May, Robert A. et al v. Keithley, Samuel W. 1859 St. Charles 3rd 424/2

Old Box 602/None

Scott
F 58
O 59
R & R
A = SS & DC Woods

29
220

R & P were sued re: note
judg by default; set aside
in terms of R N/C return
was amended & dismissed
R had a defense
LC = against P $ 943.80

O = court shouldn't have allowed dismissal

The State of Missouri, ss.

The State of Missouri, to the Honorable the Circuit Court in the Third Judicial Circuit **in said State—Greeting:**

WHEREAS, In the record and proceedings in a certain cause lately pending in the Circuit Court held in and for the County of of St. Charles in said State

wherein Samuel W. Keithley was plaintiff, and Robert A. Mary and others were defendants

in a Civil Action manifest error hath intervened, to the great damage of said defendants as by their complaint we are informed.

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

WITNESS, WILLIAM S. GLANVILLE, Clerk of our said Supreme Court, at office in the City of Saint Louis, the fifth day of March in the year of our Lord one thousand eight hundred and fifty-eight.

Wm. S. Glanville,

CLERK.

$1.50 paid by D. C. Woods atty.

State of Missouri
County of St Charles } I. Pen Emmons Jr. Clerk of the Circuit Court of St Charles County have Certified and transmitted a transcript of the record and proceedings in the within named as the same remain of record.

Witness my hand and Seal of Said Court this 13th October 1858

Pen Emmons Jr
Clk

Samuel W. Reilly, Defendant in Error
Robert A. May & ols., Plaintiffs in Error.
The State of Missouri } Error to St Charles Circuit Court.

On the application of the defendants in the above entitled cause it is ordered that the writ of error sued out herein stay execution in said cause on condition, that the plaintiff in error or some responsible person for them, together with two sufficient sureties to be approved by the judge of the Circuit Court, or the Circuit judge, of the County of St Charles, Shall enter into a recognizance to the plaintiffs, before said judge or Court, in a penalty sufficient to secure whatever debt, damages and costs, have been recovered by the judgment complained of, together with the costs and damages that may be recovered in the Supreme Court, conditioned that the plaintiff in error will prosecute such writ with effect, and pay the money that shall therein be adjudged against him by the Supreme Court, or otherwise abide the judgment of such Court therein.

The State of Missouri } I William S. Glanville Clerk of the Supreme Court of said State certify the above to be a full and perfect transcript of the order of said Supreme Court in the above entitled cause, wherein judgment was rendered by said Circuit Court in favor of said plaintiff against said defendants for the sum of nine hundred and twenty eight dollars & fifty two cents, together with interest and costs, dated 16th day of June 1858, as fully as the same now remains of record in my Office.

Witness my hand and the Seal of said Supreme Court at office in St Louis this ninth day of November A.D. 1858.

W. S. Glanville
Clerk.

State of Missouri
County of St. Charles } The Recognizance of Defendants approved by the St Charles Circuit Court with a copy of the order of approval thereon endorsed is herewith returned.

March 4, 1859
Pen Emmons Jr Clerk

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State of Missouri
County of St Charles } Be it Remembered that heretofore to wit on the 8th of May 1858 a petition was filed in the Office of the Clerk of the Circuit Court of St Charles County in the words and figures following, to wit:

Petition

Sam'l W. Keithley, Plff.
against
R. A. Mayan & Pinckney M. May defds } In the St Charles Circuit Court June Term 1858—

Plaintiff states: that defendants, by their promissory note, herewith filed, dated September the first Eighteen hundred and fifty seven, and due sixty days after date, promised to pay William Keithley the sum of Eight hundred and seventy three dollars and ninety one cents, for value received; and that the said William Keithley, on the 1st day of September Eighteen hundred and fifty seven, for value received assigned in writing and delivered the said note to plaintiff— that the whole of said note, with interest, is due plaintiff, for which he asks judgment— Edwards & Randolph
Attys for Plff.

Affidavit

State of Missouri
County of St. Charles } W. W. Edwards, on oath, says that he believes that the above petition and the matters therein, as stated, are true—

W. W. Edwards

Subscribed & sworn to before me this 8th day of May 1858. Ben. Emmons Jr Clk
By Jno H. Platt D.C.

Promissory note

$873.91 Sixty days after date we or either of us promise to pay to Williams Keithley Eight Hundred & seventy three dollars & ninety one cts for value received as Witness and to bear ten per cent interest from maturity witness our hands & seal. Sept 1st 1857.

attest
W. V. Williams

R. A. May
Pinckney W. May

assignment

On the back of said note is the following endorsement, to wit: For value received I assign the within note to S. W. Keithley. September 1st 1857.

William X his mark Keithley

And on the 10th day of May 1858 the Clerk issued a summons in the following words and figures, viz: The State of Missouri,

Summons

To the Sheriff of St Charles County, Greeting: We command you to summon the defendants R. A. May and Pinckney W. May to appear in the Circuit Court of St Charles County, at the Court House in the City and County of St Charles, on the second monday of June Eighteen hundred and fifty eight, and answer the annexed petition of Samuel W. Keithley plaintiff, and have you then and there this writ. Witness, Ben Emmons Jr Clerk of said Court, with the seal of said Court hereto affixed & D. this 10th day of May 1858.

Ben. Emmons Jr Clerk

Sheriffs Return

And the Sheriffs return is in the words and figures following, to wit: Executed the within writ and petition

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on the within named defendants Robert A May by delivering to him a copy of the within writ and petition in Saint Charles Missouri on the 14th day of May 1858 and on the other within named defendants P. M. May by delivering to him a copy of the within writ in Saint Charles County Missouri on the 14th day of May 1858

Elias C. Stewart Sh'ff

By S. M. Branham Deputy

And afterwards in the Circuit Court of St. Charles County on the 16th day of June 1858 the following proceedings were had in said cause viz:

Judgment

Samuel D. Keithley Pltff

vs

Robert A. May & Pinckney M. May } Promissory Note.

Now at this day appears the said plaintiff by his attorneys and said defendants come not but make default and fail to appear and answer the petition of said plaintiff. It is therefore considered by the Court that said Samuel D. Keithley have and recover against the Robert A. May and Pinckney M. May, the sum of nine hundred and twenty eight dollars and fifty two cents for his debt and damages as contained to be due on the promissory note in the petition mentioned & together with ten per cent interest per annum thereon from this date until paid and costs and that he have thereof execution.

And afterwards in said Court on the 16th day of August 1858. the following proceedings were had in said cause

Filing of motion to set aside judgment

touch: Samuel A. Keithley
v
Robert A. May et al
} Promissory Note.

Motion to set aside judgment filed.

And afterwards in said Court on the 5th day of August 1858 the following proceedings were had in said cause, viz: Samuel A. Keithley
v
Robert A. May et al
} Promissory Note.

Leave to amend Sheriffs return

On motion leave is given the Sheriff to amend his return of the Summons in this cause. Which said return is in the words and figures following, viz:

Amended Return

By leave of the Hon. Circuit Court of St Charles County, I make this my amended return Executed the within writ and petition on of the the within named defendants Robert A. May by leaving a copy of the within writ and petition at his usual place of abode in Saint Charles County Missouri with a free white person above the age of fifteen years and a member of his family on the 14th ~~day~~ May 1858 and on the other defendant Winchey M. May by delivering to him a copy of the within writ in Saint Charles County Mo on the 14th day of may 1858

Elias C. Stewart Sheriff
per Samuel W. Graham deputy

And afterwards in said Court on the 14th day of August 1858 the following proceedings were had in said cause, viz:

Entry of motion to set aside judgment

Samuel A. Keithley v Robert A. May et al. Promissory Note. Motion to set aside judgment and for leave to plead filed. And afterwards

on the 20th day of August 1858 the following proceedings were had in said cause.

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Samuel W. Keithley Plaintiff
v
Robert A. May and Pinckney W. May defendants
} Promissory Note.

Motion sustained

Now at this day appear the parties by their attorneys and the motion of defendants to set aside the judgment herein and for leave to answer coming on to be heard it is considered by the Court that the judgment herein rendered against defendants on the 16th day of June 1858 be and the same is hereby set aside.

And thereupon on motion of said plaintiff by his attorneys it is considered by the Court that said suit be dismissed as to Robert A. May one of the said defendants, And said plaintiff moves the Court for judgment against the other defendant, Pinckney W. May.

Dismissed as to R. A. May

It is therefore considered by the Court that said Samuel W. Keithley have and recover against the said ~~William~~ Pinckney W. May the sum of nine hundred and forty three dollars and eighty cents for his debt and damages ascertained to be due on the promissory note in the petition mentioned together with ten per cent interest per annum ~~thereon~~ till paid and that he have thereof execution.

Judgment

And thereupon said defendants file their affidavit for an appeal to the Supreme Court and tender their Bill of Exceptions to the judgment and proceedings of the Court herein, which Bill of Exceptions is signed by the Court and made a part of the record

Affidavit for appeal filed

Bill of Exceptions allowed

Affidavit for appeal

Said affidavit is in the words and figures following, viz:

Samuel D. Keithley

vs

Robert A. May & Pinkney M. May } In Circuit Court for St Charles County June Term 1858. Appeal Supreme Court.

This affiant Robert A. May, states that the appeal to the Supreme Court in the above entitled cause is not made for vexation or delay but because the affiant believes the appellants is aggrieved by the judgment of the Court.

R. A. May

Subscribed and sworn to before me August 18. 1858.

Ben. Emmons Jr. C.C.

Bill of Exceptions

Said bill of exceptions is in the words and figures following, to wit:

Samuel D. Keithley
vs
Robert A. May & Pinkney M. May } St Charles Circuit Court June Term 1858

Be it remembered that on the 16th day of June 1858 judgment was rendered in the above cause against the defendants for want of an answer, when the court was adjourned to the 3d day of August 1858. only holding 3 days, and on the 5th day of August the defendant Robert A. May and filed a motion (towit)

Motion for leave to amend Sheriffs return &c

Samuel Keithley Plaintiff

vs

Robert A. May, Wm. A Abington & P. M. May Defendants

In Circuit Court for St Charles County June Term 1858.

Robert A. May defendant in the above cause moves the Court for leave for the Sheriff to amend his return on the writ in the above cause, defendant states the return of the Sheriff in the above cause shows that the service of said writ was made by delivering unto the defendant a copy of the writ and petition when in fact the service was made by leaving a copy at his usual place of abode with a member of his family over the age of 15 years, allowing defendants 6 days to plead, he further states that judgment was given on the third day of the term in consequence of the wrong return, he therefore asks that said judgment may be set aside and the defendant have leave to answer according to law

Sidney S. Woods
Atty for defendant —

asking the court to order the Sheriff to amend his return on the writ: which was and overruled but leave given the defendant to file a new motion which was filed on the 11th day of August 1858
S. W which said motion is in the words and figures following, viz:

Motion to set aside judg and for leave to plead

S. W. Keithley, Plaintiff
as
Robert A. May &
P. M. May defendants

} In Circuit Court for St Charles County adjourned term 1858

Robert A. May states that plaintiff obtained judgment against him on the

3rd day of the court in consequence of a wrong return made by the Sheriff that said return has been amended by the ~~plaintiff~~ Sheriff showing that he had 6 days to plead to said cause. Defendant therefore moves the court to set aside said judgment and let him plead on such terms as may be just. Defendant states that the application is not made for delay, but that he has a good defence, that the note ~~sued on~~ was executed to Wm. Keithley the father of plaintiff, that one Thomas Ward sold and delivered to defendant a note on the said Wm. Keithley for three hundred dollars before the note sued on was assigned to plaintiff Defendant further states that there was no consideration from plaintiff to Wm Keithley but the said note was assigned to plaintiff for the purpose of defrauding defendant and his other creditors he the said Wm Keithley being wholly insolvent. R. A. May,

Robert A. May states that he believes the matters and things as stated in foregoing motion is true.

R. A. May

Subscribed and sworn to Aug 11, 1838,

Ben Emmons Jr Clk

On the 18th day of August the motion was sustained by the Court & the return amended and the judgment set aside. When the plaintiff dismissed his suit against Robert A. May

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in the note and took judgment against Pinkney M. May, the defendant excepted to the opinion of the Court and tendered this as his bill of exceptions and prays that the same be signed and maade a part of record.

A. H. Buckner
Judge

State of Missouri
County of St Charles } I. Ben. Emmons Jr clerk of the circuit Court of St Charles County, certify the foregoing to be a true transcript of the record and proceedings in the above entitled cause as the same remains of record in my office.

In Witness whereof I hereto set my hand and affix the seal of said Court this 1st day of October 1838.

Ben. Emmons Jr. Clk.

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3 ~~[illegible]~~

Oct '59

Samuel W. Keithley

v.

Robert A. May sol.

St. Charles Cir. Ct.

Filed 16 Oct. 1858.
Wm S Glanville
Ck.

$4.40 to Benj. Emmons
for this transcript

3 ~~[illegible]~~

Mo. to Stay exn. / bond entered & filed / Supercedeas awarded 8 Nov. 1858. Bp. 496.

Apriqt / Jurisdn / statement by S.C. / Contd / org. & Sub. /

Samuel W. Kathley
vs
Robert A May et al

In the Supreme Court of Missouri Oct Term 1858.

Now comes the dependents by their attorneys (E.B. & D.C Woods) and moves the Court to grant a supersedeas to stay execution in the above entitled Cause in the St Charles Circuit Court June Term A.D 1858. for the following Causes & Reasons viz:

1st Because the Court Commited ~~Judgment~~ error by allowing the plaintiffs to take Judgement the third day of the Court, the dependents not having been personally served with process Rev Statutes of 1855 Page 1223 Sec 7.

2 Because the dependents not being personally served with process, had six days to file their answer Rev. S. P 1231 Sec 24th.

3 Because the New Code of Mo, requires personal service upon one of the dependents by one of the two modes pointed out by the Statute, to make service personal upon the other dependents Rev. S. Page 1223.

4 Because by allowing the plaintiff to dismiss as to Robt. A. May, the note having been made for his benifit, as he having a Set-off

5thly Because the Code of Practice for 1855 compells dependents making the same defence to answer Jointly Rev. S. 1233. Section 14th.

6thly Because the note being Joint, the defence is Joint and the dismissal as to Robt. A. May changed substantially the defence to the action, Amendments to pleadings being allowed only in furtherance of Justice (Rev. S.) Page 1233 Sec 3.

7th Because the sheriffs return being false & Judgement thereon estoped the dependants until the Judgement was set aside on the 18th of August, when the court suppered Judgement the same day.

8th Because when the court set aside the Judgement it revived the rights of the dependants and gave them three days to answer in from the 18th of August

9 Because Rob. A May had filed an answer seting up a depence & set-off which was the answer of all the dependants.

10thly Because the securities are responsible men & the plaintiff insolvent. Robt. A. May the real party in interest would sustain a loss of seven or eight hundred dollars if the Judgement is not reversed.

T. G & D. C Woods atts.
for Dependants

Samuel W. Keithley
vs
Robert A. May. Pinckney
May & others

Motion & reasons to stay Execution

Filed 26 Oct. 1858.
Wm. J. Glannicke
Ck.

Know all men by these presents that we Robert A. May and Pinkney M. May Wm A Abington and Wm M. Allen acknowledge our selves indebted to Samuel W. Keithley in the sum of two thousand dollars to be void upon this condition. Whereas, Robert A. May and Pinkney M. May has appealed from the judgment rendered in the suit of Samuel W. Keithley against Pinkney M. May by the circuit court of St Charles ~~on the~~ county on the 18th day of August 1858. Now if the said Pinkney M. May will prosecute his appeal with due diligance to a decission in the supreme court, and shall perform such judgment as shall be given by the supreme court, or such as the supreme court may direct the circuit court to give and if the judgment of such 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 the appellant by the supreme court.

Robert A May (Seal)
Pinckney M May (Seal)
Wm A Abington (Seal)
Wm M Allen (Seal)

Samuel Keithly

(3)

Robert A. May et al.

Recognizance.

Prince Jr Oct. 1858

Wm Thornton Jr.

State of Missouri
County of St. Charles } In the Circuit Court of St Charles County
January 25. 1859.

Samuel W. Keithley Plaintiff
v. } Promissory Note
Robert A May et al Deptd Now at this day appear said defendants by their attorney and present their recognizance for a supersedeas in this Cause which recognizance is in the sum of Two Thousand Dollars and is executed by said Robert A May and Pinckney M May as principals and William M A Abington and William M Allen as Securities and is approved by the Court

A true Copy from the record

Witness Ben Emmons Jr Clerk of said Court with the seal of said Court hereto affixed this 4th March 1859

Ben Emmons Jr Clk

Keithley
vs
Robert A May et al

In the Supreme Court March Term A D 1857.

Assignment of Error

Now comes the Dependents & says that there is manifest error in the Record and proceedings had in the above entitled cause for the following causes & reasons to wit

1st Because the court committed manifest error, in suffering Judgement before the time had expired for the Dependents to file their answer

2 Because Because the court should not have dismissed ~~at~~ ~~as~~ to Robert A May and give Judgement against the other dependents when Robert A May had filed an answer seting up a set-off and a legal defence to the note.

3 Because the note being Joint our Code compells all of the Dependents to answer Jointly.

4thly Because after the court had set aside the 1st Judgement in consequence of false return made by Sheriff

the time allowed by statute for filing answer had not expired before the second Judgement was taken whereupon the defendants ask that the case be reversed and remanded

D. C. Woods
Atty for Defendants.

There are no such errors in the record & proceedings in this cause as appellant alleges

Edwards & Randolph by R. G. Woodson
for Pf.

Filed 31 March 1859.
Wm L Glanville, C.P.

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Keithley
Robert A. Vs May et. al

Assignment of Error
D. C. Woods

Filed 22 March 1859
W L Glanville C.P.

Lemuel N Keithley
vs
Robt A May et al

In the Supreme Court of Missouri at St Louis Oct Term A D 1859.

Statement of the case

This was a suit on a note for $873.61 & a Judgement by default was taken, which was subsequently set aside upon motion by defendants upon the grounds that the Sheriff had made an improper return. Robt A. May one of the defendants put in an answer with an offset. The plaintiff dismissed as R. A. May, and took Judgement against the other defendants before the statutory time for filing answers had expired. R. A. May was the real party in interest the other defendants being solvent, the plaintiff dismissed as to him, and took Judgement against Pinckney May one of the makers thereby cutting off the defence of the defendants in the nature of an off-set sufficient to cover the Note sued upon. Wherupon they seek relief in the Supreme Court.

D. C Watts
Atty for Defendants.

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Statement of the Case

Samuel W. Keithley
vs
R. A. May et al

D. C. Woods
Atty for
Defendants

Filed October 14. 1859.

Wm S. Glanville
Clk

Samuel W. Keithley
vs
Robt. A May &
Pinckney May

In the Supreme
Court of Missouri
Oct Term 1855.

Defendants Brief

The points in this case, are of a statutory nature, and in brief are as follows.

The 1st error Commited, was the erroneous taking of the Judgement in the lower Court, on the third day of the Court, the defendants not having been served by personal proces. Rev. S. of Mo 1855. Page 1223 Sec 7. Our new Code requires personal service upon one of the defendants, either: First. By reading the writ to the defendant, or delivering to him a Copy of the petition; or Second, By delivering to him a copy of the petition & writ; & where there are several defendants, by delivering to the defendant who shall be first Summoned a copy of the petition & writ, & to such as shall be subsequently Summoned a copy of the writ; or by leaving such copy at the usual place of abode of the defendant, with some white person of his family over the age of fifteen years.

The 2cond error Commited, was the taking of the 2cond Judgement the 2cond day that the 1st

Judgement was set aside, the rights of the defendants having been estopped by the first Judgement were consequently revived by setting the same aside, thereby giving them three additional days to file their answer &c. Rev. S. 1855. P. 1235 Sec 24th.

The third error complained of, was the dismissal of the suit as to Robt. A Bray who had filed his answer pleading a set-off equal to the note sued, upon the Code requiring defendants making the same defence to answer jointly. Page 1233 Sec 14th.

The fourth error complained of, was the note being Joint, the dismissal of the suit as to R. A Bray, (who was in fact the party for whose benefit the note was made) changed substantially the defence to the action; as amendments to pleadings are only allowed in furtherance of Justice. Rev S. 1855. P 1833 Sec 9.

The fifth and primary objection in this case, is, that the note was transferred to the plaintiff (who is insolvent) to cut off the defendants' set-off, which would operate as a hardship, as the other defendant Pinkney Bray is solvent, and if suffered to remain

in its present shape would compell Robt. A May to pay his brother Pinckney the amt. he payed upon said Judgement." We hope under the Circumstances that this honorable Court, will tollerate no such proceeding and will reverse the case and remand it L.C. Woods &

S.S. Woods
Attys. for Dependents

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Samuel W Keithley
vs
R. A May et al

Defendants Brief

List of Authorities
Rev. S. 1855. P. 1223. Sec. 7.
" " " " 1235 " 24
" " " " 1223 " 14
" " " " 1853 " 3

D. C & S. S Woods
Attys for Defts

Filed October 15. 1859.
Wm. S. Glanville
Clk

Samuel W Keithley Plf. } Supreme Court
v } Oct. T. 1859. No 3. of trials
Robert A May et al Def } Error to St Charles Circt Court

Statement of Case

This is an action brought to the June Term 1858 of the St Charles Circuit Court, by the defendants in Error Samuel W. Keithley, on a promissory note, against the plaintiffs in error Robert A May and Pinckney M. May. the joint and several makers of the note. The Sheriff returned that he had made a personal service of the summons on both of the defendants, more than fifteen days before the first day of the June Term

On the 16th day of June the third day of the term, on the motion of plaintiff the Court rendered final judgment by default against both of the defendants.

On the 5th of August the Sheriff by leave of the Court made an amended return to the summons by which it appeared that the service on Robert May was not personal, but by leaving a copy at his abode &c - he again returns personal service on Pinckney May -

On the 20th of August the judgment rendered on the 16th of June, was set aside on the motion & affidavit of Robert May. And on the same day the plaintiff dismissed his suit as to Robert May, And on plfs motion the Court again rendered judgment by default against the other defendant Pinckney May.

Whereupon Robert May files an affidavit for an appeal, but does not complete it; And

afterwards this writ of error is sued out. And the Defendants get a supersedeas from this Court.

Points to be insisted on in Argument

1 There was no error in permitting plaintiff to dismiss as to Robert May and proceed against the other defendant.

2 There was no error in rendering judgment by default against Pinckney May on 20th of August.

by R.G. Woodson for Deft in Error.

No 3. of Trials Oct. 7. 1859.

Supreme Court

Samuel W Keithley

v

Robert A Mayfield

Filed 15 Oct. 1859.
Wm. S. Glanville
Ck.

Statement of the case and points to be argued -
by R.G. Woodson for Def. in Error

Samuel W Keithley Plf. } Supreme Court. No 2. of Trials
v Oct. Term 1859.
Robert A May etal } Error to St Charles Circ. Court.

Brief of Rls. Woodson for Keithley -

The first judgment on the 16th of June was right, as the record then stood. But right or wrong defendants cannot complain of it now, for it was set aside on their own motion.

There was no error in permitting the plaintiff to dismiss his suit, or enter a "nolle prosequi" as to Robert A May one of the defendants and proceed against the others -

1 This was always permitted at Common Law, where the cause of action sued on, was in its nature several - as 1. In all actions ex delicto - 1 Ch. Pl. pg. 99. 5-22.

2. In actions on contracts, where the law severed the contract for the purpose of letting in a personal plea - as of infancy or Bankruptcy - id pg - 62, 51.

3d And even in cases where defendants had only severed in their pleadings see Minor etal v Mechanics Bank 1. Peters 47. see pg. 73 of old.

the note sued on is several as well as joint - it reads "We or either of us"

And our law has made all joint contracts several also. See Rev. Cod. 1855. p 351. 51. 4th. Which will place suits on contracts, for this purpose, on the same footing with suits ex delicto.

2d But this is a question of practice, our code has left no doubt on the point; It is singular how often our Legislature

Legislature has thought proper to mention this subject - and always to say or to imply that where there are several co-plaintiffs or co-defendants, some may be severed from the others & have different judgments - as

1. Every defendant served in time shall plead R.C. § 1222.05 -
2. Where some of the defendants do not appear, and are not served with process, plaintiff may dismiss as to those not appearing & and proceed against the others. R.C. 1225.§ 19.
3. Plaintiff not to be nonsuited by reason of his failure to join all of the defendants parties to the contract on which he sues them, but to have judgment against such as he proves to be parties to it, R.C. 1237.§ 43
4. Judgment may be rendered for or against one of several co-plaintiffs or co-defendants R.C. 1278.§ 2
5. When there are several defendants, and some appear & others make default, an interlocutory judgment by default may be entered against such as make default and the cause proceed against the others R.C. 1278.§ 8.
6 So, also they may be severed for adjudging costs R.C. 2442.§ 10
7. Tenants in Common may join in Ejectment R.C. 690.§ 3
8. Where several plaintiffs in Ejectment some of them may recover their share & others not. R.C. 691.§ 10.
9. And sometimes even distinct causes of action against different persons may be joined in the same suit R.C. 1218.§ 6. Surely in this case it is not intended to join the defendants together by a rule of practice to make them stand or fall together in their defense,

3d This Court has already settled the question - see Brown v Pearson 8 Mo Rep. 159.

4th It is every day's practice in the nisi Prius Courts and has frequently passed unquestioned in this Court - Stall v Bird 22 Mo Rep 470. Moore v Otis ~~who~~ 18 Mo 118 where this Court reverses and says that this course ought to have been pursued, and Lyon v Page, 21 Mo R. 104 ~~where it is~~ where it is held that a judgment by default against one defendant is properly taken after demurrer sustained for the other codefendants -

2d The judgment by default was properly rendered on the 20th of August

1. The defendants Wm Abington & Pinckney Mary, against whom it was taken were manifestly in default. The time for answering had expired & they had put in no answer.

2 There was no answer in for any body - 1st The paper which Robert Mary attempted to ~~plead~~ file, was put in at a time when ~~he could not plead.~~ it could not be filed in the case, On the 5th of August a regular, final judgment stood in full force against him - in that condition of the case he could not plead - Hickman v Barnes 1 Mo R 157.

2, If properly in, it amounted to nothing as an answer, see it on page 4 ~~of Record~~ of the Record - It would have been bad on demurrer, or even in arrest of judgment, or if confessed it could not support any judgment.

3 But if a good answer & properly in it was only

only the answer of Robert Mery, and the judgment is not against him - his co-defendants had showed no disposition to plead, they had not obtained leave, nor have they yet, they have never even asked for it. They were manifestly in default, and as far as appears from this record were willing to remain so

3d But if I am wrong in all this, still this judgment must stand, for its reversal can do the plaintiffs in error no good, their case was hopelessly lost by the 1st Judgt. on the 16th of June, - but for the error of the Court in permitting the sheriff to amend his return - It is error to permit an amendment after final judgment, & in disaffirmance of the judgment. If the defendants are really injured by a false return, & the case has gone to final judgment, their remedy is against the sheriff in another suit for the false return -

No 2, of trials Oct. 1859
Supreme Court

Samuel W Keithley
v
Robert A Mery

Brief of
R. G. Woodson for
S. Keithley -
Filed 17 Oct. 1859.
Wm S Geamill Ch

Saml W Keithley
vs
Robert A. May & al

Error to the St. Charles Circuit Court.

This case involves the question of the propriety of the conduct of the Court below in permitting the ~~the~~ plaintiff to dismiss his petition as to the defendant Robert May. Robert & Pinckney May were jointly sued on a promissory note: Pinckney was personally served with the writ, whilst Robert was served by leaving a copy: The Sheriff made a return that both defendants had been personally served & they not appearing on or before the ~~third~~ second day of the return term, a judgment by default was taken against them afterwards during the term on motion leave was given to the Sheriff to amend his return & the amendment having been made, it then appeared that Robert May had not been personally served with process: the court thereupon on motion of the plaintiff permitted him to dismiss his petition (the judgment by default having been set aside) permitted him to dismiss his petition as to the defendant Robert May and entered a judgment against Pinckney May. Robert May filing an affidavit in support of his motion to set aside the judgment by default against him & for leave to plead, stated that he had a good defence, that the note sued on was executed to Wm Keithley the father of the plaintiff that one Thomas Heard sold and delivered to the defendant a note on the said Wm Keithley for three hundred dollars & for the note sued on was assigned to the plaintiff: It was further stated that the assignment was fraudulent and that Wm Keithley was wholly insolvent.

From the foregoing statement of facts it will be observed, that this case, is not one falling within the provisions of the 19th section of the 5th Art of the practice act prescribing the circumstances under which a plaintiff may dismiss his petition as to some of the defendants. The defendant Robert May was regularly served with process & appeared and desired to defend the action, but because he had been served in such a way as entitled him to have the trial of the cause postponed until the next term, the plaintiff in order to prevent this discontinued as to him & took a judgment against the other defendant

As the Court had no warrant on the statute law to support the course adopted its action must look to the common law for principles by which it may be sustained: In actions of tort at common law the plaintiff could enter a nolle prosequi as to one or more of the defendants; Our statute makes all joint contracts several and when several are sued jointly allows a judgment against one or more of them changing the common law in these respects. Notwithstanding these changes, we do not conceive that the discontinuance of the action as to some of the defendants in actions on contracts is a matter entirely at the discretion of the plaintiff, and the courts should not allow it to be done, when the effect of such a course, will be to deprive a party of a just defense to the action In the case of Brown vs Pearson 8 Mo. 159 it was held that the dismissing of the action as to some of the parties was a matter of practice resting in the discretion of the Court: The same principle was maintained in the

case of Minor vs The Mechanics Bank of Alexandria 1 Pet. 5-9. In the case before us, The defendant against whom the judgment was taken cannot have used the defence which Robert May had to the action nor was he in a situation to do so as a judgment had been entered against him: If Pinckney May had satisfied that judgment, he would have been entitled to recover the half of it from Robert: & then Robert would have been compelled to pay a debt against which he had a just defence, by reason of the Courts having permitted the plaintiff to dismiss his action as to him: It is clear, that this should not be tolerated, where there is any suspicion that the plaintiffs object is to get rid of a defence to his action. Thus a party who is sued with his principal may by collusion with the plaintiff suffer a judgment to go against him & after satisfying it, compel the plaintiff to refund, & thus force him to pay an unjust debt, unless he should be able to show the collusion a matter difficult to be proved: From the facts appearing in this record we are of opinion that the court below improperly exercised its discretion in permitting the plaintiff to dismiss his action as to the defendant Robert May The judgment therefore will be reversed & the cause remanded the other judges concurring

W Scott

Stockley
vs
Mayhall

Opinion

Rev'd & Remanded.

Filed 14 Dec. 1857.
Wm. S. Glanville Cl.

X.

X