Busch, Julius vs. Diepenbrock, William 1854 St. Louis 345/11

571/29

account

law commis dismissed case b/c account too general

Ryland

rev + rem

State of Missouri } ss.
County of St Louis

Plea held before the Law Commissioners Court of Saint Louis County,

(1) Be it remembered, That on the Third day of April, in the year of our Lord, One thousand eight hundred and fifty four, was filed in the office of said Law Commissioners Court, a certain appeal from John C. Vogel, a Justice of the peace, within and for the township and County of Saint Louis, between, Julius Busch and H. W. Wismann, plaintiffs and William Diepenbrock, defendant,

The following is a true transcript of the papers of said appeal as filed in said Court, Towit,

Account Mr Diepenbrock
Bought of Julius Busch & Henry W. Wismann, Busch & Wismann

| | | | | |
|---|---|---|---|---|
| Balance from 1853, | | | | 97.90 |
| 1854 January | 29, | 1 | Bx Claret | 2.50 |
| " " | " | 1 | Gl Rum | 1.00 |
| " " | " | 1 | " Peppermint | " .75 |
| " Feby | 12 | 1 | " Syrup | " .90 |
| " " | 19 | 22 | " Brandy | 8.80 |
| " " | 25 | 5 | " Brandy | 10.00 |
| " " | 28 | 4 1/2 | " Whiskey | 6.85 |
| " March | 11 | 1 | Gl Syrup | " .90 |
| " " | 18 | 5 | " Portwine | 3.75 |
| " " | 24 | 23 | " Brandy | 23.00 |

2 (2)

| | | | | |
|---|---|---|---|---|
| " May 7 | 1/8 | Pipe | Brandy | 10.00 |
| " " 24 | 6 | Gl | Portwine | 4.25 |
| " June 9 | 10 | Gl | Brandy | 12.50 |
| " Sept 15, | 10 | " | Brandy | 7.50 |
| 1853 June 21 | 5 | " | Brandy | 6.25 |
| | | | | $196.85 |
| | | | | 148.75 |
| | | | | $48.10 |

| | | |
|---|---|---|
| 1852, May 25, | Cash | $3.75 |
| " Jun 9 " | do | 5.00 |
| " July 7 " | do | 7.50 |
| " Augn 13 | do | 7.00 |
| " Sept 30 | do | 5.00 |
| " October 15 | do | 2.50 |
| " Nov 30 | do | 50.00 |
| 1853 March 15 | do | 20.00 |
| " April 8 | do | 20.00 |
| " June 2 | do | 2.00 |
| " " 14 | do | 10.00 |
| " July 25, | do | 16.00 |
| | | $148.75 |

Summons "State of Missouri

To any Constable of Saint Louis Township in Saint Louis County. Greeting:

We command you to summon William Diepenbrock, to appear before the undersigned, one of the Justices of the peace of St Louis Township in St Louis County, on the 22nd day of February 1854 at 7 of the clock in the forenoon, at his office, in the same Township, to answer the complaint of Julius Busch &

Henry W. Wissmann, for $48.10 on a/c & Subpoena the defendant as witness for the Plaintiff.

Given under my hand, this fourth

3. day of February 1854

John C. Vogel, Justice,

Constables Return "Served the within writ by delivering a true copy of the same to the within named defendant in St Louis Township Feby 16th 1854,

Jas Kelly Constable

By M. Fitzsimmons Deputy,

Justices Docket Entries "Julius Busch and Henry W. Wissmann } Suit on a/c for $48.10 Sums issued to Const Kelly 4th February 1854, returnable 22nd

William Diepenbrock

February 1854, Sums returned executed, the parties appear, defendant moves to dismiss because no proper bill of items was filed, motion overruled, and the matter being heard, it is adjudged by the Justice that that the Plaintiffs recover not of the defendant, but that the defendant recover of the Plaintiffs for costs of suit, and that he have thereof execution, fifa issued to Const Kelly 22nd February 1854, Now on this 24th day of February 1854, the Plaintiffs file their bond and affidavit for an appeal, Whereupon the same is allowed to the Law Commissioners Court of St Louis County, fifa Recalled,

4 Julius Pusch and Henry W. Wissmann } Plaintiffs } Before Justice John C. Vogel

Affidavit William Diepenbrock Defendant } No 9 February 1854

This day, personally appeared before John C. Vogel, a Justice of the peace, in and for the County of St Louis, in the State of Missouri Julius Pusch, for himself and copartner Henry W. Wissmann, who being duly sworn, upon his oath, says, that the application for an appeal, in the above entitled case, is not made for vexation or delay, but because he believes the appellants are injured by the Judgment of the Justice J. Pusch,

Sworn to and Subscribed before me this 24th day of February 1854,

John C. Vogel Justice,

Bond "We, the undersigned, Julius Pusch and Henry W. Wissmann, and acknowledge ourselves indebted to William Diepenbrock, in the sum of Fifty dollars to be void upon this condition, Whereas, the said Julius Pusch & Henry W. Wissmann, has appealed from the Judgment of John C. Vogel, a Justice of the peace, in a certain action between said Pusch and Wissmann plaintiffs, and said William Diepenbrock defendant, Now if, on such appeal, the Judgment of the Justice be affirmed, or if on the trial, anew, in the Law Commissioners

Court of Saint Louis County, Judgment be given against the appellants, and they shall
5 satisfy such Judgment, or if their appeal shall be dismissed, and they shall ~~satisfy such Judgment, or if~~ pay the Judgment of the Justice, together with the costs of appeal, the recognizance shall be void,

Attest, this 24th day of February 1854, John C. Vogel, Justice, } Busch & Wissmann L.S. W. Hakes & Brothers L.S. "

Certificate "State of Missouri County of St Louis } ss I, John C. Vogel, a Justice of the peace, within and for the county aforesaid, do hereby certify the foregoing writing to be a full and true transcript from my docket of the entries therein made in a certain case tried before me at my office in Saint Louis Township, wherein Busch & Wissmann are plaintiffs and William Diepenbrock is defendant, and that the papers hereto attached are all the original papers filed in said suit, Given under my hand this 24th February 1854

John C. Vogel Justice of the Peace, "

And afterwards, Towit the following proceedings were had in this cause, in the Law Commissioner's Court on the respective days and Terms hereinafter mentioned, towit,

April Term 1854 (6)

Thursday April 27th 1854,

Cont "J. Busch & al
Wm. Diepenbrock } On motion of plaintiffs continued to next term, costs to abide the determination of this suit. "

June Term

Wednesday June 7th 1854,

Cont "J. Busch & al
Wm. Diepenbrock } By order of the court continued to next term at plaintiffs costs, "

August Term

Tuesday August 22nd 1854,

Judgment "J. Busch and
H. W. Wissmann
William Diepenbrock } Now at this day come the parties by their attorneys, and defendant, moves the court to dismiss this suit, for the reason that a sufficient bill of the items, on which this suit is founded, has not been filed, Whereupon the court after hearing the argument of counsel, and being fully advised thereof, doth consider that said motion be and the same is sustained, and that this suit be and the same is dismissed, and that said defendant recover of said plaintiffs his costs and

7

~~and~~ charges in this suit expended, and that execution issue therefor, "

| | |
|---|---|
| "J. Pusch, et al | Bill of exceptions |
| vs | filed by Plaintiffs |
| William Diehenbrock | attorney, " |

Said bill of exceptions is in the words and figures following towit;

Bill of Exceptions

| | |
|---|---|
| "Pusch and Wiseman | In the Law Commissioners Court |
| vs | August Term, A.D. 1854. |
| Diehenbrock | |

Be it remembered, that on this day comes the parties in the above cause and the same is called for trial, Whereupon the deft by his atty moves the court to dismiss the suit for the reason that a sufficient bill of the items upon which the suit is founded has not been filed, The court after having heard the argument of counsel and being fully advised thereof doth consider that said motion be and the same is sustained, and that the suit be dismissed, to which ruling of the court Plaintiffs by atty did then and there except, and pray the court to sign and seal this their bill of exceptions, which is done,

John M. Calom, Law Com Seal "

Thursday August 4th 1854,

8 "Julius Busch and Henry W. Wissmann } Now at this day (8) comes the plaintiffs and present to the Court their bond

Bond filed " William Diepenbrock

in accordance with the statute in that case made and provided, the said defendant, in the sum of One hundred dollars, with L. F. Schloetelberg, as security, which was acknowledged by said L. F. Schloetelberg, and approved by the court, Whereupon on motion of plaintiffs by their attorney, an appeal is granted from the Judgment herein to the Supreme Court, "

Said Bond is in the words and figures following, Towit,

Bond "Know all Men by these presents, that we Julius Busch as principal and L. F. Schloetelberg, as Security, are indebted to William Diepenbrock, in the sum of One hundred dollars, for the payment where of we bind ourselves our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated at St Louis, this the Seventh day of September eighteen hundred and fifty four,

The condition of this obligation is such, that whereas Julius Busch and Henry W. Wissmann have appealed from the Judgment rendered against them, and in favor of William Diepenbrock, in the Law Commissioners Court of the County of St Louis

for the Cost in said Suit expended,
9 Now, if the said Appellant will pay all costs and damages that may be awarded against them, occasioned by such appeal, and they shall prosecute their appeal, and shall perform such Judgment as shall be given by the Supreme Court, and such as the Supreme Court, may direct the Law Commissioner's Court, of the County of St Louis, to give, and if the Judgment or any part thereof be affirmed, that they 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 them by the Supreme Court, then this obligation to be void, otherwise to remain in full force and effect,

Julius Busch L.S.
L. F. Schloetelberg L.S.

Acknowledged and Approved
Sept 7th 1854
Ira W. Colvin Law Com.

State of Missouri } ss
County of St Louis }

I, John W. Calvin, The Law Commissioner of the County of Saint Louis, certify that the foregoing is a full, true and complete transcript of the Record and proceedings in the case of Julius Busch and Henry W. Wipmann plaintiffs and William Diekenbrock defendant, as fully as the same remains of record in my office.

In testimony whereof I hereto set my hand and affix the seal of the Law Commissioner's Court at office in Saint Louis this Seventeenth day of September A.D. 1854.

John W. Calvin,
Law Commissioner

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(29.) 89

March. T. 1855

Julius Busch &

H. W. Wissmann
appts

vs Transcript

Wm Diefenbrock
respondent

Appeal from
Law Com Court

Filed 2 October 1854.
Wm L. Glanville
Clerk

Fee $3.00 pd by
Cline & Jamison
Hart & Lecko for deft 89

Busch & Wessmann appellant } In the Supreme Court of Mo
vs
William Deepen Brock } October Term AD 1854

Now at this day comes the appellant and says that the manifest errors appearing upon the record of the above cause are as follows to wit

1st The Court below erred in sustaining the Dfts motion to dismiss the suit

2d The Court below erred in dismissing this suit because there was a good and sufficient bill of the items upon which it was founded filed with the justice at the time of its commencement

3d The Court below erred in deciding said motion in favor of Defendant because in doing so it assumed to pass upon questions that could only arise upon the trial of the cause

4th The Court below erred in sustaining said motion because it was done contrary to the law of the cause

Olive & Jameson attys for Appellants

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Busch & Wipmann

vs

William Diepenbrock.

Assignment of Errors

Filed 18th Oct. 1854,
Wm. L. Glaunier
Cl.

Cline & Lamson attys
for appellant

~~State of Mo~~

Basch & Wipmann } Supreme Court of Mo
vs
Wm Diepenbrock } October Term AD 1854

The Record of this cause shows that upon motion of the Attys for Respondent this cause was dismissed by the Law Commissioner for want of a sufficient Bill of the items upon which appellants demand was founded. the objection seems to have been taken mainly to the first Item of the "bill" which if admitted for argument sake to have been in correct would still leave a good and sufficient bill of the particulars upon which the balance of the claim was founded, and the Court below in that aspect of the case committed manifest error in dismissing the whole suit; if the first item was insufficiently stated, and remained so vague and uncertain as to mislead the Respondent and not to inform him of what he was required to answer; the utmost the court could have done under the circumstances would have been to rule out all testimony upon said defective item

But it is claimed by the [illegible] appellants that the first item of the Bill of Particulars filed before the Justice is sufficiently stated, it imports that the balance for the year of 1851 has been struck and that the sum of $97.90 remains due upon a settlement of the parties

Suppose the plaintiffs below had have been permitted to go to trial. and established by testimony that the Respondent agreed to said balance as being due and promised to pay the same. Could the item then have been more specifically stated than it was: or after a balance is struck between the parties

where is the necessary of stating the whole account upon which it is founded we know of no rule of law that would require it; The court below had no right to infer that the balance claimed did not arise upon a settlement of the accounts between the parties for that year, and the only advantage that the Respondent could take of it would be to confine the claimant to a strict proof of the settlement or recognition by the defendant that the balance was correctly struck
There is nothing in the item that was calculated to deceive either the court-jury or defendant, and if it stands this legal test it must be sufficient. "If a Bill of Particulars" is not calculated to deceive it will be deemed sufficient; unless upon affidavit, or other satisfactory evidence, of surprise, by the adverse party, Dillon is Hutchinson 3 Green 178.

Cline & Jameson attys
for appellants

No. 89

Busch & Loeffmann
&
Wm. Diepenbrock

Brief

Filed 3d April 1855
W. L. Sharrier
Ck

Cline & Jameson attys
for Appellants

Jules Busch &
Henry W Wipsmann
vs
William Diepenbrock

In the Supreme Court of the state of Missouri
March Term AD 1853

Statement of Case

This was an action brought by Busch & Wipsmann against Diepenbrock before a justice of the peace upon the following account-

Mr Diepenbrock

Bought of Jules Busch & Henry W Wipsmann
Busch & Wipsmann

| | | | | | |
|---|---|---|---|---|---|
| Balance from 1851 | | | | | 97.90 |
| 1852 | January | 29th | 1 | Bot Cart | 2.50 |
| " | " | " | 1 | Gal Rum | 1.00 |
| " | " | " | 1 | " Peppermint | .75 |
| " | Feb | 12 | 1 | " Syrup | .75 |
| " | " | 19 | 22 | " Brandy | 10.00 |
| " | " | 28 | 5 | " " | 8.80 |
| " | " | 28 | 4½ | " Whisky | 6.85 |
| " | Mar | 10 | 1 | " Syrup | .90 |
| " | " | 18 | 3 | " Port Wine | 3.75 |
| " | " | 24 | 23 | " Brandy | 23.00 |
| " | May | 7 | 1/3 | Pipe Brandy | 10 00 |
| " | " | 24 | 6 | Gal Port Wine | 4.28 |
| " | June | 9 | 10 | " Brandy | 12.30 |
| " | Sept | 15 | 10 | " " | 7.80 |
| 1853 | June | 21 | 5 | " Brandy | 6.28 |
| | | | | | 196.85 |
| | | | | | 148.75 |
| | | | | | 48.10 |

| | | | | |
|---|---|---|---|---|
| 1852 | May | 25 | Cash | 3.75 |
| " | June | 9 | Do | 3.00 |
| " | July | 7 | Do | 7.30 |
| " | August | 13 | Do | 7.00 |
| " | Sept | 30 | Do | 3.00 |
| " | Oct | 15 | Do | 25.00 |

| | | | | |
|---|---|---|---|---|
| " | November | 30 | Do | 50,00 |
| 1853 | March | 15 | Do | 20.00 |
| " | April | 8 | Do | 20.00 |
| " | June | 2 | Do | 2.00 |
| " | " | 14 | Do | 10.00 |
| " | July | 25 | Do | 16.00 |
| | | | | 148.75 |

At the trial before the justice of the peace judgment was rendered against plaintiffs, who took an appeal to the Law Commissioners Court, and when it came on for trial in said Court the defendant made a verbal motion to dismiss the cause for the reason that there was not a sufficient bill of the items filed before the justice upon which the suit was founded", which motion was sustained by said Court and the suit ordered to be dismissed to which ruling of the Court plaintiffs then and there in due form excepted and brought the suit by appeal into this Court

Cline & Jameson attys
for appellants

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Busch & Wessmann

vs

Wm Diepenbrock

Filed 3d April 1855
W. F. Glanville
Ck.

Statement of Case
Clim & Jameson
attys for Appeller

Busch & Wipman vs Diepenbrock
Reporter to make Statement

This suit was commenced before a justice of the peace: On the trial before the justice, defendant moved to dismiss the suit, because the plaintiffs had not filed with the justice a proper account containing the particular items of the indebtedness of the defendant, before the commencement of the suit, in accordance with the direction of the Statute.

This Motion the justice overruled: because the plaintiffs had filed their account. The defendant ~~xxxxxxxx~~ obtained judgment against the plaintiffs before the justice: an appeal was taken by plaintiffs to the Law Commissioner's Court.

In the Law Commissioner's Court, the defendant again moved to dismiss the plaintiffs suit, because no account had been filed originally before the justice of the peace: this motion the Court sustained, and the plaintiff bring the case here by appeal.

There was no ground, as appears by the transcript of the record, for sustaining this motion by the Law Commissioner. The plaintiffs had filed their account before the justice.

From the brief of the defendants' counsel the objection taken, was to the generality of the first item of the plaintiffs' account.

This item is thus stated, "Balance from 1857 $97.90"; the account then continues with proper dates and items, containing a long list and footing up with $196.85; giving a a list of credits amounting to $148.75. leaving a balance to plaintiffs of $48.10 —

In the opinion of this Court this general item of "$97.90. balance of account from 1857," was no sufficient ground to authorise the Court to dismiss this ~~account~~ suit; more especially after there had been a trial in the justice's Court — If the item was too general to be understood by the defendant, his remedy was to move the Court, to compel the plaintiffs to furnish the items from the account of the year 1857; not to dismiss — His motion for a more particular account, might have furnished him with all he wanted; or with all he had a right to require — This Law Commissioner should not have dismissed because a more particular account was not filed —

The Legislation of our State for many years past, has a strong tendency to do away with formal objections, and technical defects in our judicial proceedings —

It has been to this Court a matter of surprise, of regret, to observe the

great facility, with which technical and mere formal objections, have found a hearing in our ~~[illegible]~~ inferior Courts — How much better for the Courts and the parties, that the causes be determined as speedily as possible, as right and justice may require; with as little regard to mere formal defects as the law will allow —

The judgment of the Law Commissioner is reversed; the other judges concurring, and cause remanded —

John F. Ryland

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Diefenbrock

Busch & Wiseman vs ~~Diefenbrock~~

Opinion

Reversed

Filed 4th June 1856

Wm L Glanville

Clerk

XX

Julius Busch &
Henry W. Wissman appt
vs
William Diepenbrock
respt

In Supreme Court
of Missouri

Brief. Points & Authorities by
Hart & Jecko for respt.

This was a case brought before a Justice of the peace a motion was then made to ~~start~~ dississ the suit because no sufficient bill of items was filed as contemplated by Statute in such cases, the motion being overruled the same was reviewed by respt in the appellate Court to wit Law Commission Court & the motion then sustained - the only question presented by the record is whether the Law Commission properly or improperly ~~[illegible]~~ sustained the said motion.

In every suit founded on an account, a bill of the items of such account shall be filed with the Justice - before any process shall be issued in the suit

Sec 10. Rev'd Code 1845. Art 11.
Justices Courts.

The first acts of our Legislature establishing Justices courts that in all suits of debt or on account a brief statement of the cause of action and amount claimed shall be in writing & filed with the Justice the Session acts of 1826 page 32. Section

1. repeals this provision & provides that no Justice of the Peace shall issue his summons or warrant - unless the plaintiff by himself or agent shall have filed with the Justice the bond note. bill or account on which the demand is founded - this act is subsequently repealed & the provision that a bill of the items of such account shall be filed with the Justice before any process shall be instituted in the suit has been the law governing this question since 1845. if not for some time before

the bill of items filed by plaintiff before the Justice - commences with Balance from 1851. $97.90. is this an item within the meaning of the act. certainly not. the very object of the law was to give to the defendant notice as to what he had & owed or what was done & performed &c. &c for which the sum demanded is claimed was rendered & received &c. but not so in this first charge. Balance from 1851. $97.90 is no compliance with the law. again the bill then proceeds with items from 1851. down to 1853. which amounts to $98.95 & gives defendant credit with 148.75. leaving a balance due by plaintiff to defendant of $49.80 - but in plaintiffs account of items he first puts down Balance from 1851 97.90. & then goes on with items since 1851 amounting to 98.95. & adds this ~~balance~~ of

of 97.90. alleged to be balance from 1851
to 98.95 " " " items since 1851.
which together figures up 196.85. then
says we have paid him cash 148.75 &
claims a balance agt res in this way of 48.10-
strike out the first charge as not being an
item & nothing stated to shew what that
balance from 1851 consists of in items
& the credits given to Defendant exceeds
the demand of the plaintiff & he is out
of court.

We contend that in an action of an
open account, the words in a bill of
items, Balance due from 1851 $97.90
without shewing what was done for
the said amount, or even claiming
that it was a balance found due on
settlement between the parties is
not a bill of the items of account and
the Law Commissioner properly took
this view of the case & having con
sidered that first charge erroneous
the credit given to Deft by plaintiff
excluding the items of the account
outside of the first charge, properly
dissmissed the suit - for want
of a proper bill of items to shew
the Defendant justly indebted to the
plaintiff

Hart & Jecko
for resp

Busch & Wissman
appts
vs
William Diepenhoek
respts

Brief. points & authorities
by Hart & Jicko
for respts