Booge, Charles v. The Pacific Railroad Co 1842

459/3

623/15 33/212

Booge (A)

McClellan, Moody & Hillyer (A)

Thomas, Cox & Whittelsey (R)

✓

TPRC (R)

Booge - Commissioned to be a former navigator

122/mnt

- Cont. [illegible] [illegible] [illegible]

St Louis

Oct 62

July 60

Affirmed Bay

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State of Missouri } S.S.
County of St. Louis }

Be it Remembered that heretofore, to wit, on the Twenty-fourth day of January, A.D. 1859, the following Petition was filed in the Clerks Office of the St Louis Court of Common Pleas, which is as follows, to wit:

State of Missouri St Louis County.

Charles P. Booge, plaintiff,
against
The Pacific Rail Road Company, defendant.

In the St Louis Court of Common Pleas. March Term. 1859.

Petition

The plaintiff states, that on the 15th day of March, 1858, the defendant, by its Officers and agents, employed the plaintiff and contracted with him, to serve defendant, as a runner or solicitor for freight and passengers, from that time, until the close of navigation, on the Missouri River, at the hire of One Hundred and twenty five dollars, per month; and plaintiff agreed to serve defendant as aforesaid, and on the day, last named, entered upon said service and served defendant, as such runner or solicitor, from that date, up to the 19th day of June 1858, when defendant, discharged him from said service, and refused to permit him to perform

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said contract. Plaintiff offered to perform said contract and was ready at all times so to do; said navigation did not close, until after the 1st day of December 1858 The defendant is justly indebted to the plaintiff in the sum of Three Hundred and Seventy five dollars his hire aforesaid for the months of September, October and November 1858, which he ought to recover and for which he asks judgment

Plaintiff further states that on the 1st day of March 1858 the defendant by its officers and agents employed him and contracted with him to go to Pana and Sandoval in the State of Illinois on business for defendant and that pursuant to said employment he went to said places and performed the duties of said employment: said service was worth forty-five dollars and that is a reasonable charge therefor. By reason of said employment and service the defendant is justly indebted to the plaintiff in the further sum of forty five Dollars, which he ought to recover and for which he asks judgment.

McClellan. Moody & Killyer
Attys for Plff.

Harris D. Booge agent of plaintiff on oath says he believes the foregoing petition and the matters therein as stated are true.

Subscribed & Sworn to before me Jany 24th 1859 } Harris D. Booge

C. W. Hicks. Clerk

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And thereupon the following Summons was issued, to wit:

St Louis County. S.S.

The State of Missouri

To the Sheriff of St Louis County. Greeting.

Summons.

We command you to summon the Pacific Rail road Company, 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 Second Monday of March next, then and there to answer the complaint of Charles P. Borge, as set forth in the annexed petition, and have you then and there this writ.

Witness Charles W. Hicks, Clerk of our said Court, with the seal thereof, hereto affixed, at office, in the City of St Louis this Twenty fourth day of January, in the year of our Lord Eighteen Hundred and fifty-nine

Seal

C. W. Hicks. Clerk.

Upon which Summons is endorsed the following Sheriffs Return, to wit

Sheriffs Return.

Executed this Writ, in St Louis County, on the 25. day of January, 1859. by delivering a copy of the Writ and petition as furnished by the Clerk to John W. Winer President of the Pacific Rail Road

Fees 100

Michael S. Cerre, Shff.
By Eugene Mcaw, Dpy

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And afterwards, towit, on the 8th day of April 1859, the following Answer was filed, towit:

Answer.

And now comes the defendant in the above cause, and for answer to plaintiffs petition says, that the defendant denies that, on the 15th day of March 1858, defendant, by its officers and agents, employed the plaintiff to serve defendant, as a runner or solicitor for freight and passengers, from that time, until the close of navigation, on the Missouri River at the sum of One Hundred, twenty five Dollars per month, as the plaintiff hath alleged, in his said petition. Defendant denies, having ever made, with plaintiff the agreement stated in said petition; that it at any time authorized such agreement to be made and that defendant in any way recognized or sanctioned the making of any such agreement between it and plaintiff, as is alleged in said petition,

Defendant denies, that it is justly indebted to the plaintiff in the sum of Three Hundred Seventy five dollars, or in any sum, whatever for his hire for the month of September, October, and November, 1858, as plaintiff hath alleged in his said petition,

Defendant further denies, that on the 1st day of March 1858, the defendant, by its officers and agents, employed plaintiff and contracted with him to go to Pawnee and Sandoval, in the State of Illinois, on business of Defendant, and that by reason of such employment and service defend

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ant. is justly indebted. to plaintiff in the further sum of Fortyfive Dollars, as plaintiff hath alleged in said petition or in any sum whatever,

Defendant denies having any knowledge or information, sufficient to form a belief, as it respects the value of said last mentioned alleged service. Defendant therefore, asks judgment for costs,

Thomas & Cox,
Defts Attys,

George R. Taylor, President pro tempore, of the Pacific Rail Road, defendant, makes oath and says that the foregoing Answer and the matters therein as stated, he believes to be true

Sworn to before me this, apt 8. 1859. C. W. Hicks. Clk

G. R. Taylor

And at the November Term 1859, of said Court, the following Proceedings, were had to wit:

Wednesday Novr. 23. 1859

leave to file Sup. Ans,

On motion of the defendant, by attorney leave is granted it to file Supplemental Answer herein, whereupon the same is filed

And said Supplemental Answer, is as follows, to wit:

Supplemt. Answer

Defendant for answer to plaintiffs petition by way of Supplement and by leave of Court

first had and obtained, says;

Defendant denies that it made with the plaintiff the contract in the petition set forth, and denies that it contracted with the plaintiff for his services for the season of navigation of the Missouri River, and of their it puts itself on the country;

Defendant denies that plaintiff sustained the damages claimed in said petition.

Defendant says that plaintiff by his suit No 345 October Term 1858 of this Court sued this defendant for damages sustained from the breach of the same identical contract in the petition described and by the judgment of this Court on the 25th day May 1859 recovered of this defendant, damages for said breach in the sum of Two Hundred and fifty dollars which judgment still stands in full force, wherefore defendant prays judgment.

Whitelaw
Atty for Def

George R Taylor President of the defendant on his oath says that he believes the above answer and the matters therein stated, he believes to be true

G R Taylor

Sworn to & Subscribed this 15th June, 1859. G. W. Hicks, Clk

And at the said November Term 1859 the following further proceedings were had, to wit

Tuesday. January. 31. 1860

Mo. to strike out parts of Ans. over^{d} Mo. to am^{d} Petition sustained

The plaintiffs motion to strike out portions of defendants answer herein, having been heard and fully considered by the Court is overruled. Plaintiff thereupon moves the Court for leave to amend his petition herein, which is granted him, and the Court doth order that said plaintiff pay the costs accrued herein at the present term of the Court.

And the said Motion to Strike out Parts of Answer, is as follows, to wit:

Mo. to Strike out parts of Answer

Comes now the plaintiff and moves to strike out so much of defendants Answer, as is contained in the second clause thereof commencing.

"Defendant says that plaintiff by his suit No. 545. October Term, 1858 of this Court, sued this defendant for damages, sustained &c.

Because, he says that it does not contain any matter of defence in this suit, and is not sufficient in law.

McClellan & Co
for Plff

And afterwards to wit on the 12th day of April 1860. the following Amended Petition, was filed to wit:

Amended Petition

The plaintiff by leave of the Court and for amended petition herein states, that on the 15th day of March, 1858. the defendant by its officers and agents employed the plaintiff, and contracted with him, to serve defendant, as a runner or solicitor for freight and passengers

from that time, until the close of navigation on the Missouri River, at the price or hire, of One Hundred and twenty five Dollars, per month payable monthly. And plaintiff agreed to serve defendant, as aforesaid, and on the day last named, entered upon said service, and served defendant, as such runner, or solicitor, from that date, up to the 19th day of June, 1858, when defendant discharged him, from said service, without any cause and refused to permit him to perform said contract. Plaintiff, was at all times, ready and willing to perform said contract, and offered so to do, at all times up to the time when said navigation closed,

Plaintiff admits that on the day of 1858, he brought his suit in this Court, No 545, October Term, 1858, for his wages under said contract, for the months of July, and August 1858, and in said suit, on May 25th 1859, he recovered a judgment, against defendant, for $250, being the amount of his wages, under said contract, for said two months last named to wit, July and August, 1858, which judgment has been paid. There is now due and owing, the further sum of Three Hundred and Seventy five Dollars, for his wages under said contract for the months of September, October and November, 1858, Plaintiff avers, that the navigation on the Missouri River, did not close, after the date of said contract until the day of December, 1858, Wherefore he ought

9 to recover said sum of $375. and asks judgment therefor.

Plaintiff farther states that on the first day of March. 1858. defendant employed him. to go to Pana and Sandoval. in the State of Illinois, on business for defendant. That he went to said places. pursuant to said employment, and fully performed his duty and contract therein; that his services in said employment. were reasonably worth. Forty-five Dollars. and defendant still owes him that sum. which he ought to recover. and for which also he asks judgment

McClellan. M & H.
Attys for Pltff.

William S. Killyer. atty of plaintiff. on oath says. he believes. the foregoing petition. and the matters. therein. as stated. are true.
Subscribed & sworn to before me } Wm. J. Killyer
April 11th 1860.

Seal

J. Q. Adams. Fritchey
Notary Public. St Louis, Co.

And on the same day the following Answer. to Amended Petition. was filed. towit:—

Answer to Amd. Pet.

For answer to first count of plaintiffs Amended Petition, says. that it did not engage the services of plaintiff for the season of navigation, as stated in the plaintiffs petition. but on the contrary it engaged the plaintiff for such period. as it

required his services. and duly paid him. all that was due and owing to him when discharged.

For further plea to said first count. it says that plaintiff sued defendant, in this Court for the same cause of action. set forth. in said first count, and on the 25. May 1859 plaintiff recovered judgment of $250. for damages sustained. from said causes of action. as by the record of said suit will more fully appear. Wherefore defendant asks judgment.

For answer to said Second count of the amended petition. Defendant says that it did not employ defendant to go to Illinois. and did not contract with plaintiff. as in said second count alleged

Defendant therefore prays judgment &c

Whittelsey
Atty p.g.

Affidavit waived
W. C. McHillyer

And afterwards. at the April Term 1860. of said Court. the following further proceedings. were had. to wit:

Trial by Court, Nonsuit, with leave &c

Now at this day come the parties by their attorneys. and no jury being required. they submit this cause to the Court and thereupon the trial of this cause progressed. and being finished the plaintiff says. he will not further prosecute his suit. in this behalf. but takes a nonsuit. with leave to move to set the same aside. Therefore it is considered by the

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Court that the plaintiff take nothing by his suit, but that the defendant go thereof without day and recover of said plaintiff its costs and charges herein expended and have execution therefor.

And on the 18th day of April 1860 the following Motion to set aside Nonsuit was filed, to wit:

Motion to set aside Nonsuit.

The plaintiff, by leave of Court, moves to set aside the nonsuit herein adjudged against him;

1st Because under the law and the evidence in this cause the judgment should have been for plaintiff.

2nd Because the Court erred in refusing instructions asked for by plaintiff.

McClellan, M. & H.
for Pltff.

And at the said term the further proceedings were had to wit,

Saturday, May 19, 1860

Mo. to set aside Nonsuit overruled

The Court having heard and fully considered the plaintiffs motion to set aside the nonsuit herein, doth overrule the same,

Friday, June, 8, 1860

Bill of Ex filed. Affdt for App. filed. App. allowed

The plaintiff files a Bill of Exceptions and also an affidavit for an appeal and on his motion an appeal is allowed him to the Supreme Court from the judg=

ment rendered herein.

And said Affidavit for Appeal is as follows towit:

Affidavit for Appeal.

Harris L. C. Booge, agent for Charles P. Booge, plaintiff and appellant on oath, says that the appeal herein made by appellant is not made for vexation or delay, but because affiant believes that the appellant is aggrieved by the judgment or decision of the Court

Subscribed & Sworn to before me Harris L. C. Booge.
May 28, 1860.

Witness my & notarial seal.

Lucien Eaton,
Notary Public, St Louis Co. Mo.

(seal)

And the said Bill of Exceptions is as follows, towit:

Bill of Exceptions

Be it remembered that on the trial of this cause by the Court, a jury being waived by both parties, The plaintiff introduced evidence tending to prove that defendant employed him in March 1858, to serve it, as a runner or solicitor until the close of navigation on the Missouri River, at the stipulated wages of $125, per month, payable monthly. That he entered upon said service and served defendant until June 18th 1858, when he was discharged by defendant, That he had been willing and ready to serve defendant in said capacity and had

13. offered so to do. up to the 1st of December 1858 and defendant refused to let him do so: that navigation on said River. did not close in 1858 until after December 1st 1858.

And this was all the evidence for plaintiff. The Defendant. then read in evidence. the Record in the suit of plaintiff against defendant:

Record in case No. 345 Oct T. 1858

State of Missouri. St Louis County
In the St Louis Court of Common Pleas.
October Term, 1858.

Charles P. Boogs, plaintiff
against
The Pacific Rail Road Company. Defendant.

Petition

The plaintiff. states that on the 15th of March. 1858. the defendant agreed. with him. that he should serve the defendant in the capacity of a runner. for passengers and freight. from that date to the close of navigation. on the Missouri River. or during what is known as the then present business season at the stipulated wages of One Hundred and Twenty five Dollars. per month which the defendant agreed to pay him monthly. on the first day of Each month. commencing on said 15th of March 1858. for the season aforesaid And plaintiff entered upon the duties of said service. on said day for the season, aforesaid and faithfully served the defendant as a runner. up to the 19th of June, 1858. when the defendant discharged him from said service with-

out his consent. Plaintiff has ever since, been ready and willing, and is now ready and willing to go on and perform said contract on his part and now offers so to do, said season is not yet closed.

There is now justly due from the defendant to the plaintiff under said contract Two Hundred and fifty dollars, being his wages for the time intervening between the 1st of July, 1858 and the 1st of September, 1858 which has not been paid him and which he believes he ought to recover of the defendant and for which he asks judgment

McClellan, Mordy & Killgore
Attys for Plff.

Charles P. Booge, plaintiff, on oath, says he believes the foregoing petition and the matters therein as stated are true

Subscribed & sworn to before me Charles P. Booge
Sept 22, 1858. G. M. Hicks, Clerk

County of St Louis S.S.

Summons

The State of Missouri
To the Sheriff of St Louis County, Greeting:
We command you to summon The Pacific Railroad Company, 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 Second Monday of October next then and there to answer the complaint of Charles P. Booge, as set forth in the annexed

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petition. and have you then and there this writ
Witness Charles W. Hicks. Clerk of our said
Court, with the Seal thereof hereto affixed
at office, in the City of St Louis this
Twenty second day of September in the
Year of Our Lord Eighteen Hundred
and fifty eight.

Seal

Chas. W. Hicks. Clerk

Shff's Return

Executed this writ in St Louis County, on
the 24th day of September, 1858. by delivering
a Copy of the Writ and petition, as furnish=
ed by the Clerk to John M. Winner, Pres=
ident of the Pacific Rail Road Company,
Service $1.+

Michael S. Cerre, Sheriff
By Geo N. Stevens. Dpy.

Answer

And now comes the defendant and denies
that on the 15th day of March 1858. defend=
ant, agreed with plaintiff, that plaintiff
should serve defendant, in the capacity of
a Runner for passengers and freight from that
date, to the close of navigation on the Missouri
river, or during what is known as the then pres=
ent business season, at the stipulated wages of
One Hundred and Twenty five Dollars, per month,
payable monthly, on the first day of each month,
commencing on said 15th day of March, 1858. as
stated in petition of plaintiff.

Defendant admits, that plaintiff was employed
by defendant, as a runner for passengers and
freight and defendant agreed to pay him at

the rate of One Hundred and twenty five dollars per month, during the time plaintiff should be continued as such runner in the service of defendant and that plaintiff on the 15th day of March 1858, entered upon said service and continued therein up to and until the 19th day of June, following, when, having no further use for plaintiff's services: he was discharged from defendant's employment and paid in full the sum due to him at that time, to wit: the time of such discharge, which payment was accepted by plaintiff.

Defendant denies that by the terms of its agreement with plaintiff any time was fixed or limited during which plaintiff was to be continued in defendant's employment but on the contrary defendant avers and states that defendant was at liberty at any time to discharge plaintiff from its service, paying him up to the time of such discharge, at the rate above mentioned.

Defendant denies that defendant owes plaintiff the sum of Two Hundred and fifty Dollars, as stated in said petition or any sum of money whatever and asks judgment for costs

Thomas & Cox
Defts attys

John M. Olmier, President of the Pacific Railroad Company, makes oath and says that the matters stated in the foregoing Answer, he believes to be true as therein

17. stated, Jno. M. Wimer

Sworn to & subscribed before me, this 12th day of October, 1858. Chas W. Hicks Clerk

Wednesday, May 25. 1859.

Ind't. for Plaintiff $250.00

Now come the parties by their attorneys. and thereupon come a Jury. towit, Eleazar Block, Francis M Faul, Valentine Crancer, G. W. Chadwick, Ferdinand Koehler, George H. Smith, Heinrich Schneider, Henry Johanning, J. L. Casperson, Charles Chenet, Louis Dapron Leon Deno, 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 plaintiff and assess his damages at the sum of Two Hundred and fifty Dollars Therefore it is considered by the Court. that the plaintiff recover of said defendant. the damages aforesaid. as assessed and also his costs herein expended. and have execution. therefor. The defendant files a motion for a new trial herein,

And this was all the Evidence of Deft,

And thereupon the plaintiff asked the following Instruction;

Plaintiffs Instruction Refused

If the defendant employed the plaintiff in March 1858, to serve it. at $125. per month. payable monthly. from that date until the close of navigation on the Missouri River,

and plaintiff served according to his contract up to June 19th '58. when defendant discharged him, and if said navigation did not close until after December 1. 1858. and plaintiff was willing and ready and offered to serve defendant as aforesaid up to Dec 1. 1858, then plaintiff has a right to recover his said pay for the whole time up to Dec. 1st 1858 and the fact that he has before sued defendant and recovered $250, for his wages for the months of July and August 1858. is no bar to this action,

Which was refused. and to the refusal thereof. plaintiff at the time. excepted,

And the Court gave of its own motion. the following Instruction to wit. "Upon the evidence and the facts. stated in plaintiffs amended Petition. the plaintiff cannot recover"

And to this misinstruction the plaintiff at the time excepted,

And thereupon the plaintiff took a nonsuit, with leave of the Court. to move to set it aside. And afterwards. in due time. plaintiff filed his motion. to set aside said nonsuit. and for a new trial, and the Court overruled said motion, and gave judgment for defendant. to which ruling of the Court, plaintiff at the time, excepted. And plaintiff now prays. that this, his Bill of Exceptions. be signed and made part of the record. which is done,

Sam. Reber. Judge &c

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State of Missouri } S.S.
County of St Louis. }

I. Leon J Papin.

Clerk of the St Louis Court of Common Pleas. within and for said County. do hereby certify. that the above and foregoing. is a full true and complete Transcript of the Record and proceedings. had in the above entitled cause as fully as the same remain on file in my Office.

In testimony whereof. I have hereunto set my hand and affixed the seal of our said Court. at office in the City of St Louis. this 20th day of June. A.D. 1860.

Leon J Papin
Clk

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1862 December 9th put on ~~[illegible]~~ brief affirmed Affirmed
Dp 121

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~~[illegible]~~ 71. Copies
October Term 1862

Charles P. Booge.
appellant.

vs

The Pacific
Railroad Company,
respondent

Appeal from the
St Louis Court of Common Pleas
McClellan, Moody & Hillyer
Attys for Appellt.

Exd Thomas & Cox & Whittelsey
Attys for Respdt.

Filed 6th July 1860
W. H. Hannie Ck.
$8.00 Paid by Pltff

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$10.00 paid on this appeal by McClellan Moody & Hillyer Pltfs. attys.
assignment of errors

Charles P Boyle
appellant

vs

The Pacific Rail Road Company - Respondent -

IN SUPREME COURT,
October TERM, 1860 -

AND now comes the said appellant and says, that in the record and proceedings of the Court below, in the above entitled cause, there is manifest error, and for error said appellant assigns the following, to wit:

1. That said Court admitted improper and illegal testimony offered by Respondent
2. That said Court rejected proper and legal testimony offered by appellant
3. That the Court gave ~~to the Jury~~ improper and illegal instructions.
4. That the Court refused to give ~~to the Jury~~ proper and legal instructions offered by appellant
5. That the verdict was against the evidence.
6. That the verdict was against law.
7. That the verdict was against both law and evidence, and against the law under the evidence.
8. That the verdict was against the weight of evidence.
9. That the judgment was rendered in favor of the Respondent when it should have been rendered for the appellant
10. That said Court overruled the motion for a new trial, made by appellant

McClellan Moody & Wilson
attys for appellant -

And now come the Respondent and for joinder in error say, that there is no error in the record and proceedings of said Court of Common Pleas in said cause, as assigned by said appellant

Whittelsey
atty for Respt

Booge
v
The Pac R R Co

Assignment of errors

Filed 6th July 1860
W. L. Glanville
Ck.

McClellan Moody & Hillyer
attys for Appellant

Charles P Booze. Appellant

vs

The Pacific Rail Road Company } Respondent

The petition in this case states that on March 15th 1858 deft employed him as a runner or solicitor of freight & passengers for it from that date to the close of navigation on the Missouri River. at $125. per month payable monthly. That he served deft in that capacity up to June 19th 1858 when deft discharged him without cause & refused his services from that date. That he was at all times ready & willing & offered to fulfil his contract up to the time navigation on said river closed which was not until Dec 1 1858. and deft refused to permit him so to do. He admits that by suit he had recovered of deft his wages under said contract for the months of July & August. This suit was brot for his wages for the months of September October & November 1858. The suit was brot in January 24th 1859. Plff also claims of deft $400. for extra services See pages 5 & 8 of the Record.

The answer to the amended petition admits the employment of Plff at the wages stated. but denies that it employed him for any definite period. but only for such time as it required his services & avers that it paid him in full when discharged. That Plff recovered of deft 250 $ for breach of same contract as admitted in the petition and denies the extra services. See pp 9 & 10.

On the trial the court instructed ~~the jury~~ that Pltff could not recover. Pltff took a nonsuit with leave & moved to set it aside. Which motion the court overruled & Pltff appealed.
The bill of exceptions shows that on the trial Pltff proved all the facts stated in his petition & ~~not~~ denied in the answer. The deft then (unnecessarily) introduced the record of the former suit named in the amended petition & the answer. This was all the evidence in the cause. The instruction asked by Pltff (Page 13) was refused and Pltff excepted. The court then gave of its own motion an instruction to the effect that on the pleadings & proof Pltff could not recover. To which Pltff excepted.

The only question raised by this record is this. Did the former recovery by Pltff of his wages for July & August bar this action. In other words was the contract so entire a thing that Pltff could not bring a separate suit for his wages at the end of each month. Or would a recovery of one month's pay bar any other suit.
The breach of contract by deft was the failure at the end of each month to pay Pltff his wages and he could have sued for each month at its expiration. Deft's proposal to let him

with was no breach of the contract for which he could sue - It was no injury to him - The breach was the non-payment of his wages - and each failure to pay was a separate breach which gave Pltff a right of action - Occurring as these several breaches do at different periods of time - Pltff had a right to sue on each as at occurred - and any former recovery for a different breach would bar him no bar - I can see no difference in principle between this & a contract for monthly rent - A tenant for a year, under a written lease, at $125 per month, payable monthly, gives at the end of the first month & pays his rent for that month - The premises stand idle for the rest of the year - If the ruling of the court below is correct the landlord can not sue him until the end of the year - Or if he do & recover the 2nd month's rent that will bar any action for the other ten months' rent after the year has expired -

The instruction given by the court was erroneous - the one asked for by Pltff ought to have been given & the finding & judgt of the court ought to have been for Pltff for $375 - The judgt ought therefore to be reversed -

Jno C Moody
Atty for Appellant

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C

Booge
v
Pac R R Co

Appellants statement
& brief —

Filed May 3d 1862
A W Mead
Clk

James C Moody

Charles P. Booge } Appeal from
v. } St Louis Common
Pacific Railroad } Plea

Booge sued deft. for breach of a contract for services. Defendant pleaded former recovery.

The record to show former recovery showed that Borge had sued upon precisely the same contract, and had recovered judgment. But the plaintiff claimed that in said former recovery, he only recovered damages, for the loss of wages for the months of June July & August, while in the present case he claimed damages for loss of wages for the months of Sept & Oct. & Nov. of the same year, and therefore claimed that the same cause of action had not been tried in the former suit.

~~Defens~~ It is not denied that the cause of action is the same in both cases, to wit, breach of contract in wrongfully discharging plaintiff from defendants service.

Defendants Points & Authorities

1. Plaintiff can have but one action for the same breach of contract, and in that suit he can recover all the damages to which he is entitled up to the day of ~~judgment~~ trial.

The whole doctrine ~~of this~~ in relation to cause of action arising upon breach of

contract, will be found condensed in the case of Cutter v Powell 2. Smiths L.C 17. 36. Am. Ed 1852 & notes. p 36. discusess the English cases for discharge from service, & see pp 40. 41. Am. N.

15 Mo. 175 Dare v Pacific RR. 31. Mo. R. Pond v Wyman 15 Mo.
27 " 516 175. Ream v Walking 27 Mo. 516

The principle laid down seems to be this, That if plaintiff sues for breach of contract for services, that if he sues before the time of service expired, he is limited to the damages sustained up to the time of trial, although one or two cases in England have allowed the plaintiff ~~have to~~ recover ~~the~~ damages as if he had served the whole term

Plaintiff claims that he may sue for damages and divide his cause of action, in the same manner as if he had actually served monthly month.

II The former judgment for the same cause of action, is a bar to the present action.

For effect & character of a judgment as a bar, see.

Doe v Oliver &c 2. Smiths L.C. Am Ed. 503 572. 574.

McKnight v Taylor 1. Mo. 282.

Edgell v Sigerson 26 Mo 583.

III The plaintiff ~~has~~ is really splitting up his demand, and bringing several suits for the same cause of action which is erroneous

Wagner v Jacoby 26 Mo. 532. ~~Edgell v Sc~~

Whittelsey p. a.

179.

C

C. P. Beoge
v
Pacific R.R

Defrs Brief
Whittelsey
p d

Filed Dec 9. 1862
A.W. Mead
Clerk

Chas. P. Booge Appellant } Jas. C. Moody for Applt

vs

The Pacific Rail Road Coy Respondent } Cox & Whittelsey for Respdt

Appeal from St Louis Court of Common Pleas

This is a suit upon a contract for hire - The petition states that on the 15th of March 1858 the defendant employed the plaintiff as a runner or solicitor for freight and passengers from that time until the close of navigation on the Missouri River at the price of $125 per month, payable monthly - that on that day plaintiff entered upon such service and continued to serve defendant in that capacity until the 19th of June following, when defendant without cause discharged him, and refused to permit him to perform said contract, which he was at all times willing and ready to do and offered to do - The petition further states that the navigation ~~did not clos~~ on the Missouri River did not close until December 1858, and that there is due and owing him $375 for his wages under said contract for the months of September October and November -

The answer of defendant admits the employment and at the price stated,

for which he was employed, thereby preventing him from performing his part of the contract. A servant or agent wrongfully dismissed may immediately bring his action for a breach of the contract in dismissing him; or he may wait till the end of the term for which he was hired and then sue for his entire wages, and in many cases it has been contended that he may treat the contract as rescinded and sue on a quantum meruit for the work actually performed. Cutter vs Powell 2 Smith, Leading Cases 34. But he must make his election and if he elects to sue for the breach upon the termination of the period for which he was hired and recover, such recovery will be a bar to any subsequent action upon the same contract. In the case at bar the plaintiff elected to sue for a breach of the contract and brought his action on the 22c. of September 1858 and recover the sum of $250, and although this was claimed as wages due him ~~up to~~ from July 1st to September 1st

entitled to recover —

In due time the plaintiff filed his motion for a new trial which being denied, he appeals to this Court —

The only question for our consideration is whether the recovery in the first suit is a bar to the present action —

It is contended by the appellant that inasmuch as the contract calls for monthly payments he has a right to institute suit for his wages at the end of each and every month, and that a recovery for one month's services is no bar to a suit for services for a subsequent month —

As an abstract proposition this is undoubtedly true, but it is not perceived how it can be made applicable to a case of this kind, for this is not a suit for work and labor or services performed, but for the breach of a contract which breach consists in wrongfully dismissing the plaintiff before the termination of the period

but avers that it was for any stipulated period of time but only for such time as defendant might require his services, and that defendant had fully paid him for his services up to the time of his discharge — Defendant sets up as a further defence ~~that on the 25th of May 1859~~ a former recovery for a breach of the same contract —

The cause was tried by the court sitting as a jury, and upon the trial evidence was introduced tending to prove the contract as stated in the petition and that navigation ~~did~~ ~~on~~ on the Mississippi river did not close until after the 1st of December 1858 —

The defendant read in evidence the record and proceedings in a former suit between the same parties and in the same court ~~from which it appears that~~ instituted on the 22d Sept. 1858 for a breach of this identical contract, and in which plaintiff obtained judgment for the sum of $250, which defendant afterwards paid — The petition in ~~that~~ this suit is almost a literal copy of the petition in that, with this exception

that in the first suit plaintiff claim as damages the wages due him for the time intervening between the 1st of July and the 1st of Sept. 1858, while in this ~~suit~~ he sues to recover for the months of Sept. Oct. and November.

The plaintiff asked the following instruction which was refused

" If the defendant employed the plaintiff
" in March 1858 to serve it at $125 per
" month, payable monthly, from that date
" until the close of navigation on the Mississippi
" River, and plaintiff served according to
" his contract up to June 19th 58 when
" defendant discharged him, and if such
" navigation did not close until after December
" 1. 1858 and plaintiff was willing and
" ready and offered to serve defendant as
" aforesaid up to Dec 1st 1858 then said
" plaintiff has a right to recover his said
" pay for the whole time up to Dec 1st 1858
" and the fact that he has been sued
" defendant and recovered $250 for his
" wages for the months of July and
" August 1858, is no bar to this action

The court thereupon declared that upon the facts the plaintiff was not

v (Smith on Master and Servant 97. – 1 Parsons on Contracts 527 note v.)

still it can only be regarded as damages for the breach of the contract in wrongfully discharging him, for it is admitted and avered in the petition that he performed no service for the defendant after the 19th of June, the day he was discharged and he had been fully paid up to that time – It was only upon the assumption that the contract had been violated on the part of the defendant that enabled him to recover at all for mere constructive service – In this view of the case the recovery in the first suit is a bar to the present action and the court properly refused the instruction asked by the plaintiff – The judgment will be affirmed –

W. V. V. Bay

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Booge

vs

The Pacific Rail Road Company

Opinion

W. V. V. Bay

Filed December 9. 1862
A. W. Mead Clk

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