Hutchison, William vs. Patrick, Garrison April 1831 1st Dist. Howard 111/11

#110 Debt: Reversed/Remanded; Court erred in striking plea of payment

Contract; Judicial Procedure

KY law properly put @ issue in plea

State of Missouri First Judicial District Set.

The State of Missouri To the Judge of the Circuit Court for the County of Howard: Greeting.

Whereas it hath been suggested to us that in the record and proceedings and also in the rendition of the Judgment in a certain cause lately pending before you wherein William Hutchison Junr. was plaintiff and Garrison Patrick was defendant in an action of Debt on a Record, manifest error hath occured, and We being willing that such errors if any there be should be corrected, Do command you that the record and proceedings of the said cause you send certified as fully and amply as the same now remains before you to our Supreme Court to be held at the town of Fayette in the County of Howard within and for the first Judicial District of said State on the first Monday of April next, so that our Judges of our said Supreme Court on inspecting the same may proceed to do therein that which to law doth appertain and to them seem meet and proper. And have you then and there this writ

Witness Gray Bynum clerk of our said Court at office the tenth day of March in the year of our Lord One thousand eight hundred and thirty one.

Gray Bynum clerk

Supreme Court
April term 1831.

Garrison Patrick
vs } Writ of Error.
William Hutchison Jr

State of Missouri
County of Howard } Set. Plea in the Circuit Court begun and held at the town of Fayette within and for the County of Howard on the first Monday of November in the year of our Lord one thousand eight hundred and thirty before the Honorable David Todd Judge of said Court.

Be it remembered that heretofore towit on the sixteenth day of October in the year one thousand eight hundred and thirty William Hutchison Junr. by Ryland & Giles his attorney filed in the office of the clerk of the Circuit Court for the County of Howard aforesaid his Declaration against Garrison Patrick of a plea that he render unto him the sum of four hundred and thirty dollars and twenty nine cents which to him he owes and from him unjustly detains: which said Declaration is in the following words and figures towit.

State of Missouri
County of Howard } Ss. In the Circuit Court of November Term 1830.

Declaration.

Howard County towit.- William Hutchison Jr by his attorney complains of Garrison Patrick of a plea that he render unto him the sum of four hundred and thirty dollars and twenty nine cents lawful money of the United States which to him he owes and from him unjustly detains: For that whereas the said William Hutchison Jr administrator of the Estate of Nathan Hutchison deceased heretofore towit on the twentieth day of November in the year eighteen hundred and twenty before the Honourable Benjamin Shackelford by the name and description of "B. Shackelford" presiding Judge of the Circuit Court within and for the County of Trigg in the State of Kentucky in the Circuit Court of the said County of Trigg, towit in the County of Howard and State of Missouri aforesaid by the consideration and Judgment of the said Court

did recover against John Potts and (said) Garrison Patrick the sum of One hundred and three dollars and fifty cents with interest thereon to be computed after the rate of six per centum per annum from the first day of May eighteen hundred and twenty until paid and also his costs by him about his suit in that behalf expended whereof the said John Potts and Garrison Patrick were convicted as by the record and proceedings thereof remaining in the said Trigg Circuit court towit at the County of Howard aforesaid will more fully appear. which said judgment remains in full force and effect not reversed satisfied or otherwise vacated. and the said plaintiff hath not obtained any satisfaction of or upon said judgment so recovered as aforesaid - which is a part and parcel of the sum above demanded, whereby an action hath accrued to the said plaintiff to demand and have of and from the said Garrison Patrick the sum of One hundred and three dollars and fifty cents aforesaid.

2. And for that whereas also the said William Hutchison Jr administrator of the estate of Nathan Hutchison deceased heretofore towit on the twentieth day of November eighteen hundred and twenty before the Honourable Benjamin Shackelford by the name and description of "B. Shackelford presiding Judge of the Circuit court within and for the County of Trigg in the State of Kentucky, in the Circuit Court of the said County of Trigg towit in the County of Howard and State of Mesponie aforesaid by the further consideration and judgment of said Court did recover against the said John Potts and Garrison Patrick the further sum of One hundred and three dollars and fifty cents with interest thereon to be computed after the rate of six per centum per annum from the first day of May eighteen hundred and twenty until paid and also his costs by him about his suit in that behalf expended which costs the said plaintiff avers to amount to the sum of eight dollars fourteen and a half cents, whereof the said John Potts and Garrison Patrick were convicted

as by the record and proceedings thereof remaining in the said Trigg Circuit Court towit at the County of Howard aforesaid will more fully appear; which said Judgment remains in full force and effect not reversed satisfied or otherwise vacated; and the said plaintiff hath not obtained any satisfaction of or upon said Judgment so recovered as aforesaid which is a further part and parcel of the sum first above demanded, whereby an action hath accrued to the said plaintiff to demand and have of and from the said Garrison Patrick the said sum of one hundred and three dollars and fifty cents so recovered as aforesaid as well as the sum of eight dollars and fourteen and a half cents the costs aforesaid.

3. And for that whereas also the said William Hutchison Jr. administrator of the estate of Nathan Hutchison deceased heretofore towit on the twentieth day of November in the year eighteen hundred and twenty before the Honorable Benjamin Shackelford by the by the name and description of "B. Shackelford" presiding Judge of the Circuit Court within and for the County of Trigg in the State of Kentucky, in the Circuit Court of the said County of Trigg towit in the County of Howard and State of Missouri aforesaid by the further consideration and judgment of said Court did recover against one John Potts in his life time and the said Garrison Patrick which said John Potts the plaintiff avers to have died since the recovery, the further sum of one hundred and three dollars and fifty cents with interest thereon to be computed after the rate of six per centum per annum from the first day of May eighteen hundred and twenty until paid and also his costs by him about his suit in that behalf expended whereof the said John Potts in his life time and Garrison Patrick were convicted as by the record and proceedings thereof remaining in the said Trigg Circuit Court towit at the County of Howard aforesaid will more fully appear which said judgment remains in full force and effect not reversed satisfied or otherwise

vacated, and the said plaintiff hath not obtained any satisfaction of or upon said judgment so recovered as aforesaid which is a further part and parcel of the sum first above demanded, whereby an action hath accrued to the said plaintiff to demand and have of and from the said Garrison Patrick the sum of one hundred and three dollars and fifty cents aforesaid.

4. And for that whereas also the said William Hutchison Jr administrator of the Estate of Nathan Hutchison deceased heretofore towit on the twentieth day of November eighteen hundred and twenty before the Honourable Benjamin Shackelford by the name and description of "B. Shackelford" presiding Judge of the Circuit Court within and for the County of Trigg in the State of Kentucky, in the Circuit Court of the said County of Trigg towit in the County of Howard and State of Missouri aforesaid, by the further consideration and judgment of said Court, did recover against the said Garrison Patrick and a certain John Potts whom the said plaintiff avers is since dead, in the life time of the said Potts, the further sum of One hundred and three dollars and fifty cents with interest thereon to be computed after the rate of six per centum per annum from the first day of May eighteen hundred and twenty until paid and also his costs by him about his suit in that behalf expended, which costs the plaintiff avers amount to the sum of eight dollars fourteen and a half cents whereof the said John Potts in his life time and Garrison Patrick were convicted as by the record and proceedings thereof remaining in the said Trigg Circuit Court towit at the County of Howard aforesaid will more fully appear which said judgment remains in full force and effect not reversed satisfied or otherwise vacated and the said plaintiff hath not obtained any satisfaction of or upon said judgment so recovered as aforesaid, which is the balance and residue of the said sum of money first above demanded whereby an action hath accrued to the said plaintiff to demand and have of and upon the said defendant Garrison Patrick the sum of One hundred and three dollars and fifty cents so recovered as aforesaid as also the further sum of Eight dollars and fourteen and one half cents

his costs of suit aforesaid. Yet the said defendant Garrison Patrick although often requested so to do hath not as yet paid the said sum of four hundred and thirty dollars and twenty nine cents above demanded or any part thereof to the said plaintiff Nor did the said John Potts (although often requested) in his life time to pay the said plaintiff the said sum of four hundred and thirty dollars and twenty nine cents above demanded or any part thereof Nor has any person paid or satisfied the same or any part thereof to the said plaintiff for the said John Potts since his death; but the same still remains due and payable; and the said defendant Garrison Patrick hath hitherto wholly neglected failed and refused to pay the same or any part thereof and still doth fail refuse and neglect to pay the same or any part thereof to the said plaintiff: To the damage of the said plaintiff of two hundred dollars, and therefore he brings his suit &c. Ryland & Given attys for plaintiff"

On the day of filing the said declaration the plaintiff by his attorney also filed a Bond for the costs of suit, which bond is in the following words and figures towit.

"William Hutchison Jr vs Garrison Patrick } Action of Debt. In the Circuit Court of Howard County State of Missouri November term 1830.

Bond for costs. } Whereas William Hutchison Jr the above plaintiff is not a resident of this State. Now Know all men by these presents that I Joel H. Haden of the County of Howard and State of Missouri acknowledge myself bound to pay or cause to be paid unto the said Garrison Patrick the above defendant and unto the officers of the Howard Circuit Court aforesaid all costs which may accrue in the above action. In testimony whereof I hereunto subscribe my name and affix my seal this 8th day of October 1830.

Witness J. F. Ryland. (signed) Joel H. Haden (seal)"

And afterwards on the day last aforesaid our clerk of the Circuit Court aforesaid indorsed upon the said declaration a writ of Summons, which said writ is in the following words towit.

"State of Missouri } County of Howard } ss. The State of Missouri To the Sheriff of the County of Howard: Greeting: We command you to summon Garrison Patrick that he be and appear before the Judge of our

Summons.

Circuit Court at the next term thereof to be held at the town of Fayette within and for the County of Howard on the first Monday of November next then and there to answer unto William Hutchison Jr. of a plea that he render unto him the sum of four hundred and thirty dollars and twenty nine cents which to him he owes and from him unjustly detains. To the damage of the said plaintiff as is said of two hundred dollars. And have you then and there this writ. Witness Gray Bynum clerk of said (L.S.) Court at office this sixteenth day of October in the year of our Lord one thousand eight hundred and thirty. Gray Bynum clk."

And afterwards at the said first Monday of November our sheriff towit Nathaniel Ford Esquire sheriff of Howard County made return of said writ with his return thereon indorsed as follows:

Sheriff's return } "I certify that I executed the within writ of Summons on the within named Garrison Patrick by reading the within declaration and writ of Summons to him the said Garrison Patrick in Howard County on the 16th day of October 1830.

N. Ford Sheriff of Howard County by A. M. Morrison D. Shff. H.C.

And afterwards towit at the said November term of our said Court The defendant by his attorney files his Demurrer to the plaintiffs declaration and the plaintiff by his attorney files his joinder in Demurrer, and by the consent of the parties aforesaid by their attorneys they are to go to trial at the next term on the merits:— and the cause is ordered to be continued. Which said Demurrer filed as aforesaid is as follows towit.

Garrison Patrick

Demurrer. } vs } Action of Debt upon a Record.

Wm Hutchison

And the said Garrison by his attorney comes and defends the wrong and injury when &c and says that the said declaration and the matters therein contained in manner and form as the same are above stated and set forth are not sufficient in law for the said William Hutchison to have or maintain his aforesaid action thereof against him the said Garrison Patrick and this he the said Garrison is not bound by the law of the land to answer the same and this he is ready to verify. Wherefore for want of sufficient declaration in this behalf the said Garrison prays Judgment, and that the said plaintiff may be barred from having or maintaing his aforesaid action thereof against him &c. And the said defendant

shows here to the Court these further causes of Demurrer to the said declaration

1. That the said plaintiff in his said declaration does not show at what term of the Circuit Court of Trigg the said supposed judgment was obtained.

2. That the said plaintiff does not show that the said Circuit Court of Trigg County had jurisdiction of the said supposed action between the said William & the said Potts & Patrick, in which the said supposed judgment is rendered

3. That the said plaintiff in his said declaration does not show that the said supposed judgment was given by the said Circuit Court of Trigg against the said defendant.

4. That the said plaintiff has not shown in his said declaration that the Garrison Patrick mentioned in the said supposed judgment is the same person with this defendant.

5. That the said plaintiff has not shown in the first second & fourth counts of the said declaration that the John Potts mentioned in the said supposed judgment set forth in the said counts in the plaintiffs declaration is dead or that he is not within the jurisdiction of this Court.

6. That the said plaintiff has declared in the debit and debtinet and also alleges himself to be the administrator of the Estate of Nathan Hutchison deceased.

7. That the plaintiff declares in the character of administrator of Nathan Hutchison deceased and does not make proof of his letters of administration.

8. That the said plaintiff declares on a judgment obtained before B. Shackelford presiding Judge of the Circuit Court within & for the County of Trigg without showing in particular who were or whether he had any associates.

And the said declaration is otherwise informal and insufficient

John Wilson for Plff.

And the said joinder in Demurrer filed as aforesaid is as follows towit

Joinder in Demurrer.

Wm Hutchison Jr. adm.
vs
Garrison Patrick. } Joinder in Demurrer.

And the said plaintiff saith that his said Declaration and the matters therein contained in manner and form as the same are above stated and set forth are sufficient in law for him the said plaintiff to have and maintain his action aforesaid against the said defendant, and the said

plaintiff is ready here to verify and prove the same. Wherefore inasmuch as the said defendant has not answered the said declaration nor in any manner denied the same, the said plaintiff prays judgment and his debt aforesaid together with his damages by him sustained by reason of the detention thereof to be adjudged to him. Ryland & Givens for Pltff."

And afterwards towit at the February term of our said Court in the year one thousand eight hundred and thirty one, "Come the parties aforesaid by their respective attorneys aforesaid. Whereupon all and singular the premises being seen and heard and by the Court here fully understood and mature deliberation thereupon had for that it appears to the Court here that the declaration aforesaid of the said plaintiff and the matters therein contained in manner and form as the same are above stated and set forth are sufficient in law for him the said plaintiff to have and maintain his action aforesaid against the said defendant and thereupon on motion of the defendant by his attorney he has leave to withdraw his demurrer and plead Whereupon on motion of the plaintiff by his attorney he has leave to amend his declaration by interlining the word "said" which is done accordingly.

Demurrer argued & overruled

And afterwards towit at the said February term of our said Circuit Court in the year last aforesaid and on the eighteenth day of said month. Comes the defendant aforesaid by his attorney and files pleas of Nul tiel record and payment to the plaintiffs declaration, which pleas are as follows.

~~William~~ "Garrison Patrick adr William Hutchison.

And the said defendant comes and defends the wrong & injury when &c and says that there is not any record of the said supposed recoveries or any of them in the said declaration mentioned remaining in the said Circuit Court of the said County of Trigg in the said State of Kentucky in manner and form as the said plaintiff hath above in his said declaration alleged and this he the said defendant is ready to verify: Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him the said defendant &c

Plea. Nul tiel. Record.

John Wilson attorney for deft.

And the said defendant for further plea in this behalf

Plea payment. says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him because he says that after the rendition of the said supposed judgments in the said plaintiffs declaration mentioned and before the commencement of this suit viz. on the first day of September one thousand eight hundred & twenty six at the said County of Trigg in the said State of Kentucky viz. at the County of Howard aforesaid he the said defendant well and truly paid & satisfied to the said plaintiff the said several judgments mentioned in the said plaintiffs declaration with all damages interest and costs which had in any wise accrued upon the same.

And the said defendant in fact avers that at the time of the rendition of the said supposed judgments in the said plaintiffs declaration mentioned by the said Circuit Court of Trigg County in the said State of Kentucky the law of the said State of Kentucky was & ever since has been and still is that where any person had paid & satisfied a judgment which had been rendered against him by any court of that State before an action was brought upon the same judgment, in any court of the said State of Kentucky that the defendant in such action might plead the same payment & satisfaction in bar to any action brought upon the said judgment, and this he the said defendant is ready to verify, wherefore the said defendant prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him &c.

John Wilson atto for deft.

And thereupon the plaintiff by his attorney files his Replication to the defendants said plea of Nul tiel record which is as follows.

Mr Hutchison &c.
vs
Garrison Patrick } In the Howard circuit court February Term 1831.

Replication. And the said plaintiff as to the said first plea of the said defendant saith that he the said plaintiff by reason of any thing by the said defendant

in that plea alleged ought not to be barred from having and maintaining his action aforesaid thereof against him the said defendant, because he says that there is such a record of the said recoveries remaining in the said Circuit Court of the said County of Trigg in the said State of Kentucky as he the said plaintiff hath above in his said declaration in that behalf alleged, and this the said plaintiff is ready to verify by the said record, when and where and in such manner as the Court here shall direct and award and he prays that the said record may be seen read and inspected by the Court here, and because the said Court is not yet advised what judgment to give of and upon the premises a day is therefore given to the parties aforesaid before the court here until — to hear the judgment of the said Court thereupon for that the said Court here are not yet advised thereof &c

Reynolds & Given attys for Pltff.

The said plaintiff by his attorney then moved the court to set aside the defendants plea of payment as an improper plea, which motion is sustained by the Court and the said plea is set aside.

The plaintiff then by his attorney prayed a trial of the cause to which the defendant by his attorney objected and claimed a continuance of the cause on account of the amendment made to the plaintiffs declaration, Whereupon it is considered by the court that the defendant be ruled to a trial at this term.

And afterwards to wit at the day last aforesaid" come the parties aforesaid by their respective attorneys aforesaid and neither party requiring a Jury to try the issue herein all and singular the premises are by them submitted to the Court which being seen and heard and by the Court here fully understood, it is considered by the court here that there is such a record of the said recoveries remaining in the said Circuit Court of the said County of Trigg in the State of Kentucky as the said plaintiff above by pleading hath alleged, and that the said plaintiff hath sustained damages by reason of the

detention of the sum of money in the declaration mentioned to the sum of Seventy four dollars Ninety and a half cents Therefore it is considered that the said William Hutchinson Jr. recover against the said Garrison Patrick his said debt of one hundred and three dollars and fifty cents and also his damages aforesaid in form aforesaid by the Court assessed together with his costs and charges by him about his suit in this behalf laid out and expended.

Whereupon the defendant by his attorney moves the Court for a new trial of the cause, which motion is overruled.

Memorandum during the progress of this cause the defendant by his attorney saved his exception to the sound opinion of the court which were signed and sealed by the Court and ordered to be made a part of the record, which exceptions are as follows.

Exceptions. "Patrick ats Hutchinson } After the Demurrer in this cause to the declaration had been overruled the plaintiff prayed leave to amend his said declaration and at the same term made an amendment to the first count by inserting the word said which is inclosed in the parenthesis thus (and) between the words "and Garrison" in the following sentence "did recover against the said John Potts and Garrison Patrick", the defendant then filed his plea of Nul tiel record and payment, to the first the plaintiff replied to the other moved to strike from the docket, & prayed a trial and the defendant claimed a continuance on account of the amendment, but the Court refused the continuance and ruled the party to trial to which opinion of the Court the defendant excepts & prays the same may be signed & sealed & made a part of the record which is done.

David Todd (Seal)"

Exceptions "Patrick ats Hutchinson } Upon the trial of this cause the plaintiff offered in evidence upon the issue joined upon the plea of Nul tiel record the following record.

Record. "Commonwealth of Kentucky Set. Plea before the Honorable Benjamin Shackelford Judge of the Trigg Circuit Court at the Court house in Cadiz on the 20th day of November A.D. 1820. – William Hutchinson Jr. administrator

of the estate of Nathan Hutchison deceased plaintiff
against John Potts and Garrison Patrick defendants. In Debt.
Be it remembered that heretofore towit on the 12th day of
August 1820 the plaintiff in the aforesaid cause filed in the
clerks office of the Court aforesaid his declaration against
the defts. in the words and figures following towit.
"Trigg Circuit fct. William Hutchison Jr administrator
of the Estate of Nathan Hutchison decd. complains of
John Potts and Garrison Patrick in custody &c. of a plea
that they render unto him the sum of one hundred and
three dollars fifty cents lawful money of Kentucky which
to him they owe and from him unjustly detain: for
that whereas the said defendants on the 4th day of January
in the year 1820 at the Circuit aforesaid by their certain
writing obligatory signed with their own proper hands &
sealed with their seals and now here to the court shewn
the date whereof is the same day & year aforesaid, "On or
before the first day of May in the year 1820 promised and
obliged themselves their heirs &c. to pay William Hutchison
Jr. administrator of the estate of Nathan Hutchison decd. the
sum of one hundred and three dollars, fifty cents lawful
money of Kentucky, it being for value received: Nevertheless, the said defendants did not on or before the first day
of May in the year 1820 pay to the said plaintiff the said sum
of one hundred and three dollars fifty cents lawful money
as aforesaid or any part thereof although often requested so
to do, but hitherto to pay him the same the said defendants
have altogether neglected and refused and still do neglect
and refuse to the plaintiffs damage $50. and therefore
he sues &c. And the said plaintiff brings here into Court
his letters of administration &c. which do shew his right to
sue in that capacity &c. Robt. P. Henry.
on which declaration was issued the following capias ad
respondendum: "The Commonwealth of Kentucky. To the
Sheriff of Trigg County Greeting: We command you to take
John Potts and Garrison Patrick if they be found within
your bailiwick and them safely keep so that you have
their bodies before the Judge of our Trigg Circuit Court

at the seat of Justice of said County on the first day of our present August term to answer William Hutchison Jr administrator of the Estate of Nathan Hutchison deceased in a plea of Debt of One hundred and three dollars and fifty cents, damage fifty dollars, and have then there this writ. Witness William Cannon clerk of our said Court at the Court house at the seat of Justice aforesaid this 12th day of August 1820 and in the 29th year of the Commonwealth.

Will Cannon.

endorsed. "This is an action of Debt and bail is required

Robt. P. Henry P.D.

"Not executed for want of time. George Daniel S.T.C.

And at a Circuit Court continued and held for the County and Circuit of Trigg aforesaid on Wednesday the 23rd day of August 1820. It was ordered "that further proceedings in the cause aforesaid be staid and continued until the next term of this Court, and that alias process issue therein returnable thereto &c. Which alias process issued in these words: "The Commonwealth of Kentucky, To the Sheriff of Trigg County. Greeting: We again command you to take John Potts and Garrison Patrick if they be found within your bailwick and them safely keep so that you have their bodies before the Judge of our Trigg Circuit Court at the seat of Justice of said County on the first day of our next November term of said Court to answer William Hutchison Junr. administrator of the estate of Nathan Hutchison Decd. in a plea of Debt of One hundred and three dollars and fifty cents, damage fifty dollars: and have then there this writ. Witness William Cannon clerk of our said Court at the seat of Justice aforesaid this 30th day of August 1820 and in the 29th year of the Commonwealth. Will Cannon.

Endorsed: "This is an action of debt and bail is required.

Robt. P. Henry P.Q.

"Executed on the within named John Potts and Garrison Patrick 8th Sept. 1820. Jas. Wimberly D.S. for G. Daniel S.T.C.

"I Meen Patrick do hereby acknowledge myself special bail for the within named John Potts and Garrison Patrick in the suit named in the within writ. Witness my hand 8th day of Sept. 1820. Jas. Wimberly D.S. for G. Daniel S.T.C. Meen Patrick

at the seat of Justice of said County on the first day of our present August term to answer William Hutchison Jr administrator of the Estate of Nathan Hutchison deceased in a plea of Debt of One hundred and three dollars and fifty cents, damage fifty dollars, and have then there this writ. Witness William Cannon clerk of our said Court at the court house at the seat of Justice aforesaid this 12th. day of August 1820 and in the 29th year of the Commonwealth.

Will Cannon.

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And at a Circuit Court continued and held for the County and Circuit of Trigg aforesaid on Wednesday the 23rd day of August 1820. It was ordered "that further proceedings in the cause aforesaid be staid and continued until the next term of this Court, and that alias process issue therein returnable thereto &c." Which alias process issued in these words: "The Commonwealth of Kentucky, To the Sheriff of Trigg County. Greeting: We again command you to take John Potts and Garrison Patrick if they be found within your bailwick and them safely keep so that you have their bodies before the Judge of our Trigg Circuit Court at the seat of Justice of said County on the first day of our next November term of said Court to answer William Hutchison Junr. administrator of the estate of Nathan Hutchison Deceased in a plea of Debt of One hundred and three dollars and fifty cents, damage fifty dollars: and have then there this writ. Witness William Cannon clerk of our said Court at the seat of Justice aforesaid this 30th day of August 1820 and in the 29th year of the Commonwealth. Will. Cannon.

Endorsed: "This is an action of debt and bail is required.

Robt. P. Henry P.Q.

"Executed on the within named John Potts and Garrison Patrick 8th Sept. 1820. Jas. Wimberly D.S. for G. Daniel. S.T.C.

"I Meers Patrick do hereby acknowledge myself special bail for the within named John Potts and Garrison Patrick in the suit named in the within writ. Witness my hand 8th day of Sept. 1820. Jas. Wimberly D.S. for G. Daniel S.T.C. Meers Patrick

Commonwealth of Kentucky. Trigg Circuit set.
I William Cannon clerk of the Court for the Circuit afore=
said do certify that the preceeding four pages contain a
full and complete transcript of the record and proceedings
therein mention, between William Hutchison Junr. admin=
istrator of the estate of Nathan Hutchison deceased
plaintiff and John Potts and Garrison Patrick Def=
endants as the same remain of Record in my office.
In testimony whereof I have hereunto set my seal
of office of said Court at office in Cadiz this 13th day
of October 1829 and in the 38. year of the Commonwealth
of Kentucky. Will Cannon.

Commonwealth of Kentucky Trigg Circuit set.
I Benjamin Shackelford sole and presiding Judge of
the Court for the Circuit aforesaid do certify that William
Cannon who subscribes the foregoing certificate is clerk of
said Court, and that his said certificate and attestation
are in due form of law. Given under my hand this
26 day of October 1829. B. Shackelford

Fee for this Record	$1.25
Seal lay & certificate	1.25
	$2.50

Test Will Cannon clk T. C. C. 13th octr 1829."

To the introduction of which record as evidence upon
the issue aforesaid the defendant objected because the same
was varient from the declaration and because it did not
appear thereby that the defendants in the original action
had notice of the said original suit & because the said
Record was not properly certified by the presiding Judge
and because it did not appear thereby that at the time
the said William Cannon gave his certificate that he
was clerk of said Circuit Court of Trigg, all of which
objections the Court overruled & permitted the Record
to be read upon the said issue to which opinion of
the Court the defendant excepts and prays the same may
be signed & sealed which is done. David Todd (Seal)"

"Patrick
vs
Hutchison

Exceptions

At this term the defendant filed his plea of nul
tiel record and a plea of payment as it appears

upon the record, to the plea of nul tiel record the plaintiff took issue & at the same time moved the Court to set aside the said plea of payment which motion the Court sustained because the same was an improper plea, to which opinion of the Court the defendant excepts and prays the same may be signed & sealed & made a part of the record which is done.

David Todd (Seal)

Exceptions.

Patrick
vs
Hutchison

The defendant then moved the Court for a new trial in this case because the Court erred in setting aside the plea of payment filed by the defendant but the Court refused the new trial, to which opinion of the Court the defendant excepts & prays the same may be signed & sealed & made a part of this record, which is done.

David Todd (Seal)

I Gray Bynum clerk of the Circuit Court within and for the County of Howard in the State of Missouri do certify that the foregoing pages contain a true full and complete transcript of the record and proceedings of said Circuit Court in the case therein mentioned between William Hutchison Jr plaintiff and Garrison Patrick defendant as the same now remains of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said Circuit Court at office the twenty fourth day of March in the year of our Lord One thousand eight hundred and thirty one.

Gray Bynum clerk

(S)

Sept T 1831

(16)

Garrison Patrick

vs Transcript.

William Hutchinson Jr

Filed 24th March 1831.

Gray Bynum clk S.C.

G. Patrick
vs
Wm. Hutchison

Writ of error from Howard Circuit Court.

And the said Garrison Patrick plaintiff by Wilson his attorney comes & says that there is manifest error in the record & proceedings aforesaid and in the giving the Judgement aforesaid Viz

1 That the Court erred in striking from the docket the plea of payment filed by the defendant without putting the plaintiff to his replication or demurrer Therefore in this there is manifest error

2 There is also error in this Viz in refusing to the said defendant a continuance on account of the amendment made by the plaintiff to his declaration, Therefore in this there is manifest error

3 There is also error in this Viz in permitting the said record to be given in evidence upon the Issue joined because the same was variant from the plaintiffs declaration in this Viz the plaintiff declared on a Judgement Before the Hon. Benjamin Shackelford. & it shows a record of a Judgement before the Circuit Court of Frigg County and because he declares on a Judgement before Benjm. Shackelford by &c presiding Judge whereas he shows a Judgement where B. Shackelford is sole Judge.

4 There is also error in this towit in permitting to the said record of the said supposed Judgement to be given in evidence and the Issue joined because by the same record is does not appear that the said defendant had notice of the said action so decided against him in the said circuit Court of Frigg and also in this it does not appear the said John Potts had notice thereof therefore in this there is manifest error

5 There is also error in this Viz that the said record is not duly & properly certified in this Viz that it does not appear by the Certificate of the presiding ~~Justice~~ Judge that William Cannon whose name is signed to the record as Clerk was Clerk at the time he signed his said Certificate. Therefore in this there is manifest error.

6 There is also error in Vby that the said Court erred in refusing to the said defendant a new trial Therefore in This There is manifest error

And the said plaintiff prays that the said defendants may be compelled to join in these errors and that the said Supreme Court may be examine the same and that the said Supreme Court may reverse the Judgement of the said Circuit Court of Howard & that the said plaintiff may be restored to all things he has lost by the Judgement of the said Circuit Court of Howard aforesaid.

John Wilson
atto for plft in error

Garrison Patrick
vs Errors
Wm Hutchison

Filed 5. April 1831.
G. Raymond Clk

In the Supreme Court
First Judicial District
April Term 1831

Garrison Patrick

vs

William Hutchinson

And the said Hutchinson says there is no error either in the record and proceedings aforesaid or in the judgment aforesaid. And he prays that the court here do proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error and that the judgment aforesaid may be affirmed in all things

Reynolds & Givens
for Hutchinson

~~Beckit~~

Patrick

vs

~~Hutchinson~~

Jonnan in

Error

Filed 5th April 1831.

G. Bynum clk

William Hutchison vs Garrison Patrick

Error to the Howard Circuit Court

Hutchison sued Patrick on a judgment obtained in Kentucky. By leave of the court the plaintiff amended his declaration by inserting the word "said" before the words "Garrison Patrick" The defendant then filed the pleas of Nul Tiel Record, and of Payment to the declaration. The plea of payment contained an averment that in the state of Kentucky the plea of payment was good to a declaration in an action of debt founded on a judgment. Issue was joined on the first plea and the plaintiff moved the court to strike out the record; which was accordingly done

The defendant claimed a continuance on account of the plaintiffs amending his declaration and the court not allowing it, judgment was had at the same term on the first plea viz Nul Tiel Record.

It is assigned for error 1st that the plea of Payment was stricken out

2nd that the cause was not continued

3rd that the Judgment offered in evidence varied from that declared on

4th that the Record was not duly certified

5th that it does not appear by the record produced in evidence that the defendant had notice of the action in Kentucky

1st It was contended by the defendant in error that the plea was bad; 1st, because it was no bar to an action on a Judgment, that matter not being regulated by the law of Kentucky; and 2nd because the plea presented two facts to be found by the Jury. ~~It may be here observed that if the plea were double, that is if it presented two defences the proper mode to object to it is by special demurrer See 1st Chitty Pleading &c.~~ It is our opinion that the two facts constitute only one defence. It becomes then necessary to enquire whether the plea of payment can under any circumstances be a good bar to an action of debt on a Judgment. The case of Hampton and McConnel decided in the Supreme Court of the United States on a writ of error to the Circuit Court of the District of South Carolina in our opinion is in point

In that case McConnel the defendant in error declared against the plaintiff in error in debt on a Judgment of the Supreme Court of the State of Newyork to which the ~~plaintiff~~ defendant below pleaded nil debet and the plaintiff below demurred The Circuit Court rendered a Judgment for the plaintiff below, and thereupon the cause was taken up by Writ of error to that Court

The Chief Justice delivering the opinion of the court said this is precisely the case of Mills vs Duryee. The doctrine there held was that the Judgment of a State court should have the same credit, validity and effect in every other court in the United States which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court of the United States. The Judgment of the Circuit Court was affirmed, the plea of nil debet, in such case not

good in the State of New York. This decision ~~being made in pur~~ we regard as a true exposition of the 1st Section of the 4th article of the Constitution of the United States and of the acts of Congress on that subject, and so far obligatory on us. The law of Kentucky not being judicially known to us was properly ~~that~~ put in issue by the plea and the Circuit Court of Howard County should have required the plaintiff to reply to the plea of payment ~~as it~~ such as it was,

2nd In the second assignment of error we cannot see that the court has abused the discretion which the 19th Section of the act to regulate proceedings at law has allowed it to exercise. The insertion of the word "said" before the name of the plaintiff in error, in the declaration, could have been no surprise to him; he must have been morally certain that he was the person intended before the declaration was amended

3 The third assignment is that the judgment offered in evidence varied from that declared on. The judgment offered in evidence is

in these words, therefore it is considered by the court that the plaintiff recover &c. The declaration alledges that the plaintiff before he honorable Benjamin Shackelford by the name and description of B. Shackelford presiding Judge of the Circuit Court within &c by the consideration and Judgment of said Court did recover &c. By resorting to what the counsel for the plaintiff in Error calls the Clerks preamble and to the signature of the presiding Judge which we consider a part of the record we ascertain that Benjamin Shackelford was Judge of the Court, ~~that~~ which rendered the Judgment, and also that he was presiding Judge; and of his being presiding Judge of that court his own certificate is good evidence in as much as the act of Congress requires the presiding Judge to certify that the person who made out the record was Clerk. The declaration would certainly have been as good had the plaintiff below been content to say

nothing about ~~the Judge~~ ~~[illegible]~~ ~~[illegible]~~ the name of the Judge of the court; and the introduction of it has answered no purpose whatever.

In support of the 4th assignment of errors viz that the record was not duly certified the plaintiff in error has said nothing and perceiving no defect in the certificate we also will pass it over ~~also~~

The 5th assignment of errors is that the plaintiff in error had no notice of the action in Kentucky. By the sheriff's return it appears that he was taken on the Capias issued on the declaration and gave bail. This court conceiving that the Circuit Court erred in striking out the defendant's plea of payment reverse the Judgment of that court for that cause only and remand the cause for further proceedings in conformity with this opinion.

M. McGish
George Tompkins
N Wash

Garrison Patrick
vs
Opinion
Wm Hutchison

to be printed
Tompkins

Filed Dec. 9. 1831.
G Bynum clk

1

G. Patrick
vs
N. Hutchison } Writ of error from Howard Circuit

This was an action of debt brought by Hutchison against Garrison Patrick upon a Judgement of the Circuit Court of Trigg County State of Kentucky for $103.50 with interest from 1820 till paid at Six per cent. which said Judgement was given as is alledged in favour of the said Hutchison jr. as administrator of the estate of Nathan Hutchison deceased and against John Potts & Garrison Patrick which said Potts is said to be dead since
There is ~~three~~ four Counts laying the Judgement nearly similar — At the Return Term Nov. 1830. the deft. Patrick demurred generally & specially to the declaration. At Feby Term 1831 the demurrer was argued & overruled - whereupon leave was granted deft. to withdraw his demurrer & to plead — Thereupon the plaintiff asked leave to amend his declaration which was done as stated in the bill of exceptions. Thereupon the defendant filed his pleas of nulliel record & payment — The first was in the usual form - the last also with the additional averment that such plea was good to the said Judgement had the action been brought in any Court of that State. (Kentucky)
The plaintiff immediately took Issue upon the first plea. and moved the Court to strike out the second as being an improper plea which motion was sustained & the plea struck out to which the defendant excepted The plaintiff then prayed ~~Judgment~~ a trial upon the Issue joined upon the first plea - The deft. claimed a ~~contin~~

continuance on account of the amendment made to the declaration, but it was refused & the party ruled to trial and exception

Judgement was then given on submission for the debt in the declaration mentioned ($103.50) and seventy four Dollars & ninety and a half cents in damages upon the trial of the Issue ~~of the~~ joined on the plea of Nulliel record the defendant objected to the reading the record offered by the plaintiff because the same varied from the declaration because it did not appear thereby that the defendants had notice of the action & because the same was not properly certified by the presiding Judge & Clerk all of which was overrulled.

The plaintiff in error has assigned for error 1st the striking the plea of payt from the docket 2nd the refusal to continue, 3rd the variance of the Judgement produced & the one declared upon 5 the want of the same being duly certified

6 that it does not appear by the record produced that the defendants had notice of the action in Kentucky that the same record is not duly certified & that the Court erred in refusing a new trial.

upon the first error assigned the striking the plea of payment of the deft below from the ~~record~~ docket.

It is insisted by the plaintiff in error that by the constitution of the United States Art. 4 Sec 1. and the law of Congress thereon May 1790 - the Judgement of a sister State shall have the same force and effect & that the same pleas may be pleaded thereto ~~in an action thereon in another State~~ as the same would have or might be pleaded thereto were the action commenced in the State where the Judgement was originially given and no others. See Mills vs Duryee 2 Peters Con Rep. 578 3 Wheaton 234. Hampton vs McConnel. - 1 Starkie 214 & note. 215 & note - 154. & note - 1 Kent. Com. 244

It is further insisted that whether any particular plea can be pleaded to a Judgement in the State of Kentucky, depends upon the laws of that State,
That the laws of the State of Kentucky are facts when necessary to be shown here, must be shown like any other facts, by averment & proof - 2 Starke 568 & notes thereto
See 5 Littell 349 Scott &c vs Coleman
In this last case it is expressly laid down by the Court of appeals of Kentucky, that he who wishes to impeach the Judgement of a sister State must show the laws of that State by which they have less force than the appear to have. See 8 John Rep. 146 (Top paging) Thompson vs Ketchum - where the deft. relied upon infancy to a note made ~~payable to~~ in Jamaica, where the Court expressly say that such a plea should have averred that that was a good defence in Jamaica
These authorities beyond a doubt establish the position above taken and clearly show the plea of payment ~~was~~ is good and ought not to ~~be~~ have been struck out from the docket. For in that it is expressly averred that had the action been brought in that State the plea by the laws in force at the time of giving the Judgement & still is, a good plea.

The 2nd error assd is the refusal to continue the cause because of the amendment which was this to the first Count. - The said plaintiff heretofore &c &c ~~did recovered against~~ "did recover against John Potts & garrison Patrick the sum" &c this was as it originally stood the amendment made was to insert the word "said" the above sentence, between the words "John Potts and" & "Garrison Patrick" - so that the sentence now read

as follows "did recover against John Potts and said Garrison Patrick" This amendment small as it may appear, was very essential to be made to show that the Patrick sued here was the same with the Patrick sued there there must certainly appear a privity between them the other counts upon inspection will appear to be still obnoxious to the same objection.

The question then whether a continuance should have been granted or in other words whether the amendment as made operated as a continuance, depends upon whether the amendment made was material for I apprehend that a formal amendment may be made without operating a continuance but that a substantial one ~~does~~ cannot see 4 Bibb 497 Ewing's adm^r vs Beauchamp - also 1st Marsh^l 560 Potts vs Kennedy now as the declaration stood it no where (as I conceive) appeared that Patrick sued here was the same against whom the Judgement was in Ky.

In declaring upon a note or bond we in the perquisitor demand a certain sum of money of ~~the~~ ~~defendant~~ C.D. which he detains &c For that whereas ~~the~~ said "C.D." ~~defendant~~ &c now If the demand was against C.D. and in the count we laid it ~~where~~ C.D. &c without showing it was the same C.D. - This in my opinion is a substantial defect. & when amended operates under the practice of our Courts ~~to~~ a continuance and therefore the Court erred in ruling a trial

The reason that an amendment operates as a continuance is because the defendant is surprised by being served with one declaration, & at Court meets a different one. and as the law allowed him at least 15 days notice of the first before he was bound to plead so the courts will allow him at least the same time to plead to the new declaration.

The third objection is that the Court erred in permitting the record offered to be read because it varied from the Judgement discribed in the declaration.

It is a rule ~~where~~ all actions as well upon torts as ~~and~~ contracts that where any written instrument is attempted to be discribed, and the same is misdiscribed; though the misdiscription, is of an immaterial part, and although it was not necessary to discribe the same so minute, the same is fatal, if it is not proved as discribed. - See 3 Starkie 1547 1548 - And where a name of any party is misdescribed upon an action of debt upon a Judgement it is fatal because it is matter of discription. See 3 Starkie 1600 &c

The misdiscription complained of here is as follows

It is alledged in all the Counts. That "Wm. Hutchison" &c "on" &c "before the Honorable Benjamin Shackelford by the name and discription of B. Shackelford presiding Judge of the Circuit Court within & for the County of Trigg in the State of Kentucky" &c "by the consideration and Judgement of said Court did recover against" &c

The Judgement produced is simply a Judgement of the Trigg Circuit Court, without showing who was Judge thereof nor is there any thing in the record to show that Benjamin Shackelford was either presiding or sole Judge of that Court at the time the Judgement was given

It is true ~~that~~ the certificate of to the record is signed by B. Shackelford who says that he is sole & presiding Judge

and in the preamble ~~put to~~ at the head of the record the Clerk says "Pleas" ~~the Court~~ was held "before the Honorable Benjamin Shackelford Judge of Trigg Circuit Court" "at" &c "on" &c It is insisted confidently that the record in the declaration is described to have been taken before Benjn. Shackelford &c presiding Judge &c The question then is does the ~~reco~~ record produced meet that discription - I answer it does not - It is denied that the preamble of the Clerk or the certificate of the Judge forms any part of the Judgement as it was originally given, and that they are nothing

6 more

than means of proof pointed out by the laws of the U.S. That is "by the attestation of the clerk and the seal "of the Court annexed if there be a seal together with a "certificate of the Judge, Chief Justice, or presiding ~~magist~~ "magistrate, as the case may be, That the same attestation "is in due form" see 2 Vol. U.S. Laws 102. This gives no authority to the clerk to add any matter to the Judgement. nor does it authorise the Judge to give any additional force or to make that appear which does not appear by the record itself - now I apprehend that if ~~Patrick~~ Potts' name had not appeared in the record and proceedings that ~~the~~ his name being put by the clerk in the preamble or by the Judge in his certificate that the same was against ~~Garrison~~ John Potts ~~Patrick~~ - and the plaintiff had declared ~~against~~ as he has done in this case ~~that the~~ Judgement was against "John Potts & Garrison Patrick" it would hardly be pretended that there was no variance The simple certificate of ~~the~~ ~~the Judge~~ person that he is sole and presiding Judge" ~~the~~ of a certain Court on the 26th day of October 1829. cannot by any intendment prove that he was "presiding Judge" of the same Court on the 20th day Nov 1820. Then as the certificate of ~~the~~ "Benjamin Shackelford" does not prove that he gave the Judgement or that it was taken before him - This may be laid out of the way - after which there only remains the preamble of the clerk heading his record, which says the "pleas" were held "before the Honorable Benjamin Shackelford Judge of the Trigg circuit Court" I have before ~~attempted~~ to prove that this is no part of the record and therefore no evidence, but if I am wrong in that (which I do not believe) then this does not prove that the Judgement was recovered before "Benjamin Shackelford by the name and discription of B. Shackelford presiding Judge" for that does not show that he had any

such discription as "B. Shackelford", nor does it by any means ~~show that he was pres~~ appear from the fact of his being "Judge of the Trigg Circuit Court" ~~appear~~ that he was "presiding" Judge thereof - for being "Judge" & "presiding Judge", are very different things in most courts both in England & america and in particular in Kentucky where it is historically known to this Court, that the Circuit Courts of that State formerly had three Judges. It will not be necessary to show authority to prove that upon nuliel record a variance may be taken advantage of, for I presume it will not be denied.

The error assigned that it does not appear by the record that the defendant had notice of the action originally, was made without having come to any definate conclusion under the state of pleadings how far the point can be justly made. And in particular for the difficulty arising out of the ~~officers~~ Sheriff Return in ~~the~~ Kentucky which is clearly bad by the law of that State.

I feel no difficulty in coming to the conclusion that a plea denying notice (where there was no nuliel record) of a Judgement with proper averments would be good, but that not having been plead - Can it be shown upon the trial upon the Issue of nuliel record? I am led to the conclusion that perhaps it might from the fact that it has been laid down by many able Judges & Courts that upon foreign Judgements if it appeared from the record the Court lacked Jurisdiction or the defendant had not been notified of the action that then ~~it~~ the Judgement was void. or at least it might be impeached See Starkie 214 & notes.

The question upon which I am led to doubt upon this point, is whether the Court will presume that the proceedings in getting the original Judgement were strictly regular according to the laws of that State, which I am inclined to believe this Court will. Then if they will whether upon a plea of nuliel record & Issue they will permit it

to be impeached by showing ~~the~~ that the law is & that it was not regularly obtained — I am led to incline to the opinion that the Court will, from the fact that the Issue upon mutual record in my opinion put in Issue these facts — If the Judgement has in ~~law~~ all things been obtained according to the laws of that State the Issue is proved on the part of the plaintiff, if not then it ought ~~not~~ to be found for the deft. — If then the record when produced raises the presumption that all is fair it seems to follow as a matter of course that the deft. may impeach it by proving what the laws of that State is & that the Judgement does not conform ~~to them~~ thereto. This is the common case upon other Issues, of a similar nature and as an instance take non est factum — there the Issue on the part of the deft. is that it is not his deed, and here that is no such record, the Issue there upon the part of the pltff. is that it is his deed & here that there is such a record — There the pltff. produces his deed & subscribing witnesses, and it is held his deed by presumption but yet the defendant may show that it was delivered as an escrow, and the Issue is for him, so here if he produces his record, by presumption the Issue is for him, but if the defendant should show by proof that there never was such a court or that the court (if there was such an one) had not proceeded according to the laws of that State then would not the ~~Judgement~~ Issue be for the defendant for if there was no such A Court or that Court did not proceed according to the laws of that State surely it cannot be a Judgement in the legal & binding sense which concludes the defendant.

The objection then is that the sheriff in Kentucky has not shewn how he executed the process upon the defendants of course the defendant by the laws of that State is not legally notified thereof and therefore Judgement is not binding upon him in fact without notice

I am however aware that supposing this train of reasoning to be correct, I may be met with the objection ~~what the law of State~~ that it does not appear by the record in this suit what the laws of that State are on that subject - The only answer I can now think of to this objection is, that as the objection was made in the court below & decided by the Court (for the Issue was triable alone by the Court) and as the Statute of our State has made the printed Statutes of other States evidence of what the law of such State is, that perhaps it might not be necessary for the Court below to find what the law was, but that this Court, would have the same right to ~~for~~ look at & construe the law of that State as the Court below,

The reasons above are founded upon this fact, that a Judgement obtained wholly contrary to law is void and has no binding force even in the State where it is given, and by the laws of Congress 1790. Yet has no other force or effect here

As to a Judgement being void which is obtained by a court having no Jurisdiction (and notice to the person can only in common cases ~~can~~ give Jurisdiction) see the opinion of this Court at the last Term in the case of Alexander v. Haden

John Wilson
atto for plff. in error

The certificate of the Clerk is dated 13th day of Octr 1829. and the certificate of the Judge is dated 26th Octr 1829. — The Judge certifies that Cannon is Clerk, now altho he may be clerk on the 26th yet that does not prove he was so on the 13th same month —
this appears to me to be amply sufficient to reject it

J.H.

G. Patrick
vs
Wm Hutchison
3 Pts Brief

In the Supreme Court
First Judicial District
April Term 1831

Garrison Patrick Pltff in Error

vs

Hutchinson Deft in Error

The defendant in error brought suit in the court below against the plaintiff in error. The action was debt upon a judgment from Kentucky.

The plaintiff below moved the court for leave to amend his declaration by inserting the word "said" before the name of the defendant in the first count of the declaration, and the motion was sustained and the amendment made. The defendant below then asked a continuance because of the amendment which the court refused, and this is complained of as error.

Such amendments are made by permission of the circuit court, and in its discretion it may impose such terms upon the party amending. As they may deem proper. For which see 2 vol Laws of Missouri page 626 section 19

The defendant then filed a plea of nul tiel record, and also a plea of payment with an averment that such plea was admissible by the laws of Kentucky

Under the plea of nul tiel record the defendant below moved the court to

eight the records offered in evidence as variant from the one declaration. and the court overruled the motion. this too is assigned as error, this point is not deemed worthy of notice

The plaintiff in the court below moved the court to set aside the plea of payment as an improper plea and the court sustained the motion. and this is assigned as cause of reversal

In considering this part of the case I shall contend,

1st That this plea is bad even upon demurrer

2nd If good upon demurrer yet in this case the plea was properly set aside

3rd That the demurrer is insufficient.

1st That this plea is not good upon demurrer

The decision of this point depends in a great degree upon the construction of the constitution of the United States and the act of congress.

By the 4th article section 1 of the constitution of the United States it is provided that

"Full faith and credit shall be given in each
"state public acts records and judicial proce-
"edings of every other state, And the Congress may
"by general laws, prescribe the manner in which
"such acts, records and judicial proceedings

"shall be proven and the effect thereof"

The act of Congress in pursuance of the above section of the Constitution provides, the manner of authenticating records and judicial proceedings and then enacts that

"That said records and judicial proceedings and
"authentication as aforesaid shall have such faith
"and credit given to them in every court within
"the United States as they have by law or usage in
"the courts of the State from whence the said records
"are or shall be taken" / Starkie Evi 154 note /

Admitting that the plea of payment is good in Kentucky that the fact of payment had been properly established before the court. Still I shall contend that the manner of pleading payment is mere matter of practice to be regulated by the laws of the State in which suit is brought, which can in no way be affected by the constitution or act of Congress.

This State is bound to give such faith and credit to a judgment from Kentucky, as the judgment is entitled to in that State.

Then the question is, what is giving good faith and credit to a judgment. Nothing more than receiving it as conclusive evidence of what it decides, & as its truth can not be questioned, in short nothing can be pleaded which would tend to impeach it or affect its faith or credit.

But does a plea of payment affect its faith or credit, so far from it that it admits its truth and gives to it all the faith and credit which it can have any where, but says it has been discharged. Can a judgment be evidence that it has not been paid?

If the plea was formed upon a matter in discharge unknown to our law it would present quite a different question. Here it is not whether the matter pleaded be sufficient to bar a second final recovery, but whether the state of Kentucky shall decide to this state as to the manner of establishing the fact of payment. By the common law a plea of payment was not allowed, the common law is in force here by special statute. Then by the laws of this state payment of a judgment can be relied on in a court of chancery only. By the laws of Kentucky payment of a judgment may be pleaded at law. Would we ask, has not each state the right to regulate her own manner of practice or does a change in the manner of enforcing the rights of the parties affect the faith or credit of a judgment sued on.

Suppose the legislature of this state should enact that all suits brought on judgments of this or of sister states should be in chancery and that all the pleadings should be in chancery. Would it be contended that such a law would contravene the constitution of the United States, surely not. Then if the legislature have power to say that all the pleadings shall be in chancery, certainly they have power to say that a part may.

Suppose this state should adopt the civil law and do away all the pleadings of the common law, would it be contended that a plaintiff must still file his declaration at common law upon a judgment of a sister state, and the defendant plead payment.

Suppose this State should direct nil debet to be pleaded and mean permit any matter to be given in evidence which might have been specially pleaded. Thus suppose a suit brought in Kentucky upon a judgment from Missouri, and the defence was payment and the laws of Kentucky directed a special plea of payment, could the defendant plead nil debet by virtue of the laws of this State? Suppose the laws of Kentucky barred a recovery upon a judgment after ten years, could that statute be pleaded here. Suppose again that no length of time barred a recovery upon a judgment in Kentucky and by our laws in such case ten years would bar the action, could not the statute be pleaded to a judgment from Kentucky.

I shall now proceed to examine the cases as I have been enabled to find upon this subject

I will first notice the case of Scovill vs Canfield 14 Johns Rep 338. This was an action of debt upon a judgment from Connecticut. The defendant pleaded that by the laws of Connecticut the buying of judgments and other choses in action was prohibited and when such choses in action were bought by constables or other officers and suit brought the plaintiff should be non suited, and then stated that the plaintiff was a constable and had bought the judgment, and prayed the court to non suit the plaintiff, which the court refused to do, In deciding this question several grounds were relied on, one of which was

"that although the court would notice the lex loci in construing and giving effect to the contract between the parties ~~between the parties~~, yet the court must administer justice to them according to our own laws and the forms prescribed by our legislature" See also the case of Loag vs Phelps 1 John cases 139 and Rugels vs Keeler 3 John Reps 263.

Now in what is this case different from the case at bar. The plea of payment does not affect the merits of the judgment, nor does it impeach its faith or credit, it affects the manner of administering justice only. and this the supreme court of the state of New York, in the case of Scoville vs Cleveland just referred to, say each state has the exclusive right to regulate.

The next case which I shall notice is the case of Mills vs Duryee 7 Cranch 481. reported also 2 Condensed Reps 578. This was an action of debt upon a judgment from a sister state. The defendant plea was "nil debit". Was nil debit a good plea, was the only question.

In this case it was admitted that the judgment was received as evidence only, Judge Story in delivering the opinion of the court, said that it is evidence, but evidence of the highest degree, that is record evidence and can not be denied except by plea of "nul tiel record" It is also said in this case that the judgment is conclusive between the parties. Now that must mean conclusive as to the facts which it recites, because we all know that a judgment is not conclusive

evidence that it has not been paid

It was objected in this case that it was impossible to give full effect to the judgment as that court had no power to issue execution, but the court said that the power to issue execution was distinct from the judgment itself, and that a judgment may be complete and perfect and have full effect independant of the right to issue execution. In this case the only question was, was the plea of nil debet admissible. Under the plea of nil debet the party may prove that he never owed the debt and therefore the plea is clearly bad. And this was the ground relied on in argument. It is true that some expressions used in delivering the opinion of the court would seem to go further than ~~those~~ that case required, but they are extra-judicial and only dista of the judge who delivered the opinion, and must be understood as used with an eye to the point involved in that case.

Let it be recollected that Livingston J. dissented and Todd J. was absent.

I will now notice a note of the case of Hampton vs McConnel 3 Wheaton 234. given at the end of the case of Miles vs Duryee 2 Cow Ammed Rep 580.

This note says that whatever pleas are good in the State rendering the judgment are admissible in any other State. This is but a note and may not be supported by the case. And I apprehend that the pleas there spoken of are such ~~are such~~ as go to devoid the judgment. It can not mean pleas in discharge, and certainly would not be true to that extent

the plea offered in the case of Service vs Lansing 14 Johns Reps 338 is an exception, and I apprehend the plea of the statute of limitations is another.

The learned and profound lawyer Chancellor Kent in commenting on the case of Mills vs Duryee, the case of Hampton vs M'Connel 3 Wheaton 234 and the case of Shumway vs Stillman 4 Cowen New York Reports (see 1 Kents Com: 244) says the case of Hampton vs M'Connel followed the case of Mills vs Duryee and decided nothing more, and that it must not be misconstrued from those cases that nul tiel record is the only plea, and adds that any special plea which would be good to avoid the judgment is admissible. The chancellor also says that the constitution intended something more than to make judgments of state courts prima facie evidence only. It contemplated a power in Congress to give a conclusive effect to such judgments.

Now it is plainly discernable from what is here said that such judgments are received as evidence only. Independent of the constitution and act of Congress a judgment of a sister state would be only prima facie evidence. By the constitution and act of Congress such judgments are made conclusive. And this is all that was designed to be effected. It would have been useless to have by constitution, that when a judgment has been paid off in one state the party should not be compelled to pay it again in another, this he would be saved from by the universal principles of justice independent of the constitution and act of Congress.

In all the cases which I have examined the question seems to be, is such evidence conclusive? Can it be impeached and the utmost that any case has gone is, that the truth of the recital can not be questioned. At common law, the difference between a domestic judgment and a foreign one was this, the domestic judgment was conclusive evidence and the foreign judgment was prima facie evidence only. At common law a plea of payment was not allowed to a domestic judgment. By the statute of Anne the plea of payment was given to a domestic judgment. Now let me ask does the plea of payment take away the conclusive effect of a domestic judgment.

But admitting for a moment that whatever plea is admissible in the state rendering judgment should be received in every other state yet I apprehend by this must be understood the substance of the plea not its form, — the thing pleaded not the manner of pleading it.

2nd

I shall now contend in the second place that admitting the plea to be good upon demurrer in this case the plea was properly put aside.

If this plea be good with the averment it is good without it. The court must take notice that the action is founded upon a judgment from Kentucky. Then suppose this plea had been offered without the averment, and demurred to, how could the court have decided? If by the law of Kentucky the plea of payment was allowable, and that fact had been properly proved

to the court, the demurrer should be overruled, then take this plea with the averment, if the court be satisfied that such plea by the laws of Kentucky was not good, should the court receive it's, surely not. Then the only question is, at what time should the proof of the laws of Kentucky be received,

This is a new case, and we look in vain into English works for authority on this subject. It originates in a provision of the constitution of the U. States. In the absence of authority the point must be determined upon principle and analogy.

The counsel for the plaintiff in error contend that in actions upon judgments from Sister States the defendant may crowd the record with every description of plea if he but add, an averment, be it ever so false, that such pleas are admissible in the state renaming judgment. Payment, nil debet, nor assumpsit, performance and not guilty may be huddled together in one case. Take the case at bar. The parties go to trial on the plea of payment, the defendant has the privilege of proceeding in what manner he pleases in establishing his defence, He proves in the first place that the judgment has been entirely paid off and then fails to prove the averment. How then would be the proof of payment before the jury. Sure the court would tell them to disregard it, but such testimony would have

some influence upon the minds of the jury in deciding other points in the case, at least it would be calculated to distract and mislead the jury and incumber the record. Again takes the plea of nil debet, with the avrment, that when that plea the party could prove that he never owed the debt. He might continue from term to term upon affidavit that he never owed the debt, and the party plaintiff be put to immense trouble and expense to prove his demand and at the trial the defendant fails to prove the avrment.

On our part it is contended that before a trial on the merits the question whether a plea be admissible or not should be determined, that the question whether by the laws of any state a certain plea should be admitted is a preliminary matter. Now I am aware that many pleas contain avrments and those avrments are to be proved on the trial, but in such cases the avrment is a part of the plea and not, as in this case, wholly distinct from it.

When an issue is made up the parties should know from the pleading what they had to prove and what disprove, and they should not be compelled to go to work upon an uncertainty. To remedy this inconvenience pleas in abatement were first introduced. Suppose a defendant should plead —

that long before he had voluntarily given to the plaintiff more than the amount sued for. and therefore the plaintiff should not recover, surely it would be most idle to suffer the parties to take issue upon this plea and when they come to trial with their proof of gift and no gift, then to tell them that all this must be nugatory,

Then take the case at bar, the parties come with their proof of payment and no payment, and after they have gone through with such testimony, tell them that all is inadmissible

It may be asked how can the averment be proved before the trial of the case. I answer that this is a new case and must be determined according to reason and analogy and in that way which would be most convenient in practice. When a defendant pleas coverture and the plaintiff denies the plea, there is then an issue of fact to be tried before the trial in chief. In the case at bar, the defendant pleas payment with an averment, if the averment be true the plea is good, if not true the plea is bad. What is to be done? If the plaintiff admits he admits the truth of the averment, if he replies without noticing the averment he is concluded. if he replies to the plea of payment without and denies the averment he puts two distinct things in issue, and if a replication may put two distinct things in issue, it may put two

thousand in issue. I apprehend that the law giving a plea of payment, and the payment itself are distinct things.

Suppose a plea in abatement with an affidavit now offered and the plaintiff wishes to object to the sufficiency of the affidavit. How would he proceed? I answer move the court to set it aside, and the court would determine upon the sufficiency of the affidavit.

In the case at bar, the party offered a plea with an avvment, if the avvment be true the plea is good, if untrue the plea is bad, the plaintiff moves the court to set aside the plea because the avvment is not true, How then is the matter to be tried? I shall contend hereafter that the avvment in this case does not present an issue of fact, but admitting for a moment that it does present a fair matter of fact, I say let it be tried by a jury. A plea in abatement alleges certain facts, and if they are true, the writ abates, but the plaintiff may deny the facts and have the matter tried by a jury. In the case at bar, the defendant pleads payment and avvs certain facts, if the facts are true the plea is good, plaintiff moves the court to set aside the plea because the facts are untrue, the motion to set aside is in the nature of a replication to a plea in abatement denying the matter in abatement.

I take it that the avrment is no part of the plea, that, like the affidavit to a plea in abatement, it is only designed to clear the way for the admission of the plea itself, — that if the plea is good with the avrment it is good without it. Should a plea of payment be put in to a declaration upon a judgment of this state, the question arises, is this a good plea? And that question is determined by the laws of this, and the court decides upon the goodness of the plea before the trial, this is done without a trial by jury, because the court judicially notice the law of this state, Now the only difference between this case and the case at bar is this, in the one case the court officially know the law, in the other the jury find the law to inform the mind of the court.

It would be just as reasonable to suffer the parties to go to trial upon a plea of payment to a judgment of this state, and let the court leave the jury at the trial to disregard all testimony upon the plea of payment, For the only difference is the manner in which the law is made known to the mind of the court. As the court below sustained the plea this court must presume it did so, because the avrment was not true, And that the court below pursued the proper method of trying the truth of the avrment.

I believe it is not contended that the laws of Kentucky allowed a plea of payment to a judgment.

3rd I shall now in the third place contend that although this plea would have been good when supported by the proper averment, in this case the averment is insufficient.

The ~~affirmat~~ averment is insufficient. It should have set out the law itself, and not what it authorizes. The averment says that by the laws of Kentucky a plea of payment was good, whether this be true or false is a question of law. A jury can not find that a plea is good or allowed by the laws of any state — this would be referring a demurrer to the decision of a jury. All a jury could do would be to find the law itself, and whether the law as found would authorize a plea of payment is a question of law.

To make the best of this averment if it presents a matter of fact at all, it presents a matter of fact and a matter of law — 1 What is the law of Kentucky, and 2d does the laws of that state give a plea of payment to a judgment.

If the plaintiff had demurred he would have admitted the averment — if he had replied without noticing the averment, he would have been concluded, — he could not deny the averment without noticing the plea, the averment did not present an issue of fact then he could not take issue upon the averment. What could he do?

The only way that I could see to handle such a heterogeneous something, was to throw it aside, — and that we did. — If the averment had been true we would have demurred, and thus tried the question but the averment was not true and we did not wish to be prejudiced with this pretended payment.

After the jury returned with their verdict, the defendant below moved the court for a new trial, and assigned for reason that the court improperly set aside his plea of payment.

The plaintiff in error can take nothing by his motion for a new trial. Reasons for new trial all arise after upon judgment, the motion in such cases, is, to set aside the verdict and grant a new trial — the fault must be in the trial. If a motion for a new trial be sustained, the new trial is had upon the same judgment, the granting a new trial does not necessarily authorize either party to alter the state of the pleadings.

Reynolds & Givens
For Defendant in error

Additional Brief

To establish that when a foreign law is pleaded it must be set out the following authorities are refered to

1 Chitty Pleading — 198
1 American Digest — 286
Collett vs Lord Keith 2 East 273-4

To prove the pleas spoken of in the case of Mills vs Duryee and the case of Hampton and McConnel are such pleas only as go behind the judgment, and attempt to draw into litigation matters which had been decided previously the following cases are refered to

Andrews vs Montgomery 19 John 162
Borden vs Fitch 15 John 141
Rogers vs Colman & wife Hardin 414-5

Patrick
vs
Hutchinson

Deft.'s Brief