BOWLING, JAMES v McFARLAND, WALTER H. OCTOBER 1866 COUNTY OF RALLS 560/1

OLD 650/1

- REVERSED AND REMANDED

INVOLVED: CAUSE OF ACTION WAS FOUNDED UPON A WRITTEN INSTRUMENT, OF WHICH A COPY WAS FILED WITH THE PETITION; PETITION DID NOT STATE THE TERMS AND SUBSTANCE OF THE CONTRACT.

- PRACTICE
- PLEADING
- PETITION

INCLUDED
- HALL, ALLEN
- GREEN, BARTON

State of Missouri }
County of Ralls } In Ralls County Circuit Court

Pleas before the Hon John J Campbell Judge of the 16th Judicial Circuit in the State of Missouri in and for said County and Circuit

Parties

James Bowling Plaintiff
vs
Watter McFarland defendant } Civil action

Preamble

Be it remembered that heretofore to wit: on the 7th day of February A.D. 1865 the Plaintiff James Bowling exhibited and filed in the Clerks Office of the said Court in said County his petition verified by affidavit against the defendant Watter McFarland which with the Summons issued on the same and the Sheriffs return thereon reads in the words and figures following to wit:

State of Missouri }
County of Ralls } In the Circuit Court for Ralls County March Term 1865

Petition

James Bowling Plaintiff
vs
Watter McFarland Defendant

Hanibal Dec 8th 1865

I have this day sold James Bowling one hundred head of good strickly corn fed hogs to be delivered at Hannibal on or before the 15th fifteenth of Dec 1864
For all hogs weighing 200 lbs net five dollars and the regular grade below

5 cts per lb

Signed Walter McFarland
James Bowling

Plaintiff states that on the 8th day of December 1863 the defendant executed under his hand as did also the Plaintiff an agreement in writing of that date (a true copy of which is herewith filed, the original not being in the power, possession or control of the Plaintiff on account of its having been placed by Plaintiff and defendant in the possession of one Allen Hall for safe keeping and said Hall has left the State and has placed said agreement in the hands of Barton Green with instructions not to deliver the same to plaintiff or defendant and said Green refuses to give said plaintiff said agreement but has furnished him the copy herewith filed. Marked (A) &c.

That the plaintiff was from the said 8th day of Dec 1863 until the (15) fifteenth day December 1864 at all times ready and willing and is still willing and ready to perform all the conditions and stipulations of said agreement on his part; that the defendant has not performed the conditions on his part but has failed so to do in this to wit; defendant did not on or before the (15) fifteenth day of December 1864 (nor at any other time) deliver to plaintiff at Hanibal (nor at any other place) one hundred head of good strickly cornfed hogs nor did defendant deliver then and there any number of hogs ~~as~~ whatever as stipulated for in said agreement. Wherfore plaintiff asks damages to the amount of twelve hundred dollars which he has sustained by the breaches of the agreement by defendant as above stated)

A. W. Lamb & M. P. Green
Attys for Plff

State of Missouri
County of Marion
James Bowling plaintiff makes

oath and says the above petition and the matters as therein stated he believes to be true

Signed, James Bowling

Sworn to and subscribed before me February 7th 1865

Signed, W. L. Pierson
N. P.

And afterwards on the 8th day of February A.D. 1865 a summons was issued by the Clerk of said Court in words and figures following to, wit:

State of Missouri
County of Ralls } ss

The State of Missouri
To the Sheriff of
Ralls County Greeting

We command you to summons Walter McFarland that he be and appear in our Circuit Court at the Court-House in New London within and for said County on the fourth Monday in March next then and there before the judge of our said Court to answer a petition exhibited in our said Court against him by James Bowling in a civil action of which the accompanying writing

Summons

is a copy; and this you shall in no wise omit, and have then and there this Writ.

Witness my hand as Clerk of our said Circuit Court and the State thereof. Done at office in New London at the County aforesaid on the 8th day of February A.D. 1865

Signed S.K. Caldwell Clk

And afterwards on the 6th day of March A.D. 1865 the Sheriff of said County returned said Writ of Summons with the following endorsement thereon.

State of Missouri
County of Ralls } ss

Executed the within petition and writ by delivering an attested copy of the same to the within named Walter McFarland, Done in Ralls county Mo this 6th Day of March 1865.

Return

Wm Newland Sheriff Ralls Co
Signed, By John J. Newland, D.S.

And afterwards to wit: at the March term of our said Court on the 3rd day of April 1865 bring

the 7th day of Said Term an order was made and entered of record in words following to wit:

James Bowling Plaintiff
vs
Walter McFarland defendant } Civil action

Order of Court

The Said defendant by his attorney appears in Court and on his motion by the consent the parties leave is granted him to file his answer here in Sixty days before the next term of this Court and this case is continued

And afterwards to wit: at the August Term of Said Court A.D. 1865 On the 29th day of August and On the 2nd day of Said Term the defendant filed his demurrer in this cause in words following to wit:

James Bowling Plaintiff
Against
Walter McFarland Defendant } Circuit Court

Demurrer

Ralls County
Augt Term 1865

((Defendant demur to the petition of Plaintiff for the following grounds of objections

1st Petition does not State facts Sufficient to constitute a cause of action in this

Demurrer 1st Petition States that the plaintiff and defendant executed a written agreement and claims damages from defendant for a breach of the agreement but doesnot State what the agreement was and does not State what agreement or understanding defendant made for a breach of which damages are claimed)

Signed, Harrison
for Deft

An hearing of the Court said demurrer was overruled.

And afterwards to wit: at the term aforesaid that is to say on the 4th day of September A. D. 1865 and on the 4th day of said term the following order was made in this cause

James Bowling Pltff
vs
Walter McFarland Deft } Civil action

Now at this day comes the defendant by his attorneys and on leave of the Court filed his answer herein. In words and figures following to wit:

James Bowling
against
Walter McFarland

Circuit Court
Ralls County
August Term 1865

Defendant for answer to plaintiffs Petition herein says.

Answer

~~mits he executed~~ Defendant admits he executed the paper a copy of which is filed with Plaintiffs petition but defendant says the same was so executed to him without any consideration

and for further answer and defense herein defendant says that ~~there~~ at the time of the execution of said paper there was civil war in the United States and in the State of Missouri and that Martial law had been and was declared by the President of the United States, and there was in full force in the State of Missouri, that under and by virtue of said law and by virtue of the power ~~of~~ conferred and vested in the Militiary Commander of the armies of the United States and State of Missouri in said State he was prevented from complying with the terms of said paper if any there was binding on him

James Bowling
against
Walter McFarland

Circuit Court
Ralls County
August Term 1865

Defendant for answer to plaintiffs Petition herein says.

Answer

~~mits he executed~~ Defendant admits he executed the paper a copy of which is filed with Plaintiffs petition but defendant says the same was so executed to him without any consideration

and for further answer and defense herein defendant says that ~~there~~ at the time of the execution of said paper there was civil war in the United States and in the State of Missouri and that Martial law had been and was declared by the President of the United States, and then was in full force in the State of Missouri, that under and by virtue of said law and by virtue of the power ~~of~~ conferred and vested in the Military Commander of the armies of the United States and State of Missouri in said State he was prevented from complying with the terms of said paper if any there was binding on him

That he was by an order made by one of the Said Commanders to wit one J. S. K. Hayward a Col commanding a post of Said Army in the State of Missouri ordered and directed not to dispose of or in any wise part with the possession of any of the personal property of this defendant, Except according to the order of him. Said Hayward as Colonel as aforesaid that at the time Said order was made this defendant owned and had in his possession (100) hundred hogs which formed a part of his personal property and which were embraced in Said order. That afterwards to wit: on the day of 1863 and while Said Martial law was in action under Said order of the President of the United States, this defendant was the owner of and possessed a large quantity of corn and other provisions Suited for the Army of the United States and the State of Missouri and in order to furnish Supplies for Said Army and that part of it in the State of Missouri to wit: in Ralls County an order was made on this def—

endant requiring him to furnish a large quantity of said corn to said Army, in said County of Ralls at such times as said Army might need the same, and defendant was by said order forbidden to use, sell or in any manner dispose of said corn, this defendant says that said order was issued and given to him by one E. W. Southworth then an Officer of said Army to wit, a Captain, then and there as defendant was advised full power so to do, that in obedience to said order defendant did not use said corn, but retained the same, and furnished it to said Army and was thereby prevented from fatting said hogs in the condition to enable him to comply with the terms of said paper, to wit, Was prevented from giving them the food necessary to make them strictly corn fatted hogs, and defendant was in this way by reason of said order and on account of the prevalence of civil War in the State aforesaid and in the County of Ralls, prevented from complying with said contract

(if any valid contract it be)
(Signed) Wm P Harrison
for Deft

W. H. McFarland, defendant, makes oath and says that he believes the above answer and facts as stated therein to be true
(Signed) William H McFarland
Sworn to and subscribed before me this the fourth day of September 1865
R. St. John C.C.K.

And on the same day as aforesaid the Court made the following order and the same was entered of record, to wit:
James Bowling Plff
vs
Walter McFarland Deft } Civil action

Now at this day comes the defendant and files his answer to plaintiff's petition herein and the plaintiff files his motion to strike out said answer and said motion coming on to be heard in the presence of said parties and their attorneys, the said motion is by the Court sustained and the defendants said answer is struck out, whereby the said

judgment & order

plaintiffs action remains undefended and the parties appearing and neither party demanding a jury and the matters and things in this cause and especially the amount of damages by the plaintiff sustained in the premises and submitted to the court ~~sitting as a jury~~ and the cause coming on before the court sitting as a jury. After hearing the evidence in cause the court assesses the plaintiffs damages at the sum of one thousand two hundred and ninety five dollars. It is therefore considered, ordered adjudged and decreed by the court, that the plaintiff James Bowling do have and recover of the said defendant, Walter McFarland the sum of one thousand two hundred and ninety five dollars the amount of damages so assessed as aforesaid together with his costs and charges in this behalf ~~to~~ laid out and expended to be taxed according to law and that he may have execution therefor

James Bowling Plff
Against
Walter McFarland Deft } Circuit Court Ralls County
Augt term 1865

Be it Remembered that during the Session of this Court at the August term thereof to wit, on the 7th day of said term the plaintiff filed his motion herein in words and figures, to wit,

Notion

James Bowling Plaintiff
Against
Walter McFarland Deft } Ralls County Circuit Court Augt term 1865

The defendant moves the Court to Strike out defendants answer in this cause for the reasons following, to wit,

1st The Answer sets up no defense in law or equity to Plaintiffs cause of action

2nd The first part of defendants answer admits ~~the execution of~~ the execution of the written contract of Deft and denies any consideration without Stating wherein such failure consists on Stating any facts to rebut the presumption the law makes from the face of the contract filed, that there a sufficient and valid Consideration, to wit, An agreement in writing by defendant to Sell

and deliver to Plaintiff 100 hogs of a certain quality, at certain price and at a certain time and place.

3rd The rest of the answer even if true to the full extent pretended constitutes no defense. it is only the acts of the enemies of the Government and not those of its Officers or friends (armed or disarmed) that constitutes an excuse for the non-complyance with a contract. If defendant was impeded by any such causes as in that behalf he alleged in said answer, his recourse for damages is on the Government (State or Federal as the case may be) and can not avail him as against another citizen

4th The Answer is insufficient and deficive in substance and in fact and the facts therein stated constitutes no defense to plaintiffs action

(Signed) G. Porter
Atty for Deft,

Which motion being heard and considered by the Court is sustained and the defendants answer is Stricken Out.

to which action of the Court in Sustaining Said motion ~~of~~ and Stricking out Said answer the defendant at the time excepted

And afterwards to wit, at the Same term of Said Court and on the 9th day of Said term the defendant filed his certain motion in arrest of ~~Sa~~ judgment in words and figures. to wit,

James Bowling Plff
against
Walter McGarland Dft

Circuit Court of Ralls County Augt term 1865

Defendant moves the Court to arrest the judgement herein, Set aside the finding and grant him a new trial for the following reasons to wit,

1st The petition does not State facts Sufficient to constitute a cause of action

2nd Petition does aver the making of any contract by defendant or the breach of any duty

3rd Petition asks damages for the breach of a contract but does not Set out what contract the defendant made with Plaintiff

(Signed) Harrison
for Deft

which said motion being now heard and considered by the Court is by the Court overruled and the said judgement refused by the Court to be arrested. to which action of the Court in overruling the said motion and refusing to arrest said judgement the defendant at the time excepted

and defendant now comes and presents to the Court this his bill of exceptions and asks that it may be signed and subscribed by the Court and made a part of the record which is now done accordingly.

(Signed) John I. Campbell
Judge 16th Judicial Cir.

The defendant then prayed an appeal from the judgement of the Court to the Supreme Court of the State of Missouri and filed his affidavit, and bond in the sum of three thousand dollars according to law with John D. Biggs and William Newland as his Securiets.

The defendant now comes and presents this his bill of exceptions

to the court and asks the same to be signed and sealed and made part of the record which is now here done accordingly

(Signed) John T. Campbell judge of 16th judicial Circuit

State of Missouri }
County of Ralls } ss

I Reuben St. John Clerk of the Circuit Court in and for the County of Ralls and State of Missouri do hereby certify that the foregoing 18 Pages contain a true and perfect transcript of the pleadings and record in the said court of the suit above named of James Bowling against Walter McFarland.

Given under my hand and seal of said court. Done at office in New London this 1st day of December A.D. 1865.

Reuben St John Clerk

Cost Bill

Clerk St. Johns fees		$23.54
Sheriff Smiths "	"	1.95
" Bowlwares "	"	3.85
Witness fees "	"	6.46
Samuel H. Caldwell " Late Clk	"	4.75
William Newland " " Sheriff	"	1.30

26 (7)

October Term 1866

James Bowling
Res

U.S. Appeal W.S.C.

Walter McFarland
Afr.

Transcript

From Rolls Circuit
C[illegible]

Filed April 14. 1866
C. F. Fitzback
CCR

$10. fd by Smelds, Afr's atty.

1866 Oct 15th Assgmt of Errors
" " 19 Sub. on Briefs. Drs & Bro. & P.E.
and D.E. filed
" " 29. Proceed & Remanded

In the Supreme Court
October Term 1866

James Bowling Respondent
v ⅔ Appeal from Ralls County
Walter McFarland Appellant

And now comes the appellant by his attorney and says that in the record & proceedings of the said Ralls Circuit Court in the above entitled cause there is manifest error & for error said appellant assigns the following viz

1 The court erred in ~~sustaining~~ overruling the demurrer to the petition filed by defendant below

2 The court erred in sustaining motion of plaintiff below to strike out defendants answer.

3 The court erred in overruling motion of defendant to arrest the judgment & for a new trial

4 The judgment was for plaintiff below when it should have been for the defendant

wherefore appellant prays that said judgment be reversed &c.

E B Ewing
Atty for Appellant.

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James Bowling
v
Walter McFarland

Assignment of errors

E B Ewing
for Appellant.

Filed Oct [illegible]
O F. Fitzback
Clk

In Supreme Court
Oct Term 1866

James Bowling — Respondent
vs Y Appeal from Ralls
Walter McFarland Appellant
Statement of Respondent:
Respondent sued appellant in the Ralls Circuit Court on a written contract signed by him & delivered to the Respondent dated December 8th 1863 whereby he states that he had sold respondent 100 head of good strictly corn fed hogs to be delivered at Hannibal on or before Decr 15th 1864 at the price of $5 per hundred for all weighing 200 pounds nett and the regular grade below said contract signed by both parties — & was filed with Respondents petition.
Said petition was framed upon the precedent or form No. 9. page 1619 2 Vol Rev Stats 1855 "Entitled forms adapted to the laws of the State of Missouri"
To this petition Appellant demurred on the general ground that the contract set out in the said writing was not set forth or recited in the petition which demurrer was overruled — whereupon an answer was filed — by the Appellant (deft below) setting up as an excuse for not complying with the contract for the delivery of the hogs sold by him — an order of a military officer

one Cal. J. T. K. Nayward communicated to him by another officer of the U. S. Capt E. W. Southworth forbidding his selling any personal property & requiring him also to deliver his Corn for the use of the United States forces in the State — whereby he was prevented from complying with his Contract —

also that there was no consideration for said contract — which answer on motion was struck out as constituting no valid defence to the Plaintiffs Action — for reasons stated in detail in said motion of Respondents. And thereupon a trial had ~~and~~ before the Court neither party requiring a Jury & the Respondents damages assessed at the sum of $1295. & Judgment accordingly agt. Appellant this was September 4th 1865 — A motion in arrest for reasons similar to those set out in Appellants demurrer overruled & subsequently an appeal taken with John D. Biggs & Wm Newland Securities in appeal bond —

Brief & authorities of Respondent

1. The demurrer was rightly overruled & motion

in arrest. the petition was only required on the law stood under the code of 1855 to state that the deft executed the writing relied on — that it was filed with the petition — & that Jeff having complied with all of its provisions incumbent upon him — defendant broke the contract stating wherein. This is done in this case in conformity with form No. 9 of the appendix to Rev Statutes 2d vol. p 1619 — These forms appellant seasumes are part of the law of pleading under the code. made so by being adopted by the Legislative power of the State. This was held by this Court in regard to the forms adopted to the code of 1849 & published therewith See case of Gramp vs Dunnivant 23d M Reports p 254. Also 19th M. R 358 — & p 368 — The sufficiency of the averments of the petition according to the common law ~~rules of~~ principles & forms of pleading or their insufficiency therefore it is insisted is immaterial — The ~~profit~~ filing of the writing sued on under the code was intended to dispense with the necessity of setting forth its substance —

2d The answer it is insisted admitting as it did the execution of the writing by appellant

Set forth no defence - ~~The acts of the~~
The Contract imports a Consideration on its face & if its execution were admitted - a promise for a promise being a valid & sufficient Consideration & the promise in this case to ~~deliver~~ sell & deliver the hogs at a certain price to be paid thereon being admitted - the law inferred a Consideration - & consequently the averment of no consideration was inconsistent with the admission of the making of the Contract sued on.

- The acts or orders of the military officers are not alleged to have been authorized by law or if they were they constituted no excuse for non performance of the Contract - It is the acts of the enemies of the Government not those of its friends which excuse for non performance of Contracts -

G. Porter
Attorney for
Respondent

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James Bowling
Respondent
vs
Walter McFarland
Appellant

Brief of Respon-
-dent -

Auths

Filed Oct. 19. 1866
O. T. Fillback
Clk

James Bowling
v } Appeal from Rolls Circuit Court
Walter McFarland appellant

E. B. Ewing for appellant

1. The Court erred in overruling the motion in arrest. The petition is manifestly defective 2 R C p 1229 Sec 3; Id 1235, Sec 29. Biddle v Boyce 13 Mo R 532. Brown v Cole 1 E D Smith 267. It simply alleges the execution of ~~a certain~~ an agreement by plaintiff and defendant of a certain date, followed by an excuse for not producing the original. And then avers the plaintiff's readiness to perform the conditions of the agreement; the failure of the defendant to perform them on his part. ~~with that~~ in not delivering to plaintiff a given number of hogs of a certain kind, or any number of hogs whatever, as stipulated for in said agreement. These are the only allegations in the petition. The terms and stipulations of the agreement are not stated. What obligations were imposed by it, upon the plaintiff, do not appear by any averment; nor is there any allegation showing any liability of the plaintiff to defendant whatever, by virtue of the agreement; or that

there was any consideration ~~for~~ moving from plaintiff, for the delivery or an agreement to deliver ~~of the~~ hogs ~~or an agreement to deliver~~ by defendant. And even this undertaking, on the part of the defendant, only appears by implication — not by direct averment. ✗

There is no valid or binding contract alleged in the petition; nor are there any averments showing the existence of any such: nothing showing any legal liabilty of the defendant, or that plaintiff has the right to call on him for the performance of stipulations or conditions in regard to the delivery of hogs.

It is scarcely necessary to say that the insertion of the contract itself in the petition ~~such~~ could not supply these omissions, or dispense with ~~the~~ allegations showing a cause of action arising upon the contract. If one or more essential averments may be dispensed with by setting out a copy ~~merely~~ of the instrument sued on, in the petition, ~~the~~ pleader may omit all, and instead thereof, insert a copy of such instrument, and simply ask judgment.

It is submitted whether the matters set forth in the answer do not excuse defendant from the non performance of the ~~pretended~~ contract sued on, ~~without any contradicting claim~~

39.

C

James Bowling

v

Walter McFarland Appr

Brief for appellant.

E B Ewing
for Appr

Filed Oct. 19. 1866
O. T. Fitzback
Clk

In the Supreme Court
October Term 1866

James Bowling Respondent
vs " Appeal from Ralls Circuit Court
Walter McFarland Appellant

And now at this day the Respondent comes by his Attorney and denies that the Court below committed any such errors as Appellant has assigned & set forth in his assignment of errors herein filed and Respondent therefore asks that the judgment of the Court below in his favor be affirmed with damages as required by the statute in such case made & provided. G. Porter
Attorney for
Respondent

James Bowling
Resp^t.
vs
Walter McFarland
Appellant
Joinder in Error

Filed Oct. 19. 1866
O. T. Fishback
Clk

Supreme Court of Missouri
October Term 1866

James Bowling Respondent
vs & Appeal from Ralls Circuit Court
Walter M. Farland Appellant

The Respondent believing that the appeal in the above entitled cause is without merit & for vexation & delay — asks, that (if the judgment of the Court below be affirmed) ~~that~~ this Court will award him ten per cent ~~damage~~ interest on the amount of his recovery $1295 by way of damages as authorized by Section 36 of Article 14 of the Act entitled an Act "To Regulate the Practice in Civil cases" Revised Statutes of 1855 2d vol p. 1301 —

There is no evidence preserved in the bill of exceptions & Appellant produced none — the Court below allowing in Plaintiffs evidence the least amount that the evidence warrants, as damages for a breach of the contract & the presumption being in favor of the Respondent both as to the right to recover and ~~will as~~ the amount of the recovery — it is insisted that on an affirmance of the judgment below, the damages authorized be allowed Respondent. G. Porter for Respondent

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James Bowling
Respondent
vs
Walter McFarland
Appellant

— " —

Supplemental brief
of Respondent
"

Cites
2d Rev. Statutes 1855
p 1301.

G. Porter
for Respondent
"
Filed Oct 20 1866
C. T. Fishback
Clk

Appellant's statement

In the Supreme Court
October Term 1866

James Bowling Respondent.
vs } Appeal from Ralls Circuit Court
Walter W. Garland appellant

Bowling brought his action against W. Garland on an alleged contract for the sale and delivery at Hannibal on or before 15 December 1864 of one hundred head of fat hogs of the weight and at the price therein stipulated. The petition is as follows.

Plaintiff states that on the 8th day of December 1863 the defendant executed under his hand as did also the plaintiff an agreement of writing of that date (a true copy of which is herewith filed, the original not being in the power, possession or control of the Plaintiff on account of its having been placed by Plaintiff and defendant in the possession of one Allen Hall for safe keeping and said Hall has left the State and has placed said agreement in the hands of Barton Green with instructions not to deliver the same to Plaintiff or defendant and said Green refuses to give said agreement to said plaintiff but has furnished him the copy herewith filed. Marked (A). That the plaintiff was from the said 8th day of December until the (15) fifteenth day of December 1864 at all times ready and willing and is still willing and ready to perform all the conditions and stipulations of said agreement on his part; that the Defendant

has not performed the conditions on his part but has failed so to do in this to wit; Defendant did not on or before the (15) fifteenth day of December 1864 (nor at any other time) deliver to plaintiff at Hannibal (nor at any other place) one hundred head of good strictly corn fed hogs, nor did defendant deliver then and there any number of hogs whatever, as stipulated for in said agreement. Wherefore plaintiff asks damages to the amount of twelve hundred dollars which he has sustained by the breaches of the agreement of the defendant as above stated.

Defendants demur to the petition for the following grounds of objections. 1st Petition does not state facts sufficient to constitute a cause of action in this.

~~Demurrer~~ 1st Petition states that the plaintiff and defendant executed a written agreement and claims damages from defendant for a breach of the agreement but does not state what the agreement was and does not understand what agreement or understanding defendant made for a breach of which damages are claimed. The demurrer was overruled. Defendant then filed his answer as follows, Defendant admits he executed the paper a copy of which is filed with plaintiffs petition but defendant says the same was so executed by him without any consideration.

And for further answer and defense herein defend-

ant says that at the time of the execution of said paper there was civil war in the United States and in the State of Missouri and that martial law had been and was declared by the President of the United States, and then was in full force in the State of Missouri; that under and by virtue of said law and by virtue of the power conferred and vested in the military Commanders of the armies of the United States and State of Missouri in said State he was prevented from complying with the terms of said paper if any there was binding on him. That he was by an order made by one of the said Commanders to wit one J. T. K. Hayward a col. commanding a post of said Army in the State of Missouri ordered and directed not to dispose of or in any wise part with the possession of any of the personal property of this defendant, except according to the order of him said Hayward as Colonel aforesaid that at the time said order was made this defendant owned and had in his possession (100) one hundred hogs which formed a part of his personal property and which were embraced in said order, That afterwards to wit: on the day of 1865 and while said martial law was in action under said order of the President of the United States, this defendant was the owner of and possessed a large quantity of corn and other provisions suited for the army of the United States and the State of Missouri and in order to furnish supplies for said Army and that part of it in

the State of Missouri to wit: in Ralls County an order was made on this defendant requiring him to furnish a large quantity of said corn to said Army, in the said County of Ralls at such times as said Army might need the same, and defendant was by said order forbidden to use, sell or in any manner dispose of said corn. This defendant says that said order was issued and given to him by one E. W. Southworth then an Officer of said Army to wit: a captain then and there as defendant was advised full power so to do, that in obedience to said order defendant did not use such corn, but retained the same and furnished it to said army and was thereby prevented from fattening said hogs in the condition to enable him to comply with the terms of said paper, to wit: was prevented from giving them the food necessary to make them strictly Corn fattened hogs, and defendant was in this way by reason of said order and on account of the prevalence of civil war in the state aforesaid and in the county of Ralls, prevented from complying with said contract (if any valid contract it be) Plaintiff by his Attorney moved to strike out the answer for these reasons.

1st The answer sets up no defense in law or equity to Plaintiffs cause of action.

2nd. The first part of defendants answer admits the execution of the written contract of Defendant

and denies any consideration without stating wherein such failures consists - or stating any facts to rebut the presumption the law makes from the face of the contract filed that there is a sufficient and valid consideration, to wit: an agreement in writing by defendant to sell and deliver to Plaintiff 100 hogs of a certain quality, at certain prices and at a certain time and place.

5th. The rest of the answer even if true to the full extent pretended constitutes no defence, it is only the acts of the enemies of the Government and not those of its officers or friends (armed or disarmed) that constitutes an excuse for the non compliance with a contract. If the defendant was impeded by any such causes as in that behalf he alleged in said answer, his recourse for damages is on the Government (State or Federal as the case may be) and cannot avail him as against another citizen.

4th. The answer is insufficient and defective in substance and in fact, and the facts therein stated constitutes no defense to plaintiffs action.

The motion was sustained and said answer stricken out - to which ruling of the Court defendant excepted.

Defendant in due time filed his motion to ~~set aside~~ arrest the judgement set aside the finding and grant a new trial for the following reasons.

1st. The petition does not state facts sufficient

to constitute a cause of action.

2nd. Petition does not aver the making of any Contract by defendant or the breach of any duty.

3d. Petition asks damages for the breach of a Contract but does not set out what Contract the defendant made with plaintiff.

The motion was overruled and judgment for plaintiff ~~and~~ Defendant excepted ~~[illegible]~~ filed bill of exceptions & ~~Defendant~~ ~~then~~ prayed an appeal, which was granted.

E B Ewing
Atty for Appellant.

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James Bowling
v
Walter McFarland app

Statement of
Appellant
E B Ewing
Atty for app

Filed Oct 19 1866
C. J. Fulbach
Clk

James Bowling
v. Pls.
Walter McFarland
Appt.

In the Supreme Court
Oct. T. 1866.

Opinion of the Court.

The cause of action was founded upon a written instrument, of which a copy was filed with the petition; but the petition did not state the terms and substance of the contract. It has been already decided that in determining the sufficiency of the petition, the averments contained in it can alone be considered, and that the instrument filed as an exhibit constitutes no part of the petition. (Baker v. Berry, 57 Mo. 304; Barry v. Lackey, 35 Mo. 392). The forms contained in the practice act of 1849 were a part of the statute, but the forms recommended by the editor of the Revised Statutes of 1855 have not the sanction of legis-

lative enactment. The petition was clearly bad on demurrer, or on motion in arrest of judgment.

Reversed and remanded.

The other judges concur.

O. W. Holmes

James Bowling
Res
v.
Walter McFarland
Appt.

Opinion
Reversed & remanded
Holmes.

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O. T. Hickback
Clk