Adam, Washington F. v. Mercer, John C. and Antelo, Anthony J. | 1858 | St. Louis | 407 1/5

Old Box 598/10

Md A wants $220.16 w/int.
adam says they owe him for castor oil &
should offset
awarded Md A $258.04

F1857
Oct 1858
R&R
Scott

O = improperly sustained demurrer to set-off
did have suf. COA

County of St. Louis } Be it remembered that
State of Missouri } heretofore to wit on the
19th day of January 1855

(1) there was filed in the Office of the Clerk of the St. Louis Court of Common Pleas within and for the County aforesaid a certain petition which is in the words and figures following to wit;

Petition John C Mercer & Anthony J Antelo plffs } In the St. Louis Court of Common Pleas Saint Louis County
vs
Washington ~~William~~ F. Adams Deft } February Term 1855

Plaintiffs who are partners in trade under the firm of Mercer & Antelo state that defendant owes them the sum of Two hundred and twenty 16/100 dollars with interest from the 20th day of February 1854 as follows.

That on the first day of October in the year 1852 defendant drew his draft or Bill of Exchange dated St. Louis Mo Oct 1st 1852 by which he quested plaintiffs four months after the date thereof to pay to the order of W. F. Adams (being himself said defendant) for value received Seven Hundred and Sixty dollars and charge the same to the account of him said defendant said original Bill of Exchange is herewith filed & made part of this petition

That plaintiffs thereafter accepted said Bill of Exchange and the same being endorsed by defendant paid said Bill in full at maturity to the holder thereof of which defendant had notice and by reason of the premises became in=

debted to plaintiffs in the amount of the said bill so paid by them to wit the sum of Seven hundred and sixty dollars ($760) with interest thereon from the fourth day of February AD 1853 being the day of maturity and payment of said Bill That defendant is entitled to a credit of Six hundred and four dollars and ninety four cents on said amount of indebtedness principal and interest due and accrued on the 20th day of February 1854 less a discount of sixteen (84/100 dollars (being interest off for delay of payment, said credit being the nett proceeds of sales of merchandise by said defendant consigned to said plaintiffs and sold for his account; and defendant is entitled to no other credit on said draft nor hath paid any further sum thereon but is still indebted to plaintiffs by reason of the premises in said balance of Two hundred and twenty dollars and sixteen cents for which with interest from said 20th day of February AD 1854 plffs ask judgment & for their costs By Henry Hitchcock plffs atty

Henry Hitchcock attorney for said plaintiffs makes oath and says that he believes the foregoing petition and the matters therein as stated are true Henry Hitchcock

Sworn to before me this 19th Jany 1855

C. W. Hicks clk

St Louis Mo Oct 1st 1852

Exchange for $760

Four Month after date of this my first of Exchange (Second of the same tenor & date unpaid) pay to the Order of W

(3)

F. Adams Seven Hundred & Sixty dollars value received and charge the same to account of

To Mercer & Antelo Your Obt Servt

Philadelphia W. F. Adams

(Endorsed) W. F. Adams

Payable at the Farmers' Bank Mercer & Antelo.

Thereupon issued the following Summons

County of St. Louis Sp

Summons

The State of Missouri

To the Sheriff of St. Louis County, greeting: We command you to Summon William F. Adams to appear before the judge of our Court of Common Pleas on the first day of the next term thereof to be held in the City of St. Louis within and for the County of St. Louis on the first Monday of February next then and there to answer the complaint of John C. Mercer Anthony J. Antelo as set forth in the annexed petition; and have you then and there this writ;

(Seal) Witness Charles W. Hicks Clerk of our said Court with the seal thereof hereto affixed at Office in the City of St. Louis this 19th day of January in the year of our Lord eighteen hundred and fifty five

C. W. Hicks clk

Thereupon the Sheriff made the following return;

Shiffs Return

Executed this writ in the County of St. Louis on the 19th day of January 1855 by delivering a copy of the same & petition as furnished by the Clerk to William F. Adams

Turner Maddox Sheriff

By J. S. Wilkins Deputy

And afterwards the following further proceedings were had in this cause to wit;

February Term 1855 Saturday 17th February 1855

(4) leave to amend petition and same done by changing William to Washington

On motion leave is given the plaintiffs to amend the petition herein by changing defendants name from "William F Adams" to "Washington F Adams" and the same is accordingly amended

And ~~afterwards to wit~~ on the 12th day of February AD 1855 the following answer was filed to wit:

Answer

Defendant denies that he owes plaintiffs the amount claimed in their petition or any amount of money whatsoever. Defendant says he shipped to plaintiffs twenty five barrels of Castor Oil being about One thousand gallons on the first day of October 1852, and on the same day drew his draft upon them as stated by plaintiffs which was accepted and paid by them at maturity. The said Oil was received by plaintiffs and at the time of its receipt was worth in Market One dollar per gallon and frequently afterward before the time of its sale. That plaintiff ought to have sold immediately but instead held on till Febry 20th 1854 when they sold at Much lower rates. That the proceeds of this Oil when sold amounted to seven hundred and eighty two $\frac{27}{100}$ dollars, and the plaintiffs claimed as charges the sum of One hundred and seventy seven $\frac{33}{100}$ dollars. Defendant says the said Oil ought to have been sold for more than said amount and that said charges were incorrect and too high and that after striking a just balance between himself and plaintiffs he will owe them nothing

P Bland atty for Deft

Washington F. Adams defendant makes oath and

(5)

says he believes the above answer and the matters as therein stated are true

Sworn to before me this 12th Febry 1855 } W. F. Adams.

C A Hicks, C.A.C.

* And afterwards the following further proceedings were had in this cause to wit;

Mo to strike out ans & Ord & leave for plff to amd. pet.

Tuesday March 20th 1855

The plaintiffs motion to strike out the answer herein being submitted to the Court, and the Court being fully advised of and concerning the premises thoth order that said motion be overruled Leave given plaintiffs to amend petition.

And afterwards on the 21st day of March A D 1855 the following amended petition was filed; to wit;

Amended Petition

The plaintiffs compose the firm of Mercer & Antelo doing business under that style and as an amended petition by leave of Court state;

That defendant is indebted to them for money by them paid laid out and expended to his use & benefit and at his request in the sum of Two hundred & twenty & 16/100 dollars with interest since the 20th of February A D 1855.

That at the request and for the accommodation of Defendant said Mercer & Antelo accepted and at maturity paid his draft on them which is annexed to the original petition dated Oct 1st 1852 payable four months after date for Seven Hundred and sixty dollars payable to his the drawers order; and the defendant has only placed them in funds on account of their said acceptance in the sum of Six hundred

(6)

and four dollars & 94 cents which amount being deducted leaves the balance due to plaintiffs as above stated $220 16/100 dollars and interest; which defendant has since repeatedly promised to provide for & pay but has neglected and failed so to do And therefore plaintiffs ask judgment by Hitchcock their atty.

J. A. Kason acting for plaintiffs & being specially informed respecting the matters set forth in the petition states that he believes the foregoing amended petition & matters therein as stated are true J. A. Kason.

Sworn to before me this 21st March 1855

C. A. Hicks clk

And afterwards the following further proceedings were had in this cause to wit;

March Term 1855 Tuesday April 17th 1855

Leave to make new affd to amd pet & same made Mo to set aside amd pet & subsequent proceedings thereon Overruled.

On motion of the plaintiffs leave is given them to make affidavit to their amended petition and same made. thereupon the motion to set aside amended petition and subsequent proceedings thereon being submitted to the Court and the Court being fully advised of and concerning the premises doth overrule said motion.

Affidavit to amended Petition

Affidavit to amended petition

Henry Hitchcock attorney for said plaintiffs makes oath and says that he believes the foregoing amended petition and the matters therein as stated are true. Henry Hitchcock

Sworn to before me this 14 April 1855

C. A. Hicks clerk

And afterwards on the 21st April 1855 the following Answer to amended petition was filed;

The defendant for answer to the

7

Answer to amd pet

amended petition of the said plaintiff denies that he was at the time of the commencement of this action or now is indebted to the said plaintiffs in the sum of two hundred and twenty 4/100 dollars or in any other sum of money for or on account of the matters stated in said amended petition or for or on account of any matters whatever. The defendant further answering denies that the said plaintiffs at the request and for the accommodation of the defendant accepted and at maturity paid the draft of the defendant described in said petition and alleges that said draft was drawn by him & accepted & paid by the said plaintiffs under the following circumstances viz: that at the time of the drawing of the said draft the said defendant shipped to the said plaintiffs as consignees One Thousand gallons of Castor Oil which naturally would and as defendant believes in fact did come to the possession of the plaintiffs prior to the acceptance maturity & payment of said draft by the plaintiffs and that the said Defft drew said draft and the said plaintiffs accepted and paid the same in part payment of the amount and value of such consignment of Castor Oil and in consideration thereof and not for any other consideration or for any other reason or on any other account whatever to the knowledge or belief of the defendant: that at the time of such consignment the said defendant did not in any manner restrict the said plaintiffs in the sale of such Castor Oil either as to time or price and that it became and was the duty of the said plaintiffs to sell and dispose of such Castor Oil in a reasonable time and for a reasonable

8

price; that at the time of the receipt of such Castor Oil by the said plaintiffs and for a long time thereafter such Castor Oil was of the value of One Dollar or over per the Market per gallon and amounted to much more than sufficient to pay the amount of said draft and the expenses attending the shipment & sale of such oil and the commissions of the Plaintiffs upon such sale and that the said plaintiffs have never in any manner accounted with and paid to the defendant the amount or value of said Castor Oil other than by the acceptance & payment of said draft; and the defendant denies that he has only placed the said plaintiffs in funds on account of their said acceptance and payment of said draft in the sum of Six hundred & four dollars and ninety four cents but alleges that the said plaintiffs accepted and paid said draft with funds in their hands belonging to the said defendant to an amount more than sufficient to pay the amount of said draft & on account thereof. The defendant for further answer to the amended petition of the plaintiffs states that at the time of the drawing of the draft mentioned in said plaintiffs petition he shipped to the said plaintiffs as consignee One thousand Gallons of Castor Oil then of the value of One thousand dollars and over which he is informed & truly believes was received by the said plaintiffs prior to the acceptance & payment of said draft by them; that said draft was drawn by the defendant & accepted and paid by the plaintiffs upon and in consideration of such consignment and not for any other consideration or upon any other

(9)

account; that at the time of such consignment to to the said plaintiffs, the said defendant did not in any manner restrict the said plaintiffs in the sale of such Oil either as to time or price and that it became and was the duty of the said plaintiffs to sell said Castor Oil within a reasonable time and for a reasonable price; that at the time of the receipt of said Oil by the plaintiffs & for a long time thereafter the Market value thereof in Market was One dollar per gallon and over which was a reasonable price that the said plaintiffs contrary to & in violation of their duty as such consignees neglected to sell said Oil within reasonable time & for a reasonably price but on the contrary thereof did not sell the same until about One year after the receipt thereof by them and then at the price of about Seventy cents per gallon (as he is informed by the said plaintiffs not having any other information on the subject of the time of sale or the price obtained except from said plaintiffs the has no knowledge of the truth thereof except the statements of said plaintiffs whereby and by means of which the said defendant suffered great loss & damage amounting to the sum of about four hundred dollars and which said loss and damage he now recoup against any claim or demand of the said plaintiffs on account of the acceptance and payment of said Draft and hereby sets up said claim the same in bar of the claim of the said plaintiffs to the amount of such loss & damage so sustained The defendant for further answer to the amended petition of the said plaintiffs states and alleges that at the time of the commencement of this action the said plaintiffs were and still are justly

(10)

indebted to the said Defendant in the Sum of One Thousand dollars and over for and on account of One Thousand Gallons of Castor Oil had and received by the said Plaintiffs of and from the said Defendant at their request of the value of One thousand dollars or over about the Month of October A.D. 1853, which said Castor Oil the said Plaintiffs have appropriated to their own use & benefit & had & done prior to the commencement of this action after allowing to the said Plaintiffs the amount of said draft paid by them and the amount paid by them for the transportation of said Oil having a balance due the said Defendants of at least the Sum of Two hundred Dollars; and the said Defendant will set off the said Sum of One thousand dollars being the value of said Castor Oil, and will set off the price and value of said Castor Oil against the demand and claim of the said Plaintiffs and hereby ~~demurr~~ does set off the same, and claims a judgment in his favor against said Plaintiffs of the amount of Two hundred Dollars together with his costs & charges

R. C. Bland
Defts Atty.

County of St. Louis }
Washington } F. Adams the defendant being duly sworn says that the foregoing answer & the matters therein as stated he believes to be true

F. Adams

Sworn & Subscribed this 21st day of April A.D. 1855 before me

C. H. Dick, Clk

And afterwards to wit on the 21st day of April 1855 the following Demurrer & Offset was filed to wit;

(11)

Demurrer to Offsett.

Plaintiffs demur to the so called offsett, set up in and being the latter part of defendants answer to the amended petition herein;

Because the facts alleged by way of offsett & upon which defendant claims the same are not sufficient to constitute a legal offsett nor entitle the defendant to set up the same in this action

Because it does not appear from said allegations respecting said offsett that any indebtedness from plffs to Deft existed, or any contract or agreement express or implied for the payment of any sum for said Castor Oil by said plaintiffs; nor that any liquidated sum was or is due from plaintiff on account thereof,

Because the alleged facts upon which said offsett is based if true as alleged could render pl'ffs liable to deft if at all only in an action against them by defendant for damages for said alleged conversion and appropriation of said Castor Oil to their own use and cannot be legally set up by way of offsett.

And because said defendants having in the preceding portion of said answer set up a claim against plffs for unliquidated damages in recoupment, which claim he expressly alleges to have arisen out of the entire transactions between said parties as set forth by him, he cannot also set up a double claim for offsett to a still greater amount purporting and by him alleged to have arisen out of the same entire transaction, and on its face inconsistent with and contradicting said claim for accoupment & the facts alleged in support thereof

By Hitchcock their atty.

And afterwards the following further proceedings

12

Demurrer to offsett sust.d

were had in this cause to wit;

March Term 1855 Thursday May 10" 1855

The plaintiffs demurrer to the defendants offsett herein being submitted to the Court and by the Court fully understood it is considered by the Court that said demurrer be sustained."

And afterwards the following further proceedings were had in this cause to wit;

October Term 1856 Thursday December 4" 1856

Jury & Judgt.

Now at this day come the parties by their respective attorneys, and thereupon the defendant files an affidavit, and moves the Court for a continuance of this cause which motion is by the Court here overruled: and thereupon come also a jury to wit; James Hobbs P S Merrill Alex Sues John Rowe Chs Mehl D Harvey Wm Schaerenghausen Andreas Krug Conrad Wetter D Schumacher George A Tennell & P H Wright twelve good and lawful men who being duly elected tried and sworn the issues herein joined well and truly to try, the trial progressed and being finished the jurors aforesaid upon their oaths aforesaid say they find for the plaintiffs and assess their damages at the sum of two hundred and fifty eight dollars and four cents; therefore it is considered by the Court that the plaintiffs recover of the defendant the damages aforesaid as assessed and also his costs herein expended and have execution therefor.

And afterwards the following further proceedings were had in this cause to wit;

Monday January 12" 1857

The plaintiffs come by their attorney and

13
New trial refused.

remit the sum of Seventy Seven cents of their judgment herein, and thereupon it is ordered that the defendants Motion for a New trial herein be overruled.

And afterwards on the 20th February 1857 the following Bill of Exceptions was filed herein.

Bill of Exceptions.

Be it remembered that this cause came on to be heard at this same term before this Court, the plaintiff to maintain the issue on their part called as a witness who was duly sworn

John T. Tracy, John T. Tracy testified

I was in October 1854 in the employ of Gutman Robinson & Co of this City who were correspondents of plaintiffs. As plaintiffs agents and under written instructions from Plffs which I saw Gutman Robinson & Co directed me to go and collect of defendant the amount of the account marked "A" now shown me. I called on defendant more than Once in the fall of 1854 & presented said account "A" and requested payment. Defendant examined said account "A", never made any objection to it said he would settle it. He afterwards said he would ship Castor Oil to plaintiffs to meet it. I afterwards showed Deft the paper marked "B" now shown me, he said he would deliver the oil, but he never did so. This paper marked "A" is the same one presented by me to deft & by him examined, he said he would settle the demand, made no other objection or reason for not doing it then but something about not being able to do so at that time. Deft never settled it to my knowledge.

Plffs then offered in evidence said paper

(14)

marked A. Deft objected to this evidence as incompetent under the issue ~~to which Deft~~ The Court overruled the Objection to which Deft excepted & the paper A was read to the jury

Exhibit "A" Mr. W F Adams

In a/c current &c Int to 20 Febry 1854.

with Mercer & Antelo

1852	To our acc yr dft for yrself	4 Feby 1853	$ 765 00.381	$ 48 26
Oct 11	" Interest		65 10	
1854 Febry 20			$ 825.10	

Cr

1854 Febry 20	By nett prds Sales No 1	6 aug 1854	" 604.94 16	$ 16 84
	Cash this day due Mercer & Antelo		$ 220.16	$ 65.10

E E Philada 20" Febry 1854

To Balance Cash 20 Febry 54" as above $ 220.16

Interest to date 252 days " 9.24

Cash this day due Mercer & Antelo $ 229.40

E E Philadelpa 30" Oct 1854

Mercer & Antelo

Pr John H Geyer

The plffs here rested their case.

The Defendant offered and read in evidence to the jury the said order marked B and rested his case;

Philadelphia Sept. 13 1854

Exhibit "B" Mr W T Adams

St. Louis Will please pay to Mess Yeatman & Robinson & Co Two hundred & twenty seven 86/100 Dolls say $ 227 86/100 in Caster Oil of his brand or Lard Oil at the fair market value & charge the same to

Yr obsts

Mercer & Antelo.

(15)

The foregoing contains all the evidence offered or given on the trial of said cause,

The Court on its own motion gave the Jury the following instruction to wit!

Instruction of the Court, given.

If the jury believe from the evidence that when the plaintiffs accepted the draft in question the defendant had not put the plaintiffs in funds to pay the same and did not so put him in funds thereafter, and that the plaintiffs paid the same and were only in part reimbursed therefor by defendant then they should find for ~~defendant~~ the plaintiffs the balance due and may allow interest on said balance from the time the same was demanded ~~of the Defendant~~ of the defendant at the rate of six per cent per year. The burthen of proof is upon the plaintiffs.

The jury rendered a verdict for the plaintiff and ~~also~~ the Defendant afterwards in due time filed a motion for a new trial of which the following is a copy.

Motion for a New Trial

And now comes the defendant and moves the Court to set aside the verdict and grant a new trial in this cause for the following reasons to wit;

1st Because the verdict was against the instructions of the Court

2d " Because the verdict was against the evidence

3d Because the verdict was against law,

Bland & Swan atty's for Deft

Which the Court overruled & denied and the defendant duly excepted.

And because none of the exceptions so offered and made on the trial of said cause appear on the record therefore on the prayer of the

(16)

defendant the Judge of said Court hath signed this Bill of Exceptions according to the Statute in such case made & provided in this same term

Samuel Treat Judge (Seal)

And afterwards the following further proceedings were had in this cause to wit;

Tuesday February 24" 1857

Appeal granted

The defendant comes by his attorney and files an affidavit for an appeal herein, and on his motion an appeal is allowed him to the Supreme Court from the judgment herein rendered, whereupon the defendant files an appeal Bond with Washington F Adams as principal and George W Putnam and Charles D Colman as sureties which Bond is acknowled by the obligors and approved by the Court.

Which affidavit & Bond are in the words and figures following to wit;

Affidavit for Appeal

Washington F Adams the defendant in the above entitled action being duly sworn deposes and says that the appeal in this action is not made or taken for vexation or delay but because the affiant believes that the appeal lant is aggrieved by the judgment of this Court

Sworn this 21st day of Feby 1857 before me

W. F. Adams

W Hicks clk

Appeal Bond

Know all men by these presents that we Washington F Adams as principal and George W Putnam and Charles D Colman as sureties are held and firmly bound into Anthony J Mercer & David Antello in the sum of ——— dollars for the payment of which well and truly to be made we bind ourselves, our heirs exec-

(17)

-utors and administrators jointly and severally firmly by these presents. Sealed with our seals and dated at St. Louis this 18th day of February AD 1857

The condition of the above obligation is such that whereas Washington F. Adams has appealed from the judgment rendered against him and in favor of Anthony J. Mercer & David Antelo in the St. Louis Court of Common Pleas for the sum of —— dollars & —— cents together with costs

Now if the said appellant will pay all costs and damages that may be awarded against him occasioned by such appeal and shall prisecute his appeal: and shall perform such judgment as shall be given by the Supreme Court, and such as the Supreme Court may direct the St. Louis Court of Common Pleas to give: and shall if the judgment or any part thereof be affirmed comply with and perform the same so far as it may be affirmed and pay all damages and costs which may be awarded against him by the Supreme Court then this obligation shall be void otherwise to remain in full force & effect

Washington F. Adams. (Seal)
George W. Putnam (Seal)
Charles D Colman. (Seal)

(18)

State of Missouri
County of St. Louis } ss. I Charles W. Hicks
Clerk of the St. Louis
Court of Common Pleas within and for the County aforesaid certify the above and foregoing to be a full true and complete transcript of the record and proceedings in the above entitled cause as fully as the same remains in my Office

In Testimony whereof I hereto set my hand and affix the Seal of said Court at Office in the City of St. Louis this Second day of April A.D. 1857

C. W. Hicks
Clerk

Index to Transcript

Petition	Page	1
Summon & Shffs Return	"	3
Leave to amend pet & same done by changing William to Washington & Answer	"	4
Mo to strike out ans &c Ord. & leave for pltff to amd. pet Amended Petition		5
Leave to make new afft. to amd. pet & done. Mo to set aside amd. pet & proceedings Ord.		6
New affidavit to Amd. Pet	"	6
Answer to amended Petition & Offset	"	7
Demurrer to Offset	"	11
Same sustd. & Jury trial & Judgt.	"	12
New trial refused & Bill of Exceptions	"	13

Exhibit "A" & B " 14
Instructions given by the Court " 15
Motion for a New Trial " 15
Appeal granted affidavit for appeal " 16
Appeal Bond " 16

93 ~~88~~

(10)

Oct. Term. 1858

John C Mercer and
Anthony J. Antelo. reapt.

vs Transcript

Washington F. Adams apt.

Appeal from St. Louis Court of
Common Pleas

Filed 9 October 1857
(Wm. S. Glanville Clk.
Bland & Colman

$4.75 paid by Deft
Ex.

93 ~~88~~

Mot. to affirm. Mot. to dis. / order, mot. to reinstate, order / opgt. error / forever /
argued & submitted / Rev. & remanded 18 Dec. 1858 - B.p. 523 /

Mercer & Antelo, (pl'ffs) Respondents
vs
Washington F. Adams (deft) appellt

In the Supreme Court of Missouri
October Term 1857
Appeal from St Louis Court of Common Pleas

The above named respondents by their attorney move the Court herein to dismiss the appeal taken in this cause:

Because said appeal being returnable to the present term of this Court the transcript & record herein were not filed in time according to law:

Henry Hitchcock
Atty for Respondents

No 93

Mucu & Antelo

v

W. F. Adams

Supreme Court – Oct 7/57

Mo: to dismiss

Hitchcock

for respts

Filed 22 Oct. 1857.

Wm S Glanville

Ck.

John C. Mercer and
Anthony J. Antelo - Appellees -
vs
Washington F. Adams - Appellant -

In the Supreme Court of the State of Missouri - October Term 1857.

St. Louis County ss:

Charles D. Holman being duly sworn, says, he is one of the Attorneys for the Appellant in the above entitled cause, and that his Law Partner now is, and for the week last past has been, absent from this City, on professional business, and will continue absent, probably, about two weeks longer; that the Law Partner of this deponent has had the principal charge of this case, Peter E. Bland Esqr; that the Appeal in this case was taken sometime in the month of February last, and this deponent in good faith supposed and believed that the Manuscript therein was returned to and filed at the last March Term of this Court, and so believed, until the day the same was filed in this Court, when this deponent for the first time learned that it was not so filed, and immediately caused the same to be so filed; that this deponent so learned for the first time that it was not so filed, from an examination of the Docket of this Court as published, by the Clerk of this Court, for the purpose of learning what cases he was interested in upon said docket; that immediately on learning that this case was not upon said docket, he caused said

transcript to be returned and filed in this Court, and he would have had the same done earlier had he not have supposed the same had been already filed therein, and the delay in filing the same was owing entirely to such misapprehension; that said Appeal was taken in good faith, and not for delay; that deponent for the first time learned of the application to dismiss said appeal on Friday evening last, too late to make application for the restoration of said Appeal on that day, and deponent was engaged professionally all day on Saturday last, so as to be unable to do so on that day, or until the present time; that deponent has made application to the Attorney for the Appellees to reinstate said appeal, which he declined to consent to have done; & further saith not -

Sworn this 26th day of October 1857. before me -

Wm S Glanville, Clk. Sup. Court.

Chas. D. Colman

In Supreme Court - October Term 1857 -

Mercer & Antello - vs Washington F. Adams.

Affidavit in support of motion to set aside order dismissing Appeal -

Bland & Colman Attys for Appellant.

John C. Mercer and Anthony I. Antello - Appellees -
vs
Washington F. Adams - appelt -

In the Supreme Court of the State of Missouri - October Term 1857 -

And now at this day comes the said Appellant by his Attorneys, and moves this Court to set aside the order of this Court, made on or about the 23d day of October inst, 1857, dismissing the appeal in this action for the reasons and causes stated and set forth in an affidavit of Charles D. Colman herewith filed, and also upon the ground that said appeal should not have been dismissed for the cause alleged in the motion made by the appellees in that behalf, there being no authority for the dismissal of said appeal, for any such cause; or for such other or further Rule, order or relief in the premises as the Court shall think proper to grant therein -

October 26th 1857 -

Bland & Colman
Attys for Appellant -

93

John C. Mucer &
Anthony I. Antelo

vs

Washington F. Adams.

Motion to set order
dismissing appeal and
affidavit in support &c:

Bland & Colman
Attys for Appt.

Filed 26 Oct. 1857
Wm S Glanville
C/c

Mercer & Antelo
vs
Washington F. Adams

In the Supreme Court
State of Missouri
October Term, 1857

Plaintiffs move the Court to dismiss the appeal granted in the above cause

Because said ~~[illegible]~~ appeal was improvidently granted, said defendant (as appears by the record in this case) never having complied with the statutory provisions authorizing such appeal to be taken — In this — That no such bond as required by law has ever been filed in said cause in the Court below:

Because the defendant upon his application for an appeal filed an instrument purporting to be a bond such as required by law in such case, and purporting to secure said plaintiffs in the amount of such ~~judgment~~ damages & costs as might be awarded by the Supreme Court: which bond though approved by said Court of Common Pleas and made part of the record in this cause, is not such as by law in such case required

Therefore plaintiffs pray that this Court make an order dismissing said appeal or requiring said defendant to file such bond as required by law, in this Court, ~~and~~ and in default thereof said appeal to be dismissed —

By Henry Hitchcock
Pl'ffs Atty

93

Mucci & Antelo

v

W. F. Adams

Mo. to dismiss appeal

Hitchcock p.q.

Filed 30 Oct. 1857

Wm. S. Glanville

Ck.

In the St. Louis Court of Common Pleas

December 24th. 1867.

John C. Mercer & Anthony J. Antelo

vs. F.

Washington F. Adams.

The defendant this day comes into Court and by his attorney moves for leave to file a new appeal bond herein, and said leave being granted, the ~~plaintiff~~ defendant files a bond with himself as principal and George W. Putnam and Chas. D. Coleman as sureties, which bond is for the sum of $525.00 and being here in open Court acknowledged by the obligors, is approved by the Court.

A true copy from the record
Witness my hand and the seal of said
Court the day and year
above written

A. N. Hicks

Clk

John C. Mercer Vol.

v.

Washington F. Adams

Bond for Costs &c.

Filed 24 Decr. 1857

Wm S Glanville Ck

John C. Mercer &
Anthony I. Antelo
vs
Washington F. Adams.

In the Supreme Court of
the State of Missouri -
March Term 1888 -

Now now at this day comes the said defendant & Appellant, & says that in the Record and proceedings aforesaid, and also in giving the Judgment aforesaid, there is manifest error, in this, viz: that by the Record aforesaid, it appears that the Judgment aforesaid in form aforesaid given, was given for the said Plaintiffs and against the said defendant, whereas by the Law of the Land said Judgment ought to have been given for the said defendant and against the said Plaintiff; also that there is error in this viz: that the Court erred in admitting illegal & improper evidence on the Trial of the cause; also that there is error in this, viz: that the verdict of the Jury is contrary to evidence and unsupported by evidence; also that there is error in this viz: that the verdict of the Jury is contrary to Law; there is also error in this, that the Court erred in refusing a new trial in the case; And the said defendant prays that the Judgment aforesaid, for the errors aforesaid and other errors appearing in the Record and proceedings aforesaid may be reversed, annulled & altogether held for naught, and that he may be restored to all things which he hath lost by occasion thereof &c:

Bland & Colman
Attys for Appellant.

Now come said respondents by their atty and say that there is no such error in the said Record and proceedings or in the judgment in said cause as by said appellant alleged

Filed 4 Novr. 1888.
Wm Glasscock Clk

Henry Hitchcock
atty for Respts

No ~~188~~ 93

John C. Mercer &
Anthony I. Antelo
vs
Washington F. Adams

Assignment of Errors -

Bland & Colman
Attys -

Filed 23 April 1858.
Wm S Glanville
Ch

John C. Mercer et al. — Appellees — vs Washington F. Adams — Appellant —

In the Supreme Court of Missouri — Oct. Term 1858 — Appellants Statement of case —

This was an action commenced in the St Louis Common Pleas Court; An amended Petition was filed, alleging an indebtedness from Defendant to Plaintiffs on account of an alleged acceptance of a Bill of Exchange by them "at the request & for the accommodation of the Defendant"; and further alleging that "Defendant has only placed them in funds, on account of their said acceptance, in the sum of six hundred and four dollars and 94 cents" —

The answer of the Defendant denies that such acceptance was at the request or for the accommodation of the Defendant, and denies all indebtedness to the Plaintiffs; Also Seperately sets up damages by way of Recoupment, for alleged misconduct in relation to the Sale of certain Castor Oil, growing out of the Same transaction; And also Seperately setting up an Offset, of one thousand Dollars, for "One thousand gallons of castor Oil had & received by the said Plaintiffs, of & from the said Defendant, at their request, of the value of one thousand dollars" —

The Plaintiffs filed a Demurrer to such Offset, which was sustained by the Court —

The cause was afterwards brought to a trial, and

the only evidence given by the Plaintiffs upon the issue on their part, was of the presentation of a certain account to the Defendant; an examination of such account by the Defendant; that he made no objections to it, but "said he would settle it;" "said he would ship Castor Oil to Plaintiffs to meet it," but had never settled it to the knowledge of the witness, and then offered such account in evidence which Defendant objected to, the Court overruled the objection & Defendant excepted, the Paper was read -

The Plaintiffs thereupon rested, & the Defendant read in evidence an order drawn by Plaintiffs upon him for the payment of the amount of their alleged claim, in Castor Oil of his brand, or Lard oil, at Market price -

(See account & order on page 14 of Transcript)

No other evidence was given; the Court, of its own motion, gave the Jury the following instruction, being the only one given, viz:

"If the Jury believe from the evidence, that, when the Plaintiffs accepted the draft in question, the Defendant had not put them in funds to pay the same, and did not so put him in funds thereafter, and that the Plaintiffs paid the same, & were only in part reimbursed therefor by defendant, then they should find for the Plaintiffs the balance due, and may allow interest on said balance from the time the same was demanded of the defendant, at the rate of six per cent per year. The burthen of proof is upon the Plaintiffs" -

A verdict was rendered for the Plaintiffs; a Motion for a New Trial filed & overruled; a Bill of Exceptions filed; and an appeal brought to this Court -

Bland & Colman
Attys for Appellant

No. 93 –

In Supreme Court –
Oct. Term 1858 –

John C. Mercer
et al –

vs

Washington F. Adams

Statement of Case
for Appellant –

Bland & Colman
Appltt Attys –

Filed 8 Nov. 1858,
W S Glanville
Ch

John C. Mercer et al — Appellees
vs
Washington F. Adams — Appellant

In the Supreme Court of Missouri — Oct. Term 1858 — Points and Brief on part of Appellant —

I. The Court below erred in Sustaining the Demurrer of the Plaintiffs, to that part of Defendants Answer setting up the Offset —

1. It was not filed in time — Code 1849 Art 6, 19 — This may not be an objection to be made in this Court, but we make it, as the Demurrer was in fact, filed, and decided upon, Ex parte, & without any knowledge on our part —

2. The matter set up in that part of the answer demurred to, constitutes a good and valid claim in favor of the Defendant against the Plaintiffs —

3. Such matter, is Seperately stated, and Sufficiently certain, to be generally understood —

The grounds of Demurrer assigned, are not any of them well taken; the Court must determine the Sufficiency of every pleading by itself, and of every Seperate defence, also; and cannot look at another pleading, or another part of the same pleading, for the purpose of determining the sufficiency or insufficiency of the one, or part, demurred to —

4. The only question which can arise upon Demurrer, is the Sufficiency of the pleading demurred to, both as to matter & form of Statement —

If inconsistent defences are set up, or the same matter in different forms, it can only be reached by motion —

II. The Court below erred in allowing the account marked "A", to be read in evidence to the Jury —

1. It neither proved, or tended to prove, the issue on the part of the Plaintiffs, which was, that they accepted a Bill of Exchange, in the manner and under the circumstances alleged in their Petition —

The Plaintiffs being acceptors of a Bill of Exchange, are, presumptively, primarily liable to pay the same, & cannot recover against any other party to the Bill, without proving, that they accepted for accommodation & without funds —

The Paper read in evidence, neither established, or tended to establish any such facts —

2. It did not appear that such paper was made out by, or at the instance of the Plaintiffs —

3. It did not appear that such Paper was a full Statement of all the transactions between the Parties; or that the Oil therein credited, was the only Oil received by Plaintiffs of Defendant —

4. The whole gravamen of the Petition, is founded upon the allegation of the acceptance of a Bill of Exchange by the Plaintiffs, at the request & for the accommodation of the Defendant —

There is no claim in the Petition upon an account, or for money paid generally, but only for money paid on a Bill accepted for the accommodation of Defendant —

How does, or can such Paper prove, or tend to prove the fact, that such acceptance was at the request, or for the accommodation of Defendant, or without funds? —

III. The Defendant introduced and read in evidence the order of the Plaintiffs drawn upon him for payment of their claim in Castor oil, or Sand oil at Market Value, and the possession of this order by the Defendant, and its production upon the trial, is presumptive evidence of payment thereof by him.

If the Defendant had obtained the possession of the order without payment, it was a matter easily proved by the Plaintiffs; and the testimony of the only witness sworn, throws no light upon the subject; he does not speak of the order; he only says, that the demand has not been paid, to his knowledge. If it had not been paid, how came the order in Defendants possession?

IV. The Court below erred, in the instruction given to the Jury upon his own Motion.

1. It does not present, for the consideration of the Jury, the issue raised upon the Petition of the Plaintiffs, as to the acceptance of a Bill of Exchange, for the accommodation of Defendant.
2. It assumes, upon its face, that such Bill of Exchange or Draft, was accepted by Plaintiffs at the request of and for the accommodation of the Defendant.
3. It submits to the Jury a question of fact, to be determined by them, about which there was no proof, viz: as to whether the Plaintiffs accepted the Draft in question, without funds.

4. It assumes, that if they accepted without funds, & had not been put in funds, the Defendant was liable, without reference to the question, whether such acceptance was at the request, or for the accommodation of the Defendant —

5. It charges the Jury that "the burthen of proof is upon the Plaintiffs," without informing the Jury in what respect, such "burthen of proof is upon" them —

It clearly appears from the Record, that the case has not been fairly disposed of, or the rights of the Parties fully ascertained and determined; and such being the case, the Judgment should be reversed & a New-Trial had —

Bland & Colman
Appltts Attys —

No. 93
In Supreme Court —
Oct. Term 1858 —

John C. Mercer
Etal —
vs
Washington F. Adams

Brief & Points on part of Appellant —

Bland & Colman
Appltts Attys —

Filed 8 Novr. 1858.
W. S. Llanville
Cl.

Warren & Noble
vs
N. F. Adams

In the Supreme Court of Missouri
October Term 1858
Appeal from St. Louis Com. Pleas

Respondents' Statement of the Case.

Pl'ffs sue defendant for a balance of $220.16 due them from him on a/c of a draft, drawn by defendant on, & accepted & paid by, plaintiffs, for defendant's use &c.

The draft was dated October 1st 1852, for $760: and plaintiffs admit a partial payment thereon, leaving $540: principle and failure to pay the balance:

Defendant denies indebtedness generally — admits the drawing, & the acceptance and payment by pl'ffs of the draft — but sets up facts by way of recoupment — That at the date of the draft defts shipped to pl'ffs [at Philadelphia] One thousand gallons of Castor oil, on which consignment said draft was drawn: That no restrictions were put upon pl'ffs as to the disposition of said oil, & that it was their duty to have sold the same within a reasonable time & for a reasonable price: That plaintiffs received said oil before making of said draft — That said oil was then & afterwards worth One dollar per gallon — That plaintiffs were thereby placed by defendant in funds sufficient for the payment of sd draft — & that ~~not~~ plaintiffs have now in any manner accounted with defendant for said oil save by the acceptance & payment of said draft:

— Defendant's answer also alleged an offset agst plaintiffs based on the same shipment: To which offset plaintiffs demurred & said demurrer was sustained. No other offsets or payments save by said shipment was alleged by defendant

At the Trial plaintiffs introduced John

T. Tracy, — who proved that as agent of plaintiffs he presented to defendant an account marked (A.) showing a balance of Two Hundred & twenty 18 dollars with interest thereon, due plaintiffs, which defendant examined & promised to pay; ~~[illegible]~~ and afterwards said he would ship oil to plaintiffs for the amount but never did so:

Witness afterwards showed defendant an order (B.) from plaintiffs for the amount of said ~~[illegible]~~ balance & interest payable in castor oil at fair market value: which defendant again promised to deliver to the payees of said order, agents of plaintiffs: — but never did so: —— The order was not accepted in writing.

Deft excepted to the introduction of said a/c marked "A." which was offered by plaintiffs & admitted by the Court:

Deft introduced no testimony whatever except the order "B." itself above mentioned:

The Court instructed the jury that "if they believed that when plaintiffs accepted the draft in question the defendant had not put them in funds to pay the same, & did not so put them in funds thereafter, & that plaintiffs paid the same & were only in part reimbursed ~~[illegible]~~ therefor by defendant, then they should find for the plaintiffs the balance due therefor, & might allow interest at 6% per an. from the time the same was demanded: — and that the burthen of proof was on the plaintiffs".

The jury found for the plaintiffs the sum of $258 $\frac{04}{100}$.

Hitchcock
for Respondents —

Moreau & Antelo Respts
"
Adams — appellt

Plaintiffs make the following points

1 — The demurrer to the offsets was properly over-ruled —

2. The order "A." was properly admitted in evidence.
— Because it bore directly on an issue made by defendant himself, viz: that plaintiffs had never accounted with him for said shipment of 1000 galls. of castor oil save by acceptance & payment of said draft:
— it appearing from said a/c, which was admitted by deft to be correct, what was the disposition of said oil, the proceeds thereof & the balance due from deft —
— Because, the demand being generally for money paid for defts use on the draft in question, and the a/c showing that said acceptance & the oil alleged by deft to have been shipped on a/c thereof were the matters in question, it was directly relevant —

3. The instruction given covered the only issue in the case on which any evidence was given: and was correct —

Hitchcock for respts

93 Oct 7/1858

In the Supreme Court

Mercer & Antelo
Respts

v

W. F. Adams
Appelt

Statement of case for Respts

Filed 8 Novr. 1858.
W. S. Glanville
Cl.

Hitchcock for Respts

J. C. Mercer & al
vs.
W. F. Adams
} Appeal from the St. Louis
Court of Common Pleas

This judgment will be reversed because the Court improperly sustained the demurrer to the defendants plea of set-off: The plea set forth a sufficient cause of action and would have withstood a demurrer under the old practice.

The account (A) was properly admitted in evidence, as the proof in support of it, tended directly to maintain the plaintiffs cause of action.

The order to which reference is made by the defendant was not on his suspicion, but it seems by the record that it was produced by the plaintiffs.

We see no error in the instruction given by the court.

Judgment reversed & the cause remanded the other judges concurring

Wm Scott

Mercer & al
vs
Adams

Opinion

Rev. & Remanded

Filed 18 Decbr. 1858.
Wm S Glanville
Ck.

x .x