Smith, Constantine M. vs Kritzer, Martin L. 1855 Jackson Co/6th Circuit 201/4

Old 68/22

Reversed

$3225

W E Dunscomb Esqr
Clerk of Supreme Court
Jeff' City Mo

Dear Sir
Please issue Writ of Error in Martin L Kritzer defend=ant in Error, against. Constantine M. Smith Plaintiff in Error, To the Jackson Circuit Court. at Independence. Sixth Judicial Circuit.

The Cause in the Court below is

Martin L Kritzer Plaintiff
against
Constantine M Smith defendant

Smith prosecutes this Writ of Error.

Yours Faithfully
J Brown Hovey
Smith's Atto of Rec

May 18th 1857

Kritzer

v J precipe

Smith

filed May 23 1855

Wm E Dunscomb

Clerk

Storey

atty

THE STATE OF MISSOURI, ss.

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

WHEREAS, In the Record and Proceedings in a certain cause lately pending in the Circuit Court of Jackson County in the Judicial Circuit aforesaid wherein Martin L Kritzer was plaintiff and Constantine M Smith 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 first Monday in July 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 twenty third day of May in the year of our Lord one thousand eight hundred and fifty five

Wm E Dunscomb

Howes for pl. E.

State of Missouri
Jackson County Jr. I Saml D Lucas Clerk
of the Circuit Court Within and for
the County of Jackson aforesaid
do certify that in obedience to
the Commonwealth of the Within
Writ I have to append a full
true and Perfect Transcript
of all the Record and Proceed-
ings in the Case of Martin L
Hutsee Plaintiff against Constan-
tine M Smith Defendant as
fully as the same remains of
Record in Said Court

In Testimony Whereof I
hereunto Set My hand
and affix the Seal of said
Court at office in Independence
this 12th Day of June
A.D. 1855

Saml D Lucas
Clerk

Filed 25th Day of May
1855 S D Lucas
Clerk

State of Missouri } (1)
Jackson County } ss Pleas in the Circuit
Court begun and held at the City of
Independence for the County of Jackson
in the Lisette Judicial Circuit of the
State of Missouri on the Second
Monday of September in the Year
of our Lord One Thousand Eight
Hundred and fifty Four before the
Honorable William T. Wood Judge
of Said Circuit,

Be it Remembered
that heretofore Point on the 10th day of
August in the Year Eighteen hundred
and fifty Four. Martin L. Kritser by
Reed & Hicks his attorney filed in the
office of the Clerk of the Circuit Court
for the County aforesaid his Petition note
affidavit and Bond against Constan-
-tine M Smith. which said Petition is in
the Words and figures following Point

" Martin L Kritser Plaintiff } In the
against } Jackson Circuit
Constantine M Smith } Court September
Defendant } Term 1854

Plaintiff States that Defendant by his
Promissory note hereto annexed dated
April 17th 1854 promised for value
Received to Pay Plaintiff the Sum of
Three Thousand Two Hundred and
Twenty five Dollars Nine Months after
date. which is yet due and unpaid
and for which he Plaintiff asks Judge-
-ment.

Martin L Kritser by
Reed & Hicks

Martin L Kritser the above Plaintiff
makes Oath and Sayeth that he

Petition,

believes the above Petition and the Matters therein Contained are true

Mr L. Kutsee

Sworn to and Subscribed before me this 10th day of August AD 1854

Saml D Lucas Clerk

Which Said Note is in the Words and figures following Point "$3225 00/100 Nine Months after date I Promise to pay to Martin L Kutsee Three Thousand Two Hundred & Twenty five Dollars for Value Received being the Purchase Money for a Certain Lot & Store House, Independence Mo April 17th 1854 C. M. Smith.

Note

Which Said Affidavit is in the Words and figures following Point "State of Missouri } Jackson County } Personally Came before me Clerk of the Jackson Circuit Court this 10th day of August 1854 Martin L Kutsee. and makes oath that the Defendant in a Certain Action this day by him instituted, Constantine M Smith is justly indebted to him Kutsee after allowing all just Credits and Set offs The Sum of Three Thousand Two Hundred & Twenty five Dollars on his Promissory Note which is filed with the Petition in Said Course. and he further States that he has good reason to believe and does believe that Said Defendant Smith is about fraudulently to Conceal or dispose of his Property or Effects so as to hinder or delay his Creditors. and that he further has good reason to believe & does believe that he is about fraudulently to convey or assign

Affidavit,

his property or effects so as to hinder or delay his creditors and that he has

(3)

"further ~~has~~ good reason to believe and does believe that said Smith has absconded or absented himself from his usual place of abode in this State so that the ordinary process of Law cannot be served upon him.

M L Kitsee

Sworn to and subscribed before me this 10th day of August 1854

Saml D Lucas Clerk

Which said Bond is in the words and figures following to wit

"Know all men by these Presents that We Martin L Kitsee as Principal & John Lamelis and William S Stone as Securities are held and firmly bound unto Constantine M Smith in the sum of Six Thousand 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 10th day of August 1854

The Condition of this obligation is such that Whereas said Kitsee as Plaintiff is about to bring a suit by attachment in the Circuit Court of Jackson County against said Constantine M Smith as Defendant returnable to the next September Term thereof Wherein the sum sworn to is Three Thousand Two Hundred and Twenty five Dollars - Now if the said Plaintiff shall Prosecute said suit without delay and with Effect refund all sums of money that may be adjudged to be refunded

Bond

to Said Defendant. or found to have been received by Plaintiff and not justly due to him and pay all Damages that may accrue to any defendant or Garnishee by reason of Said Attachment or any Process or Proceeding in Said Suit or by reason of any Judgment or Proceeding thereon, then this Bond shall be void, otherwise it shall be in force,

M. L. Kutsco Seal
John Landis Seal
W. S. Stone Seal

On which "Said Bond is the following Endorsement made by our Said Clerk Toint.

"I approve of this Bond and Security, Saml D Lucas Clerk"

And afterwards Toint on the day of the filing of Said Petition. Note affidavit and Bond. our Said Clerk Endorsed on Said Petition a Writ of Attachment, which Said Writ is in the Words and figures following "Toint.

"The State of Missouri

To the Sheriff of the County of Jackson Greeting, We command you to attach Constantine M Smith by all and Singular his Lands & Tenements Goods & Chattels Monies Credits and effects or so much thereof as Will be sufficient to Secure the Sum of Three Thousand Two Hundred and Twenty five Dollars with interest and Costs of Suit in whose hands or possession Soever the Same may be

Writ of attachment,

found in your County and that you Summon the Said Constantine M Smith. that he be and appear before the Honorable Judge of our Jackson Circuit Court at the Court House in the City of Independence on the Second Monday in September next it being the 11th day of Said Month Then and there to Answer unto the Complaint of Martin L Kutser as Selfarth in the foregoing Petition and also that you Summon all and Every Person in whose hands or Possession Soever any Such Lands Tenements Goods Chattels Monies Credits or Effects May be found and Especially John Wilson and John Parker 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 that you have then and there this Writ and that you Certify how You Execute the Same.

L.S.

Witness Saml D Lucas Clerk of our Said Court With the Seal thereof hereto affixed at office in Independence This 10th Day of August A.D. 1854

Saml D Lucas Clerk

Return of Writ.

And afterwards To wit on the Said Second Monday of September. our Said Sheriff To wit Benjamine F. Thomson late Sheriff of Jackson County Returned Said Writ as follows "To wit, "I certify that I Executed the Within Writ by leaving a True Copy of the Within Petition and

Out at the usual place of abode of the within
named Constantine M Smith with a White
Person of the family over the age of 15 Years
and by attaching all the right title interest
and claim of the aforesaid Constantine M
Smith in and to a part of Lot Number Sixty
Six (66) in the old Town of Independence
being 24 feet front and running back
South to the alley and being the same
Part of said Lot recently sold by Martin
L Kutser to said Smith. Upon which the
Store House and other buildings stand that
were some time since occupied by Martin
L Kutser more recently by the said Smith
and at present (mainly) by John Wilson &
John Parker said Lot is in Jackson County
Missouri. Also by attaching the following
described Goods as the Property of the said
Constantine M Smith viz 71 pieces fancy
Prints &c (a Large Lot of Merchandize as per
Inventory & Return of Sheriff) Jackson County
August 9th 1854. I further certify that
I notified the Defendant Constantine M
Smith of his right under the Law to retain
certain Property (and on account of what
I conceived at the time to be an agreement
of the Parties (Plaintiff Martin L Kutser and
the Defendant Constantine M Smith)
I did not levy on his House and
Kitchen furniture nor Books. believing
at the same time that he did not
have as much in value as the Law
Could have allowed him (as the head
of a Family) and further that I made
due search and could not find in
Jackson County any other Real Estate

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Goods & Chattels Moneys Credits or Effects Wherein to Carry this attachment. August 9th 1854 B F Thomson Sheriff

I further Certify that I did by declaring to Each of them Summon John Wilson & John Parker to be and appear before the Judge of the Jackson Circuit Court on the Second Monday in September next it being the 11th day of Said Month (and the return day of the Within Writ) then and there to answer unto what may be Objected against them touching their indebtedness to the Within Mentioned Constantine M Smith All in Jackson County on the 9th day of August 1854

B F Thomson Sheriff

I further Certify that I did by declaring to Jabez Smith Summon him the Said Smith to be and appear before the Judge of the Jackson Circuit Court at the Court House in the City of Independence on the first day of the next September Term of the Jackson Circuit Court to be begun and held at the Court House in the County of Jackson on the Second Monday in September next it being the 11th day of Said Month then and there to answer unto what may be objected against him touching his indebtedness to the Within Named Defendant Constantine M Smith done in Jackson County on the 28th Day of August at 9 Oclock and 30 Minutes A.M.

Sheriffs Fees B F Thomson Esq. Sheriff

Levy & Ret	$2.00
" 3 Garnishees	3.00
" Valla Bona	.50
	$5.50

(8)

And afterwards Point on the fourth day of Said Term it being the 14th day of September 1854 Among other Proceedings the following Were had and Made Point.

" Martin L Kirtser
vs
Constantine M Smith } Petition & attachment

Now at this day Came the Parties aforesaid by their Attorneys and Said Defendant files his Plea in Abatement

Which Said Plea is in the Words and figures following Point,

" Martin L Kirtser Plaintiff
(vs) against
Constantine M Smith Defendant } In the Jackson Circuit Court September Term 1854.

Plea in Abatement,

And the Said Defendant by his attorneys Comes and Defends against the attachment Sued out in this Cause and Says that at the time of the Making of the Said affidavit for attachment in this Cause he was not about fraudulently to Conceal or dispose of his Property or Effects so as to hinder and delay his Creditors and that at the time last aforesaid he was not about fraudulently to convey or assign his Property or Effects so as to hinder or delay his Creditors all which Said Defendant is ready to verify Wherefore he prays Judgment if the Said Plaintiff Shall further have or Maintain his aforesaid Action against him

Harvey & Buchanan
& J M Cashbourn

And afterwards Point on the Ninth day of Said Term it being the 20th day of September 1854 Among

other proceedings the following were
had and made Point
"Martin L Kutsee
vs
Constantine M Smith } Petition & attachment

Now at this day came the
Parties aforesaid by their attorneys and the
Plea in Abatement filed by said Defend-
-ant is taken up and thereupon came
the following Jury Point Allen Heightman
Samuel Clark Joel F Chiles William
Parker William M Thomas James M
Burris Daniel Johnson Beal Green
Cornelius Conrad James Bridges
John Dennis and John M Scaptrest
Twelve good and lawful men who
being duly Elected & sworn Well and Truly to try
the issue joined between the Parties
aforesaid. And thereupon by consent
of said Parties the jury are Permitted
to disperse under the Charles of the Court
until 8 o'clock to Morrow Morning.

Trial

And afterwards to wit on
the Tenth day of said Term it being the
21st day of September 1854. among other
proceedings the following were had and
made Point
"Martin L Kutsee
vs
Constantine M Smith } Petition & attachment

Verdict

Now at this day came the
Parties aforesaid by their attorneys. and the
Jury Empannelled and sworn in this Course
on the Plea in Abatement on yesterday
also appear and upon their oath af-
-oresaid do say "We the Jury find for the
Plaintiff Joel F Chiles Foreman"

It is therefore Considered and Adjudged by the Court here that this Cause proceed. and it is further Considered by the Court here that Said Plaintiff recover against the Said Defendant his Costs and Charges in and about Said Plea and out and Expended and that he have thereof Execution and thereupon Said Defendant files Motion for a New Trial on Said Plea in abatement, which Said Motion being by the Court seen and heard is by the Court overruled,

Motion New Trial, Judgment

And afterwards Point on the Thirteenth day of Said Term it being the 25th Day of Said ~~Term~~ September 1850 among other Proceedings the following were had and made Point

"Martin L Kutsee
vs
Constantine M Smith } Petition & attachment

Motion in arrest,

Now at this day Came the Parties aforesaid by their attorneys and Said Defendant files Motion in arrest of the Judgment on the Plea in abatement, which Said Motion being by the Court here seen and heard is by the Court overruled. To the Opinion of the Court in so overruling Said Motion for a New Trial in Said Plea in abatement and in so overruling Said Motion in arrest of the Judgment in the Trial of Said Plea the Defendant Excepts and files here in his Bill of Exceptions which is Signed Sealed and made a part of the Record in

1st Bill of Exceptions

this Cause,

Which Said Bill of Exceptions is in the Words and figures following Point,

" Martin L Hartsee Plaintiff
against
Constantine M Smith
Defendant

In the Circuit Court Jackson County Mo September Term A D 1854

Best Remembered that at the calling of this Cause in the Term aforesaid and after the Jury Was Sworn to try the issue upon the Plan in abatement to the affidavit of Plaintiff for attachment in this Cause the following Proceedings Were had and made Point, The Plaintiff introduced the following testimony upon the issue aforesaid

William Lucas a Witness for the Plaintiff testified that Some time about the last of June 1854 the Defendant Went down the Missouri River, and that after he left in the forepart of July George C Smith, defendants Brother Sent Three Boxes and one Package to Witness at the River to be Shipped by Witness to Edwardsville Ill, care of Helfenstein & Gore at St Louis That the Boxes and package Were Marked to Mrs C S L Smith, Witness does not Know What the Boxes or Package Contained, but he Shipped them as Merchandize in the Bill of Lading and they guessed at the Weight at 700 Pounds These Boxes and Packages Were Sent from Independence the

Place where Defendant was doing Bus-
siness as a Merchant. Some time af-
=terwards. and after Defendant re-
turned to Independence there were
several bundles apparently furniture
and one Box sent to Witness Tare
House to be Stopped down the River
Market to "C M Smith" These last
were sent to the River after Witness
understood this attachment had
issued,
Washington Kelly a Witness for the
Plaintiff testified that some time be-
fore the August Election ~~Witness~~
between Supper time and bed time
after dark he saw a Negro boy
wheeling a load of goods in a Wheel
Barrow to Hickmans Store on the West
Side of the Public Square and the Boy was
wheeling them that way the goods ap-
peared to be nails and groceries. The
Boys name he thinks was Bill who
lives with Dr Henry, that on the Friday
previous to the Election (1854) the Store of
Defendant in Independence was closed
Defendant at the time was absent
and the Store was in Charge of George
W Smith defendants Clerk. Witness does
not think that Defendant had many
goods in the Store but they were put up
so as to fill the Shelves as much as
possible. and this is Customary among
Merchants who have but a Small Stock
The goods seemed to him been re-
duced in amount since Defendant
moved to the Kirtser Store. but Witness

does not know that they were more reduced than from ordinary sales. Witness is clerk in an adjacent store and thinks what he saw looked suspicious. That after defendant bought the House of Plaintiff he put into it shelving and counter's and had them painted. The House had been previously occupied as a Grocery & Drum Shop and Defendant fitted it up in Genteel Style as a Dry Goods Store before he moved into it. Witness does not know the value of the improvements—

John Landis a Witness for the Plaintiff testified that some time in July last he was at the back of his House next door to Defendants Store in Independence and after dark he saw some Negro boys carrying a Box and what appeared to be Dry Goods out of the back door of Defendants Store back to the alley—where by the sound of the Wheels there appeared to be a waggon. he could not discover what kind of goods they were but they looked like Cotton goods and Calico's. One of the Negro Boys was named Primus a Slave of Jabez Smith who lives near this City. That some days before the August Election the Store of Defendant was closed and afterwards the goods remaining here packed in Boxes and removed to the 2nd floor of the same House. Defendant was absent at the times above ~~specified~~ spoken of and the Store was in Charge of his Clerk George W Smith Defendant

resided with his family in the upper Stories of the Store House and his furniture was there at the times spoken of and Witness stated that the Parcels which the boys were carrying out might have been bed clothes but they had the appearance of being Cotton Goods and Calicos in the usual folds. He further stated that after defendant bought the House from Plaintiff he had new Shelving Drawers and Counters put into it and had it well fitted up for a Dry Goods Store the same having been a Grocery & Dram Shop before. That there were one Counter and some Shelving on one side when defendant bought it but whether the same Shelving remained there or was replaced by new Witness does not know. Defendant moved his goods into the Store in the forepart of May last He does not know the value of the improvements Defendant put on the House.

The Plaintiff then offered to read in Evidence the following Deposition of Constantine M Smith as Admissions of the Defendant in this Cause Point

"Depositions of Witnesses produced Sworn and Examined at the office of Woodson Chrisman & Hornings in the City of Independence Missouri on the 26th day of August 1854 between the Hours of Eight Oclock A M and Six Oclock P M of said Day to be read in Evidence in the Trial of a certain Cause now

and undetermined in the Circuit Court of Jackson County State of Missouri between Thomas J Whitcomb and Moses P Whitcomb as Plaintiffs against Constantine M Smith and Francis M Huffaker are Defendants on the Part of the Plaintiff

Constantine M Smith of lawful age being produced and Sworn upon his Oath deposes and Says. That he is one of the defendants in this Cause. He further States that Some time in August 1852 he went from Edwardsville in the State of Illinois to St Louis in the State of Missouri and Called upon the Defendant Huffaker at the Store of Pittman & Tennent in St Louis and that after Some Conversation said Huffaker invited Said Defendant to go with him into One of the upper Stories of Said Stores, and after they got up there Said Huffaker proposed to this Defendant to go into bussiness with him. Said Huffaker Stated that he Would furnish the Capital and they Would do Bussiness together in the name of C M Smith, The City of Independence was then Spoken of as the place of doing bussiness. That this deponent told Said Huffaker that he Would take time to reflect about his proposition, and this defendant went back to Illinois to Council with his friends Concerning the Matter, and that he returned to St Louis about Two Weeks afterwards and Called upon said Huffaker and accepted his proposition

to go into business with him. Deponent
Soon afterwards again returned to Illinois
and remained there to Went Saml
Huffaker's Order to return to St Louis.
deponent further says and about the
1st of October Huffaker came over to
Edwardsville where he remained and
requested Saml Deponent to return to
St Louis, Saml Huffaker stated that he
had made some arrangements to lay in
goods at St Louis. That about the 5th of
October 1852 Saml Defendant went over
to St Louis and when he had arrived
there Saml Huffaker had commenced
laying out some goods at Pillman &
Tennents and Dawn King Ho. that Saml
Huffaker stated to Saml Defendant that
he deponent was not a Judge of Goods
it was not necessary for him to attend in
the laying out of Saml Goods. and
that as he deponent was unwell he
could remain at his boarding House
Saml Huffaker then went on to lay the
goods for the City of Independence
to which Place they had concluded
to bring them. After that on Sunday
morning deponent called upon Saml
Huffaker at the Monroe House in St
Louis and Saml Huffaker invited Saml
deponent to go up into his room and
Saml Deponent did so. and Saml Huff-
-aker produced an article of Writing
which Saml deponent did not read
but Saml Huffaker read to him. The
general import of Saml article was and
Saml Deponent clearly contracted to

Pay Saml Huffaker about $2000 a year as Clerk as that would be about the Amount that they would each make in the ~~[illegible]~~ first year. According to Saml Huffakers Calculations. Saml Huffaker stated as a reason for signing Said Article of Writing. that if they failed in bussiness he Huffaker would be able to save that Amount through Said Article of Writing and that thereupon deponent signed Said Article of Writing which Article Said Deponent Bessowns Said Huffaker still holds. at the Commencement of Said Copartnership it was understood between Said Deponent and Huffaker that they were to Equal Partners in the Profits and losses of Said Copartnership Concern. On the next Morning Monday Said Huffaker proceeded to finish the Purchases for Said Copartnership Concern. and that the deponent was Some times with him while the Goods were being Purchased from the Different Houses in St Louis. On Wednesday Morning following about the 11th of October 1852 deponent went Round with Said Huffaker and Closed the Bills of Said Purchases by giving the notes of the Said C M Smith. and that the Goods were Shipped on the Same Evening for Said Independence. and that the Defendants both Came with Said Goods on their Arrival at Independence deponent and Huffaker opened a Store and from that time until the first of May 1854 they did Bussiness as Partners

in Said City of Independence in the Pur-
chases and Sales of Goods Wares and
Merchandise and the General Business
of Merchants under the Name and
Style of C M Smith; During the Ex-
istence of Said Copartnership the Said
Concern frequently made Purchases
and Sales of Goods and did the
General business of Merchants dur-
ing all which time Said Haffa-
ker was a full and Equal Partner
in Said Concern and that there was
no limitation as to the termination of
Said Copartnership. Until it was
mutually dissolved on the 1st day of
May 1854 At the time of Said
dissolution this Deponent took about
Three Thousand Dollars Worth of Said
Goods at 20 per cent on Eastern Cost
and Said Haffaker Kept the Balance
of Said Goods Amounting to about
Twenty or Twenty Five Thousand Dollars
Worth of Goods, Deponent, further States
that he Executed to Plaintiffs a Note
Signed C M Smith for $149 50/100 dated
the 2nd or 3d day of November 1853 payable
Six Months after date and that Said
Note was given for Goods bought from
Plaintiffs for the benefit of Defendants
and Said Goods were received by
Defendants at their Store in Said City
of Independence Soon after the date
of Said Note. Deponent further States
that he has Examined the Account
to him here Shown and Marked Ex-
Cubit "A" and Made Part of this

deposition. and the same contains a true list of the goods and the prices they purchased from said Plaintiffs by said Defendants as aforesaid amounting to $149 50/100 and that said sum is still due Plaintiffs from Defendants in the goods mentioned in the aforesaid account. Deponent further states that he executed to Plaintiffs another note signed C M Smith by F M Huffaker for the sum of $91. dated August 15th 1855 payable six months after date and that said note was given for goods bought from Plaintiffs for the benefit of Defendants. and that said goods were received by Defendants in their store in Sac Independence soon after the date of said note and deponent further states that he has executed an account to him Lee Shemi and marked exhibit "B", and made a part of his deposition, and the same contains a true list of the goods and prices they purchased of said Defendants from said Plaintiffs as aforesaid amounting to $91. and that said sum is still due from said Defendants to Plaintiffs for the goods mentioned in the aforesaid account,

Cross Examined on the part of Defendant Huffaker

Question 1st Was there not a contract by you with Huffaker and he was to clerk for you at a Valley

Answer 1st There was a contract to and obeed you

Question 2d Did you take and keep a duplicate copy of that contract,

Answer 2nd I did not
Question 3rd Was it not at your request that Huffaker went to Edmondsville.
Answer 3rd It was not. as it was in answer to his request that I should come down,
Question 4th Did not Huffaker make the purchases as your Clerk or agent
Answer 4th He made the purchases in my name in accordance to the agreements in the Copartnership the Bussiness having to be done in my name.
Question 5th Was he not authorised by you to purchase the goods as your agent,
Answer 5th He was not
Question 6th Were there any articles of Copartnership in writing between yourself and Huffaker,
Answer 6th There was not,
Question 7th Was there Ever at any time while doing Bussiness any settlement of Copartnership accounts.
Answer 7th None until the dissolution of Copartnership and then by a bussiness Trade. There was no settlement by items,
Question 8th How long did the Bussiness Continue from the time of its Commencement until its dissolution.
Answer 8th From September 1852 until about the 1st of May 1854
Question 9th During the time was there

any invoice taken or Statement made of the Copartnership Accounts of the Concern,

Answer 9th There was not Some time in the Month of January last before we went East. I proposed to Huffaker to take an account of the Stock on hand but Huffaker opposed it Saying that it was not necessary.

Question 10th Who took and Kept at the time of Separation all the Books notes and Accounts due to "C M Smith"?

Answer 10 I received and Kept them According to an Agreement at the dissolution.

Question 11th At the time of Separation did you not sell out the Entire Stock of Goods on hand to Huffaker for $15000. and Execute your receipt to that Effect,

Answer 11th I sold the Goods for $15000 and Huffaker was to let me have of those Goods $5000 and he was to pay Eastern Notes to the Amount of near $3000 which were due in Bank Some time in the Present Month, and was also to make up any deficiency that might occur in the Payment of the Notes of Pettman & Tennents and Dunn King & Co and Huffaker wanted the whole Amount of the Goods on hand at 20 per Cent under Eastern Cost He. My Brother and myself agreed after guessing to find the Amount of Goods on hand at $20000 I objected to let

Huffaker have them at $15000 which would be 20 per cent off upon which he made the Agreement as before Mentioned, before the Sale of the above Goods at $15000 I Executed my Receipt

Question 12th After this Sale of Huffaker did you not buy back from him $3100 of these Goods.

Answer 12th I Received $3100 Worth of the Goods at 20 per cent on Cast-in Costs which was Part of the $5000 Worth which Sum Huffaker was to let me have, at the time of the Sale I was to have the Goods at 20 per cent off. the Same per cent which Huffaker took them at, instead of which he made me take them with 20 on.

Question 13th Were there any Private Books Writings or accounts Kept by the Concern to Show the relative Standing of Each in the Concern

Answer 13th There was not Except the Regular Books of the Concern, the individual accounts of Each Member of the Concern were regularly Kept in the Books of the Concern. My own account on Sum Books I would Suppose was pretty large on account of having to Support my family.

Question 14th Were the individual accounts of you and Huffaker ever considered in any Settlement between you.

Answer 14th They Were not.

Question 15 Did you Ever authorise Mr Washburn of Indiana to write

a Letter to Pittman & Tennent of St Louis Stating that you had failed and that Huffaker was a Partner of Mine. If so was he authorised by you to write it in your Name

Answer 15th I have seen such a Letter in the hands of Mr Tennent and the Same was written in my name by my authority and by Mr Washburn.

Question 16th Did you ever state in the Presence of Mr Lucas Henry Rubey Mr Jarbert Mr McCutcheon Mr C Staples or any other Person, that Huffaker was only Employed by you as Clerk and had no interest whatever in the Concern or Words to that Effect.

Answer 16th I do not recollect of having any Conversation with those mentioned in the above interrogating, but I do remember when asked by Persons of Said Huffaker was a Partner of Mine to have answered that he was not. and that I did so Generally owing to an Previous agreement that said Huffakers Name was to be kept silent.

Question 17 Did you not voluntarily make the Statement to Said Persons or others and at other times. Those when asked the Question "whether he was a Partner.

Answer 17th I did not.

Question 18 Who now have Control and Possession and ownership of the Notes Books and Accounts of C M Smith

Answer 18. George C Smith My Brother.

Question 19th How did they come into his possession,

Answer 19 They were assigned to him by Mr Washburn my agent by my authority for indebtedness due to G W Smith,

Question 20th What was the nature and amount of that indebtedness,

Answer 21st One consideration was for services rendered by G W Smith on the years 1849 & 1850 for attendance in my office & Drug Store. and services rendered about my House such as feeding Horses Chopping Wood &c this applies to the $1000 note and for a length of time amounting to nearly two years The consideration of the $500 note is for his services to Mr Smith the 1st of May 1854.

Question 22nd Where were these notes in fact Executed

Answer 22nd They Execut date I dont know the last was Executed say about the Middle of June last. I dont know when the $1000 note was Executed Exactly. but it was some time after the first of May last the not certain

Question 23 What was the gross amount of the notes accounts and Books and assets of C M Smith so turned over to George W Smith.

Answer 23. There was no notes as far as I know of the amount of assets as near as I can form any idea was about $800 all in accounts.

Plaintiffs by their attorneys objected to each

and Every Question put by Defendant because the Same is illegal irrelevant and incompetent and to the Answers because they are Answers to illegal irrelevant and incompetent Questions

Re Examined by Plaintiff

Question 1st During the time you were doing Business in Independence up to May 1854 to Whom did the Goods in the Store belong

Answer 1st The goods belonged to the firm of C M Smith Composed of Con Stantine M Smith & Francis M Huffaker

Question 2d Did you put any Capital into the Concern

Answer 2d I did not Huffaker furnished the Capital

Question 3d How much Capital did Huffaker put into the Concern.

Answer 3d I do not know the Exact Amount but think from $8000 to $9000 I never saw but very little of it. but that is about the Amount which Huffaker Estimates to have put in

Question 4th Give your reasons for telling Persons that Huffaker was not a Partner in the Concern.

Answer 4th I did so at Huffakis request Since we have been Merchandizing in Independence he has requested me to Say nothing about our Copartnership and further this deponent Sayth not

C. M. Smith

State of Missouri }
County of Jackson } ss I William L Bone an acting Justice of the Peace Within and for the County aforesaid do hereby

Certify that Constantine M Smith the Deponent was by me duly sworn to testify the whole Truth of his knowledge touching the matter in Controversy aforesaid that he was Examined and his Examination reduced to Writing and by him Subscribed in my presence on the day between the hours and at the Place in that behalf aforesaid

Justice fees $3.00 Wm L Bone JP

(And the following is a copy of the Petition and separate Assign of Frances M Huffaker in the Cause of Whitcomb & Whitcomb against Smith & Huffaker in which Said Depositions were taken.

" Thomas J Whitcomb &
Moses P Whitcomb Plaintiffs
against
Constantine M Smith & Frances
M Huffaker Defendants

In the Circuit Court of Jackson County

Plaintiffs State that Defendants trading and doing business as Partners under the Name Style and firm of "C M Smith" by their Promissory Notes dated November 2nd 1853 Promised for Value Received to pay to the Order of Plaintiffs who were trading under the Name & Style of Whitcomb & Brother the Sum of One Hundred and Forty Nine & 50/100 Dollars Six Months after date which Sum and the interest thereon yet due and owing to Plaintiffs and for which they ask Judgment. Plaintiffs further State that on account of Land and Stock between Plaintiffs and Defendants. defendants trading under doing Business under the Name and Style of C M Smith for Goods Sold and Delivered by Plaintiffs to Defendants and on

a full Settlement thereof had between Plaintiffs and Defendants on the 2nd day of November 1853 Defendants owed and acknowledged them selves indebted to Plaintiffs in the Sum of One Hundred and forty Nine & 50/100 Dollars which Sum and the interest thereon since Same Settlement are still due and owing to Plaintiffs and for which they ask Judgment, Plaintiffs further State that on the 2nd day of November 1853 and prior thereto Defendants were trading and doing Bussiness under the Same Style and firm of C M Smith and that on Said 2nd day of November 1853 Plaintiffs trading and doing Bussiness under the Name Style and firm of Whitcomb & Brother Sold and delivered to Defendants Goods and Mer Chandize to the Amount of One Hundred and forty Nine & 50/100 Dollars on a Credit of Six Months the Particulars of all which will fully appear by reference to the Account of the Same hereinth filed and made Part of this Petition that Said Goods were received and used by Defendants for their use as Partners as aforesaid that a note was Executed for the Same Signed "C. M. Smith" and the Same therefore Annexed. That Said Goods were for the use of both Defendants as a firm as aforesaid and they both become liable to pay for the Same that the Money for Said Goods no any Part thereof has been Paid for by Defendants or either of them but the whole Still remains due and owing by Defendants to Plaintiffs with the interest thereon and for which Plaintiffs ask Judgment Plaintiffs further Say that Defendants trading and doing Bussiness as

Partners under the Name Style & firm of "C M Smith" by their Promissory Note dated August 15th 1853 Promised for Value Received to Pay Plaintiffs Trading & doing Business under the Name & Style of "Whitcomb & Brother" or order the Sum of Ninety One Dollars Six Months after date Which Sum of the interest thereon are Still due for Which they ask Judgment. Plaintiffs further State that on an account hereof and Stated between Plaintiffs and Defendants Defendants Trading and doing Business under the Name and Style of "C M Smith" for goods Sold and delivered by Plaintiffs to Defendants and a full Settlement therefore and between Plaintiffs and Defendants defendants due on the 2nd day of November 1853 One and Acknowledge themselves indebted to Plaintiffs in the Sum of Ninety One Dollars which Sum with interest thereon Since Said Settlement is Still due & Owing Plaintiffs for which they ask Judgment. Plaintiffs further State that on the 15th Day of August 1853 and Prior to that time Defendants Were Trading and not doing Business under the Name & Style of "C M Smith" and that on Said 15th Day of August 1853 Plaintiffs Trading and doing Business under the Name Style and firm of Whitcomb & Brother Sold and delivered to Defendants Goods and Merchandize to the Amount of Ninety One Dollars on a Credit of Six Months the Particulars of Which will fully appear by reference to an account of the Same hereto annexed and made Part of this Petition and Said

goods were received and used by Defendants for their use as aforesaid as Partners. And a Note was Executed for the ~~Said Goods~~ Same Signed "C M Smith" and that the Same Amt is last above hereto annexed. And Said Goods Were for the use of both Defendants as a firm as aforesaid. And they both became liable to pay for the Same. And the Money for Said Goods Nor any Part thereof has not been Paid by Defendants with the interest thereon and for which they ask Judgment

J M Washburn atty

J M Washburn Agent for Plaintiffs Makes Oath and States that he believes the above Petition and the Matters therein Stated are True

J M Washburn

Subscribed and Sworn to before me this 18th Day of Aug. 1854

Saml D Lucas Clerk

On which Same Petition and Said Clerk Endorsed a Writ in Words and figures as follows Tiz

" The State of Missouri

To the Sheriff of Jackson County Greeting. You are hereby Commanded to Summon Constantine M Smith and Francis M Huffaker if they be found in Your County and they be and appear before the Honorable Judge of our Jackson Circuit Court at the Court House in the City of Independence on the Second Monday in September next it being the 11th day of Said Month then and there to answer unto the Complaint of Thomas J Whitcomb and Moses P Whitcomb as Selfath in the foregoing Petition and that you have then and there this Writ and that you Certify how you

Execute the Same

L.S. Witness Saml D Lucas Clerk of our Said Court Witn his Seal thereof hereto affixed at Office in Independence this 18th Day of August A.D. 1854

Saml D Lucas Clerk

Which Said Petition and Writ and the Return day thereof was Returned by the Sheriff of Jackson County in Words and figures following Point

" I Certify that I Executed the Within Writ by delivering a True Copy of the Within Petition and Writ to the Within Name Constantine M Smith and Francis M Huffaker Each on the 21st day of August A.D. 1854 in Jackson County

Sheriffs Fees $ 2.00 William Botts Sheriff

And afterwards Point on the Sixth day of Said Term it being the 16th Day of September 1854 the Said Defendant Huffaker filed his Separate Answer to Said Petition in Words and figures as follows Point.

" Thomas J Whitcomb &
Moses P Whitcomb Plaintiffs
Against
Constantine M Smith & Francis M Huffaker Defendants } In the Circuit Court Jackson County

The Separate Answer of said Defendant Francis M Huffaker to Said Petition, This Defendant Said Francis M Huffaker in Answer to Said Petition denies that on the Second day of November A.D. 1853 or Prior thereto or Since Said Defendants Were Partners or that they Ever traded or transacted Business under the Name Style and firm of "C M Smith,

or under any other name or firm. This
defendant denies that said Defendants
as Partners doing Business under the
name Style and firm of C M Smith or
otherwise ever executed either of the notes
described in or attached to said Petition
Defendant denies that he ever executed
either of the notes described in or attached
to said Petition, Defendant denies that
on the second day of November A.D. 1853
or at any other time said Defendant
accounted with said Plaintiffs or that an
account was ever stated between them
for goods sold and delivered by Plaintiffs
to Defendants or on any other account
or that any settlement was made
between said Plaintiffs and said De-
fendants or that Defendants then or
at any other time ever owed or acknowledged themselves indebted to said
Plaintiffs in the said sum of $149 50/100 or
any other sum, Defendant denies that
on said 2nd day of November A.D. 1853 or
at any other time any said Plaintiffs sold
and delivered to Defendants as Partners
or otherwise goods and merchandize
to the amount of $149 50/100 or to any other
amount on a credit or otherwise -
Defendant denies that Plaintiffs sold
and delivered to Defendants the goods
wares and merchandize mentioned in
the account annexed to said Petition
or any part thereof or that the sum
or any of them were received by said
Defendants from Plaintiffs for the use
of said Defendants as Partners or other-
wise, Defendant denies that on

the 15th day of August A.D. 1853 or at any other time Said Defendants Accounted with Said Plaintiffs or that any account was ever stated between them or that any settlement ever took place between them or that Said Defendants acknowledged themselves to owe or were indebted to Plaintiffs in the Said Sum of $91. or any other Sum, Defendant denies that on the 15th day of August A.D. 1853 or at any other time Said Plaintiffs sold to Said Defendants goods and merchandize to the amount of $91 or any other amount on a credit or otherwise, Defendant denies that Plaintiffs sold and delivered to Defendants any of the goods mentioned in Said account annexed to Said Petition or Either of them or that the Same or any pay thereof were received by Said Defendants from Plaintiffs for the use of Said Defendants as Partners or otherwise

Hicks Real & Lawyer
Attys for Deft - Huffaker

This Affiant Said Defendant Francis M Huffaker makes oath and says he believes the above Answer and the matters therein as stated are true

F M Huffaker

Sworn to and Subscribed before me this 16th day of Sep. Under A.D. 1854

S D Lucas Clerk

and to the reading of Said Depositions or any part thereof as Admissions of Said Defendant or otherwise the Said Defendant objected and the Court therefore Permitted Said Plaintiff to introduce Said Depositions as Evidence

to the Jury and to the opinion of the Court in so permitting Plaintiff so to Recall Said Depositions to the Jury the Said Defendant by his Attorneys Excepted and the Plaintiff then recall in Evidence that Part of Said depositions Commencing at the 18th interrogatory in the Cross Examination and Ending with the Answer to the 23rd interrogatory in Said Cross Examination in these Words Point.

Question 18th Who now have Control and Possession & Ownership of the Notes Books and Accounts of C M Smith

Answer 18th George W Smith my Brother

Question 19th How did they Come into his possession.

Answer 19th They Were assigned to him by Mr Washburn my agent by my Authority for indebtedness due to G W Smith.

Question 20th What was the nature and Amount of that indebtedness.

Answer 20th That indebtedness is in the form of Two Notes One for $1000 the Other for $500 a Business Transaction between Ourselves not Connected with the Store,

Question 21st What Were the true Consideration for which those Notes were Executed

Answer 21st One Consideration for which these Notes were Executed was for Services rendered by G W Smith in the Year 1849 & 1850 for attendance on Office & Drug Store and Services rendered about my House, such as feeding horses chopping wood &c. this applies to the $1000. Note and for a length of time Amounting

to Nearly Two Years. The Consideration of the $800 Note is for his Services to me Since the 1st of May 1854

Question 22d When were these Notes on fact Executed,

Answer 22d The Exact date I dont Know the last one was Executed Say about the Middle of June last I dont Know When the $1000 Note was Executed Exactly but it was Some time after the first of May last. Thos not Certain.

Question 23d What was the gross Amount of the Notes Accounts and Books and Assets of C M Smith So Turned over to George W Smith

Answer 23d There were no Notes as far as I Know of the Amount of assets as Near as I can form any idea was about $800. all in Accounts,

And the Court hereupon remarked that the Defendant might read the remainder of Said Depositions which Defendant refused to do. The identity of the Defendant with Said depositions is not disputed, and thereupon Plaintiffs rested his Case and the Defendant introduced the following Testimony - Point,

Jabez Smith a Witness for Defendant testified that he had heard the Testimony of John Lancelis and that Some time about the first of July 1854 he bought a Lot of Cotton goods and other goods from the Defendant through his Clerk George W Smith for the Purpose of Clothing his Slaves. And that as his Servants

were bussy during the day time he
sent his Waggon into Town for the
Goods after Supper. That the boy
Winnie Spoken of by John Landis in
his Testimony was one of the Servants
sent with the Waggon for the Goods
That they got the Goods and brought
them home in the Waggon after night
He further stated that Defendant was
absent at the time, that after he un-
derstood that Defendant had bo-
ught the House from Plaintiff. de-
fendant fitted up the Store room for
a Dry Goods Store, the Same having
before ~~had~~ been used as a Grocery
That Defendant had been Shelving
Drawers and Counters put into it
in a very genteel manner which
made it a very nice Store room
That he does not know how much
it would Cost to put those improv-
ments into the Store room but would
think about Two or three Hundred
Dollars.
George W Smith a Witness for the
Defendant testified that he was the
Clerk and brother of Defendant from
the time Defendant went into the
Kitsee House until his Goods were
Attached in this Cause, That Defendant
about the 23rd day of June last left.
Independence with his family to visit
their friends at Edwardsville Ill
from where he had moved when he
Came here, That his Mother had been
residing at Independence but had
returned to Illinois. and that the

Three Boxes and one Package Spoken of by Wm Lucas in his testimony Contained the Beds and bedding and some articles of Dress and toilet belonging to Mrs E S L Smith his Mother and some Clothes of his Younger Sister Thus they also Contained a few articles of Casts off Garments which the Witness had Worn out and was Sending to his Mother to Make Carpet rags of and that some Boxes and Packages Contained nothing which belonged to Defendant Thus Sworn after this attachment was levied defendant retirement to Independence and the Bundles of Furniture and box of which Said Wm Lucas Speaks was the furniture and Medical Books which had been released to Defendant from the attachment as Exempt from the Tent. The Defendant bought the House where the Store was Kept from the Plaintiff Some time in April last and fitted it up with Shelving drawers and Counters and had it all Painted inside, one of the Counters was there at first, but he cut it down from a high Bar Counter to the height of the new one put in on the other side & the Shelving was all made new Except that some of the old Shelving plank may have been worked in. O C Stewart did this Work on the Store room and furnished the Materials and his bill

was about Three Hundred and Eighty Eight Dollars. He further testified that O C Stewart was owing C R & I R Hickman and he Stewart drew an order on Defendant in favor of the Hickmans for the amount of his bill and they took it in goods and while Defendant was absent the Hickmans sent for their goods of a night, after the usual laboring hours, as they could then get Slaves who were busy in the day time to pack them over to their Store, The Black Boys Current Sum of their Consisting of Nails and Sugar and Coffee on a Wheel Barrow, witness heard the Testimony of John Lewellis and Kennis that the Goods of which he Speaks were the Goods of Jabez Smith which he had bought before and came in the usual Business hours. and Witness further testified that he was usually at the Store of Defendant at night and while defendant was gone was always there at night and that no Goods ever went away from said Store Except to the usual purchasers and in payment of Just debts due by Defendant, that Defendant was to give Plaintiff Five Thousand Dollars for the Store House and Lot in Time. on Cross Examination Witness Stated that Defendant owed Plaintiff about Sixty Dollars which was payable in goods out of the Store for Groceries which Defendant had bought of him that the original Sum was

about One Hundred Dollars and Plaintiff had taken up about $40 of it and that a day or Two before defendant returned or it may have been a day or two before this attachment Twice Sued out Plaintiff Applied to Witness for the balance due him on goods and Witness told him that he was Expecting his Brother Every hour and requested him to Wait tet Defendant returned and that he did not let Plaintiff have the goods. In Answer to a question by Plaintiff on that Point Witness Stated that the reason why he did not let Plaintiff have the $60 in goods, was that owing to a Difficulty which his brother was in owing to Huffakers refusal to pay the debts of the old Concern of Smith & Huffaker he believed that Defendant Would have to get Plaintiff to take the House back and he wanted to want until his Brother returned to Arrange Matters with Plaintiff himself. He further Stated that about the 2nd day of August 1854 by the direction of defendant One J M Washburn who was defendants attorney Wrote Letters to all the Creditors of Defendant in Defendants name informing them that owing to the fact that Saml Huffaker had all the goods of the old Concern of C M Smith that he was totally unable to meet his debts and that Huffaker was a full Partner in the Concern and that the Debts could be made out of him. He further testified that there was but a Small Stock of Goods

about $ 3000 worth taken to the Kutsen
Store - that they were placed upon the
Shelves in such a manner as to make
the Shelves look as full as Possible
and that this was the Custom among
Merchants who had a small stock
That when Defendant left in June
he was undetermined whether he
would buy more Goods before he
returned or would return to Inde-
=pendence before he went for Goods
and said that it would depend upon
what arrangement could be made
of Debts due due by the old Concern
This Witness further Testified in Chief
that he closed the Doors of the Store on
the Friday previous to the August Election
by the advice of Mr Washburn defendants
attorney and agent owing to the fact that
it was considered inadvisable to keep
the Store open with so small an
amount of Goods and that all the
Goods in the Store were Publicly Pack
=ed in Boxes and placed in the upper
Story of the House with the knowledge
of the Plaintiff and that they remained
there until they were attached in this
Suit, That Defendant owed him a
Note of one Thousand Dollars for Ser
vices rendered to him in the Years 1847
and 1850 and that about the middle of
June 1854 he gave him a Note for five
Hundred Dollars for his Services from the
first of May to May 1855 and afterwards as-
signed to him a number of Accounts
against different Persons Amounting
in all to about a Thousand Dollars

to Secure the Payment of Sand indebtedness and out of which to pay the Same of these accounts about Eight Hundred Dollars and will be available and Collected John C Reed a Witness for the Defendant testified that Defendant bought the House where he was doing Bussiness from the Plaintiff Same time in April last about the date of the note Sued on in this Course. That Witness drew the Ordinary That Defendant was to give Five Thousand Dollars for the Store House on Lot on Nine and Twelve Months Credit and that the note Sued on in this Course was one of the notes given for Sand house and Lot and that the Same is not yet due. That at the time of the Sale Plaintiff Executed a Deed to Defendant for the Premises and took from defendant a Deed of Trust upon the Property to Secure the Payment of the Purchase Money. That the rent of Sand Property was Worth from five to Seven Hundred Dollars per year James R Hickman a Witness for the Defendant testified that Same time about the Middle of July last the Precise date he could not Att Without reference to his Books. Arrow C Stewart being indebted to the firm of C R & J R Hickman drew an order in their favor on Defendant for Three Hundred and Eighty Eight Dollars and Some Cents. and by an arrangement with Defendants Clerk George C Smith they took the amount on goods such

as groceries and nails. And that they Employed black boys to bring them accross the Square from Defendants Store to their Store. That they Employed these boys after the usual laboring Hours and they Packed them and Wheeled them in a Wheelbarrow from the Defendants Store to theirs at Night between Supper time and bed time. Witness also Stated that the Shelving and improvements made by Defendant in the House bought of Plaintiff were made between the time of the Purchase and the time Defendant removed into the house with his goods—

John M Cashburn a Witness for the Defendant testified that he was the Attorney and Agent of Defendant during his absence and that the Store of Defendant was closed by his direction, that having fully Examined the affairs of Defendant he was convinced that as Huffaker had refused to liquidate the Debts of the old firm of "C. M. Smith" the Defendant would be unable to go on in Business and he thought it would be to the interest of Defendant to stop the Expense of Keeping open the Store with so few goods in hand and therefore the Store was closed and the remaining goods packed in Boxes and Carried up Stairs where they remained until they were attached in this Case. The Store room was then rented to Welsen and Parker to the mined

their goods into it. When Defendant
Started to Illinois he was undetermined
whether he would bring on more goods
or not depending on what arrang-
ment he could make in relation
to the difficulty he had with Huffaker
about the payment of the debts of the
old concern of "C M Smith" and that
he was afterwards requested by Defen-
dant to write to all of Defendants
Creditors in St Louis and New York
and Boston informing them of his
and the situation of the Partnership
goods and disclosing to them the Part-
nership of Huffaker in the former firm
of "C M Smith" This the Witness did
by letters written in the name of
Defendant about the 2nd day of
August 1854 Witness further stated
that Defendant and Huffaker have
since been sued by the Creditors in
this Court for something over Ten
Thousand Dollars — Defendant have
closed his case and this is all
the Testimony in this Cause and after-
wards Point on the same day in the
Term aforesaid the said Plaintiff
asked and obtained the following
instructions to the Jury Point

"That if the Jury believe from the Evidence
that Defendant was about fraudulently
to convey or assign his property or
effects so as to hinder or delay his
Creditors they must find the issue
for the Plaintiff,

"That if the Jury believe from the Evidence that the Defendant at the time of the Making of the Affidavit was about fraudulently to Conceal or dispose of his property or effects so as to hinder or delay his Creditors they must find the issue for the Plaintiff."

And thereupon the said Defendant by his attorneys moved the Court to instruct the Jury as follows Point

"Martin L Kirtsee Plaintiff
Against
Constantine M Smith Defendant }

Defendant moves the Court to instruct the Jury as follows,

1st That the belief of the Plaintiff or his reasons for belief of the facts stated in his Affidavit is not the matter for the Jury to find in this Cause but they will find whether the facts stated in the Affidavit existed at the time of making the Affidavit or not

2nd That unless they believe from the Evidence that the Defendant at the time of making the said Affidavit was about fraudulently to Convey assign Conceal or dispose of his property or effects so as to hinder or delay his Creditors in the Collection of their debts they will find the issue for the Defendant

3rd That before they can find for the Plaintiff on this issue they must believe from the Evidence that

Rebuttal & Exceptions

defendant at the time of making of said affidavit had concerned the idea or intention to hinder or delay his creditors in the collection of their debts and that he had done some act to indicate a design to carry out such intention.

4th That a Debtor has the right by Law to prefer and pay off one creditor leaving others unpaid and such payment or preference would be of its self no evidence of fraud

Harvey & Washburn

And the Court gave to the Jury the 1st 2nd and 4th instruction so asked by the Defendant and refused to give the 3rd and to the opinion of the Court in so refusing to give the said 3rd instructions so asked by Defendant the said Defendant by his attorney excepted. And afterwards Point on the same day in the Term aforesaid there was a verdict of the Jury in favor of the Plaintiff and upon the Rendering of said verdict the Defendant by his attorney filed the following Motion to set aside said verdict and to grant him a new Trial in the words and figures following Point

Martin L Kutsen Plaintiff } In the Circuit
against } Court Jackson
Constantine M Smith Defendant } County

The said defendant by his attorneys comes and moves the Court to set aside the verdict of Jury

upon the issue made upon the affidavit of Plaintiff for attachment in this Cause and to grant him a New Trial therein for the following reasons Point

1st That the Jury found against the Law and the Evidence

2nd That the Court Erroneously Permitted Plaintiff to introduce as Evidence on the trial a Portion of the Cross Examination of Constantine M Smith in a deposition in another Cause and not between the same Parties, in which other Cause Said Defendant had been Examined as a Witness,

4th That the Court Erroneously Refused to give to the Jury the 3rd instruction asked by the Defendant

Harry L Washburn
Attorney for Defendants

Which said last Mentioned Motion being by the Court heard and fully understood as by the Court overruled and to the opinion of the Court in so overruling said last Mentioned Motion the said Defendant Excepted and afterwards Point in the Term aforesaid the said Defendant filed herein his Motion to arrest the Judgment herein in the Words and figures following Point.

Martin L Kutsee } In the Jackson
vs } Circuit Court
Constantine M Smith } September Term 1859

And the said Defendant by his Attorneys Comes and moves the

Court to arrest the Judgment in this Cause because
1st There is no finding of the Jury as to the issue in the Plea in abatement
2nd The affidavit is in the alternative ~~attachment~~ and there is no sufficient finding to Warrant a Judgment thereon
3rd That the finding does not correspond to the issues and no Judgment of the Court can identify the Pleadings
4th That neither the Pleadings nor the finding of the Jury will support a Judgment in this Cause

Henry L Buchanan
Washburn attorneys

Which Sent last Mentioned Motion being by the Court heard and fully understood is by the Court overruled and to the opinion of the Court in so overruling Sent last Mentioned Motion the Sent Defendant by his attorneys Excepts and Prays and this his Bill of Exceptions be Signed Sealed and made part of the Record in this Cause which is done accordingly

Wm. P. Wood Judge Seal

And afterwards Point on the Seventeenth day of Said Term it being the 29th Day of September 1854 among other proceedings the following Were had and made Point

Martin L Kirtser
vs

Constantine M Smith } Petition & Attachment

It is Adjudged that the Sheriff of Jackson County Proceed and sell for Cash in hand all the goods Merchandize and Personal Property attached in this Course and that he Conduct such Sale as Sales of Personal Property sold under Writs of Fieri facias and that he return the Money arising from said Sale until the further order of this Court and that he report his Proceedings in the Premises and this Course is continued,

And afterwards To wit At a Term of the Circuit Court begun and held at the Court House in the City of Independence for the County of Jackson in the State of Missouri on the Second Monday in March A.D. 1855 it being the 12th Day of Said Month Court met Pursuant to adjournment Present The Honorable William T Wood Judge of Said Court.

And afterwards To wit On the Fourth day of Said Term it being the 15th day of March 1855 among other Proceedings the following were had and made To wit

Martin L Kutser } Petition & Attachment
vs
Constantine M Smith }

Now at this day came the Parties aforesaid by their attorneys and said Defendant asks leave of the Court to file Demurrer to

Final Judgment

Final Judgment

Plaintiffs Sinn Petition, which Cure the Court refuses to Grant and Sinn Demurrer is not filed, and the Said Defendant having failed to file his Answer herein according to Law whereby the Said Petition remains against him undefended It is therefore Considered by the Court here that Said Plaintiff recover against the Said Defendant for Want of Answer and the Plaintiffs Demand being upon a Note the Court doth find that Said Defendant is indebted to Said Plaintiff in the Sum of Three Thousand Two Hundred and Fifty Three Dollars and Twenty five Cents the Amount of Said Note and the Interest thereon and it appearing to the Court here that the following Property has been attached in this Cause Point "A Part of Lot NO 66 in the Old Town of Independence being 24 feet front and running back South to the Alley and being the Same Part of Said Lot recently Sold by Martin L Kutser to Said Smith upon which the Store House and other buildings Stand, that was Said time Said Occupied by Martin L Kutser more recently by the Said Smith and at Present Merely by John Wilson and John Parker Said Part of Said Lot is in Jackson County and also a Lot of Goods and Merchandize as Per Inventory filed herein

It is therefore Considered

by the Court here that said Plaintiff recover against the said Defendant the sum aforesaid so found by the Court as aforesaid together with his Costs and Charges in this behalf laid out and Expended (and it is further ordered that the same Real Estate as aforesaid (said Personal Property having been heretofore ordered to be sold) be sold and the proceeds thereof be entered as a credit on this Judgment) and that said Plaintiff have thereof Execution,

And afterwards to wit on the Fifth day of said Term it being the 16th Day of March 1855 among other proceedings the following were had and made to wit

"Martin L Kutser
vs
Constantine M Smith } Petition & attachment

Now at this day came the Parties aforesaid by their attorneys and said Defendant files Motion to set aside the Judgment by Default rendered herein which said Motion being by the Court seen and heard is by the Court over ruled to which Opinion of the Court in so over ruling said Motion the Defendant excepts and thereupon said Defendant files his Motion in Arrest of the Judgment herein which said Motion being by the Court here seen and heard is by the Court over-ruled to the Opinion of the Court

Motion to set aside

Motion in Arrest,

in so overruling Same last Mentioned Motion the Defendant Excepts

And afterwards Point On the Eighth day of Same Term it being the 21st day of March 1855 Among other Proceedings the following were had and Made Point

" Martin L Kutsee
vs
Constantine M Smith } Petition & attachment

Now at this day came the Parties aforesaid by their attorney And Said Defendant files his bill of Exceptions to the Opinion of the Court in Overruling his Motion to Set aside the Judgment by Default and Motion in arrest of Judgment. Which Said Bill of Exception is Signed Sealed And Made a part of the Record in this Cause.

Which Said Bill of Exceptions is in the Words and figures following Point,

" Martin L Kutsee Plaintiff
against
Constantine M Smith Defendant } In the Circuit Court Jackson County Mo

March Term 1855.

Bill of Exceptions,

Best Remembered that on the Calling of this Cause on the 6th Day in the Term aforesaid the following Proceedings were had and Made Point The Defendant by his attorneys asked leave of the Court to file herein the following Demurrer to the Petition of the Plaintiff. Which Demurrer is in the Words, ~~and figures~~ following Point,

Martin L Kutsee
vs
Constantine M Smith } In the Circuit Court
Jackson County

The Defendant by his attorneys Comes & Asks to hear the Same Promissory Note Mentioned on Said Petition and the Same is read to him on these Words "Nine Months after date I Promise to pay Martin L Kutsee Three Thousand Two Hundred and Twenty five Dollars for Value Received being the purchase Money for a Certain Lot and Store House in Independence Mo April 17th 1854

C M Smith.

And thereupon the Defendant Demurs to the Petition of Plaintiff because it does not State facts Sufficient to Constitute a Cause of Action in this 1st Third the Petition asserts that the amount of Said Note was due to him at the time of the Commencement of this Suit when by the Law of the Land Arising upon Said Note the Same was not due to him,

2nd Third Said Petition Ought to have Stated a Sufficient Reason under the Statute for Commencing this Suit before the Note became due and there being no Such Reason given in Said Petition the Same is not Within the Provisions of the Statute and the Plaintiff is not Entitled to Maintain this action Either at Common Law or by Statute

Henry & Buchanan
attys for Deft

and the Court thereupon refused to permit the said Defendant to file the same and to the opinion of the Court in so ~~[illegible]~~ refusing to permit Defendant to file said Demurrer the said Defendant by his Attorney Excepts and immediately after such refusal, & the request of Plaintiff the Court Rendered Judgment for Want of Answer against Defendant for the Amount of said Note and Interest, and afterwards Point on the 5th Day in the Term aforesaid the said Defendant by his Attorneys filed herein the following Motion to set aside Judgment for Want of Answer which is in the Words following Point

Martin L Kutsee
Against
Constantine M Smith

In the Circuit
Court Jackson
County

The said Defendant Comes and Moves the Court to set aside the Judgment for Want of Answer in this Cause for the following reasons

1st That Defendant by the Law of the Land had a right to the first Six days of this Term to Plead to said action,

2d Because the Court refused on the 4th Day of this Term to permit the Defendant to Plead to said action

Haney & Buchanan
Attos for Defendant

Which said Motion being by the

Court herein and fully understood is by the Court overruled and to the opinion of the Court in so overruling said Motion the said Defendant Excepts. And afterwards to wit on the day last aforesaid the said Defendant by his attorneys filed herein the following Motion in arrest to wit

Martin L Kutsee
against
Constantine M Smith } In the Circuit Court Jackson County

And the said Defendant comes and moves the Court to arrest the Judgment herein for the following reasons

1st Because the Court had no right in the Law to render the said Judgment at the time and upon the finding in said Course

2nd That the Pleadings and Exhibits in said Course are not sufficient in the Law to support the Judgment.

3rd That the Petition shows that at the time of the Commencement of this Suit the Plaintiff had no right of action against Defendant upon the note sued on because the same as set up in said Petition is shown to have not been due at the Commencement of this Suit. and Plaintiff in said Petition makes no statement that by statute Would give him a right of action before said note was due

Henry S Buchanan
Atty for Defendant

Which Sum last Mentioned Motion being by the Court heard and fully understood is by the Court overruled And to the Opinion of the Court in So overruling Sum last Mentioned Motion the Same Defendant Excepts And Prays And this his Bill of Exceptions be Signed Sealed And Made Part of the Record in this Cause Which is done Accordingly.

Wm. T. Wood Judge Seal

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(55)

State of Missouri }
Jackson County } ss I Saml D Lucas
Clerk of the Circuit Court Within
and for the County of Jackson
aforesaid do certify that the
Proceedings 54 Pages Contain a
full True and Perfect Trans-
-Cript of all the Record and
Proceedings in the Cause therein
Named Wherein Martin L
Kutsee is Plaintiff and Constantine
McGuire is Defendant as the
Same now remains of Record
in Said Court

In Testimony Whereof I
hereunto Set my hand
and affix the Seal of
Said Court at Office in
Independence this 12th Day
of June A.D. 1855

Saml D Lucas Clerk

Bill of Costs
Clerks fees To wit
This Transcript 16200 @ 10 $ 16.20
Certificate & Seal to Same 0.50
Filing Writ of Error 0.05
Certificate & Seal to Return 0.50
Postage Paid on Transcript 0.36 $ 17.61
(all other Costs Paid) Attest S D Lucas Clerk

228

Martin L Kritzer

v

Constantine M Smith p.e.

filed June 18 1855

Wm E Dunscomb

Clerk

Jackson

6th

Kritzer vs Smith In the Supreme Court

The Argument.

In approaching the argument of this case, I shall first attempt to show from the facts that the Cross-Examination of Smith in the Whitcomb deposition, as read in Evidence in this cause, was originally produced in fraud of the law, and by gross imposition upon Smith.

The record shows that Kritzer, by Hicks and Reid, his attorneys, commenced this suit on the 9th day of August 1854.

A glance at the testimony will clearly show that the affidavit of Kritzer was wholly based upon what he then believed, and what he then believed he could prove, to be, the clandestine removal of Smith's goods by night, in wheelbarrows and a waggon; and the shipment of the three boxes in the name of his mother.

Now, we have not to draw upon our imaginations to know that when Kritzer closed the doors of a merchant on the public square, by attachment, the fact was "talked about"; and the causes for attachment freely discussed in business circles.

We further see by their descriptions of locality, that the witnesses, pro and con, were residents of, and near Smith's place of business.

On the 18th day of August 1854, Whitcombs commenced their suit against Smith and F M Huffaker, the object of which will appear by the petition, and especially the separate answer of Huffaker, to have been, to charge Huffaker for goods sold and notes executed in the style "C M Smith" as a partner of Smith, his Codefendant.

By looking at the record we again see that Hicks & Reid are attorneys for this resisting defendant Huffaker.

The Whitcombs afterwards give notice to take a deposition on a certain day, and on that day proceed to take the testimony of Huffaker's codefendant - Smith.

Now, it is but reasonable to believe that Kritzer and his attorneys had by this time been informed, through the general conversation consequent, in business circles, upon the attachment of a merchant that the acts upon which they had predicated their affidavit for attachment would be entirely and utterly explained away; and that the affidavit so far as those facts were concerned, would stand a slim chance upon plea in abatement.

Kritzer's bond is out for double the amount of the large debt sued on, and if he fail to sustain his attachment, then the shutting up of a merchant would be no cheap affair! Something must be done!

The taking of Smith's deposition in the Whitcomb case is now an open field for Kritzer's lawyers, who are also attorneys for the contestant - Huffaker! If they can upon cross-examination "gouge" anything out of Smith that will help "our client - Kritzer", out of his dilema, it will then do to read in Kritzer's case as an "admission"! "And if we fail, then it will be only irrelevant in Whitcomb's case, and cannot injure "our client" - Huffaker!"

Thus, Sir, they take a deposition to be read as an admission in Kritzer's case, in fraud of the law, and in gross violation of the rights of parties littigant!

Am I mistaken in this inference? What lawyer ever asked those questions, and elicited those answers, with a view to evidence upon the issue in the suit of the Whitcombs against Smith and Huffaker?

The Whitcombs having, in Chief, proven the whole of their petition to be true, rested; and defendant Huffaker by his attorneys commence a cross-examination. The questions and the answer to them did not affect Whitcomb's cause of action in any way, and therefore they merely object to each and every the questions and answers, and have their objections appended to the deposition.

What did the Whitcombs care as to what answers were elicited to such questions? And what did they care whether the Justice wrote down all or one half that the witness actually said in answer?

It is a well known fact in practice, that, unless insisted upon by a party or the witness, the Justices, or Commissioners, never pretend to take down what a witness says in explanation, enlargement or contraction of the main fact of which he testifies. But I digress. I merely throw out these hints to expose what I believe to have been a deliberate attempt to take a deposition in Whitcombs case to be read in Kritzer's! Not as a deposition;- but as "admissions"! of which I shall now speak particularly!

Startling as the announcement may be to the ears of this Court, I am about to assert, and try to prove, that the Rule which admits what a witness has sworn upon a trial to be given in Evidence against him in a suit where he is a party, is not a branch of the Common law, and never was!

Blackstone says that the Common law is "founded upon the principles of Eternal Justice". This rule, on the contrary, is solely founded in English necessity! Growing out of the peculiar practice adopted for the particular benefit of Lincoln's Inn!

They had their King's Bench and Nisi prius- their Courts Barron, Common Pleas, Exchequer, Admiralty, Ecclesiastic, and their Commission in Bankruptcy. And besides these they had their Court of Chancery. And

over all these, presided that half Court-half legislature-"The House of Lords"! (New York imitated this latter folly until they got ashamed of themselves in the case of the People vs J V N Gates! 4" IR)

Now, under the English practice, whenever in any of these other Courts, it became necessary to purge a party on oath, it became indispensible to go to the Court of Chancery, and by a long winded and humble petition to ask the Chancellor to "dig" the truth out of him! In other words, it became necessary to file a "bill for discovery". And when the answer was obtained, the whole was certified back to the Common law Court for Evidence. After this game had been played for about a Century, and parties litigant had accumulated a vast amount of "discovered Evidence", it became a question among the Judges, whether it was not as competent to read in Evidence-what a party had already sworn to, as to go to a Court of Chancery, and make him say it over again in the particular case. And upon this ground, bills and answers in Chancery came into general use at law, as evidence against the party who had made them. So also with Examinations before the Commission in Bankruptcy, voluntary affidavits &c. The object of admitting them as evidence was to save time, and the trouble of resorting to Chancery; and the principle upon which they were admitted in Evidence was, First, that they were the voluntary act of the party, and he was in a manner estopped from afterwards denying them. And, Secondly, The party had uttered and used them for his own supposed benefit, and could not afterwards have any equitable objection to their being used for the benefit of others.

But never, I believe, had the English Courts dared to carry this rule so far as to include the testimony of a witness, given before a Court in another trial, until the Case of Lord

Audley's servants, and the case of Collett vs Lord Keith. And of this latter case I have something to say.

This was an action by Collett vs Keith (4th Espinaces Case 212.) for taking the plaintiff's ship. It appears that Lord Keith had been sworn as a witness in another cause before Lord ~~[illegible]~~ Kenyon, and had testified that he had taken the ship, and was proceeding to give the circumstances under which he had taken it; when the Court stopped him, by remarking that in that case it was unnecessary for him to explain his conduct.

Afterwards Collett sued Keith for taking this ship; and offered in Evidence to support his declaration, the bare testimony of Lord Keith given in the other cause, that "he had taken the plaintiff's ship." And although Lord Keith offered to show the circumstances under which that testimony was given and that to admit his Evidence in that case as an "admission" would be and was a great imposition upon him, yet, Le Blanc J. permitted the plaintiff to give the fact so sworn to in Evidence against Lord Keith; though he was willing to permit Lord Keith to introduce evidence in defence, to explain the reasons for taking the ship. And this is a leading case for Kritzer! And I am to be told that this precedent is a branch of that law which is "founded upon the principles of eternal justice"! When, if we let the moral feelings of an honest heart speak, it is founded upon the principles of damnable iniquity! Greenleaf, and Starkey quote the case and pass over it without comment! Not daring to subject themselves to the denunciations of all honest men on the one side, and the ban of "high authority" on the other! Philips seems to have have been keen enough to forget all about such admissions, though he mentions every other species, from an answer in Chancery to examinations in Bankruptcy.

How does this rule harmonize with all those benevolent guards which the Common law throws around a witness to induce him to fully unbosom himself as to the whole truth of his knowledge — touching the matter in issue?

Does the Common law tell the witness — "You shall tell so much of the truth as may be relevant to the issue; and altho' the remainder of the facts are wholly within your own knowledge, you shall not speak of them! And yet you shall be sued, and this, your half admission shall be given in evidence against you!" Is this Common law Sir? Is this that rule which grows out of the nature of things, and the relations of Civilized society? Or is it a rule — growing out of the unwieldy and complex machinery by which rights were enforced under the Statutes of Great Britain?

The man who voluntarily tells his own story without oath, is privileged to have his whole admission taken together! But the man who is forced by an oath to tell the truth, and stopped in the middle of his statement, by the strong arm of the Court, is thereby subjected to a recovery against himself, unless forsooth — held in mercy by the permissive tenderness of Justice Le Blanc — he is permitted to find some person, if he can, to prove the same facts that upon the former trial, he would have added to his testimony, if the Court had not stopt him?

Suppose no other person knows these explanatory facts? What becomes of the party against whom such "admissions" are permitted to be read as Evidence? He is in the meshes of a net of damnable fraud! woven around him, as my opponent would say, by the benevolent fathers of the Common law! — wherein "there is no wrong without a remedy", and "no injury without redress!"

As my only object is, to arrest the attention of the Court, and open a train of reflection upon the points I make, I shall pursue this view no farther: but pass to the next.

I have said in my brief that there is a marked distinction, touching this kind of "admissions", between irrelevant testimony, and that against the giving of which the witness is protected.

What is irrelevant evidence? I answer, it is mere words without meaning or effect! It is not permitted to go to the jury at the trial; and if by neglect it has come to their ears it will be withdrawn from them. Its truth or falsehood is a matter of no consequence in the law, and will not support an indictment for perjury however wilfully and falsely spoken! Not so with privileged Evidence! If a man testify where he might have demurred - and his testimony is relevant, it is competent and effective! And for its truth or falsehood the witness is as much a subject of the law concerning perjury as if his testimony had not been privileged!

In a voluntary affidavit, a man is supposed to have protected himself! and if he did not do so it is his own fault! But show me a case where a deposition de bene esse has ever been read as an "admission"! - And I will yield the point upon a single authority. Remember that all depositions taken under our statute are taken "de bene esse" - Not to be evidence unless the witness, himself, is not within the power of the Court who tries the cause! Then, until it is read at the trial it is subject to suppression, striking out and every sort of objection, as to materiality, competency or otherwise! And if the witness is present he may alter or explain away all its force and still both stand consistantly together as the truth! Is such a deposition one of those "admissions" which are such "potent evidence" from the fact that "it" made under oath?"

Remember too, that the deposition of Smith had never been read in the Cause in which it was taken. It was taken soon after the commencement of the suit! Before the return term! – and the Court will see by the petition and answer in that case, that by the statute of this state the cause was not for trial until the next March term.

Was this deposition, then, "the Evidence of a witness taken or given upon a former trial"? Had there been any trial? Had Smith testified at any trial? If he had, the Court can easily see that he never would have been permitted to state what Kitner read, out of Smith's deposition in Whitcomb's case!

The rules as to these "admissions" as laid down in English practice, no where recognize any other kind of Evidence than that which is given at the trial of a case; or before Commissioners in Bankruptcy, which is the same thing, for the Commissioners were the "triers" of fact in Bankruptcy. Therefore Examinations of a Bankrupt taken before them were evidence as "admissions" of the party making them. And the English authorities say that if these examinations have been improperly taken, or improper questions have been asked, the way to prevent such improper examinations from being used as "admissions" is to apply and get an order to have them taken from the files for that cause. Now sir, What chance had Smith to have this irrelevant matter stricken out of his deposition? The cause of Whitcomb vs Smith & Huffaker was not called, upon the return docket, at the time the truth of Kitners affidavit was tried below! and Smith was not the party to move for that purpose, and could not have done it, at any time, if he would.
There is no case which I have been able to find, and no Elementary work which speaks of the admission of a "deposition" taken in another cause in testimony, as evidence of an "admission" of a party to a suit. And I therefore presume that

the point at bar is this moment as much open to discussion in England as it is here in this Court.

Depositions, as such, can only be read in the cases ~~in the cases~~ in which they are taken, or between the same parties!

Now let us look at the tendency of enlarging the English rule so as to cover Keltner's case.

A lawyer in good practice generally has more than one suit. Now if he has a suit against "A" in which he has not the testimony to succeed against "A", he has only to try the beautiful experiment which has been tried in this case — to wit. Give notice to take depositions in some other cause, summon "A" as a witness, and instead of confining him to the issue in which the notice was given — pump him as to your matter of controversy with himself!! The Justice before whom the deposition is taken, will not know what the real issues are, and will take down the witness' answers! If his answers suit your case against him, then read it in Evidence as an "admission"? and if not, then it is only irrelevant in the cause in which it was taken & wont hurt you! Good game this!

But the question is, are we turned loose at the mercy of such tricksters? or are we governed by fixed rule — written law? If the latter, we should at least keep within the rule and not go beyond it! Especially when the rule itself is at war with every other rule of Evidence.

Thus, I leave this view of the case and turn to another.

I believe it is a principle of law, as old as the bible, that where the reason for a rule no longer exists, the rule itself is thereby abrogated. Let us apply this principle to the introduction of Smith's deposition into this case as "admissions".

I think I have shown, that the reason for the Rule as to this sort of "admissions" — grew out of the multiplicity of Courts and the inconvenience, under English practice, of going to Chancery every time the testimony of a party was necessary to an issue at law.

Now Sir, do these reasons, or any other, now exist in this state: Whereby there is any necessity to continue a rule of doubtful propriety, founded in precedents which carry with them palpable evidence of arrant fraud upon parties litigant; and whose only tendency is to pander to the trickery and duplicity of dishonest men!

By our Statute, Courts of law and equity are blended. This of itself does away with the necessity upon which the rule was established. But our Statute has gone further than this! It is provided in the Code of practice of 1849 that a party to a suit may be summoned and sworn as a witness! And that a bill for discovery shall not be necessary in any case!

If I could give Judge Wells credit for any other motive than personal notoriety in the compiling of that Code, I should be bound to acknowledge the developement therein of an honest purpose to do away with such iniquitous doctrines as are advanced in the case of Lord Keith! For that Code blots out every reason for introducing as "admissions" in one case, what a witness may have sworn upon the trial of another suit! Then, I ask, if every reason for the rule is abolished, ought the rule any longer to exist? It is a rule in direct violation of that humane doctrine of the common law, which requires a party's conversations to be given in evidence as they occurred, both for and against himself! The rule under discussion, on the contrary, is limited to meet the issue upon which the party may have testified; and on the ground of irrelevancy, he is debarred from stating such other facts as will protect himself from personal injury! Instead of being an incentive to full and true dis=

Closure of Evidence, the witness is kept in constant dread of danger to himself! God knows there is a sufficient premium offered in our Statutes for perjury, without resorting to men's fears to make them tell a lie!

Again, there is a well settled doctrine of the law "That the declarations of a person who is a competent witness in a cause, cannot be given in evidence"!
How will we harmonize this doctrine of the law with the code which says that every man is a competent witness for his opponent?

Another reason why the crossexamination of Smith should not have been read in evidence in this case, is found in the fact, as shown by the record, that both George W Smith the assignee of the accounts spoken of, and John M Washburn the attorney of C M Smith who assigned them - were witnesses in this cause. Yet not one question was put to them in relation to the facts mentioned in that cross examination. Did not the assignee know as much about the assignment and the consideration of it, as the assignor? But I may be asked why the defence did not question them in relation to those facts? I answer, for the same reason that we refused to read the remainder of the Whitcomb deposition when prompted to do so by the Court below. We stood upon our objections to it. And therefore would do no act, nor ask any question that would seem to recognize that deposition as evidence in this cause!

So much for the "admissions", and I come to the 3rd instruction for the defendant below which was refused.

It will be seen by the record that the Court below inserts the word "Fraudulently" into each of the instructions given for Knitrer. Now this word as used in the statute, sometimes means more and sometimes less, than its literal definition signifies. Some acts are fraudulent in law, which are not so in morals; and some acts are fraudulent in morals which are not so in law! By this 3rd instruction we merely ask the

Court below to define what fraud is in the particular case. Instead of which they leave the jury to their uninstructed prejudices. We ask the Court to say to the jury that the defendant below must have intended to hinder or delay his creditors and must have done some act to indicate such intention. This Court, say in Curtiss vs Settle 7 Mo Rep 454, "he, who conveys to another his property, with intent to hinder or delay his creditor, is guilty of fraud on that creditor". If these words mean anything, they mean that the act, coupled with the intent, constitutes the "Fraudulently" mentioned in the causes for attachment. But we think that in refusing our third instruction, the Court below did not agree with this Court in their interpretation of the word "fraudulently" as used in the statutary causes for attachment. And as that instruction was of vast importance to us on the trial, we wish to be informed which is right upon it, this Court or the Court below!

The next point to which I wish to call the attention of the Court, is to the affidavit itself, as mentioned in the motion to arrest the Judgment that "the cause proceed"

The action of, or by attachment is given by Statute alone, and is given only upon condition that the party seeking the remedy shall comply with the stipulations therein mentioned, both as to time and manner. In this affidavit there are three causes stated alternately. Two of which are causes which when properly stated and sustained, give this remedy upon a debt that is not yet due, as in this case; and the last does not give the remedy in this case. The two first are plead to, and the last remains on the record undenied. May we not well suppose that this general verdict of the Jury was found upon it, there being no controversy about it?

The doctrine that one good Count will sustain a judgment upon general verdict, does not apply to Statutary remedies, which are stricti juris. But even if it did, there is a clear misjoinder of Causes which is fatal even after verdict! If the plaintiff below would avoid arrest, he should have withdrawn the last Cause from the Case; but not having done so, it is fatal in arrest.

I have but one more point in argument, and that is the fact that the Court below refused to permit the defendant below to plead to the merits of the action on the 4th day of the March Term 1855.

It is seen by the record that the note sued on, was not due until the 17th of January 1855.

The Statute of '47, giving an attachment upon notes that are not due, does not prescribe the time or manner of pleading to the merits. And the statute concerning pleading to notes and Contracts for the direct payment of money &c does not apply to this note, because the same is not payable directly, but some months after suit is commenced on it. Then I take it that the time for pleading to such a note is within the first six days of the term after the note has matured, because the statute says that no judgment shall be rendered upon it until the term after it has matured. ~~For this reason~~ I contend that I had an undoubted right to file my demurrer on the 4th day of the March term 1855. The general statute states that defendants shall plead at the same term at which judgment would be rendered in case they did not plead; and I reason from this fact, that if Judgment could not have been rendered in this Cause at September 1854, then that was not the term at which the statute required us to plead. For if September was the

term for us to plead, then judgment for want of answer would have been proper at that term, after the first six days! But the statute forbade a judgment at that term because the note was not due!

A word in regard to my final motion in arrest and I am done.

This motion brings up the same points which the demurrer would have raised, if it had been heard. And the Court can thereby see there were merits in the demurrer offered.

The act of 1849, page 9. gives a new and extraordinary remedy! And I believe that the books are clear and without disagreement, that when a statute gives a new and extraordinary remedy, the party seeking it must bring himself within its provisions. (3 Howard US Rep 556)

Neither by the Common Law, nor any Statute, was a plaintiff privileged to bring a suit upon a note until it was due! until the passage of the act of 1847. And the authorities are agreed upon the principle, that when a plaintiff has a new remedy by a recent statute, he shall declare under the statute and set it out! (Referring to it by its title would be sufficient under the Wells Code)

Yet we see by Ritter's petition, that he has brought his suit as if the statute of 1847 was not in Existance! A mere general petition, as upon a note that was due at the time of the commencement of the suit! The note is made part of the petition! And upon oyer & demurrer, motion to set aside the Judgment by default or in arrest, — How does the instrument and the petition correspond? We cant look at his affidavit in attachment, for that is no part of the merits of indebtedness or non-indebtedness! We cannot look at the act of 1847, for he has not by his petition, claimed the benefit of its provisions!

Then, how does the plaintiff below stand in view of the several motions made in this cause? I respectfully submit that he stands - "flat of his back"!

I have no doubt of the reversal of this cause, upon either and every point I have made; but as we have no decision of this Court upon the subject of these "admissions" I would suggest that it is due to the state that an elaborate opinion should settle that question under our statutes.

With grateful acknowledgements for the kind perusal of this my argument, I submit the case on the part of the plaintiff in Error.

Hovey

(67)

5 modern Reports – Earl of Bath vs Bathertea
page 10 – ~~Bo~~

Martin L Kritzer
Respondent in Error

vs } Plaintiffs Brief &
Written argument

Constantine M Smith
Plaintiff in Error.

filed June 23 1855
Wm E Dunscomb
Clerk

fi

Hovey for Plff in Error

See set concern
[illegible]

Martin L Kritzer, Respondent in Error
against }
Constantine M Smith Plaintiff in Error

In the Supreme Court
of the State of Missouri

Error to the Jackson Circuit Court.
(Notice of writ of Error appears by the record)
This was an action by attachment upon a note that was not due, brought by Kritzer against Smith, to the September Term of the Jackson Circuit Court.

The petition set out the note and asked Judgment in the usual form, as if the note were then due, and the note shows that the note was not due until the 17th of January following. The bond was Executed to C M Smith, and not to the State! The affidavit stated three causes for attachment, alternatively, as follows, "That said Smith is about fraudulently to conceal or dispose of his property or effects so as to hinder or delay his creditors."
"That said Smith is about fraudulently to convey or assign his property or effects so as to hinder or delay his creditors."
"That said Smith has absented or absconded himself from his usual place of abode in this state, so that the ordinary process of law cannot be served upon him"
At the return term, the

defendant filed his plea putting in issue the truth of the two first causes mentioned in the affidavit, and was silent as to the 3rd cause.

A jury was then empanneled to try the issues tendered upon the causes for attachment, and we state the evidence alternately, for plaintiff and defendant, until we come to that part of plaintiff's proofs which was objected to.

Plaintiff proved by a witness that Smith started down the Mo River about the last of June 1854. and that about the 1st of July 1854. three boxes and one package were sent from Smith's to be shipped to Edwardsville Ill, that they looked like boxes of merchandise. and were marked "Mrs E & L Smith", and that these boxes were so shipped by witness who was a warehouseman.

In reply to this, Smith proved that these boxes and package contained the household furniture of Smith's mother who had been residing at Independence but who had recently moved to Illinois, her former home, and that no property of Smith was in them. That Smith went down the river on business and returned in about three weeks.

Witten proved by a witness that some time before the August Election 1854 he saw a slave named "Bill" wheeling

Wm Lucas' Evidence

George W. Smith &c

goods, between Supper and bedtime after night, from Smith's Store, across the Square to Hickman's store in Independence, and that on Friday previous to the August Election, the Store of Smith was closed, and that it looked suspicious.

In reply to this, Smith proved by ~~two~~ witnesses that he bought the Store house of which he was the occupant, of Kritzer, in April 1854. Which Store house was the Consideration of the note here sued on, and gave Kritzer a deed of trust upon it to secure the payment, and that after the purchase he Employed one Owen C Stewart to put in, and Stewart did put in new Counters and Shelving, Changing the Store from a grocery to a dry goods house at a Cost of upwards of $300. and that he paid Stewart in goods, and that these were the goods spoken of by Kritzer's witness, and that they were removed after supper because Servants were at leisure and Could be hired to do it at that time, though busy elsewhere during the day. And that the Store was shut by his Clerk on said Friday in Smith's absence.

Kritzer proved by a witness that some time in July 1854 a wagon and team

W Kelly's Evidence

I. Hickman, G W Smith, J W Reid, & J M Washburn's Evidence

with some negro boys came up the alley back of Smith's store, between supper and bedtime, after dark, and that a large quantity of dry goods were then taken out of the back door of Smith's store and put in that waggon and hauled off! That Smith was then absent. That Smith occupied the upper stories of the store house as a residence, and that while absent, his furniture &c remained there as before.

In reply to this, Smith proved by Jaber Smith, that he bought a large quantity of goods about that time from Smith, defendant, through his clerk, and that as he bought them they were laid aside, and said Jaber paid for them, and that as his teams were engaged during the day, he sent his negroes and teams for them after supper. That these goods were bought in defendant's absence, with which to clothe said Jaber's Slaves.

At the close of his testimony in chief Whitson by his attorneys offered to read in evidence a deposition of defendant Smith, which had been taken in another Case of Whitcomb & Bolton against defendant Smith and one Francis M Huffaker. The history of said deposition as shown by the record is as follows.

J. Smith's Evidence

Jaber Smith's Evidence

Some time after Kritzer had commenced this suit, Whitcomb & Whitcomb commenced their suit against defendant Smith and Huffaker upon notes signed "C M Smith" and for goods and merchandise sold and delivered, charging that Huffaker was an equal partner of Smith at the time of the purchase of the goods and making the notes, under the name and firm of "C. M. Smith". Huffaker answers separately, denying that he was a partner, and consequently not liable. Hicks & Reid are attorneys of record for Kritzer, and also for Whitcomb's defendant - Huffaker.

Upon this state of facts or pleading, the Whitcombs, on the 26th day of August 1854, proceeded to take the deposition here offered in evidence, and having by said Smith proven their whole case in chief, they, by their attorneys turned the witness over to Huffaker, who, by his attorneys commenced, and carried out a long list of cross interrogatories and answers, to each and every of which questions and answers, the Whitcombs by their attorneys merely objected, on the ground of their irrelevancy and incompetency, as appears by the record.

And having offered said Smith's deposition in evidence, said Kritzer, by

his attorneys asked to read to the jury (22)
that part of said deposition commencing
at the 18th Interrogatory in the Cross-ex
-amination and ending with the answer
to the 23rd. And the following are the
parts offered.
"Question 18. Who now have control and pos=
session and ownership of the Notes, Books and
accounts of C M Smith?
Answer 18th George Smith, my brother.
Question 19th How did they come into his pos=
session?
Answer 19th They were assigned to him by Mr
Washburn, my agent, by my authority, for
indebtedness due to G W Smith.
Question 20th What was the nature and
Extent of that indebtedness?
Answer 20th That indebtedness is in the
form of two notes; one, for $1000. the other
for $500. a business transaction between
ourselves, not connected with the store.
Question 21st. What was the true consideration
for which these notes were Executed?
Answer 21st One consideration was services
rendered by G W Smith in the years 1849 and '50,
For attendance in office and drug store, and
services rendered about my house, such as
feeding Horses, Chopping wood &c. This applies
to the $1000. note. and for a length of time
amounting to nearly two years. The consider=
ation of the $500 note is for services rendered
to me since the 1st of May 1854.
Question 22nd. When were these notes in fact
Executed?

Cross Ex of dft in Whitaker's dep'

answer 22nd The Exact date, I dont Know; the last one was Executed about the middle of June last. I dont Know when the $1000. note was Executed, exactly, but was some time after the 1st of May last, tho' not certain. Question 23rd What was the gross amount of notes, accounts, books and assetts so turned over to George W Smith?
Answer 23rd There were no notes as far as I know of. The amount of assets as near as I can form an idea was about $800. all in accounts."

The defendant below objected to the reading of said part of said deposition, as admissions of defendant below, or any part of said deposition. The Court below overruled the objection and permitted the same to be read, remarking at the time that defendant below might read the whole of it, if he chose, which defendant below by his attorneys refused to do, and defendant below Excepted to the opinion of the Court in permitting the same to be read, and the above questions and answers were read to the jury.

On the Close of the testimony Plaintiff by his attorneys asked and obtained the following instruction

"That if the Jury believe from the Evidence that the defendant was about fraudulently to Convey or assign his property or Effects

so as to hinder or delay his creditors, they will find the issue for the plaintiff.

That if the jury believe from the Evidence that the defendant, at the time of making the affidavit, was about fraudulently to conceal or dispose of his property or Effects, so as to hinder or delay his Creditors, they will find the issue for the plaintiff."

The defendant below then asked the following instructions

1st That the belief of the plaintiff, or his reasons for belief of the facts stated in the affidavit is not the matter for the jury to find in this cause, but they will find whether the facts stated in the affidavit existed at the time of making the affidavit or not.

2nd That unless they believe from the evidence that the defendant, at the time of the making of the said affidavit, was about fraudulently to convey, assign, conceal or dispose of his property or effects, so as to hinder or delay his creditors in the collection of their debts, they will find the issue for the defendant.

3rd That before they can find for the plaintiff on this issue, they must believe from the evidence, that the defendant, at the time of the making

of said affidavit, had conceived the idea or intention, to hinder or delay his creditors in the collection of their debts, and that he had done some act to indicate a design to carry out such intention.

4th That a debtor has a right by law to prefer and pay off one creditor leaving others unpaid, and such payment or preference would be of itself no evidence of fraud."

The Court below gave the 1st 2nd and 4th instruction asked by defendant below, and refused the 3rd; to which refusal defendant Excepted.

The Cause was submitted to the Jury and they found the following verdict.

"We of the jury find for the plaintiff
Joel F Chiles foreman"

The defendant below then moved to set aside the verdict and for new trial on the grounds that the jury found against law & Evidence, 2nd That the Court Erroneously permitted plaintiff to read that part of the Whitcomb deposition, and that the Court Erroneously refused to give the 3rd instruction asked by deft.

This motion was overruled and

defendant Excepted.

Defendant below then moved to arrest the Judgment "that the Cause proceed" on the grounds that the verdict is insufficient; That the affidavit is in the alternative, and the verdict being general, is no index to what the jury have found.

This motion was also overruled and defendant excepted. And this Cause was Continued.

And at the March Term 1855, on the fourth day of the Term defendant below offered to file a demurrer, Craving oyer of the note sued on, and for Cause showing that the petition stated no fact, and referred to no statute, by which the plaintiff was entitled to sue upon a note that was not due. and because the petition stated that the amount of the note was due to plaintiff, when the note showed that it was not due.

The Court below refused to permit said defendant's attorney to file said demurrer, and defendant Excepted And although no default was made, The Court below immediately afterwards rendered Judgment for want of answer, on the fourth day of the Term for the amount of the note and interest — about $3000.

The defendant below then

moved to set aside the judgment by default of answer, on the ground that the note not being due at the last term, he had the right of the first six days of the March term to plead in, and that the Court refused to permit him to plead on the 4th day of the term.

This motion the Court below overruled and defendant Excepted,

Defendant below then moved in arrest, on the grounds that the Court had not lawful right to render the Judgment at the time it was rendered. And that the petition, unaided by further avernment, shows that at the time of the commencement of the suit plaintiff had no cause of action.

This motion was also overruled, and defendant Excepted and this cause is by the defendant below, brought to this Supreme Court by Writ of Error.

Hovey. of Counsel for the plaintiff in Error, to reverse the Judgment of the Court below, will insist upon the following points and authorities.

First. That the Court below Erred in permitting respondent to read, as admissions of plaintiff in Error, the Cross examination of plaintiff in Error, in the deposition taken in the Case of Whitcomb and

Whitcomb against Smith and Huffaker.
And of this –

1st They were questions which the party had no right to ask nor the witness to answer, upon the issue under which the deposition was taken! And herein of the distinction between irrellevant Evidence, and that against the giving of which the witness is protected.

Compare 1st Starkey 6th Edi Page 370
and Greenleaf Vol 3rd section 188. (new Vol)
With 1st Starkey 6th Edi page 172
and Greenleaf Vol 3rd Sec 191 (new Vol)

2nd The deposition had never been read in evidence, and that part of it could never have been read in the case in which it was taken, and is therefore ~~is~~ not within that old rule "that what a witness testifies in another trial may be given in Evidence against him as an admission"

See Statute Chap 48 Sec 20

3rd The rule as to sworn admissions applies only to voluntary affidivits, bills and answers in Chancery – Examinations before Commissioners in bankruptcy, Oral testimony given in regular Cause before a Court – and depositions which have been used for the purpose of Evidence

See Collett vs Lord Keith 4 Esp' Cases 212

Point 1½. The plaintiff below filed no bond to the State of Missouri and was not Entitled to the attachment, and his suit ought to be dismissed.
Stephenson & Hord vs Robins, 5 Mo Rep 18
Steamer Archer vs Goldstein & Ro 13 " " 25

2nd That since the Statute of 1849 the reason for the rule at common law touching sworn admissions no longer Exists. and it ought not to be Enforced.

See practice acts of 1849
Article 24 section ~~12~~. 11.
Alexander vs Mahon 11 GR 185
Jackson Ex dem ~~Payne~~ vs Payne
15 Johnsons Reports 493

3rd That said Cross-Examination so read in Evidence was obtained by imposition and fraud upon the defendant below

See the Evidence.

4th That the Court below ought to have given the 3rd instruction asked by the defendant below, because the word "fraudulently" as used in the Statute Concerning attachments is a legal term having therein a legal meaning as well as a litteral meaning.

See Curtiss vs Sette 7th Mo Rep 454. as to "intent to hinder or delay Creditors" being the "fraud" of the case.

5th That the Court below ought to have sustained the motion to arrest the Judgment "that the suit proceed". see statute Chapter 11 Section 26. and of this

1st The "absenting and absconding" mentioned in the affidavit as one of the Causes for attachment is not a legal Cause where the debt is not due at the time the suit is commenced.

See Statute laws of 1847 Page 9. approved Jan' 23rd '47

2nd The verdict being general and the affidavit in the alternative There is no Certainty as to what the Jury did find.

See affidavit & verdict

3rd There being a misjoinder of Causes for attachment, and the improper Cause not having been withdrawn from the jury, the whole is bad on motion in arrest. Especially on general verdict.

See Chitty Pl Vol 1 Page 205
16 Johnsons Reports 146. Cooper vs Bissel

6th That the defendant was not bound to plead to the merits of the action until the note became due, and the suit being brought under a special Statute before the note was due, is not within the rule as to pleading to suits on bonds and notes, and defendant below was Entitled to the first six days of the March term 1855 in which to plead to the merits.

See Laws of 1847 page 9 "
approved Jany 23rd 1847

7th That the Court below ought to have sustained the motion to set aside judgment by default, because the same was rendered on the 4th day of the term, though that was not the last day of the term.

See Statute Practice at Law Chapter 136 Sec 9. of Article 3rd page 810

8th That the Court below ought to have sustained the final motion in arrest of Judgment, because the petition showed that the note was not due, and did not set out or refer to any statute by which the plaintiff below was entitled to sue before the note was due.

9th That the act of 1847 (Page 9) gives an Extraordinary remedy, and the petition must aver facts that bring the plaintiff within the reason of the act.

See 3 Howard US Rep 556

All which, with the annexed written argument, is respectfully submitted, and plaintiff in Error prays that the Judgment of the Court below be reversed, and that he be restored &c

J Brown Hovey
of Counsel for the Plaintiff in Error

Martin L Kritzer
Respondent in Error

vs } Plaintiffs Brief

C M Smith
Plaintiff in Error

Martin L. Kitzee, Respondent in Error
against
Constantine M. Smith. Plaintiff in Error

Supreme Court of Missouri
Error to Jackson County

The transcript of the cause below, shows this to have been an action by attachment brought by Kitzee against Smith upon a note not then due, to the September term of the Jackson Circuit Court.

Reid. For defendant in error relies upon the following points to affirm the judgement below.

1st. The deposition of Smith containing his sworn admissions, taken in the case of Whitcomb & Whitcomb vs Smith & Huffaker was properly allowed by the court to be read to the jury in evidence; it falls within the rule which allows, the sworn admissions of a party to be used in evidence against himself — See Collett vs Ld. Heith. 1st Espinass. Cases P. 212. — 1st Starkie page 172 = 1st Campbell Reps. Smith et al. vs Bradnell P. 30. 1st Campbell Reps Stockfleth vs DeTastil and others P. 10 and Helm vs Handly 1st Little Kentucky Reps, Pages 219 & 220.

2d It is wholly immaterial, for the use made of the deposition on this trial, whether that part of it relied on as evidence to support the attachment, was or was not material to the issue in the case in which it was taken. Though a witness may some times demur or refuse to answer. Yet if he does dispose to

facts which may effect him in another controversy, there is no rule which precludes such admissions from being used against him, — Helm vs Handly 1st Little Ky Reports Page 220.

3d. The cross examination or the deposition under which the statements of Smith were made, was not improper or irrelevant to the issue in the cause in which the Depositions were taken, the issue there, was the liability of Huffaker as a partner of Smith, to Smiths Creditors. — To establish this and thereby relieve himself from one half his liabilities, Smith is a willing witness. This is the effect of his testimony. The cross examination was to sift Smith as an interested witness, and his answers used against him in this Suit, go to show that he used the goods, effects, books and accounts of the concern as his own, in assigning them to his brother for his own private ends, and thus far, to contradict his statement that Huffaker was a joint owner & Partner. And for this purpose, to affect his veracity and credit as a witness, if for no other, the cross examination was relevant and proper — See transcript of "Case, Whitcomb & Whitcomb vs Smith & Huffaker" "Separate answer of Huffaker and deposition of Smith

4th It is wholly immaterial, whether the deposition of Smith, had ever been used on a trial or not, its value as an admission of Smith in this Suit, could neither be more nor less, by its being used on the trial of Whitcomb & Whitcomb vs Smith & Huffaker; it is the taking of the deposition, the making of the statement, that makes it evidence as an admission, not the use that may be hereafter made of it — Oral Statements made by a witness, it is

true, cannot be used against him except after made on a trial, for the reason that as a witness he can make such statements no where else; while depositions, are always made in advance of a trial; and being written and signed are safer evidence against a party than the recollection of an oral statement.

5th The statute of 1849 has had no effect to vary the rule of evidence concerning these admissions. A party has now the option to introduce the adversary himself as a witness, or to prove his admissions by others as he always could. — The right to call on a party as a witness is not to prejudice of any right before existing, to prove his admissions by another.

6th. — The attachment law of 1847 is a mere supplement to the act of 1845, and is not such a statute as must be specially pleaded. — It can no more be said that it is a special act, or provides an extraordinary remedy, than that the act of 1845 is such an one.

7th. There is nothing in the practice act of 1849 or in the supplementary attachment law of 1847 which changes the time of pleading in these cases of debts not due. — In this case there was an appearance at the first term by plea in abatement and the proceeding thereby became one "in personam," after the failure of this plea the defendant should have pleaded as to the court to the merits if he desired to do so. The judgement by default was not taken until the 4th day of the next march term, after the debt was due. — See transcript.

8th The 3d instruction asked by the defendant was properly refused — it involves the absurdity of a plaintiff taking steps to prevent a fraud which has been consummated — under the clause of the statute relied on, it was sufficient for the jury to be satisfied that fraud was intended, without going further to know if it had been accomplished. The very gist of this action was to prevent an intended fraud, not to defeat one already perpetrated.

9th. The additional cause alleged in the affidavit that "the defendant had absconded or absented himself" is mere surplusage and no cause for arrest of judgement — though it might have been stricken out on motion.

10th A general verdict for the plaintiff is a good and is in accordance with the statute — See attachment act. Rev. code. Art 1. Sec 26th — and upon the issues as presented by the plea in abatement was sufficient (See affidavit and plea in abatement.)

That plea only put in issue those causes alleged in the affidavit under which attachment lies for debt not due; and the verdict could only apply to the issues made. It is wholly immaterial, which of the issues or whether both were found for the plaintiff — in either event it has the same effect —

11th. If the bond was defective in form it was proper to take advantage of it on motion, when the law provides that it might be amended without pre-

judice to the plaintiff (See Attachment law Art 1. Sec 6) and neglect of the defendant to object before judgment cannot inure to the benefit of the defence. The case is altogether unlike "Stephenson & Hoard vs Robbins 5th Mo Rep. P. 18. There no bond was filed.

P.S.B. The bond, though informal is good, the only defect being, that it is made distinctly to the defendant and not to the State for his use. — It will afford the same substantial protection as if made "to the State" — See Garthwright vs. Callaway county & State of Missouri 10th Mo Rep. Page 663.

Martin L. Kritzer

vs

Constantine M. Smith

Brief of Points and authorities filed by Reid of Counsel for Kritzer - Respondent in Error. —

For the Judges

filed July 2 1855

Wm E Drumcomb

Clerk

(54)

Martin L. Kritzer, Respondent in Error
against
Constantine M. Smith. Plaintiff in Error

Supreme Court of Missouri
Error to Jackson county

The transcript of the Cause below shows this to have been an action by attachment brought by Kritzer against Smith upon a note not then due, to the September Term of the Jackson circuit Court

Reid - For Defendant in Error relies upon the following Points to affirm the judgment below —

1st The Deposition of Smith, containing his sworn admissions, taken in the Case of "Whitcomb & Whitcomb vs. Smith & Huffaker" was properly allowed by the Court, to be read to the jury in evidence; it falls within the rule which allows, the sworn admissions of a Party to be used in evidence against himself = See Collett vs Ld. Keith 4th Espnaw. Cases. P. 212. = 1st Starkie page 172 = 1st Campbell Rep. Smith et al. vs. Bradnell P. 30 = 4th Campbell Rep. Stockfleth vs. De Tastet & others P. 10 = & Helm vs. Handley 1st Little Ky. Rep. P. 219 & 20.

2nd It is wholly immaterial, for the use made of the Deposition on this trial, whether that part of it relied on as Evidence to support the attachment, was or was not Material to the issue in the case in which it was taken. Though a Witness may sometimes Demur & refuse to answer, yet if he does depose to facts which may offset him in another Controversy, there is no rule which precludes such admissions from being used against him. Helm vs Handy. 1st Little Ky. Rep. page 220

3d The Cross Examination in the Deposition, under which the statements of Smith were made, was not improper or irrelevant to the issue in the cause in which the Depositions were taken. The issue then, was the liability of Huffaker as a partner of Smith, to Smith's Creditors. To Establish this and thereby relieve himself from one half of his liabilities, Smith is a willing witness. This is the Effect of his Testimony. The Cross Examination was to sift Smith as an interested witness, and his answers used against him in this suit, go to show that he used the goods, effects, Books & accounts of the concern as his own, in assigning them to his Brother for his own private ends & thus far, to contradict his statement that Huffaker was a joint owner & Partner

And for this purpose, to offset his credit & credit as a witness, if for no other, the Cross Examination was relevant & proper = See Transcript of "Case, Whitcomb & Whitcomb v. Smith & Huffaker" "Separate answer of Huffaker & Deposition "of Smith"

4th " It is wholly immaterial, whether the Deposition of Smith, had ever been used on a trial or not, its value as an admission of Smith in this suit, could neither be more or less, by its being used on the trial of "Whitcomb & Whitcomb vs. Smith & Huffaker" it is the taking of the Deposition, the making of the Statement, that makes it evidence as an admission, not the use that may be thereafter made of it = Oral Statements made by a witness, it is true, cannot be used against him except after made on a trial, for the reason, that as a witness he can make such Statements no where else; while Depositions, are always made in advance of a trial; and being written & signed are safer Evidence against a party, than the recollection of an Oral Statement

5th " The Statute of 1849 has had no Effect to vary the rule of Evidence concerning these admissions = A Party

has now the option to introduce the adversary himself as a witness, or to prove his admissions by others, as he always could = The right to call on a party as a witness is not in prejudice of any right, before existing, to prove his admissions by another =

6th The Attachment Law of 1847 is a mere Supplement to the act of 1845 and is not such a Statute as must be specially pleaded = It can no more be said that it is a Special act, a provides an extraordinary remedy, than, that the act of 1845 is such an one =

7th There is nothing in the practice act of 1849 or in the Supplementary attachment Law of 1847 which changes the times of pleading in these cases of debts not due — In this case there was an appearance at the 1st Term, by plea in abatement & the proceeding thus became one "in personam"; after the failure of this plea, the defendant should have pleaded at that court, to the merits if he desired to do so — The judgment by default was not taken until the 4th day of the next March Term, after the debt was due = See Transcript

8th The 3d Instruction asked by the Defendant was properly refused — it involves

the absurdity of a Plaintiff taking steps to prevent a fraud which has been consummated — under the clause of the statute relied on, it was sufficient for the jury to be satisfied that fraud was intended, without going further to know if it had been accomplished — The very gist of this action was to prevent an intended fraud, not to defeat one already perpetrated =

9th

The additional cause alleged in the affidavit that "The Defendant has absconded & absented himself &c" is mere surplusage & no cause for arrest of judgment — though it might have been stricken out on motion —

10th

A General verdict for the plaintiff is good & is in accordance with the statute — see Attachment Set. Rev. code. Art. 1st, Sect. 26 = And upon the issues as presented by the plea in abatement was sufficient (see affidavit & plea in abatement)

That plea only put in issue those causes alleged in the affidavit under which attachment lies for a debt not due; And the verdict could only apply to the issues made — It is wholly immaterial, which of the issues is whether both were found for the plaintiff — in either event it has the same effect =

11th If the Bond was defective in form it was proper to take advantage of it on motion when the Law provides that it might be amended without prejudice to the Plaintiff (see Attachment Law Art. 1st. Sec. 6) and neglect of the defendant to object before judgment cannot ensure to the Benefit of the defence = The case is altogether unlike "Stephenson & Hood vs. Robinz 5th Mo. Rep. P. 18." — There no Bond was filed

12th The Bond, though informal is good, its only defect being, that it is made directly to the defendant & not to the state for his use — It will afford the same substantial protection as if made "to the state" = See Garthwright vs. Calaway County & the State of Missouri 10th Mo. Rep. Page 665 =

Martin L. Kritzer

vs.

Constantine M. Smith

Brief of Points & authorities filed by Reid of Counsel for Kritzer - Respondent in Error =

[47]

Martin L Kritzer Respondent
against
Constantine M Smith plaintiff in Error

In the Supreme Court
In the State of Missouri
July Term AD 1855

And the said plaintiff in Error comes and says that manifest Error hath intervened in the record and proceedings of the Jackson Circuit Court in the above cause, to the great damage of the said plaintiff in Error. Wherefore he prays that said Errors be corrected.

And for a more specific assignment of Error, the said plaintiff in Error states that the Court below Erred in this to wit, That the Court below permitted the respondent to read in Evidence as admissions of defendant below a part of a deposition of defendant below which had been taken but never read in the Cause of Whitcomb vs Whitcomb against Smith & Huffaker, when by the law of the land the Court below ought to have rejected said Evidence.

2nd The Court below refused to give to the Jury the 3rd instruction asked by defendant below, when by the law of the land, the Court below ought to have given said 3rd instruction.

3rd That the Court below overruled the motion of defendant below for new trial, when by the law of the land said Court ought to have sustained said Motion for new trial.

4th That the Court below overruled the motion of defendant below to arrest the Judgment "that the Cause proceed", when by the law of the land the Court below ought to have sustained said Motion in arrest.

5th That the Court below refused to permit the defendant below to plead to the merits of the action, or to demur to the petition of plaintiff below, on the 4th day of the March Term of the Court below AD 1855, when by the law of the land the Court below ought to have permitted the defendant below so to plead and demur.

6th That the Court below overruled the motion of defendant below to arrest the Judgment upon the petition in the Court below, when by the law of the land the Court below ought to have sustained said last motion.

Wherefore for these and other Errors apparent upon said

record, the plaintiff in Error prays that the Judgment of the Court below in this Cause be reversed, and that he be restored to all his rights which he had before.

J Brown Hovey
for the Plaintiff in Error

Martin L Kritzer
Respondent in Error

vs } assignment of Error

Constantine M Smith
Plaintiff in Error

filed July 2 1855
Wm E Dunscomb
Clerk

J B Hovey

(58)

Martin L Kitner
against
Constantine M Smith

} In the Circuit Court Jackson County

To Martin L Kitner the above named Plaintiff.

You are hereby notified that I have sued out of the Supreme Court of this state a Writ of Error returnable to the July term of said Supreme Court, in the above Entitled Cause, and that said Cause will be reviewed in said Court on such day in said Term of said Supreme Court as the same may be therein docketed.

C M Smith
Defendant
By Hovey & Washburn
attys

Kritzer
vs } Notice
Smith

filed June 23 1855
Wm E Drumcomb
Clerk

I certify that I Executed the Within Notice by delivering A Copy of the Same to the Within Named Martin L Kritzer on the 21st day of May 1855 in Jackson County Mo

William Botts Sheriff

Sheriffs fee $0.50

(53)

C. M. Smith Pltff in error } Error to the
vs } Jackson Cir
M. L. Kritzer Defdt in error } Cuit Court

As to the objection, stated in the brief, that the bond for the attachment was not made payable to the State of Missouri, it may be answered, that no point on the validity of the bond was made in the court below. In ~~[illegible]~~ thus meeting the objection stated, we are not to be understood as expressing the opinion that the bond in this case would not have supported an action.

There was no error in refusing leave to the defendant below to file his demurrer, as we are of the opinion that it contained no cause affecting the plaintiff's action. On the face of the petition it appeared, that the time for the payment of the note had not arrived, ~~at~~ on which the suit was brought, and the word ~~[illegible]~~ "due" used in the petition, must be construed to mean as it does in the saying debitum in presenti, solvendum in futuro. The law authorized proceedings by attachment against debtors in certain circumstances, when the debt was ~~not~~ payable till ~~at~~ a time, posterior to the bringing of the suit: But this law in the mind, the the proceedings would have been entirely intelligible: It was no more necessary to refer to that, than to any other general statute.

If it had appeared, that the defendant had any defense to the action of the plaintiff, the court under the cir

cumstances should have lent an indulgent ear to it, but as it does not appear, from any thing in the record, that there was any real defense to the merits of the action, we cannot perceive any ground on which we would be warranted in reversing the judgment. The defendant we conceive was not bound to plead to the action, until after the note on which the suit was brought became due.

In whatever light it may be viewed, we cannot see any ground on which the objection to the deposition of the defendant Smith given in another action can be upheld. We take it for granted that the hand writing of Smith the defendant whose name is subscribed to the deposition was proved or admitted inasmuch as the bill of exceptions states, that "the identity of the defendant with the deposition is not disputed". His name being subscribed to the deposition, on no ground could it be refused as an admission. It was evidence just as a letter or voluntary affidavit would have been. There is nothing in the practice act of 1849 which can affect this question. That a party can be sworn as a witness in a cause, can be no reason why his admissions may not be read against him. It was a rule of the common law, that what a witness sworn on a trial between others subjecting him to an action or the payment of a debt might be given in evidence against him in a suit in which he was a party. He

was not exempt from giving such testimony He was at liberty afterwards to explain his evidence. This we conceive to be the common law on this subject confirmed by an act of Parliament made in accordance with ~~a Ma~~ the views of a majority of of the English ~~statutes~~ Judges. We have a similar statute: Irrelevant questions put with a view to extract evidence from the witness against himself, would be discountenanced, and all courts would protect a witness in his refusal to answer them. Questions improperly put, yet if answered, the answer will be evidence against the witness. This matter is so plain that it cannot be necessary to say more upon it.

As the deposition was read as an admission, regularly the party reading it should have read the whole. The distinction is, that when an answer is read as a part of the pleadings in the cause in which it is filed, only such parts may be read, as the party desires. But when it is taken from the cause in it is filed, & read in another proceeding as an admission, there the whole of it must be read by the party offering it. The course pursued on the trial was not regular, but as it does not appear that there were any other parts of the deposition read which varied the sense of those parts which were read, we cannot reverse the judgment for that cause. The deposition read on the trial is in the record, & we do not see, that the party was injuriously af

fected by the omission to read the whole of it. 3. Greenleaf. 1 Starkie 290. 1. 2. 3.

Either were issues, taken on but two of the causes alleged for suing out the attachment, there being a general verdict for the plaintiff, does not create any error, as either of the causes on which issue was taken was sufficient to support the attachment. The omission to take issue on the third ground stated in the affidavit for the attachment, was no admission of its truth and it is immaterial in fact to such an admission, the plaintiff is not affected, thereby although it may be, that this ground of itself would not sustain an attachment under the circumstances.

There is no warrant in the statute for the idea contained in the 3rd instruction asked by the defendant, it was therefore properly refused: The instructions given, clearly set forth the law applicable to the case.

The judgment in this cause was a general one. The 59th sec. of the 1st act of the law concerning attachments enacts, that where is a general judgment against the defendant, the execution shall be a common fieri facias, which may be levied upon all the property of the defendant subject to execution, whether attached in the cause or not. The judgment and award of execution therefore in this case is erroneous, inasmuch as the Court undertook to specify, what

property should be sold. The judgment being a general one as required by the pleadings the court had no authority to condemn the attached lot to be sold, as under such a judgment the attached property need not necessarily be sold: If there is other property sufficient to satisfy the execution the defendant may surrender it and have the attached property released if he wills it. This is a right, the execution law gives him and which the Court had no power to take away.

The judgment will be reversed and a general judgment will be entered here such as the law requires, and the defendant in error will pay the costs:

The other judges concur

Wm Scott

28.

Kritzer
vs
Smith

Opinion

filed Sep. 29 1855
Wm E Duncomb
Clerk

89.

THE STATE OF MISSOURI, SCT.

THE STATE OF MISSOURI TO THE SHERIFF OF THE COUNTY OF Jackson IN SAID STATE, **Greeting**:

WHEREAS, Constantine M. Smith on the twenty eight day of September in the year eighteen hundred and fifty five at our Supreme Court for the State of Missouri aforesaid, before our Judges of said Court, recovered against Martin L. Kritzer the sum of twenty four $\frac{56}{100}$ dollars for his costs and charges by him expended in a certain suit wherein the said Smith was plaintiff in error and the said Kritzer was defendant in error which to the said plaintiff in error were adjudged, as appears to us of record: **Therefore**, We command you, that of the goods and chattels, lands and tenements of the said Martin L. Kritzer in your bailiwick you cause to be made the aforesaid costs, and that you have the same before the Judges of our said Supreme Court, on the second Monday in January next, to render unto the said Constantine M. Smith the costs aforesaid, and that you certify to our said Judges how you execute this writ, and have you then there this writ.

SEAL OF THE SUPREME COURT OF MISSOURI

Witness, William E. Dunscomb, Clerk of said Supreme Court, at office; in the City of Jefferson, the fifth day of October in the year of our Lord one thousand eight hundred and fifty five

Wm E Dunscomb

89

January Term 1856

Constantine M Smith

vs Exc'on.

Martin L Kistner

Costs

S D Lucas	17.61
Wm Botts	.50
Mc D Dennis	30
Wm E Dunscomb	6.15
This unit	1.00
	$25.56

Clackson

This Execution is Returned Satisfied in full October the 18th 1855

William Botts Sheriff