Kallman, Herman et al v. Schei.fer, Jacob D. 1860 St. Louis 457/6
(also Schiefer)

Old Box 614/10

MO= Kahlman
Bockler
30
232

partners in bldg. of railroad
bridge over Miss. River
debt
deny partnership & debt
LC= award $2157

M60
F 58
Aff Scott
R= TC Johnson

O= when def. is joint a def.
can't testify in behalf of
CO-defs

State of Missouri }
County of St Louis } ss: Be it Remembered that heretofore to wit, on the ninth day of June A.D. 1856 there was filed in the Office of the Clerk of the St Louis Court of Common Pleas within and for the County aforesaid a Petition which is in the words and figures following: to wit:

Petition

Jacob D. Schiefer vs Neuman Kalman, Ferdinand Strange, Frederick Schulenburg Adolphus Goeckler & Francis Saler partners, as Railroad Contractors for building the Cascade Bridge, and under the names sometimes of Kalman Strange & Co and at times of F. Strange & Co	Plaintiff In the St Louis Court of Common Pleas October Term 1856 Defendants

1st Plaintiff states that defendants were partners in the building of the Cascade Bridge and as such on the 17. September 1854. they became indebted to plaintiff in the sum of $1072.72 for provisions furnished to defendants at their request in the months of June, July, August and September 1854. And on the day and year aforesaid the defendants gave an order on Schulenburg & Co and Francis Saler to pay the said sum together with three several notes mentioned therein (which order is herewith filed) upon which on the 25th Sept 1854. the payors in said order paid $536.36 as half of the said sum of $1072.72. and also the note of E. Lucas for $258.71. But they refused to pay either of the other notes mentioned in said order, or any part thereof Plaintiff states that there is now due to him for provisions furnished as aforesaid $536.36. for which with interest he asks judgment.

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2 He further states that on the fifteenth June 1854. the defendants under the name of F. Stange & Co executed and delivered to plaintiff their two several bonds each for the sum of $515.90 described to be for value received, one payable one month after date, and the other payable two months after date upon which nothing has been paid and both of said bonds are still due and owing to plaintiff They are the same obligations mentioned in the order filed under the first count and called therein notes. He asks a further judgment against defendants for $1031.80. with interest said bonds are herewith filed.

3d He further states that on the 24th November 1854 the defendants under the name of Kalmon Stange & Co made and delivered their certain due bill to P. A. Neath for the sum of $106.17 balance of a certain note withdrawn from Court in September. and on the 20th June 1855 the said Neath for value received assigned the said due bill or note to plaintiff. The whole of said note or due bill is still due and owing to plaintiff and for which with interest, he asks judgment. The said due bill is herewith filed.

4 He further states that defendants under the name of Kalmon, Stange & Co by H. Mallinkrodt their Clerk and agent made and delivered their certain note or due bill (which is herewith filed) to Engelbert Pail for 17.45 dated 18th Sept. 1854. and said due bill being still unpaid on the 1st May 1856 the said Deal assigned the same to plaintiff for value received. Plaintiff states that said note or due bill is still owing by defendants and he asks judgment for the same with interest.

5. He further states that on the 18th Sept. 1854. the defendants under the name of Kalmon Stange & Co. by Mallinkrodt their Clerk and agent made and delivered their certain note or due bill to Adam Heiss for the sum

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of $20.25, and the same being still due and payable on the 3. of Decr. 1854. the said Neiss for value received assigned it to plaintiff. The whole of said due bill (which is herewith filed) is still due and owing and he asks judgment therefor with interest.

6th He further states that on or about the 15th May 1854, at the instance and request of said defendants he paid to a company engaged in delivering Piles for the Pascmade Bridge, composed of John N. Heath and John McAffee the sum of $15. which said sum is still due and owing by defendants to plaintiff and for which he asks judgment.

7th He further states that on the 20th October 1854 one Jacob Branch was indebted to plaintiff in the sum of $9.00. one Jacob Kracker was indebted to him in the sum of $5.85. and one Joseph Bucher was indebted to him in the sum of $4.00 for goods, wares and merchandise furnished to them by plaintiff. which three several sums amounting in the aggregate to $18.85 the defendants assumed to pay, and thereupon the plaintiff discharged the said Branch, Kracker and Bucher from the payment thereof, and plaintiff believes that they have paid the said sums to defendants. Plaintiff states that defendants have not paid to him the said several sums amounting to $18.85 wherefore he asks judgment for the same with interest

8 He further states that defendants are indebted to him for 1430 feet of pine lumber delivered to them at the mouth of the Pascmade on or about the 18th of July 1854 and of the value of $30.00 which said sum the defendants are legally bound to pay wherefore he asks judgment for $30.00 with interest

Wherefore plaintiff asks judgment in the aggregate for the following sums with interest as shown in the foregoing counts.

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1st Count for $536.36 with interest from 17th Sept. 1854 till Judgment. 2nd Count for 1031.80 with interest on 515.90 from July 15, 1854. till Judgment, and on 515.90 from 15. August 1854 till Judgment.

3rd Count for 106.17 with int. from 24 Nov. 1854 till Judgment
4th Count for 17.45 with int. from 18 Sept. 1854 till Judgment
5th Count 20.25 with int. from 18 Sept 1854 till Judgment
6th Count 15.00 with int. from 15. May 1854 till Judgment
7th Count 18.85 with int. from 20. Oct. 1854 till Judgment
8th Count 30.00 with int. from 18 July 1854 till Judgment

$207.72

Thos Johnson
Atty for Plaintiff

County of St Louis, ss: Jacob D. Schiefer being duly sworn states that the foregoing petition and the matters therein as stated he believes to be true

Sworn to and subscribed before me this 29th day of May 1856 — Jacob D. Schiefer

Chas H. Hicks Clerk

Appearance of Deft

And on the nineteenth day of June A.D. 1858. the defendants filed the following appearance: to wit: Enter appearance for Nahlman Boechler. Saler and Schulenberg in the above suit waiving formal and service of summons reserving all rights to demur and answer. June 9. 1856 Chr Knibben

Atty for ed Defendant

Amended Answer

And on the Twentieth day of March A.D. 1858 the following amended answer was filed by Consent: to wit:

The defendants by leave of Court come and file their amended answer and state that they were not partners in the building of the Cascade Bridge. They deny that on the 17. of September 1854. or before or since they became indebted as partners

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or otherwise to the plaintiff in the sum of $1072.72 or any other sum for provisions furnished to them at their request or otherwise in the months of June, July August and September 1854. These defendants deny that they ever gave an order on Schulenburg & Co and Francis Saler to pay the sum of $1072.72, or any other sum

These defendants deny that they gave an order as stated by plaintiff to pay the three notes mentioned in his petition. These defendants further answering deny that there is anything due the plaintiff from them on any account, claim, demand or obligation mentioned in the plaintiffs petition

These defendants further deny that they on 15 June 1854. or at any time under the name of F. Stange & Co, executed and delivered to plaintiff the two bonds of these defendants as stated in the plaintiffs petition. These defendants further answering deny that they on the 24th November 1854 or at any other time under the name of Kalmon Stange & Co made their due bill to R. A Neath for $106.17 as stated in plaintiffs petition, whether or not said Neath ever assigned the due bill mentioned in plaintiffs petition to the plaintiff these defendants do not know and have not knowledge or information sufficient to form a belief thereof.

These defendants further answering deny, that they under the name of Kalmon Stange & Co by H. Mallenkrodt made or delivered their due bill to Engelbert Peal for $17.45. as stated in Plaintiff Petition, whether said Peal ever assigned such due bill to the plaintiff these defendants do not know and have not knowledge or information sufficient to form a belief. These defendants further answering deny that they on the 18th September 1854. or at any other time under the

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name of Kalmon, Stange & Co made or delivered their note or due bill to Adam Heiss for the sum of $2025 as stated in plaintiffs petition, whether said Heiss ever assigned any note or due bill to the plaintiff these defendants do not know and have not knowledge or information sufficient to form a belief.

These defendants further answering deny that they ever requested the plaintiff to pay and they deny that he paid at their instance the sum of $13. or any other sum to any company engaged in delivering piles for the Gasconade Bridge as stated in the plaintiffs petition.

These defendants further answering deny that they ever assumed to pay to the plaintiff the sums which he states in his petition Jacob Branch, John Kracker, and Joseph Bocher were indebted to the plaintiff. These defendants further answering deny that they are indebted to the plaintiff for 1430 feet of Pine Lumber or for any quantity or kind of lumber whatever.

Kribben & Krum & Harding
for Defendants

Christian Kribben attorney for Defendants makes oath and says the above answer and statements therein contained are true

Sworn to and subscribed before me this 20th of March 1858 — Chr Kribben

C W Hicks Clerk

And afterwards at the March Term 1858 the following further proceedings were had to wit:

Jury Trial & Cause Contd.

Wednesday March 24. 1858

Now at this day come the parties by their attorneys & thereupon come a Jury to wit L. D. Tanzy. M. J. Meyers Benjamin Lacy. Louis Rolker. Peter Lippard

8 D. Tutsman. Henry Felsing. Wm Donahoe. J. B. Demette James Porter. John H. Hall. and F. B. Edgar twelve good and lawful men, who being duly elected tried and sworn the issues herein joined well and truly to try the trial progressed but not being finished is laid over until to Morrow morning

And at the said Term the following further proceedings were had to wit: Thursday

Trial continued March 25th 1858. Now again come the parties and Jurors as aforesaid, and thereupon the trial progressed and being finished the Jurors aforesaid retire to consider of their verdict.

And at the said Term the following further Proceedings were had to wit.

March 26. 1858

Verdict for $2157.00 Now again come the parties and Jurors as aforesaid and said Jurors upon their oaths say they find for the plaintiff and assess his damages at the sum of $2157 00/100 therefore it is considered by the Court that the plaintiff recover of the defendants the damages aforesaid as assessed and also his costs herein expended and have execution therefor. The defendants Schulenburg Boeckler & Saler file a motion for a new trial herein.

And at the said Term the following further proceedings were had to wit:

Saturday April 24. 1858.

The defendants motion for a new trial being heard and fully understood by the Court it is ordered that said motion be overruled

The following further proceedings were had at said Term to wit. Saturday June 19. 1858

Appeal granted. The defendants file a motion and affidavit for an appeal herein and thereupon an appeal is allowed them to the Supreme Court from the Judgment herein rendered

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and they thereupon file an appeal bond with Charles F. Meyer as principal and Charles F. Meyer and Nimrod Hasto as securities which bond is approved by the Court.

The affidavit and bond for appeal is in the words and figures following to wit

Affidavit

Adolph Boeckler one of the defendants for himself and codefendants makes oath and says that the appeal in the above entitled cause is not made for vexation or delay but because the appellants believe themselves aggrieved by the decision & judgment of this Court Adolphus Boeckler

Sworn to and subscribed before me this 19th day of June 1858 C W Nicks, Clerk

Appeal Bond.

Know all men by these Presents that we Christian Kibbew as principal and Charles F. Meyer and Charles Zoller as securities are indebted to Jacob L. Schnieder in the sum of $200 for the payment whereof 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 19 day of June 1858. The condition of this obligation is such that whereas Frederick Schwelenburg Adolph Boeckler and Francis Saler Herman Kallmann and Ferdinand F. Stange have appealed from the judgment rendered against them and in favor of said Jacob L. Schnieder in the St Louis Court of Common Pleas for the sum of $207, together with costs. Now if the said appellants shall prosecute their appeal with due diligence to a decision 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 St Louis Court of Common

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Pleas to give, and if the Judgment of such Court 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

Approved Attest
C H Nicks
Clerk

Chr Kribben LL
Chas Meyer & LL
Chas Zoller LL

And on the 24th March 1858 the following Bill of Exceptions was filed

Bill of Exceptions.

Be it remembered that on the trial of the above cause in the said Court the following Proceedings were had Defendants Francis Saler, Frederick Schulenburg and Adolphus Boeckeler at the time of the calling and before the trial of the cause on the 24 March 1858, applied to the Court for a continuance thereof based on the absence of Hermann Kallmann who resides in the City & County of St Louis alleged by said defendants to be a material witness for said last mentioned defendants, said absent witness Kallmann had been duly subpoenaed and in attendance on Court heretofore when said cause was first called, under a general leave to take attachments, an attachment had also been issued for said Kallmann but had not been returned or served on the absent witness, Plaintiff objected to a continuance on the ground of absence of said Kallmann for the reason that said Kallmann was a co-defendant with said Saler Schulenburg & Boeckler on the record, Whereupon the Court ruled that it could entertain no application for a continuance on said ground and refused further process for said Witness, to which ruling

the defendants aforesaid then and there excepted & prayed the Court to sign ~~seal~~ this Bill of Exceptions which is done

Saml Reber Judge &c

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 records and proceedings in the case of Jacob D Schiefer plff against Hermann Kallmann et al Defts as fully as the same remain 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 2d day of October AD 1858

C. W. Hicks clk.

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(10)

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March Term 1860

Jacob D. Schiefel
respondent

vs ⅌ Transcript

Hermann Kaffman
Ferdinand Haug et al
appellants

Appeal from St Louis
Court of Common Pleas

Filed 2d Oct 1858
Wm L Leavitt Ch.
Chas Kribben
for appellants

H. Johnson for
Respondent

$5.00 paid by atty Kribben

12.25

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res. stio & parity / mo. to affm. with 10 per. C. damages
opigt errors / joinder / submitted /

Affmd. 29 June 1860, with 10 per ct. damages $215.70
C. p. 72

(437)

Jacob D Schiefer, respondent
against
Kallman Stange & others, appellants

} Appeal from the St Louis Court of Common Pleas.

This was an action in the nature of assumpsit against the defendants who were charged as partners, and joint contractors. There was a verdict for the plaintiff on the 26 March 1858. for 2157^{x}_{-} and judgment was thereupon rendered on the same day.

No assignment of errors has been filed in this court. But, passing over this, the bill of exceptions shows the following as the only ground of argument in the Supreme Court. viz.

Upon the calling of the cause for trial - which was nearly two years after the commencement of the suit - the defendants, Saler Schulenburg and Beckler "applied to the Court for "a continuance based on the absence of Hermann "Kallmann (one of the defendants) who resides in the "City & County of St Louis. alleged by said defendants to be a "material witness for said last mentioned defendants "- said absent witness Kallmann had been duly subpoenaed and in attendance on Court heretofore "when said cause was first called. under a general "leave to take attachments an attachment had also "been issued for said Kallmann but had not been "returned served on the absent witness. Plaintiff "objected to a continuance on the ground of absence of "said Kallmann for the reason that said Kallmann "was a codefendant with said Saler Schulenburg &

"Boeckler on the record. Whereupon the Court ruled that "it could entertain no application for a continuance "on said ground and refused further process for said Wit "ness - to which ruling defendants excepted at the "time". This is the only exception saved -

All the proceedings being in regular form nothing can be assigned for error here except the action of the Court below in refusing to grant a continuance because of the absence of one of the defendants, on motion of the rest of defendants who desired him to testify in their behalf touching a contract alleged to be joint -

Omitting for the present all view of the matter as far as the application stands unconnected with the relation of Kallmann to the record. the question which was in the mind of the Court was "Can a defendant ask for the process of the Court to bring in his codefendant to testify for him in an action of assumpsit"?

And respondent confidently submits that he cannot. for the reason that a codefendant is not a competent witness for the defence. The statutory provisions on that subject are to be found in Sections 3. and 6. of Rev. Co. 1855. p. 1577. Tit. Witnesses -

Section 3. is as follows. "Any party to a civil action or proceeding may compel any adverse party or person for whose benefit &c to testify at the trial" &c &c.

Sec 6. is as follows. "The following persons shall "be incompetent to testify: first, A party to the action "or any person for whose immediate benefit the action

"is prosecuted or defended except as hereinbefore provided in this act." &c

Nothing can be plainer; and the cause is submitted with a prayer for the affirmance of the judgment with ten per cent damages. on account of a frivolous appeal.

Gantt. with T. C. Johnson
for respondent.

It is conceived that the act of 12th feb. 57 (p. 181. of session acts) gives no aid to the application of defendants for a continuance on account of the absence of Hallman their codefendant. The only matter as to which he could by possibility have been examined was the partnership: for he could not have been heard to diminish the debt. under the act quoted. but only to disprove the joint liability of defendants with him. for it as partners. To let in this proof the parties should have severed in their pleas. But by looking at their plea or answer it will be seen that it is joint: and when we consider that this answer was an amended one, and was filed immediately before the trial in place of one which was filed at the return term in 1856, it is plain that the parties did not rely on or set up any defence which was not common to them, or in other words, on any but a joint defence. Now. no codefendant can be heard to establish any such defence. See Benoist v. Donnely 26 Mo R 589

Again. the error assigned was for a ~~failure~~ refusal of the Court to continue the cause. The only grounds assigned for a continuance are that a witness has been served with a summons, and that an attachment has been issued for him on which he is not found. The Court decides not to grant further process for the witness - and rightly so decided. for neither materiality nor diligence is shown. The objections urged by the counsel for the plaintiff need not be noticed. The question is, does it appear by the

record that the Court improperly refused process? No such thing appears for no case was made for the issue of process of attachment. Did the Court improperly refuse a continuance for the absence of Kallman? It did not, because there was nothing before the Court from which it was possible to infer either that he was material, or that the other defendants had used any diligence to procure his attendance. No compliance with the rules of Court on this subject is shown: nor is any compliance with the statute on this subject shown. (8 Mo. 606.)

As the record stands, it is singularly unsuggestive of diligence on the part of defendants at any stage. But it does exhibit Kallmann complaining, (quite as loudly as any of his codefendants) of the failure or refusal of the Court to force him to come into Court and testify. The case was 3 days in trying. There is no pretence of any effort on defendants' part to bring Kallman in during the trial — It does not even appear that he was not absent by their connivance.

Thos T. Gantt. with Thos C. Johnson
— for respondents —

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Schiefer
v
Kallmann Stange
et al

Statement of the
Case & points made
for affirmance by
Gantt. for
Respondent

In case the motion to affirm be not sustained, Mr. Gantt submits the cause on his brief for decision.

Filed April 11: 1860.

Wm. S. Glanville
Clk.

9 Hun. Pr. 391
10 N. 390
9 Barbm. 318

Jacob D. Schafer
v.
Norman Kalman
et al

In the Sup. Court.

Appeal from Common Pleas.

And now at this day comes the appellee Jacob D. Schafer and moves the Court to affirm the judgement of the Court below with 10 per damages. for the reason that no specimen of errors has been filed according to law & the practice of this Court, and that the appeal is frivolous.

See Statement & brief filed in the cause by appellee.

Grant & Johnson
for Schafer.

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Jacob D. Schaefer.

ag.

Herman Kalmard et al

Motion to affirm judgement of this court below –

Grant & Johnson for Schaefer appellee

Filed 14 April 1860.

Wm J Glanville

ck

Henry Schieffer et al
respts

vs:

Kallman Stange
et al - applts

Supreme Court
March Term
1860

Assignment of errors -

The appellant comes & says that there is manifest error in the record proceedings & judgment of the Court below, in this, to wit: that the Court below refused to sustain the defendants motion for a continuance

Kribben
pr Kunn & Harding
for applts.

There is no such error as the appellant hath alone suggested

Filed 17 April 1860
Wm L Glanville ck.

Gantt with Johnson
for respondent.

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Sup Court Mar 7/60

Schiefer &c

vs:

Kallman &c

Assigns errors

Krum & Harding

for Kribben

Filed 16 April 1860.

Wm J. Glanville Ck.

Jacob D. Scheiffer
vs
Herman Kallman
Ferdinand Stange & al

Appeal from the St. Louis Court of Common Pleas

This case comes here for a refusal of a continuance: In this respect it is like the case of Garnier vs Lebeau & al decided at this Term of the Court: The judgment will be affirmed with Ten per cent damages

Judge Ewing concurring

W. Scott

Schiefer
vs
Herman Kallman et al

opinion

affirmed.

Filed 29 June 1860.
W. S. Manville Ck