Hatry, Joseph vs Shuman, Edward 1850 St. Louis 164/2

Debt 3

$1200

State of Missouri } ss
County of St Louis } Be it remembered that heretofore to wit on the 16th day of August A. D. 1848. there was filed in the Clerks office of the St Louis Court of Common Pleas a petition in the words and figures following viz:

Petition } "To the Honorable the St Louis Court of Common Pleas

Edward Shuman plaintiff states that he is the legal owner of a note against the defendant Joseph Hatry to the following effect

$200. New Orleans the 10th Decr 1847.

Eight months after date I promise to pay to the order of E. Shuman at the sum of Two Hundred dollars value received

Joseph Hatry

Yet the debt remains unpaid and therefore he demands judgment for his debt and damages for the detention thereof together with costs

E. Shuman by his attys Blumenhafett & Simmons

affidavit } State of Missouri } ss
St Louis County } Edward Shuman the plaintiff in the above petition in debt being duly sworn says that Joseph Hatry the above named defendant is justly indebted to this affiant after allowing all just credits and offsets in the sum of Two hundred dollars together with interest on the same, that said indebtedness accrued on account of a promissory note which is hereto annexed a copy whereof is set forth in the above petition, and this affiant has good reason to believe and does believe that said debt was contracted out of this state to wit in the State of Louisiana and that the said Joseph

2) Hatry the debtor after the making and delivery of said note absconded from the said state of Louisiana and secretly removed his property and effects into this state with the intent to defraud hinder or delay his creditors and further this affiant saith not.

Sworn to & subscribed before me this 16 August 1848. P. Tippitt clk } E. Shuman

Bond } Know all men by these Present. that we Edward Shuman as principal and John W^m. Haechell as security are indebted to the State of Missouri in the sum of four Hundred dollars for the payment whereof we bind ourselves our heirs Executors and administrators jointly and severally firmly by these presents, sealed with our seals and dated at St Louis this sixteenth day of August Eighteen hundred and forty eight, The Condition of this obligation is such that whereas Edward Shuman is about to institute a suit in the St Louis Court of Common Pleas by attachment against Joseph Hatry defendant for the sum of Two Hundred dollars and — cents. Now if the said plaintiff shall prosecute his action without delay and with effect refund all sums of money that may be adjudged to be refunded to the defendant or found to have been received by the plaintiff and not justly due to him and pay all damages that may accrue to any defendant or any garnishee by reason of the attachment or any process or proceeding in this suit or by reason of any judgment or process thereon, then this obligation to be void otherwise to remain in full force

Approved } E. Shuman (Seal)
P. Tippitt clk } John Wm Haechell (Seal)

Attachment } 3) The State of Missouri

To the Sheriff of St Louis County. Greeting.

We command you to attach Joseph Haty by all and singular his lands and tenements goods chattels credits and effects or so much thereof as shall be sufficient to secure the sum of two hundred dollars and — cents with interest and costs of suit in whose hands or possession soever the same may be found in your bailwick and that you summon the said Joseph Haty to appear at the next term of the St Louis Court of Common Pleas before the Judge thereof on the first day of said term to be holden at the City of St Louis within and for the County of on the third Monday of September next then and there to answer unto Edward Lhuman of a Petition on note. And also that you might summon all and every person in whose hands or possession soever any such lands tenements goods chattels moneys credits or effects may be found and particularly that they be and appear before the Judge of our said Court on the first day of the term aforesaid, then and there to answer unto what may be objected against them and have you then there this writ

Witness Philip Sippitt clerk of our said Court with the seal thereof hereto affixed at office in the City of St Louis this 16th day of August in the year of our Lord Eighteen hundred and forty Eight

P. Sippitt clerk.

Sheriffs Return } Executed this writ in the County of St Louis on the 18th day of August 1848 by attaching as the property of the defendant Joseph Haty the following goods and chattels to wit: Ninety seven finger rings, six lockets, seventy one studs, twenty

4) five pairs of ear rings, two gold pencils, thirty two Breast pins, two scarf pins, one eye glass and three Heart slides, which said property the said Hatry was permitted to retain in his possession having given bond according to law, which said bond is herewith returned also by reading this writ and Petition to said Joseph Hatry.

Samuel Conway Sheriff By D. H. Bishop Deputy.

The following is the Bond for delivery of property.

Bond for Delivery

Know all men by these presents that we Joseph Hatry as principal and Lorentz Schoeffler as surety are indebted unto Samuel Conway Sheriff of St Louis County or his assigns in the sum of five hundred dollars for the payment whereof we bind ourselves our heirs Executors and administrators firmly by these presents, sealed with our seals and dated this Eighteenth day of August in the year of our Lord one thousand Eight hundred and forty eight. The condition of this obligation is such that whereas in virtue of a writ of attachment issued from the Saint Louis Court of Common Pleas of St Louis County returnable to the September Term thereof in the year Eighteen hundred and forty Eight at the suit of Edward Shuman Plaintiff against Joseph Hatry defendant the Sheriff of St Louis County has attached certain property to wit: Ninety seven finger rings, 6 Lockets, 71 studs, 25 pair Earring 2 Gold pencils 34 Breast pins 2 scarf pins 1 Eye glass 3 Heart slides, of the value of two hundred and fifty dollars which have been restored on the Execution hereof. Now if the said Effects so attached and restored shall be produced and delivered subject to the Judgment of said Court, when and where

8) the Court shall direct then this obligation shall be void otherwise it shall remain in force

Signed sealed and delivered in the presence of D H Bishop } Jos Hatry (Seal) Lorenty Shaeffler (Seal)

And afterwards in September 19th 1848 the following plea was filed:

Plea in abatement } "And the said defendant by his attorney Charles H. Haven comes & says that the said defendant has not absconded from said State of Louisiana nor has he secretly removed his property or effects out said state into this state with intent to defraud hinder or delay his creditors, and this he prays may be enquired by the County.

Joseph Hatry by his attorney O. H. Haven

And on the same day the following plea

Plea of Genl issue } "The said defendant comes and defends the demand of the plaintiff

Charles H. Haven attorney for defendant.

And afterwards the following proceedings were had

September Term 1848. October 21st 1848

Plea in abatement stricken out } "The motion of said plaintiff to strike out the plea in abatement filed herein by said defendant being heard and the Court being fully advised of and concerning the premises it is ordered that said motion be sustained."

The following Bill of Exceptions was filed October 28th 1848.

First Bill of Exceptions } "Be it remembered that at the present term of this Court the plaintiff made the following motion in this cause

Motion to strike out plea in abatement } "And now comes the said plaintiff and moves the Court to strike out the plea in abatement filed

6) in this cause for the reason that said defen-
-dant has pleaded to the merits of the action
Blennerhasset Simmons attys of plfs
and when said motion was called and before
the same was disposed of the defendant asked
leave to withdraw from the files his plea to the
merits of this action filed herein, but the Court
refused to grant such leave to the defendant
whereupon the defendant Excepted to the judgment
of the Court refusing him leave to withdraw said
plea to the merits, and thereupon the Court sus-
-tained said motion of the plaintiff and struck
out said plea in abatement, to which judgment
of the Court the defendant also Excepted and
now here tenders his bill of Exceptions to the said
judgments of the Court and prays that his said
bill may be signed sealed & made part of the
record which is accordingly done
M. Blair Judge (Seal)

And afterwards the following proceedings were had
September Term 1848. November 8th 1848.

Judgment 5 "Now at this day come the parties by their attornies
and submit this cause to the Court which being
heard the Court doth find that said defendant
is indebted to said plaintiff in the sum of two
hundred dollars, and doth assess the damages
of said plaintiff sustained by reason of the detention
of said debt at the sum of three dollars. It is
therefore considered by the Court that said plaintiff
recover of said defendant the debt and damages
aforesaid in form aforesaid by the Court found
and assessed and also his costs and charges herein
Expended and have thereof Execution.

New trial refused & appeal recog } 7) And afterwards the following proceedings were had viz:
September Term 1848 November 9th 1848.
"The defendant files a motion for a new trial herein, which being heard and the Court being fully advised of and concerning the premises, it is ordered that said motion be overruled, and thereupon said defendant files an affidavit herein and on his motion an appeal is granted him from the decision herein to the Supreme Court. whereupon Joseph Hatry as principal and Adam Weidman and George Snyder as securities severally acknowledge themselves indebted to Edward Shuman in the sum of Four hundred dollars to be levied of their respective goods and chattels lands and tenements, Yet upon condition that Joseph Hatry shall prosecute his appeal now taken with due diligence to a decision in the Supreme Court, and that if the judgment appealed from is affirmed or his appeal dismissed he will pay the debt damages and costs recovered against him by the judgment of the St Louis Court of Common Pleas together with the interest that shall grow due thereon, and that he will pay all costs and damages that shall be adjudged against him in the Supreme Court upon his appeal then this recognisance to be void otherwise to remain in full force and virtue.

The following is the affidavit for appeal

Affdp appeal } " Joseph Hatry defendant in the above suit makes affidavit that the appeal he has taken in this cause is not made for vexation or delay but because this affiant believes that he is aggrieved by the judgment of the Court Jos Hatry

Subscribed sworn to in open Court the 9th November 1848 P. Tippett clk

8) The following is the Bill of Exceptions

Bill of Exceptions } "Be it remembered that after the coming in of the verdict in this Cause the defendant filed the following motion for a new trial

Mo for new trial } "The said defendant moves the Court to set aside the verdict of the Court sitting as a Jury in this Cause & grant the said defendant a new trial

1. Because the verdict was against the Evidence
2. Because the verdict was against the law

Hanew for deft

which motion was by the Court overruled, to the overruling of which motion the defendant objected and Excepted and now tenders his bill of Exceptions to the said judgment of the Court which he prays the Court to sign seal & make part of the Record herein which is accordingly done

M. Blair Judge (Seal)

State of Missouri } ss
County of St Louis } I Philip Tippett Clerk of the St Louis Court of Common Pleas in and for said County certify the foregoing to be a full and complete transcript of the record and proceedings in the Cause of Edward Shuman against Joseph Hatry as the same now 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 St Louis this sixth day of February A. D. 1849.

Philip Tippett Clerk

Index

Petition & affidavit	Page	1
Bond	"	2
attachment & Sheriffs Return	"	3
Bond for Delivery	"	4
Plea in Abatement & Plea gen'l issue,	"	5
Plea in abatement stricken out	"	"
1st Bill of Exceptions	"	"
Motion to strike out plea in abatement	"	"
Judgment	"	6
New trial refused & appeal recog.	"	7
Aff't for appeal	"	"
Bill of Exceptions – Mo for new trial	"	8

~~29~~ ~~29~~

(3)

March T. 1850

Edward Shuman

v. } Transcript

Joseph Hätry

Filed Feby 15. 1849.
H. L. Boon clk.

$3.30. for [illegible] prby Dept

Joseph Hatry
vs
Edward Sherman

In the Supreme Court
March Term 1849

And the Said Appellant Joseph Hatry, by his Attorneys, Comes & Shows error in the record & proceedings in this Cause, in this, that it ~~Manifest~~ appears from Said record that judgment in the Cause in the Said Court of Common Pleas was rendered for Said Appellee, whereas by the law of the land the judgment of Said Court Should have been rendered for Said Appellant.

And also that Said Court of Common Pleas refused to permit Said Appellant to withdraw his Said Plea to the Merits, as prayed by him in Said Court

And also, that Said Court of Common Pleas struck out Said plea in abatement filed in Said Cause by Said Appellant.

And also that Said Court of Common Pleas refused to grant to Said Appellant a new trial as prayed.

For these & other errors & imperfections in Said record & proceedings appearing the Said Appellant prays that the Said judgment of the Said Court of Common Pleas may be in all things set aside, reversed and for naught held.

Aaron S Bay
Atty. for Appellant.

29.

Joseph Hatory
Appellant

vs

Edward Thurman
Appellee

Assignment of Errors

Harris & Bay
Attys. for appellant

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

Joseph Hatry
Appellant
vs
Edward Shuman
Appelle

In the Supreme Court
March Term 1849

And now comes the said Edward Shuman Appelle and saith that there is no error in the Record and proceedings of the St Louis Court of Common Pleas, in this cause, in manner and form as the said Appellant hath herein alleged, wherefore the said Appelle prays that the judgment of said Court of Common Pleas rendered herein may be in all things affirmed

Clement Corbett & Simmons
Attys for Appelle

No. 29.

Joseph Hatry
appellant
vs
Edward Shuman
appelle

Joinder in Errors

Glenn Kassett & Simmons
attys for Appellee

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

Joseph Natry
Appellant
Vs.
Edward Shuman
Appelle

In the Supreme Court
March Term, 1849

Blennerhassett and Simmons for Appelle: Insist

1st That the Statutory plea to the affidavit in an attachment suit, is, in its legal construction, a plea in abatement of the attachment writ for matter dehors the record, and like any other abateable plea is varied by a subsequent plea to the merits of the action. 3rd Stewarts Repts. p. ~~489~~ 489 Cleveland vs Chandler

10 Mo. Rep. p. 274. 2nd There is no force in the Second point made by the Appellant, If his plea to the affidavit had failed on trial, he could still have plead to the merits of his cause It is the invariable practice in the St Louis Courts to grant this privilege in all similar cases, and the Appellant would also have been entitled to it upon general principles

3rd The Court of Common Pleas committed no error in refusing the Appellant leave to withdraw his plea to the merits of the Action. The evident object of the Appellant was to let in his plea in abatement, which the Court very properly, at that time, would not permit Vide. Caine's, cases, Vol: 3rd p. 102. The motion for that purpose was merely a verbal one, and no reason was assigned in support of it, It was not made until a month after the plea was filed, and then at the time when the motion to strike out the plea to the affidavit was called for a hearing.

Under such circumstances the Court would have done great injustice to the plaintiff had it forced him to a trial of an issue raised by a dilatory plea, in a case where his evidence, as may be legitimately inferred from the

Record, would have to be procured in a distant State, and thus have delayed the recovery of a demand admitted to be just, and against which no defence was made or offered to be made, so far as the merits of the case were concerned

No 28/ 75

Joseph Katy
vs
Edward Shinnen
Brief
Dismissed

Joseph Haty
appellant
vs.
Edward Sherman
appellee

In the Supreme Court
March Term 1869.

On appeal from the St. Louis Court
of Common Pleas.

Edward Sherman brought Suit by Petition in debt in the St. Louis Court of Common Pleas, against Joseph Haty, and sued out an attachment therein. At the return term, and within the two first days of the term, the defendant filed a plea in the nature of a plea in abatement & also, but afterwards on the same day filed a plea of the Merits. The plaintiff moved to strike out the plea in abatement for the reason that the defendant had pleaded to the Merits of the action.

While said Motion was pending the defendant asked leave to withdraw from the files his plea to the Merits, but the Court refused to grant him such leave, and sustaining the plaintiff's Motion struck out the plea in abatement. And afterwards rendered judgment against the defendant for the amount of the plaintiff's demand. The defendant now appeals from the judgment of the Court refusing him leave to withdraw his plea to the Merits, and striking out his plea in abatement.

Points & Authorities

1. The Court erred in striking out the plea in the nature of a plea in abatement. The Statute gives the defendant the right to contest, in this manner, the truth of the plaintiffs' affidavit, and the Court had no discretion in allowing or refusing ~~to allow~~ the plea.

Revised Statutes of 1845. Title, "Attachment," p. 139-140.

2. The filing of the plea to the merits was merely to prevent a judgment by default in case ~~in~~ the issue on the plea in the nature of the plea in abatement was decided against the defendant. The 8th Sect. of 3d Article of the act concerning "Practice at Law." R. S. p. 810, requires that "every plea to the merits of the action, shall be filed on or before the sixth day of the term."

3. Even if the Court had a discretion in striking out the plea, it was improperly exercised, and did great injustice to the defendant, for the plea to the merits, pending the plea in ~~abat~~ abatement, was at most a mere irregularity. Leave to withdraw a plea to the merits is generally granted as a matter of course. At least the Court should have permitted the defendant to elect by which plea he would abide. 1. Johnson's Cases. 105. Le Conte v. Pendleton. 1. Dunlap's Practice 471.

Harris & Bay
for Appellant

75

Joseph Hatay
Appellant
vs.
Edward Sherman
Appellee

Statement of Case
&
Points & Authorities
by
Haren & Bay
Attys. for Appellant

"Afterwards but on the same day he" filed"
"When said Motion was called for a hearing"

Haty vs Shuman -

The Clerk will here insert the Statement of this Case by the Appellant's Counsel -

From the above Statement, the only point for the consideration of this Court, arises from the action of the Court below in striking out the defendant's plea, putting in issue the truth of the affidavit, on which the attachment issued in this case -

This plea is said, by the statute permitting the defendant in attachment to file it, to be a plea in the nature of a plea in abatement - Such a plea has been heretofore considered by this Court to be "a plea in abatement" - See Livingood vs Shaw 10 Missouri Reports 276 - I am of the opinion that this is the correct and proper construction - and that such a plea is simply a plea in abatement - It is governed by the same rules and liable to the same consequences as it partakes of the nature of a plea in abatement -

The defendant in the Court below filed on the same day his plea to the merits of the action, after he had first filed his plea in abatement - The plaintiff subsequently moved the Court to strike out the plea in abatement, because the defendant had after filing it, plead to the merits of the action - The Court sustained this motion, struck out the plea in abatement - The trial was afterwards had upon the merits, and the plaintiff obtained judgment -

During the pendency of the motion of the plaintiff to strike out the defendant's plea in abatement, the defendant moved the court for leave to withdraw this plea to the merits; this was refused — The defendant excepted to the opinion of the court in refusing him leave to withdraw his plea to the merits also excepted to the opinion of the court in striking out the plea in abatement —

The filing of a plea to the merits after one in abatement had been filed, was in my opinion properly considered by the court below a waiver of the plea in abatement — and the court decided correctly in striking out the plea —

We find no fault with the court below in refusing the defendant leave to withdraw his plea to the merits —

Dilatory pleas, pleas in abatement, have never met with much favor in Courts of Justice — Nor do I feel inclined to reverse this feeling —

From the whole view of the case then, I am inclined to think the Court below decided properly, and that its judgment should be affirmed —

Its judgment is accordingly affirmed —

John F. Ryland

Concurred in

W. B. Napton

Jas H. Birch.

Hatty vs Sherman

Opinion by Ryland
Judge