Hunton, Felix vs Hite, Ormsby
Hite, Abraham 1854 Benton Co) 199/11

17 Debt

$221 owed to H+H

Hunton sought to evade debt thru techni. (mistake by a clerk)

THE STATE OF MISSOURI, ss.

The State of Missouri, To the Judge of the Seventh Judicial Circuit in said State, GREETING:

WHEREAS, In the Record and Proceedings in a certain cause lately pending in the Circuit Court of Benton County in the Judicial Circuit aforesaid wherein Ormsby Site and Abraham Site were plaintiffs and Felix Stinton was defendant.

in an action of manifest error hath intervened, to the great damage of the said defendant as by his complaint, we are informed.

NOW, we being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf, COMMAND YOU, that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held at the City of Jefferson, in the county of Cole, in said State, on the second Monday in January next, so that our Judges of our Supreme Court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right and according to law ought to be done.

Witness, WILLIAM E. DUNSCOMB, Clerk of our said Supreme Court, at office, in the City of Jefferson, the tenth day of July in the year of our Lord one thousand eight hundred and fifty four

Wm E Dunscomb

SEAL OF THE SUPREME COURT OF MISSOURI

Wright

58.

Ormsby Stite & Abram Stite, defdts in error

v

Felix Hunton, p. Ex

filed Dec. 5 1854

Wm E Dunscomb
Clerk

Benton

7th

Chg. postage 10 cts

Versailles mo. July 8th 1854

William E Dunscombe. Esqr –

Dear Sir:

I wish a writ of error, to the Benton circuit court, in the case of — Ormsby Hite & Abraham Hite. vs. Felix Hunton — on the part of Mr Hunton —

I wish, if you conveniently can, you would send it up by next mail — I should like to have the writ with our clerk by the time I get home —

Your friend.
J. P. Wright

Ormsby & Abraham

State

vs } precipe.

Felix Stanton

filed July 10 1854

Wm E Duncan

Clerk

Weight

Benton

Ormsby & Hite
and Abraham
& Hite Merchants
&c

The above is a fac Simile of the names of the parties plaintiff at the head of plaintiff petition as in the Original filed

Henry H. Burns Clerk
by Jno Aymerson D.C.

#221

Louisville Oct 18-1843

One day after date I promise to pay to Ormsby White & Co or order Two hundred and twenty one dollars for value recd

Witness my hand

Felix Hunter

State of Missouri,
County of Benton.

Be it remembered, that on the nineteenth day of August A.D. 1852, the following petition was filed in the office of the Clerk of the Circuit Court for Benton County, to wit:

Ormsby Hite and Abraham Hite merchants trading under the name and style of Ormsby Hite & Co. Plaintiffs. against Felix Hunton Defendant

In the Benton Circuit Court September Term 1852

The plaintiffs state that said defendant by his promissory note hereto annexed, dated the eighteenth of October eighteen hundred and forty three promised for value received to pay the said plaintiffs (by their Copartnership name of Ormsby Hite & Co.) one day after date the sum of two hundred and twenty one dollars which and the interest thereon are yet due and for which the plaintiffs ask Judgement.

Winston for Plffs

James Winston attorney for said plaintiffs makes oath and says that he believes the above petition, and the matters therein as stated are true

James Winston.

Sworn to & subscribed before me the 19th day of August 1852
Thomas J. Bishop Clerk of Benton Circuit Court

Filed August 19. 1852
Thomas J. Bishop Clerk.

and on the same day was issued the following summons to which the seal of said Court was annexed, to wit:

Benton County Set.

The State of Missouri,

To the Sheriff of Benton County

Greeting

We command you to summon Felix Hunton so that he be and appear before the Honorable Judge of our Benton Circuit Court at the Court House in the City of Warsaw in Benton County on the Second Monday in September A.D. 1852 to answer the complaint of Ormsby & Hite and Abraham Hite plaintiffs and this he shall in no wise omit and have you then and there this writ.

In testimony whereof I Thomas J Bishop Clerk of the Benton Circuit Court have hereunto set my hand and affixed the seal of said Court at Warsaw the 17 August 1852.

{Seal}

Thomas J. Bishop Clerk.

upon which was indorsed the following return, to wit:

I S B Howard Sheriff of Benton County do hereby certify that I did on the 20 day of Aug 1852 serve the within summons and declaration by reading the same & by delivering to him said Hunton a true copy thereof in the City of Warsaw.

Seth B Howard Sheriff

fee $1 00

And at a Circuit Court of the Seventh Judicial Circuit of the State of Missouri begun and held at the City of Warsaw within and for the County of Benton on Monday the 13th day of September in the year of our Lord One thousand eight hundred and fifty ~~two~~

Present Hon. Waldo P Johnson Circuit Judge
Seth B. Howard Sheriff, and
Thomas J. Bishop, Clerk,
Court having adjourned from day to day until Friday the seventeenth day of said Month and year, when and where were had the following proceedings, to wit:

Ormsby & Hite and
Abraham Hite plaintiffs
vs
Felix Hunton defendant } Petition on Note

Now at this day come the parties by their Attorneys, and by consent of parties this case is continued until the next Term, and the defendant is allowed to file his answer at any time within sixty days from the end of this term.
And on the second day of November AD 1852 the following answer was filed by defendant, to wit:

Ormsby & Hite &
Abraham Hite
avs
Felix Hunton } In Benton Circuit Court
Sept Term A D 1852

This defendant Felix Hunton here says that he never executed or made any note whatever payable to Ormsby & Hite and Abraham Hite, as stated in the plaintiffs petition & he does not owe any such note or any part of any such note

Felix Hunton

State of Missouri }
County of Benton } ss

and the defendant further says that he never made or executed to the plaintiffs Ormsby & Hite and Abraham Hite, partners by the name of Ormsby & Hite any such Note as is described in the plaintiffs petition.

I F Hunter do solemnly swear that the facts stated in the above answer are true to the best of my knowledge and belief

Sworn to and subscribed before me this 2 Nov 1853
Thomas J Bishop Clerk
of Benton County Circuit Court

Felix Hunter

and on the same day was filed the following

Ormsby & Hite & al. Hite
vs
Felix Hunter –

The defendant moves the Court to quash the summons in this case 1st Because there is no summons in favor of Hite & Co. – 2nd Because the summons is in favor of Ormsby & Hite & Abraham Hite and the note filed herewith shows no indebtedness or contract with such parties – 3rd Because the note filed herewith shows from the defendant to said Ormsby & Hite & Abraham Hite 4th Because the summons and petition do not correspond as to the names of plaintiffs and defendant –

F Hunter

and at a Circuit Court begun and held as before mentioned, on Monday the 14th day of March A.D. 1853

Present Hon Waldo P Johnson Circuit Judge
Seth B Howard Sheriff
and Thomas J. Bishop Clerk

when and where were had the following proceedings, to wit:

Ormsby & Hite
Abraham Hite } Plaintiffs
vs } Civil Action
Felix Hunter } Defendant

Now at this day come the

parties by their attorneys, and the defendant asks leave to file an amended answer in this suit and the same is allowed, and now filed. Which is as follows,

Ormsby & Hite &
Abraham Hite
Merchants trading under
the name & style of
Ormsby Hite & Co. Plaintiffs
against
Heley Hunton Defendant.

In the Benton Circuit Court

The defendant Heley Hunton for answer to said petition states that he never executed or made any note whatever payable to Ormsby & Hite and Abraham Hite as stated in plaintiffs petition, and he says he does not owe any such note or any part of any such note. And defendant further says that he never made or executed to Plaintiffs Ormsby & Hite & Abraham Hite by their Copartnership name of Ormsby Hite & Co. any such note as described in plaintiffs petition. And defendant denies that by his promissory note dated the eighteenth day of October eighteen hundred and forty three, he promised to pay the said Ormsby & Hite & Abraham Hite, by their Copartnership name of Ormsby Hite & Co. the said sum of two hundred & twenty one dollars or any part thereof & he denies that the same or any part thereof is still due said plaintiffs Ormsby & Hite & Abraham Hite as set forth stated and described in plaintiffs petition —

Heley Hunton

State of Missouri }
Benton County } ss I Heley Hunton do solemnly swear that the facts stated in this amended answer are true

Heley Hunton

Sworn to and subscribed before me
this 14 day of March 1853
Thomas J Bishop Clerk
of Benton Cir Court

and on the second day of said Court, present as before, the following proceedings were had, to wit:

Ormsby & Hite &
Abraham Hite Plaintiffs
vs
Felix Hunton Defendant
} Petition &c

Now at this day come the parties by their Attorneys, and the plaintiff files a motion to strike out defendants answer. Which motion is in the following words, to wit:

Ormsby Hite
and Abraham Hite
against
Felix Hunton
} Petition in the Circuit Court

The said plaintiffs Ormsby Hite and Abraham Hite move the Court to strike out the answer of the defendant filed in this case 1st Because the answer does not respond to the petition of the plaintiffs 2nd Because the answer is wholly irrelevant, in this to wit, the suit is brought by Ormsby Hite and Abraham Hite, and the answer, responds to the action, as if the same was brought by Ormsby & Hite and Abraham Hite, and the said answer contains no defense

Winston
for Plffs

And on the sixth day of said Court, present as before, the following proceedings were had, to wit:

Ormsby & Hite &
Abraham Hite
vs
Felix Hunton
} Petition &c.

Now at this day come again the

parties by their attorneys, and the said plaintiffs now withdraw the motion to amend the writ filed in this case. and the motion filed by plaintiffs to strike out defendants answer being sustained. and defendants answer is struck out. And it is ordered by the Court that this suit be stated as follows, viz.

Ormsby Hite &
Abraham Hite } plaintiffs
against
Felix Hunton defendant — who appear to be the real parties.

And on the same day present as before the following proceedings were had, to wit:

Ormsby Hite &
Abraham Hite } Petition and Note
vs
Felix Hunton

Now at this day come again the parties by their Attorneys, and the defendant not having filed any answer in this case, and it appearing to the Court that the defendant is indebted to the said plaintiffs in the sum three hundred and forty five dollars and eighty four cents upon the said note in the petition specified including interest up to this time. Therefore it is considered that said Ormsby Hite and Abraham Hite recover against said Felix Hunton the sum of three hundred and forty five dollars and eighty four cents, and that they have thereof execution.

And on the same day present as before the following proceedings were had, to wit:

Ormsby Hite &
Abraham Hite } Petition &c Judgment for Plaintiffs.
vs

Heley Hunton }

Now at this day come again the parties by their Attorneys, and the defendant now files a motion to arrest the judgement. which motion is by the Court overruled. And the defendant now files a Bill of exceptions, and prays that the same may be signed sealed and enrolled and made a part of the record in this cause. And it is accordingly done.

The motion to arrest is in the words following, to wit:

Ormsby Hite & }
Abraham Hite } In Benton Circuit Court
against } March Term 1853
Heley Hunton }

Now at this comes the said Heley Hunton and moves the Court to ~~arrest~~ arrest the judgement rendered in favor of said Ormsby Hite & Abraham Hite, against said Hunton because said Hunton is not sued by said Ormsby Hite and Abraham Hite but is sued by Ormsby & Hite and Abraham Hite. Because the Court had no authority to render said judgment against said Hunton in favor of said Ormsby Hite and Abraham Hite Because the Court had no right to strike out said answer and render Judgement for want of an answer Because said Hunton had been summoned to answer Ormsby & Hite and Abraham Hite and he had filed a good and sufficient answer to their petition, and the Court had no right to render judgment for want of an answer — Because said Hunton was only bound to answer Ormsby & Hite & Abraham Hite and he has well answered their petition.

H P Wright
Atty for Hunton.

and the Bill of Exceptions is in the words following, to wit:

Ormsby Hite &
Abraham Hite
against
Felix Hunton

In the Benton Circuit Court.

Be it remembered that at this 19 day of March 1853 the motion of plaintiffs to strike out the answer of said Felix Hunton come on to be heard, the said motion was sustained & said answer was by the Court stricken out & the Court directed the Clerk to to now entitle said cause Ormsby Hite & Abraham Hite against Felix Hunton – the said cause having been entitled Ormsby & Hite & Abraham Hite against Felix Hunton and said Hunton having been summoned to answer said Ormsby & Hite & Abraham Hite – to which opinion & decision of the Court in striking out said answer and also in directing the change in the title of said cause said Hunton by his Attorney objected & excepted – said Hunton then filed his motion in arrest of the Judgement which was overruled by the Court & said Hunton excepted & prays this his Bill of exceptions to be signed sealed and made part of the Record which is accordingly done

Waldo P Johnson (Seal)

And on the twenty fourth day of March in the year of our Lord One thousand eight hundred and fifty four this execution was issued by the clerk of the Benton County Circuit Court, in the words following, to wit:

County of Benton, S.C.T.

The State of Missouri

To the Sheriff of Benton County – Greeting,

Whereas, Ormsby Hite and Abraham Hite on the 17th day of March A.D. 1853, at our Circuit Court, before our Judge thereof recovered against Felix Hunton the sum of three

hundred forty five ~~forty six~~ dollars and eighty four cents which to the said Ormsby Hite and Abraham Hite were adjudged, as appears to us of Record: These are therefore to command you, that of the goods and chattels, lands and tenements of the said Felix Hunton in your bailiwick, you cause to be made the aforesaid sum of three hundred and forty five dollars and eighty four cents & costs; and that you have the same before the Judge of our said Court on the second Monday in September next, to render to the said Ormsby Hite and Abraham Hite said sum of money & costs aforesaid: And that you certify to our said Judge how you execute this writ. And have you then and there this writ.

In Witness whereof, I, Henry H Burns Clerk of the Benton Circuit Court have hereunto set my hand, and affixed the seal of said Court, at the City of Warsaw the 24th day of March, A.D. 1854.

L.S.

Henry H Burns Clerk of the B.C.C.

upon which is endorsed the following return, to wit:

State of Indiana }
County of Benton } ss

I John C Arthur Sheriff of Benton County return the within execution not satisfied by order of the plaintiffs this 15th day of August A D 1854.

J C Arthur Sheriff B.C.

State of Missouri }
County of Benton }

I, Henry F Burns, Clerk of the Circuit Court for Benton County, do hereby certify that the foregoing is a true & correct Copy and transcript of the records and proceedings of the case of Ormsby Hite & Co. against Felix Hunton as full as the same remain of record in our said Benton Court, and I hereby make this return to the annexed writ of Error.

In Testimony whereof I have hereunto set my hand and affixed the seal of said Court at Warsaw this first day of December A.D. 1854.

Henry F Burns Clerk
of Benton Circuit Court
by Jno. Aymerson D.C.

In the Supreme court
January 5. 1855

Ormsby Hite & Alsam Hite
vs
Felix Hunton
} Error to Benton

Now at this day comes the said Defendant by his attorney & says that in record & proceedings & in the rendition of the judgment in this cause there is manifest Error in this to wit.

1st. Judgment was rendered in favor of plaintiffs when by the law of the land said judgment should have been rendered in favor of said defendant.

2d. The court erred in refusing to quash the summons.

3d. The court erred in striking out the answers of Deft

4th The court erred in changing the title of the cause. & in giving judgment in favor of Ormsby Hite & Alsam Hite when Deft had been summoned to answer different parties. & no amendment had been made

And for the errors aforesaid Deft prays that said judgment may be reversed. & that he be restored to all things which he has lost by reason of said judgment.

F. P. Wright
Atty for Deft

Ormsby Hile &
Abram Hile
vs
Tele & Hunter

assignment of
errors

Bright

Filed Jany. 15th 1855
Wm E. Dunscomb
Clerk

Ormsby Hite & Co vs Hunton —

The plaintiffs file their petition against the defendant in the Benton Circuit Court —

The petition is in the name of Ormsby Hite & Abraham Hite — merchants trading under the name and style of Ormsby Hite & Co plaintiffs, against Felix Hunton, defendant — The plaintiffs state that said defendant by his promissory note hereto annexed, dated the Eighteenth day of October, Eighteen hundred and forty three promised for value received to pay the said plaintiffs by their Copartnership name of Ormsby Hite & Co, one day after date the sum of Nine hundred and twenty one dollars, which and the interest thereon are yet due and for which the plaintiffs ask judgment"

The Summons issued, requiring the defendant "to answer the Complaint of Ormsby & Hite and Abraham Hite plaintiffs" — At the return term of the writ the parties appeared — and time was given to defendant to file his answer at any time within sixty days from the end of the term —

Within the time allowed — the defendant filed the following answer —

" Ormsby & Hite & Abraham Hite

vs

Felix Hunton — This Defendant Felix Hunton here says, that he never executed or made any note whatever payable to Ormsby & Hite and Abraham Hite as stated

in the plaintiffs petition & he does not owe any such note or any part of any such note; That he never made or executed to the plaintiffs Ormsby & Hite and Abraham Hite partners by the name of Ormsby & Hite any such note, as is described in the plaintiffs petition" —

At the same time he also filed his motion to quash the suit — Because there is no summons in favor of Hite & Co. 2nd Because the summons is in favor of Ormsby & Hite & Abraham Hite and the note filed in the case shews no indebtedness or contract with such parties. 3rd Because the note filed herewith shows no indebtedness from defendant to said Ormsby and Hite & Abraham Hite — 4th Because the summons and petition do not correspond as to the names of plaintiffs and defendant —

At the next term of the Court following —

The defendant asked leave to file an amended answer — which was granted and which answer is as follows —

"Ormsby & Hite & Abraham Hite — merchants trading under the name & style of Ormsby Hite & Co — Plaintiffs against Felix Hunton — Defendant	In the Benton Circuit Court

The defendant Felix Hunton for answer to said Petition states, that he

never executed or made any such note whatever payable to Ormsby & Hite and Abraham Hite as stated in plaintiff's petition, and he says he does owe any such note or any part of any such note. And defendant further says, that he never made or executed to plaintiffs Ormsby & Hite and Abraham Hite, by their Co partnership name of Ormsby Hite & Co any such note as described in plaintiffs petition. And defendant denies that by his promissory note dated the Eighteenth day of October Eighteen hundred and forty three he promised to pay the said Ormsby & Hite & Abraham Hite, by their Co partnership name of Ormsby Hite & Co the said sum of two hundred and twenty one dollars or any part thereof; and he denies that the same or any part thereof is still due said plaintiffs Ormsby & Hite & Abraham Hite as set forth, stated and described in plaintiff's petition"—

The plaintiffs moved to strike out the answer; because the answer does not respond to the petition of the plaintiffs, because it is wholly irrelevant in this, that the suit is brought by Ormsby Hite and Abraham Hite and the answer responds to the action as if it were brought by Ormsby & Hite & Abram Hite and the said answer contains no defence—

The Court sustained the plaintiffs motion and struck out the defendant's answer.

The defendant failing to file any other answer, judgment was rendered

and then ordered that the suit be stated as follows Ormsby Hite & Abraham Hite plaintiffs against Felix Hunter defendant—who appear to be the real parties— In the caption of the original petition, ~~was~~ there seems to have been something between "Ormsby" & "Hite" which might have been ~~mistaken~~ taken for a part of the "N" or for an "&".

against the defendant — The defendant filed his motion to arrest the judgment — which motion was overruled — The defendant then filed his Bill of Exceptions to the various rulings of the Court —

I have thus spread the various acts of the parties and the Court in full in this opinion; and upon looking into them, find nothing requiring the interference of this Court —

The petition either originally or as amended is for the proper parties and in the name of the proper plaintiffs viz Ormsby Hite & Abraham Hite — The mistake of the Clerk in the summons gave rise to all the various motions of the defendant —

The variance between the summons and petition can not be taken advantage of now as formerly by the rules of the Common Law — The Petition is the Commencement with us — and the object of the summons is to bring the defendant before the Court — When there, he must answer the petition and not the summons — The petition and note annexed informed the defendant of the cause of action — he knew the plaintiffs; the face of the note shewed him, who were the persons suing in the petition and the Petition itself shews this —

At the return term the defendant gets leave to answer; and he files what he calls his answer and his

motion to dismiss too — It is too late to ~~[illegible]~~ move to dismiss after answering; and an answer and a motion to dismiss at the same time being filed, the answer is a virtual waiver of the motion to dismiss — "A misnomer of the plaintiff could only be pleaded in abatement and was no ground for setting aside the proceedings; or for a motion in arrest of judgment; or of non suit at the trial, at least if it appeared that the defendant was aware that the action was brought by the person who actually sues" 1st Chitty's Pleading 282 — See Duval vs Craig et als. 2 Wheaton's Rep. 45 — Such was the practice at Common Law —

But here the only matter relied on to dismiss the suit is the variance between the petition and the summons — This Court held in Jones vs Cox & others 4 Vol. Mo Rep 173. that a variance between the declaration and the writ cannot be taken advantage of on motion to quash — also held, that where the summons varies from the declaration the Court may permit the summons to be amended and such act is not ground for a continuance — Judge Scott in this case of Jones vs Cox says — If a variance between the declaration and writ can be taken advantage of at all, it is not seen on what principle a party can avail himself of it by motion to quash — According to our practice the declaration is filed before the writ issues and the declaration being the foundation of the writ

and accompanying it, the party would look to it, in order to ascertain the nature of the demand against him, and by whom it was instituted - a variance between it and the summons can not mislead him" - And now it may taken as the decision of this Court, that no such variance can be taken advantage of - I repeat, that the object of the suit is to bring the party into Court, and when there he must answer to the petition or demur to it - He has nothing to do with the suit -

The Court below has ample power to make amendments in its proceedings - Petitions may be amended whenever justice will be promoted thereby - Here the Court ordered the case to be properly stated; and the defendants answer not being responsive to the petition, but rather an evasive effort at special pleading, and being what might almost be said to be a negative pregnant - almost a confession that the note was given and debt due to Ormsby Hite & Co - that is, to Ormsby Hite & Abraham Hite, and the defendant failing to file a proper or directly responsive answer; the judgment below was properly rendered against the defendants - and will therefore be affirmed - Judge Scott concurring.

John F. Rigland

58

Hites vs Hunton

Opinion

Ryland

Filed Oct. 13 1855

Wm E Duncomb

Clerk

1855

In the Supreme Court
January T. 1855

Ormsby & Hite &
Abram Hite } Error to Benton
vs
Isley Hunter

A suit was instituted in the Benton circuit court on the following note

$224 Louisville Oct 18 1843
One day after date I promise to pay to Ormsby Hite & Co a order two hundred and twenty one dollars for value received witness my hand Isley Hunter

The cause was entitled
Ormsby & Hite and Abraham Hite vs Isley Hunter. The petition alleged that defendant by his promissory note promised to pay plaintiffs by their co partnership name of Ormsby Hite & Co the sum specified. Defendant was summoned to answer the complaint of Ormsby & Hite and Abraham Hite plaintiffs — Defendant filed a motion to quash the summons assigning among other reasons, because the summons & petition do not correspond as to the names of plaintiffs & defendant

Defendant filed an answer denying that he ever executed any note payable to Ormsby & Hite & Abram Hite, nor to them by their copartnership name of Ormsby Hite & Co — He denies that he owes them the same &c

Plaintiffs filed a motion to strike out the answer which the court sustained

~~by the court~~ — and it was ordered that the case be stated on the record as follows

Ormsby Hite &
Abram Hite
vs
Isley Hunter

The court then gave judgment against defendant in favor of Ormsby Hite and Abram Hite for ~~the amount~~ of the note — Defendant moved in arrest of judgment, which was overruled exceptions taken & the cause brought here by writ of error.

The clerk has added, as he says, a fac simili of the heading of the petition, — but this detached piece of paper forms no part of the record & if it did, it would do plaintiff no good —

Points & authorities

I. P. Wright

If the suit was instituted in the name of Ormsby Hite & Abram Hite, then the summons should have been quashed, commanding, as it did, defendant to answer the complaint of Ormsby & Hite and Abraham Hite.

If the petition & writ contemplated as to the parties — then the court erred in striking out defendants answer, as well as in changing the title of the cause and

rendering judgment in favor of persons different from those who sued.

The answer contained material matter & should not have been stricken out. It was responsive to the petition.

Ormsby Hite &
Abram Hite

~

Felix Hunter

Defts Briefs

Wright

Ormsby White &
Abraham White, Respondents
vs } Error to Benton
Felix Houston, appellant

This was an action on a promissory note, to recover two hundred and twenty one dollars, with interest. The defendant, by mistake, was summoned to answer the complaint of Ormsby & White and Abraham White. At the return term, by consent of parties, the cause was continued, and the defendant allowed sixty days to file his answer. The answer denied the execution of any note to Ormsby & White and Abraham White. The plaintiffs moved to strike it out, because not responsive to the petition, and it was done. No other answer being filed, judment was rendered for respondents. The court directed the clerk to correct the title of the case upon the record, and this and striking out defendants answer are the errors complained of. The defendant moved to quash the writ; but the motion, it seems, was not disposed of, except by correcting the title of the cause upon the record. The bill of exceptions preserves none of the motions.

Gardenhire, for Respondents

1. The court did right to correct the mistake in the writ, by making the entries on the record conform to the petition. Practice in Courts of Justice, Article XI, Sec. 5. It was the practical mode of reaching the error. In the English practice, the process preceded the declaration; and ~~and~~ if the plaintiffs name was mistaken, he might still declare against the defendant in his right name. Such a misnomer, if continued in the declaration, could only be pleaded in abatement; and was no ground for setting aside the proceedings; or for a motion in arrest of judgment; or of nonsuit at the trial, 1st Chitty's Plead. 282; 2 Wheaton, 45.

2. The defendant answered the Summons. She should have answered the petition. She was not summoned to answer the summons, but the petition. If he answered the petition at all; the names in the writ had nothing to do with it. The writ was to bring him in to look at the petition, and its office was then done. His answer could consist of but two things; a specific denial of each allegation controverted or of any knowledge sufficient

to form a belief; or a statement of new matter constituting a defence. Practice in Courts of Justice VI. Sec. 7. It had neither.

3 Motions are no part of the record, and as none are preserved in the bill of exceptions, this court must presume that the court below did right. 10 Mo. Rep. 459.

Cornsby Hite et al
res Error to Benton
Helen Glenaton
Brief for Respondents