Spurzer, Aaron vs. Cecil, Philip M; admin of Eckels, B M ; 1860 Henry Co. #7 Cir.

254/110

90/19

$305 Lebanon Mo Jany 25th 1869

On or before the first day of October next I promise to pay to the order of P W Lecil Admr of B W Eckols Estate Three Hundred and five Dollars for value recieved, negotiable and payable without defalcation or discount and with interest from maturity at the rate of ten per cent per annum

Aaron Spurgen

State of Missouri
County of Henry } ss. 7th Judicial Circuit

Pleas before the Honorable Foster P. Wright Judge of the Circuit Court of Henry County in the Seventh Judicial Circuit in the State of Missouri on the 22 day of May A.D. 1860.

Be it remembered that heretofore to-wit on the 3rd day of October A.D. 1859 there was filed by Philip W. Cecil Admr. of the Estate of B.W. Eckols deceased; in the office of the Clerk of the Henry Circuit Court a petition against Aaron Spunger, which said petition is in the following words and figures to-wit.

Original petition

"In the Circuit Court of
Henry County Missouri

Philip W. Cecil as Administrator
of the Estate of B.W. Eckols deceased Plaintiff
Against
Aaron Spunger Defendant

Plaintiff states that Defendant on the 25th day of January 1859 executed to plaintiff as Administrator of the Estate of B. W. Eckols deceased a note (herewith filed) whereby he promised to pay plaintiff as such Ad-

ministrator Three hundred and Five Dollars on or before the first day of October A.D. 1859 and that on the day and year first aforesaid Defendant for the purpose of securing the payment of said Note executed and delivered to plaintiff as Administrator aforesaid a Mortgage Deed (which is herewith filed) conveying to plaintiff as Administrator aforesaid real estate situate and lying in the Town of Clinton County of Henry in the State of Missouri known in said mortgage Deed by the following description to wit Lot No three containing one half acre upon the following conditions to wit: whereas said Spurger has this day executed and delivered to said Cecil his promissory note for the sum Three hundred and Five Dollars due on the 15th day of October next, now if the said Spurger shall well and truly pay said Note according to the effect and tenor thereof then this obligation to be void, otherwise to remain in full force and virtue.

Original petition

Plaintiff avers that Defendant has failed to perform the said conditions on his part and that said sum of Three hundred and Five Dollars and all interest due thereon remain unpaid.

Wherefore he prays that Judgment

(3)

original petition

may be rendered for the Debt and all interest, and that the Equity of Redemption of said Defendant in and to said Real Estate be foreclosed and that the same or so much thereof as may be necessary be sold to pay off and discharge the Judgment rendered and for other and proper relief.

Burge & Stone
Attys for Plffs.

Dewitt C. Stone one of the above named Attorneys makes oath and says the above and foregoing petition and matters therein as stated he believes to be true

Dewitt C. Stone

Subscribed and sworn to before me this 3d day of October 1859

L. H. Tutt clk.

And upon which said petition there was issued from the office of the Clerk of the Henry Circuit Court a Writ of summons directed to the Sheriff of Henry County Missouri, which is in the words and figures following to wit:

Henry County sct.

Summons

The State of Missouri

To the Sheriff of Henry County

Greeting: We command you to summon Aason Spurger that he be and appear in our Henry Circuit Court before the Hon. Judge thereof on the first day of the next Term of said Court which will be begun and held at the Court House in the Town of Clinton in said Henry County on Monday the 14th day of November 1859 then and there to answer to the complaint of Philip W. Cecil as Administrator of the Estate of B. W. Eckols decd plaintiff, as set forth in the foregoing petition, and have you then and there this writ and that you certify to our said Court how you shall have executed this writ. Witness Lewis H. Tutt Clerk of said Court with the seal thereof hereto affixed at office in Clinton this 3d day of October 1859.

L. S.

L. H. Tutt Clk.

Upon which said Writ of summons there is endorsed the following return of the service thereof by the Sheriff of Henry County Missouri to-wit:

(5)

Sheff. return

"William R. Taylor Sheriff of Henry County Missouri do hereby certify that on the 4th day of October 1859 at the County aforesaid I delivered the within named Aaron Spunger a certified copy of the within petition & writ

W. R. Taylor Sheriff of
Henry County Mo.

And afterward to-wit at a Circuit Court continued and held at the Court House in the Town of Clinton in said Henry County on Wednesday the 16th day of November A.D. 1859 the following among other proceedings were had to-wit.

"Philip W. Cecil Admr. of the Estate of B. W. Eckols decd. Plff. } Civil Action to foreclose mortgage
Against
Aaron Spunger Deft. }

Now at this day comes the said Defendant by his Attorney and files herein his answer to plaintiffs petition"

Which said answer so filed as aforesaid is in the following words and figures to-wit:

"In the Circuit Court of
Henry County Missouri

Philip W. Cecil as Admr. of
the Estate of B. W. Eckols dec'd. Plff. } Civil action to
Against } foreclose Mortgage
Aaron Spencer Deft.

Defendant for answer to so much of plaintiffs petition as he is advised is necessary and material for him to answer, answers and says that the note upon which is instituted and for which the mortgage was given to secure the payment thereof was given for the price of a slave named King, and Defendant says that said plaintiff before and at the time of the sale knew that said slave was unsound and diseased and very old and worthless, and said plaintiff knew before and at the time of the said sale of said slave to Defendant that the Defendant believed said slave to be sound and free from disease, and only about forty eight years old, and said Plaintiff knowing that Defendant labored under such belief did not at any time before the sale or at the sale disclose to Defendant the fact that said slave was unsound and diseased and much older than forty eight but of the age of seventy years, and said Plaintiff fraudulently concealed said unsoundness and the disease of said slave and his age, and said slave at the time of the sale was unsound and diseased and was wholly worth-

Answer to petition

(7)

Answer to original petition

less, and said slave within about three weeks after Defendant purchased said slave died of said unsoundness disease and old age, by means whereof there was no consideration for said note and Mortgage and the same wholly and entirely failed, and said plaintiff ought not to have or recover of this Defendant any part thereof

Johnson & Ballou
Atty for Defl.

Aaron Spurger the above named Defendant makes oath and says that the above answer and matters therein as stated he believes to be true

Aaron Spurger

Sworn to and subscribed before the undersigned Clerk of the Henry Circuit Court this 15th day of November 1859.

L. H. Fitt Clk.

And afterwards to-wit at a Circuit Court continued and held at the Court House in Clinton on the 15th day of May A. D. 1860 the following among other proceedings were had to-wit

"Philip W. Cecil Admr. &c Plff. } Civil action to foreclose
Against } Mortgage

Aaron Spurger Dft.

Now at this day comes the said plaintiff in this cause by his attorney and leave is given him by the Court to file his motion to strike out Defendants answer in this cause which is done accordingly

Which said motion to strike out answer is in the words and figures following to-wit:

Motion to strike out answer

Philip W. Cecil as Administrator of the Estate of B. W. Eckols deceased Plaintiff — In the Circuit Court Henry County

Against

Aaron Spurger Defendant.

Plaintiff by his Attorney comes and moves the Court to strike out the answer of Defendant in this cause Because said answer sets forth no facts constituting any defence of any kind whatever to plaintiffs action, for that Defendant sets up as a bar to any recovery and as their sole defence an alleged unsoundness of said slave sold to Defendant & nowhere in the said answer avers or pretend to set forth the name nature or character of said pretended unsoundness or disease and nowhere avers that the name of said disease was or is unknown to him, nor does he in his answer give or

describe the symptoms or character of said pretended unsoundness.

And plaintiff says that said answer is further wholly insufficient & no defence in this, that the same does not state or show any damage whatever arising to defendants by reason of unsoundness or diseased condition of said negro, and said answer is further wholly insufficient and no defence in this, for that this suit is brought by plaintiff as Administrator upon a Note executed to him as such Administrator & said answer nowhere avers that plaintiff as such Administrator made to Defendant any warranty whatever of the soundness of the said negro or made any representation whatever in regard to the soundness of said negro, or used any artifice or deceit of any kind whatever whereby said pretended unsoundness was concealed and Defendant thereby induced to purchase said negro. And said answer is further insufficient in this, for that the same nowhere charges that plaintiff in any way or in any character or capacity made any representations whatever to Defendants in regard to the soundness of said Negro, or used any artifice or deceit whatever whereby the alleged unsoundness was concealed from Defendant, or Defendant by

Motion to strike out Answer

reason of said deceit induced to purchase said negro.

Wherefore plaintiff asks the Court to strike out said answer.

Burge & Stone, Peyton & Boggess for Plaintiff

And afterwards to wit at a Circuit Court continued and held at the Court House in the Town of Clinton on the 18th day of May A. D. 1860. the following among other proceedings were had to-wit:

P. W. Cecil Adm. of B. W. Eckols Estate Plff. } Civil Action
Against
Aaron Spurger Deft.

Now at this day comes the said Plaintiff by his Attorney and files herein his amended petition"

Which said amended petition filed as aforesaid is in the following words and figures to-wit"

"Philip W. Cecil Administrator of the Estate of B. W. Eckols deceased Plaintiff } In the Circuit Court Henry County
Against
Aaron Spurger Defendant

Plaintiff in his amended petition by way of amendment states that Defendant on the 23d day of January A. D.

Amended petition

(11)

1859 executed and delivered to plaintiff as Administrator of the Estate of B. W. Eckols deceased the promissory note herewith filed dated the 25th day of January A.D. 1859 whereby he promised for value received to pay plaintiff as such Administrator the sum of Three Hundred and Five Dollars on or before the first day of October A.D. 1859 and to bear ten per centum per annum interest thence from the maturity thereof until paid, any part of which said note together with the said interest thereon remain wholly unpaid and yet due to plaintiff as such Administrator as aforesaid. And plaintiff further states that on the day and year first aforesaid the defendant for the purpose of securing the payment of said note executed and delivered to plaintiff as such Administrator aforesaid a Mortgage Deed herewith filed conveying to plaintiff as such Administrator aforesaid the following described Real Estate lying & situate in the Town of Clinton County of Henry and State of Missouri and known and described in the Plat of said Town & known in said Mortgage Deed by the following description to-wit Lot No Three containing one half acre upon the following conditions to-wit Whereas said Spurgin has

Amended per

this day executed and delivered to said Cecil his promissory note for the sum of Three Hundred and five Dollars due on the first day of October A.D. 1859. Now if the said Spurger shall well and truly pay said note according to the effect & tenor thereof then this obligation to be void otherwise to remain in full force and virtue.

Plaintiff avers that Defendant has failed to perform the said condition on his part & that said sum of Three Hundred & five Dollars and all interest due thereon remain unpaid.

Wherefore he prays that Judgment may be rendered for the Debt and all interest, and that the equity of Redemption of said Defendant in & to said Lot or Real Estate be foreclosed and that the same or so much thereof as may be necessary be sold to pay off and discharge the Judgment rendered & for other proper relief.

Plaintiff further states that said promissory note filed with petition and mentioned in Mortgage and secured thereby was made and delivered by Defendant to Plaintiff for the price of a negro slave named King by plaintiff as such Administrator on or a-

Amended Petition

bout the first day of January A. D. 1859 and before the Execution & delivery of said note sold to Defendant.

Plaintiff states that the purchase price of said slave was the sum of money specified in said note to-wit the sum of three Hundred and Five Dollars and that said slave so sold was the sole consideration of said note. Plaintiff further states that said slave before and at the time of said sale belonged to the Estate of the said B. W. Eckols and of which he was the only lawful Administrator and further that said slave for a long time before said sale and in the life time of the said Eckols was the property of the said Eckols. Plaintiff further states that on or about the first day of January A. D. 1859 at the Court House door in the Town of Clinton in the County of Henry and State of Missouri as such Administrator aforesaid that is to say as Administrator of all and singular the goods & chattels the rights credits and estate of the said B. W. Eckols deceased & while legally acting and authorized to act in that capacity he offered for sale at public auction to the highest bidder & on a credit of nine months the said slave King above named & further that at said public sale the Defendant being the

Amended petition

highest bidder for said slave became the purchaser thereof, and the same was then and there sold to him at and for the said sum of Three Hundred and five Dollars. Plaintiff avers that Defendant afterwards made and executed to him as such Administrator the said note filed with petition and secured by said Mortgage for the said purchase price of said slave so sold to him as aforesaid that is to say, for the said sum of Three Hundred & five Dollars.

Petition

Plaintiff expressly avers that said slave was sold by him at said public sale as property belonging to the said Estate of said Eckols decd. & further that said slave was then & there sold by him to Defendant as Administrator of B. M. Eckols decd. & solely in that character and capacity, and that the said slave King was so purchased of him by Defendant. Plaintiff files herewith and shows to the Court his letters of Administration on said Estate all duly and properly issued and showing authority of plaintiff to act in the premises.

Amendment

Plaintiff further states that for sometime before & ever since the day of said sale he has been and now is the sole Administrator of said Estate.

(15)

Bunge & Stone Peyton &
Boggess Pltffs Attys

P. W. Cecil Administrator Plaintiff on oath says that the aforesaid petition & matters & things therein as stated he believes to be true.

P. W. Cecil

Sworn to and subscribed before me this 18th of May 1860

B. L. Quales clk.

And afterwards to-wit at a Circuit Court continued and held at the Court House in the Town of Clinton in said Henry County on the 21st day of May A.D. 1860. the following among other proceedings were had to-wit

"Philip W. Cecil Admr. of B. W. Eccles dec. pltff.
Against
Aaron Spurger Deft.

Now at this day comes the said Defendant by his attorney and file herein his answer to plaintiffs amended petition:

Which said answer so filed as aforesaid is in the words and figures follow-

ing to wit:

In the Circuit Court
Henry County

Philip W. Cecil as Adm. of the
Estate of B. W. Eckols dec'd. Plff. } Civil action
Against } to foreclose
Aaron Spanger Deft. } Mortgage

Aaron Spanger the above named Defendant for answer to said Plaintiffs petition or so much thereof as he is advised is material for him to answer answering says that he by the promissory note filed in this case did not promise to pay plaintiff as administrator as therein alleged but said note was executed to P. W. Cecil but not to him as Administrator.

And said plaintiff further answers and says that he denies that he executed and delivered to plaintiff as administrator of the Estate of B. W. Eckols dec'd. the Mortgage filed with said plaintiffs petition and therein mentioned. but that the same was executed to P. W. Cecil and not to him as Administrator of any Estate. Wherefore Defendant says that the said Philip W. Cecil as ad-

ministrator of the Estate of B. W. Eccles deceased ought not to have or maintain his said supposed cause of action.

And for a further defence to said supposed cause of action defendant says that he admits said promissory note was given for the price of a negro slave named King, and he says that said Mortgage was given to secure the payment of the same note, and he further says that said plaintiff before and at the time of the sale of said slave knew that said slave was unsound and diseased and very old and worthless, and said plaintiff knew before and at the time of said sale that the Defendant believed said slave to be sound and free from disease and only about forty eight years old, and defendant did not know of said unsoundness or disease or age of said slave, and said plaintiff so knowing that Defendant labored under such belief did not at any time before or at said sale disclose to Defendant the fact that said slave was unsound and diseased and much older than forty eight years to-wit of the age of seventy years, and said plaintiff fraudulently concealed said unsoundness and disease of said slave and his age, and said plaintiff avers that at the

Answer to amended petition

Answer to amended petition

time of the sale of said slave said slave was unsound and diseased and over the age of forty eight years and was also wholly worthless, and said slave within about three weeks after defendant purchased said slave died of said unsoundness disease and old age, and was wholly lost to Defendant, wherefore said plaintiff ought not to recover upon said note and Mortgage the consideration thereof having wholly failed, and there being no consideration therefor

Johnson & Ballou
Attys. for Dfts.

Affidavit &c

Aaron Spurger the above named Defendant makes oath and says that the above answer and the matters therein stated he believes to be true

Aaron Spurger

Subscribed and sworn to before me this May 21st 1860.

R. K. Murrell clk.

And afterwards to-wit at a Circuit Court continued and held at the Court

House in the Town of Clinton in the County of Henry on the 22d day of May A.D. 1860 the following among other proceedings were had to-wit:

Philip W. Cecil Admr. of the Estate of B. W. Eckols decd. Plff. } Civil action to foreclose Mortgage
Against
Aaron Spunger Defendant

Now at this day come the parties by their Attorneys and the said plaintiff by his attorney on leave given him by the Court files his motion to strike out Defendants answer to plaintiffs amended petition in this cause* which said motion being seen and fully understood by the Court is by the Court sustained, and the said answer stricken out accordingly And thereupon the said Defendant having failed to file any additional answer in this cause whereby the same remains wholly undefended, and this action being founded on an instrument of writing whereby the amount of indebtedness is ascertained, and the plaintiff not requiring a Jury the same is submitted to the Court here, and the Court doth find for the plaintiff the sum of Three Hundred & Twenty four 58/100 Dollars for his Debt and interest thereon.

(* See motion in Bill of Exceptions Ck)

And the Court further finds that on the 25th day of January A.D. 1859 the defendant made and executed to Plaintiff a Deed of Mortgage duly acknowledged conveying to said plaintiff the following Real Estate lying and being situate in the Town of Clinton County of Henry and State of Missouri and Known upon the Plat of said Town as Lot No Three (3) containing One half acre together with all the rights and appurtenances thereto belonging.

Upon the express condition that defendant should pay or cause to be paid a certain note executed to plaintiff bearing date the said 25th day of January A.D. 1859 for the sum of Three Hundred and five Dollars the same upon which this suit was instituted, and now amounting to the said sum of Three Hundred and Twenty four 58/100 Dollars.

In consideration of the premises it is considered by the Court that the said plaintiff have and recive against the Defendant in this cause the sum of Three Hundred Twenty four 58/100 Dollars so found as aforesaid, and his costs in this suit expended, that the Equity of Redemption of the said Defendant in and to said Lot

Judgment

(21)

No Thou conveyed to plaintiff as aforesaid be forever barred and foreclosed and that the same be sold to satisfy the Debt and costs aforesaid, and if said Real Estate be not sufficient to satisfy said Debt and costs then the residue to be levied of other goods and chattels lands and tenements of said Mortgagee and thereupon comes the said Defendant by his attorney and files herein motion for a new Trial* of this cause, which said motion being seen and heard by the Court overruled, whereupon said defendant files herein his motion in arrest of Judgment† which said motion being seen and understood by the Court is by the Court overruled, to the overruling of which defendant excepts, and files herein his Bill of Exceptions, and prays that the same may be signed sealed and made a part of the Record which is done accordingly, and Defendant prays for an appeal in this cause to the Supreme Court of the State of Missouri, and files herein his affidavit for the same† which appeal is granted by the Court whereupon Defendant files herein his recognizance† for an appeal which approved by the Court and it is ordered by the Court that all procedings in this case be stayed.

Judgment

*See Bill of Exceptions } †See pages of Transcript

And which said Bill of Exceptions so filed as aforesaid is in the words and figures following to-wit:

In the Circuit Court
Henry County

Philip W. Cecil as Admr. of the Estate of B. W. Eckols decd. Plff. } Civil Action to foreclose Mortgage
Against
Aaron Spurger Deft.

Be it remembered that on this 22d day of May 1860 the plaintiff filed his motion to strike out Defendants answer to his amended petition, which motion is in the following words and figures

Bill of Exceptions

Philip W. Cecil as Administrator of the Estate of B. W. Eckols deceased Plaintiff } In the Circuit Court Henry County
Against
Aaron Spurger Defendant

Motion to strike out answer

Plaintiff by his Attorney comes and moves the Court to strike out that portion of the Defendants answer beginning at the word "Aaron" on the first line of the first page and ending at the word "Estate" on the 21st line of the same page of said Answer First because said part of it meant as a pretended denial of the Execution of said

(23)

note & also of the Execution of said Mortgage & is no sufficient or any denial whatever of either allegation in petition contained to-wit that Defendant executed said note & said Mortgage Deed to plaintiff as Administrator. Secondly because said portion of the answer sets up no matter whatever constituting any defence of any kind whatever to the action of Plaintiff, nor is the same any sufficient answer by way of denial or otherwise to the allegations or any of them in petition contained.

Plaintiff further moves the Court to strike out all the balance of said answer to-wit every part of the answer beginning at the word "wherefore" on the Twenty first line of the first page and ending at the word "therefore" on the last line of the last page of said answer. Because said portion of said answer sets forth no facts constituting any defence of any kind whatever to plaintiffs action, for the Defendant sets up as a bar to any recovery and as his sole defence an alleged unsoundness of the slave sold to defendant & nowhere in said answer avers or pretends to state the name nature or character of the said pretended unsoundness or disease & nowhere avers that the name nature or character of said unsoundness was or is unknown

Bill of Exceptions
Motion to strike out answer

to Defendant nor in said portion of his answer nor any where else in the answer does the Defendant describe the kind or character of said unsoundness or disease.

And Plaintiff says that said portion of the answer is insufficient & no defence in this that the same does not show or state any damage arising by reason of said unsoundness or diseased condition.

And said portion of the answer is wholly insufficient and no defence in this that this suit is brought by plaintiff as Administrator upon a note executed to him as such Administrator, the consideration of said note being solely & so charged the purchase price of a slave belonging to the Estate of said Eckols deceased and sold to Defendant by plaintiff as the administrator of said Estate & said Answer nowhere avers that plaintiff as such Administrator made to Defendant any warranty whatever of the soundness of said slave or made any representations in regard to the soundness of said slave, or used any artifice or of any kind whatever whereby said pretended unsoundness & disease & old age was concealed, and Defendant thereby

Bill of Exceptions
Motion to strike out answer

induced to purchase said slave.

And said Answer is further insufficient in this, for that the Defendant does not aver that Plaintiff in any way or in any character or capacity made any representations to Defendant in regard to the soundness or age of said slave or used any artifice or deceit whereby the pretended unsoundness or the real age of said slave was concealed and Defendant thereby induced to purchase said slave, And said answer & the said portion thereof asked to be stricken out is further wholly insufficient & no defence in this that said answer nowhere avers that said unsoundness was not open to the observation of the purchaser & nowhere denies that said unsoundness & age was such as to impose upon the purchaser & for anything stated in said answer the unsoundness disease and age of said slave might have been known & patent to the most casual observer, and and said Answer is no defence in this that said slave was sold by Plaintiff as Administrator & purely in that capacity & at public auction & no unsoundness disease or defect of any kind whatever existing before or at the time of the sale can be set up against

Motion to strike out Answer

the Administrator in any action for the recovery of the purchase Money.

And said portion of the answer is wholly insufficient in this, that said answer is not responsive by way of denial or in any other way to the petition of plaintiff & the allegations therein. Wherefore plaintiff — the Court to strike out said answer and every part thereof

Burge & Stone
Beyton & Baggs for Plffs

Bill of Exceptions

Which motion coming on to be heard was by the Court, and the whole of said Defendants answer was by the Court stricken out, to which decision of the Court in sustaining said motion and striking out said answer Defendant at the time excepted, whereupon Judgment was rendered against said Defendant, and thereupon Defendant filed his motion to set aside said judgment and grant a new Trial, which said motion to set aside the Judgment is in the following words and figures to-wit

In the Circuit Court
Henry County

Philip W. Cecil as Admr of the

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Estate of B. W. Eckols decd. Plff. } Civil action to
Against } foreclose Mortgage
Aaron Spurger Defendant }

The Defendant now comes here into Court and moves the Court to set aside the judgment in this case and grant a new Trial for the following reasons.

1st Because the Court erred in striking out Defendants answer to Plaintiffs amended petition.

2 For other reasons.

Johnson & Ballou
Atty for Dft.

Bill of Exception
Motion in arrest of judgment

Which last mentioned motion the Court upon the hearing thereof overruled and defendant excepted, and thereupon defendant filed his motion in arrest of judgment, which is in the following words and figures to-wit.

"In the Circuit Court
Henry County

Philip W. Cecil as Admr. of the
Estate of B. W. Eckols decd. Plff. } Civil action to
Against } foreclose Mortgage
Aaron Spurger Dft. }

The Defendant now comes here into Court and moves the Court to arrest the judgment rendered in this

case for the following reasons 1 Because said amended petition does not set forth sufficient facts to constitute a cause of action. 2 The petition discloses the fact that neither the note nor the Mortgage therein specified were made to the said Philip W. Cecil as administrator of the Estate of Eckols (and said plaintiff ought not to recover as Administrator when he could only recover if acted in his individual capacity) and thereby debar the Defendant from setting up a defence that would be available to him if the suit had been instituted in the name of Philip W. Cecil and not as Administrator. 3 Because said amended petition is otherwise informal and insufficient 4 The judgment is irregular and erroneous

Johnson & Ballow
Attys. for Deft

Bill of Exceptions

Defendant thereupon presented this his Bill of Exceptions to the Court and prayed that the same should be signed and sealed and made a part of the Record, which is accordingly done

F. P. Wright Seal
Cir. Judge

(29.)

The following is a Copy of the affidavit for an appeal, filed as aforesaid

In the Circuit Court
Henry County

Philip W. Cecil as Admr. of the Estate of B. W. Eckols dcd. Plff. } Civil action to foreclose Mortgage
Against
Aaron Spunger Defendant }

Now at this day comes here into Court said Defendant and prays an appeal to the Supreme Court from the Judgment of this Court, rendered against him in the above entitled cause.

Affidavit for appeal

Aaron Spunger the above named Defendant upon oath states that the appeal in the above cause is not made for vexation or delay, but because said affiant believes that the appellant is aggrieved by the judgment and decision of this Court

Aaron Spunger

Sworn to and subscribed before the undersigned Clerk of the Circuit Court aforesaid this 22d day of May A.D. 1860.

R. K. Russell Clk

The following is a copy of the Recognizance filed herein as aforesaid to-wit:

In the Circuit Court

Henry County

Philip W. Cecil as Admr. of the Estate of B. W. Echols decd. Plff. } Civil action to foreclose Mortgage

Against

Aaron Spurger Dft.

Judgment against defendant for $324.98 and costs &c &c in appeal to Supreme Court.

We Aaron Spurger as principal and Robert H. Farley Burt Holcomb and David Owen as his securities acknowledge ourselves to owe and stand indebted to Philip W. Cecil as Administrator of the Estate of B. W. Echols deceased in the sum of Seven Hundred Dollars for the payment of which well and truly to be made we bind ourselves our heirs executors and Administrators firmly by these presents to the said Cecil as such Administrator or his successors sealed with our seals and dated this 22 day of May 1860.

Recognizance

The condition of the above recognizance is such, whereas the said Aaron Spurger defendant in the above entitled cause has appealed to the Supreme Court of this State from the judgment and decision of the Circuit Court of Henry County aforesaid, now if the said defendant Aaron Spurger

appellant shall prosecute this appeal with due diligence to a decision in the Supreme Court, and shall perform such judgment as shall be given in the Supreme Court or such as the Supreme Court shall direct the Circuit — to give and if the judgment of said Court or any part thereof be affirmed, that he will comply with and perform the same, so far as it may be affirmed and will pay all damages and costs which may be awarded against appellant by the Supreme Court, then the above recognizance shall be null and void, otherwise to be in full force and effect.

Recognizance

Aaron Spunger (seal)
Burt Holcomb (seal)
R. H. Farley (seal)
David Owen (seal)

State of Missouri
County of Henry } ss

I, Richard K. Murrell Clerk of the Circuit Court within and for the County aforesaid do certify that the foregoing 31 pages contain and are a full true and perfect copy of the Record and proceedings in the case therein mentioned wherein Philip N. Cecil as Admr. of the Estate of B. W. Eckols decd. is plain-

tiff and Aaron Spenzer is Defendant as fully as the same appears of Record in my office & I further certify that I herewith transmit all the original papers in said cause not forming a part of the Record. In Witness whereof I have hereunto set my hand and affixed the seal of said Court at office in Clinton this 21st day of June 1860.

R. K. Murrell Clerk

1860
Dec 5th R K Murrells Clerk fees

To making out this Transcript - 5600 words & figures @ 15 p 100	8.40
" Certificate & seal to same	50
" Postage on same	30
	$9.20

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7. ~~38~~ ~~21~~

Philip W. Cecil, admr.
of estate of B. W. Eckols
deceased — — —

N. J. Record
Aaron Spurger appt.

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filed Dec 21st 1869
(Clerk fee $10. paid)
Wm E Dunscomb
Clerk

Peyton for respondent
Johnson & Ballou for appts

Henry
7th

In the Supreme Court
Jany Term 1861.

Phillip W. Cecil, as admr.
of the estate of
B. W. Eckols dec. Resp
vs
Aaron Spurgen applnt

} appeal from Henry Cir. Court.

And now here comes the said Aaron Spurgen the appellant and says that in the record and proceedings aforesaid there is error in this to wit,

1st The Circuit Court erred in sustaining the plaintiff the Respondent motion to strike out the whole of appellants answer to Respondents amended petition,

2d The Circuit erred in overruling appellants motion for a new trial.

3d The Circuit Court erred in overruling the defendants motion in arrest of Judgment.

Wherefore and for divers other good causes and reasons the said appellant prays that the Judgment of the Henry Circuit Court may be reversed and that ~~they~~ he may be restored to the rights he has been deprived of thereby

Johnson & Ballard
attys for appellant

P. W. Cole as admr
of the Rep
vs
Aaron Spenger
appellant

assignment of
Errors

~~28~~

filed Jan. 19th 1861
Wm E Dunscomb
Clerk

Cecil, adm of
Eckols - Respt
vs
Spurger appt

Appeal from the Henry Cir: Court

This is a suit brought to foreclose a mortgage given to secure the payment of a note for 305 dollars made by ~~Spurger~~ Spurger to Cecil adm of Eckols - The note was given it would seem, for the price of a negro belonging to the Estate of the pltffs intestate, sold by Cecil as adm. to the defendant - The defendant filed his answer to the amended petition which on motion of the pltff. was stricken out for insufficiency and a final judgment rendered for the debt and for the foreclosure of the mortgage from which the defendant appealed to this Court -

The material part of the answer is as follows - "The deft. further says
" that the said pltff before and at the
" time of the sale of said slave knew
" that said slave was unsound and diseased
" and very old and worthless, and said
" plaintiff knew before and at the time
" of said sale that the deft believed

" said slave to be sound and free from
" disease and only about forty
" Eight years old and deft. did not
" know of said unsoundness or disease
" or age of said slave, and said plaintiff
" so knowing that ~~plaintiff~~ defendant
" labored under such belief did not at
" any time before or at said sale dis-
" close to defendant the fact that said
" slave was unsound and diseased and
" much older than forty eight years-
" to wit, of the age of seventy years, and
" said plaintiff fraudulently concealed
" said unsoundness and disease of said
" slave and his age; and said plaintiff
" [defendant] avers that at the time
" of the sale of said slave, said slave
" was unsound and diseased and
" over the age of forty eight years
" and was also wholly worthless, and said
" slave within about three weeks after
" defendant purchased him died of
" said unsoundness disease and old
" age and was wholly lost to deft.-
" wherefore" &c

What sort of case the evidence may disclose when the parties come to a trial we of course cannot foresee; nor have we anything to do with that matter.- For the purposes of the question raised by the motion to strike out we are obliged to take

the material allegations of the answer to be true; and if they are found to constitute a defence the judgment must be reversed, otherwise it will be affirmed —

Where a vendor sells property having a latent defect of which he knows but which he fails to disclose to the vendee, knowing that the latter is acting upon the supposition no such defect exists, he is guilty of a fraud, and the fraud may be pleaded as a good defence to an action for the price of the property. McAdams vs Bales, 24 Mo. R 223 — Barron vs Alexander 27 ib 530. —

The answer in this case comes within the above rule, and the same was therefore improperly stricken out — Let the judgment of the Circuit Court be reversed and the cause remanded to be proceeded in in conformity with this opinion. —

Dryden

Cecil adm Eckols
vs
Spurger

Opinion of
Court by
Tryden

Filed July 29/62

Reversed

In the Supreme Court of
the State of Missouri, at
Jefferson City.
July Term 1862

Philip W. Cecil as administrator of
the Estate of B. W. Eckols deceased
Plaintiff
against
Aaron Surger - defendant

Statement of the case -

This was a suit in the Henry County
Circuit Court by Philip W. Cecil as
administrator of the Estate of
B. W. Eckols deceased - against
the defendant Spurger on a
note and to foreclose a mortgage
on real Estate - The plaintiff
files the note - and in his pe-
tition charges that the consider-
ation of the said note, for the
payment of which the mort-
gage was given as security,
was the price of a negro man,
belonging to the Estate of B. W. Ec-
kols deceased, sold at public

auction by the plaintiff as the administrator of the Estate of said Eckols - Plaintiff avers that the negro man, named King, was the property of said Estate, and was the sole consideration of said note. That plaintiff as the administrator of said Estate of B. W. Eckols deceased and acting as such, sold said negro man King in January 1859, and the note sued on and the mortgage given to secure the price of said negro man, were given by defendant to plaintiff as such administrator - That defendant has wholly failed to pay the debt in said note and mortgage mentioned - Plaintiff prays for judgment & that the mortgage be foreclosed & property mortgaged be sold to pay said debt - &c -

The defendant sets up in his answer; First, that he by his promissory filed in this case did not promise to pay plaintiff as administrator as alleged in plaintiffs

petition; but said note was executed to P. W. Cecil but not to him as administrator - also denies that the Mortgage was executed to plaintiff as administrator of the Estate of Rev. Eckels, deceased; but that the same was given to Cecil, but not as administrator - and for further answer, defendant admits that the promissory note was given for the price of a negro slave named King - & that the mortgage was given to secure the payment of said note - but says that the plaintiff before and at the time of the sale of said slave, knew that said slave was unsound and diseased and very old and worthless; and plaintiff knew that defendant believed said slave to be sound and free from disease and only about forty eight years old; and says that defendant did not know of said unsoundness or disease or age of said slave and that plaintiff so knowing that defendant labored under such be

-lief, did not at any time before or at said sale disclose to defendant the fact that said slave was unsound and diseased and much older than forty eight years, but twenty years old - and plaintiff fraudulently concealed said unsoundness & disease and age of said slave - and defendant avers that the said slave was in sound & diseased and seventy years old & worthless; and that the slave died in about three weeks after said sale - wherefore plaintiff ought not to recover of defendant -

This answer was all stricken out on plaintiff's motion: defendant failed to file any other answer, & judgment was rendered against defendant for want of answer - Upon judgment defendant moved to have set aside & for a new trial which motion was overruled: He also moved in

amount of judgment, which was overruled — Exceptions were taken & Defendants bring the case here by appeal —

Points & authorities for appellee —

1st & only point. was defendants answer sufficient to bar plaintiffs action?
We answer in the negative

See following cases —

Jolliffe vs Collins	21. Mo Rep	338 —
Brown vs North —	"	528
McAlamy vs Cates	24 Mo.	223
Lindsay vs Davis —	Mo —	

Cecil adm
vs
Spurgen

Statement
& Brief
for Cecil
Ryland & Son

Filed
Smallwood Clk