special agreement he could not recover, as he

had not performed his part of the agreement, nor shown any legal excuse for not performing it.

The instruction given by the court was erroneous as it left the a matter of law to the jury, in the construction of the power of attorney.

The court also erred in refusing the third instruction asked by the defendant, for if the contract was reduced to writing, then it was a special agreement by its terms, and the plaintiff should have declared upon the contract therein contained, and not having done so, he could not recover upon the common counts merely. The first witness introduced by the plaintiff, proved a special contract to pay a particular sum, if then that was altered and another made by force of the instrument of writing, then that writing was itself a contract, and the only legal evidence of the terms agreed upon between the parties, and it was the duty of the plaintiff to declare upon the contract contained in the written instrument and having failed to do this, he cannot recover. The general principle is well established, that where a contract is made, all anterior and cotemporaneous stipulations and representations are merged in the written instrument." Gooch v Connor 8 Ko R. 391. The court therefore erred in refusing the third instruction asked by defendant.

The court below having thus erred in refusing instructions asked by defendant, and in the instruction given on its own motion, and in overruling the motion for new trial, its judgment should be reversed. &c

Whittlesey
Counsel for Appellant.

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Supreme Court
March Term 1849

Adam Lemp

vs

Chas. F. Streiblein

Appellants Brief

Whittelsey

Counsel for Appt.

By these presents. I the undersigned Adam Lemp of St Louis State of Missouri in the United States of America transfer to Mr. Charles F. Streibelein. Merchant at Hesse Cassel now living at No 125 in Westerdoor formerly — Landbereiter bij Landgericht in Cassell. all and every legal proper authority & power my son Jacob Lemp of Eschwege who is somewhat over ten years old (abzufohlen) to convey to St Louis to take him under his protection and control and "zuzuführen" convey him by the first safe opportunity to my present place of residence in St Louis, during this time to provide all things for him to take care of him and furnish him all necessaries and generally in all matters in relation to the premises for me & in my stead so to act as I as father would be in condition to act if personally present For this purpose I give to Mr. C. F. Streibelein all requisite authority and parental control, and ratify hereby all that he may do & perform in and about the premises as if done by me At the same time I promise hereby said C. F. Streibelein to pay him all costs & outlays arising out of the premises and him in all cases to compensate In Testimony whereof I have with my own hand signed this Power of attorney Done at St Louis twenty-first of June eighteen hundred & forty six Lemp

This instrument was acknowledged before a Justice of the Peace & regularly proven

Streibelein

Lemp,
vs
Steiblein. } App. from Com: Pleas.

According to the statement which has been furnished in this case, the plaintiff was prevented from complying with his verbal agreement, by the interference of the defendants into. Assumpsit, therefore, was the proper remedy.

Upon the other point presented, although the instruction given by the Court, in lieu of those refused, was rather unperspicuously drawn, it certainly did not present the case of the plaintiff in a more favourable point of view than was warranted by the contradictory state of the testimony — presented as above. The jury having found for him under such circumstances, to interfere with their verdict would be to run counter to the spirit of all previous decisions of this Court upon similar questions. The judgment of the Circuit Court is therefore affirmed.

Ja's H. Birch.

Concurred in:

W. B. Napton

Adam Lemp
vs } Opinion
Charles F. Streiblin

March Term 1849
Birch, Judge.

Filed April 10. 1849.
H. L. Boon clk.