KING, ELIZA v PEARCE, ALBERT MARCH 1867 COUNTY OF ST. LOUIS 5776

OLD 657/7

- AFFIRMED

- INVOLVED:
  - PRACTICE - CONTINUANCE
  - AGENCY - CONTRACT

In the Sup Ct Mo
March 7, 1867.

Eliza King Res,
v
Albert Pearce Applt
} Appeal from St Louis Court Pleas

Opinion of the Court

The matter stated in the affidavit for a continuance, taken in connection with what transpired at the previous term, is not sufficient to warrant this Court, in interfering with the ruling of the Common Pleas, overruling the defendants application.

At the previous term the motion for a continuance was on the ground that the plaintiff and Capt Atlee were indispensable witnesses. At the time when the cause was tried, no efforts has been taken to procure the testimony of these two witnesses, nor was it suggested that they were at all material, But

the continuance then prayed for was on account of the absence of Hescox, and the inability to take his deposition. From a reading and inspection of the two affidavits, and looking into the matters stated as reasons for desiring the evidence of the different witnesses, at the respective terms, the court might well have concluded that the motion was merely for delay. Such being the fact, and there is no flagrant abuse of power exhibited, and the ruling of the court below being entitled to every intendment in its behalf, there is nothing here in that regard requiring a reversion.

The record shows that Henly purchased the cotton as agent of defendant, and that it was actually received and appropriated by the defendant. At the time the contract was entered into and the purchase made, Henly showed plaintiff, the defendant's letter

of July 29, 1862, authorizing him to buy cotton, and stating that he would deposit the purchase money in bank at St Louis, if the seller preferred it. In the unsettled state of the country where plaintiff resided, it was hazardous and unsafe to keep money, and therefore she sold taking a receipt that the money should be paid at some future time, or deposited in bank for her use. The evidence does not afford any pretence for saying that the contract was made with the agent in his individual capacity and not with the principal. But if there was any doubt about that question, it was left to the jury under instructions in the most favorable aspect for the defendant.

If the agent has been false to his trust, or wronged his principal, the latter has his remedy, but the plaintiff who acted in good faith, ought not to be made to suffer thereby.

Judgment affirmed

The other judges concur

David Wagner

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Eliza King

v

Albert Pearce

Opinion of the

Court Wagner

Filed April 18. 1867

O. Fishbackell

per E.M. Cody Dep

Affirmed

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State of Missouri } ss Be it Remembered that here to-
County of St Louis } fore, to wit, on the 7th day of October 1863 there was
filed in the Office of the Clerk of the Court of Com-
mon Pleas within and for the County aforesaid a Pe-
tition which is in the words and figures following, to
wit:

Petition

State of Missouri } In the St Louis Court of Com-
County of St Louis } mon Pleas November Term 1863

Eliza King, plaintiff
against
Albert Pearce, defendant } The Plaintiff States that
on the Eleventh day of
August in the year eighteen hundred and Sixty two she
sold and delivered to the defendant (through and by means
of the intermediation of his agent, Thomas J Henly, to
that effect duly constituted & appointed) thirty bales of Cotton weigh-
ing fourteen thousand four hundred and ninety pounds
at and for the price of twenty two and one half cents
per pound: the price whereof being three thousand
two hundred and Sixty dollars, twenty five Cents.
The said defendant agreed and promised to pay to the
Plaintiff or to deposit the same in Bank of St Louis
to her credit; and the said defendant received and ap-
propriated to his own use the said Cotton. And on the third
day of October 1863 the said Plaintiff required the
said defendant to pay the said sum of money to her or to
deposit the same to her credit in Bank of St Louis, but
said defendant wholly failed and refused to Comply with said

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request and refuses to pay the said Sum of money to the Plaintiff or any part thereof wherefore the said Plaintiff sues and asks judgment for the said Sum of three thousand two hundred and Sixty dollars 25/100 and interest and Costs

Thos. T. Gantt

atty for Plaintiff

Church Buck being duly Sworn Says on his oath he is the agent of the plaintiff that he verily believes the aforegoing Petition and the matters and things therein Stated and Set forth to be true

Church Buck

Sworn to And Subscribed before me this 7th Oct 1863 S. J. Papin Clerk

And on the Same day the following Summons was issued to wit:-

Summons

County of St Louis ss

The State of Missouri, To the Sheriff of St. Louis County, Greeting. We command you to Summon Albert Pearce 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 Third Monday of November 1863, then and there to answer the Complaint of Eliza King as set forth in the annexed Petition; and have you then and there this writ

Witness Leon J Papin, Clerk of our said Court with the seal thereof hereunto affixed at Office

Seal U. S. Stamp 50 Cents

in the city of St Louis this Seventh day of Oct in the year of our Lord eighteen hundred and Sixty three

Leon J Papin Clerk

I acknowledge my self bound for all costs that may occur in the case of Eliza King against Albert Pearce. Witness my hand and seal at St Louis this 7th day of Oct 1863

Thos. T Gantt (Seal)

Sheriff's Return

The defendant not found in my County

John C Vogel Shff

Bryan Cross D.

And on the 12th day of February 1864 the following Summons was issued to wit:-

Second Summons.

County of St Louis ss.

The State of Missouri To the Sheriff of St Louis, County Greeting: We again Command you to summon Albert Pearce 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 on the first Monday of April 1864, then and there to answer the Complaint of Eliza King as set forth in the annexed Petition; and have you then and there this writ

(Seal)

Witness Leon J. Papin Clerk of our said Court with the seal thereof hereunto affixed at office in the city of St Louis this 12th day of February in the year of our Lord eighteen hundred and Sixty

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Sheriff's Return

Your Leon. J. Papin Clerk

Albert Pearce not found in my County

Fee 50 cents

John C Vogel Sheriff

Jacob L Wegand Dy.

And the 22nd of April 1864 the following answer was filed, to wit:-

Answer

Defendant for answer to Plaintiffs Petition denies that Plaintiff ever sold or delivered to defendant thirty bales of Cotton weighing 14491 pounds, or any other quantity of Cotton, as alleged in said Petition, at the price therein named or at any price.

Defendant denies that Thomas J. Henly was the agent of defendant as alleged, and for the purpose mentioned in said petition. Defendant denies that he agreed or promised to pay to the Plaintiff the price of said Cotton, or to deposit the same in Bank at St Louis to her credit, and denies that he ever made any such Contract with defendant, or ever authorized any other person to make any such Contract with her.

Whether defendant ever received and appropriated to his own use the said Cotton or any cotton that ever had been plaintiffs. Defendant has no Knowledge or information sufficient to form a belief, but if such were the fact, defendant received and paid for it in good faith not knowing that Plaintiff had any interest in it as hereinafter stated. And for a further and complete answer to plaintiffs petition, defendant further states

5 that on the twelfth day of July 1862, he entered into a written contract with Thomas J. Henley (who represented to defendant that he had an extensive acquaintance and many friends and relatives in Tennessee) whereby said Henly agreed to go to Tennessee and purchase Cotton for gold and defendant agreed with said Henly to purchase of him all the cotton, he, said Henly would purchase, and to pay him in gold whatever said Cotton should cost said Henly and also to pay him a certain proportion of all the profits that might be made by the sale of said Cotton in New York whither said defendant was to send it. Defendant further states that in pursuance of said Contract and in no other way. Said Henly did go to Tennessee and did purchase about one hundred and Sixty (sic) bales of Cotton, which Cotton, defendant afterwards purchased of said Henly and paid him in cash for the same, upon delivery, as he had agreed to, and afterwards paid to him his proportion of the profits upon a resale of said Cotton, and had a final settlement with said Henly of all matters connected with said Henly the purchase and sale of said Cotton, before the Commencement of this suit, before defendant ever heard or knew or had any notice of any claim of Plaintiff on account of any sale to Henly of Cotton, or that plaintiff pretended to have any claim against this defendant on account of the same or on any account whatsoever.

Defendant further states that Plaintiff sold any

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cotton to said Henly upon the terms set forth, it was sold to him on his own credit and not on the credit of defendant. And said Henly had no authority to buy said cotton for defendant on any such terms Defendant denied no such credit for cotton and took no credit, but on the contrary paid for all that said Henly or any other person delivered to defendant, on the delivery thereof, wherefore he prays to be dismissed with his costs

Geo. P. Strong
Atty for defendant

Geo C. Pearce, agent for said defendant, being duly sworn says he believes the foregoing answer and the matters therein as stated to be true

Geo C. Pearce

U. S. stamps 5 cts
Seal

Sworn to and subscribed before me this 21st day of April 1864

Sanford E. Leavitt
Notary Public

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And this case was Continued on affidavit till June 22nd 1865 when the following proceedings were had, to wit:-

Affidavit overruled

Verdict $3781.89

Thursday June 22nd 1865

Eliza King
Vs. 128
Albert Pearce

Now at this day came the parties by their respective attorneys, the defendant files a motion, and affidavit in support thereof for a Continuance, which motion having been heard and fully considered by the Court is overruled; thereupon come a jury, to wit: A. Lenz, Leopold Fisher V. S. Gordon, Francis Giles, Francis Sharwitz, Frederick Neidringhaus, Joseph Ratty, William Reiss, J. S. Frank, John Schnell, John Scholl and F. Pitzman, 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 the find for the plaintiff and assess her damages at the sum of Thirty Seven hundred and eighty one Dollars and eighty nine cents. Therefore it is considered by the Court that the plaintiff recover of the defendant the damages aforesaid as assessed and also her costs herein expended and have execution therefor.

And on Tuesday June 27. 1865 the following further procedings were had, to wit:

Motion for a New trial overruled

The Court having heard and fully considered the defendants motion for a New trial herein doth

order that the same be overruled.

And on Saturday November 18th 1865 the following further proceedings were had to wit:-

Appeal allowed

The defendant files a Bill of Exceptions and an affidavit for an appeal, and on his motion by attorney, an appeal is allowed him to the Supreme Court from the judgment herein rendered, and he thereupon files an appeal bond which is approved by the Court.

Which affidavit for appeal, Bond, and Bill of Exceptions are as follows:-

Affidavit for appeal

Geo. P. Strong being duly sworn says that the appeal in the above entitled cause is not made for Vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment or decision of the Court Geo. P. Strong

Sworn to and subscribed before me this 18th Nov. 1865 Leon J. Papin clerk

Appeal Bond

Know all men by these Presents, that we J. S. Ballenger as principal and Edgar Ames and George Charles Pearce as securities, are indebted to Eliza King in the sum of Seventy Seven hundred Dollars, for the payment whereof we bind ourselves our heirs, executors and administrators jointly & severally firmly by these presents. Sealed with our seals, and dated at St Louis this twenty second day of July One thousand Eight hundred and Sixty five. The Condition of this obligation is

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such, that whereas Albert Pearce has appealed from the judgment rendered against him and in favor of said Eliza King on the 22nd day of June 1865 in the St Louis Court of Commom Pleas for the sum of thirty Seven hundred and eighty one dollars and eighty nine cents, together with Costs. Now if the said appellant shall prosecute his 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 Commom Pleas to give, and if the judgment of such Court, or any part thereof be affirmed, that he will comply with and perform the same so far as it may be affirmed, and will pay all damages and costs which may be awarded against him by the Supreme Court then this Obligation to be Void otherwise to remain in force

J. S. Ballenger (seal)
Edgar Ames (seal).
Jno. C. Pearce (seal)

Approved by Court Nov. 18. 1865
Lew. J. Papin Clerk

Bill of Exceptions

Be it Remembered that this cause was first set for trial at the April Term 1865 on the twenty Seventh day of April 1865, and was on that day by Consent of parties, and on account of the absence of witnesses laid over to be met after the determination of the other cases remaining on the trial docket and on the tenth day

of June 1865 the said cause was set for trial on the twenty first June '65 and and notice thereof was then given by the Court to both the parties and on the twenty first day of June 1865 when the said cause was called for trial according to the said resetting, the defendant presented the following affidavit, that is to say:-

Affidavit for Continuance

George C Pearce being duly sworn says he was Cashier and Confidential Clerk of defendant and his partners Henny and Wordruff during 1862 and three and while defendant with others was engaged in the purchase of Cotton in the Southern States, and that he was familiar with the business of defendant, and that defendant removed to New York several years since and has not since been a resident of Missouri or given his personal attention to this case. Affiant with his partners Wm S. Chapman and Daniel B. Pearce have been engaged in settling up the business of defendant of and his firm of Henning & Wordruff, and has been and still is familiar with their business and has had much to do in connection with defendants Counsel in this cause. Affiant further states that Warren S. Hecox who is a Merchant and trader and resides in Chicago Illinois is a material witness for defendant in the above entitled cause, and his testimony is material for defendant, and without it affiant believes defendant cannot safely go to trial, that there are no other witnesses in attendance or known to af-

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fiant, or to defendant, as affiant verily believes whose testimony could have been procured in time for this trial, upon whom defendant can safely rely to prove the particular facts he expects to be able to prove by said Hecox. Affiant knows from conversations with said Hecox and between said Hecox and defendant, in affiants presence, that defendant expects to prove that all the cotton purchased for defendant by Thos. J. Henly (who is as affiant is informed and believes a relative of plaintiff and her principal witness) was paid for at the time it was delivered to defendant or his agents, and that no cotton was purchased of plaintiff on credit and no such contract made with her as is alleged in plaintiff's petition. Also that said Henly frequently represented and declared that said Cotton had all been paid for.

Defendant has been unable to take said Hecox' deposition because ever since this suit was brought and before he has been spending most of his time in the Southern States, travelling from place to place, not remaining any fixed time in any one place long enough for defendant to ascertain the fact and give the requisite notice for taking his deposition. Affiant learns that said Hecox has within the last few days and since the 12th. of this month, returned from the South, but that he did not remain at home but a few days, but has gone to New York and is still absent from his place of residence. affiant is informed and believes that

efforts were made previous to the last setting of this Cause to get the deposition of said Hecox and notice given, and the papers sent to Chicago to take his deposition, but he was still absent from home and they did not know when he would return. Affiant is informed and believes that said Hecox has about finished up the business which has kept him from home so much of the time for several years past and that defendant will in all probability be able to secure his testimony in time for the trial of this Cause at the next term. That this application is not made for delay, but that justice may be done in the premises & that the costs of the previous Continuance have been paid: that said witness is not absent by the Consent Connivance or procurement of defendant as affiant believes, nor of his agents or Attorney

Geo E. Pearce

Sworn to and Subscribed before me this 22d. day of June A. D. 1865 Leon J Papin, Clk.

And the Notice and return to take depositions in Chicago:-

Notice to take depositions

To Mrs Eliza King or T. T. Gantt Esq. her Attorney. You are hereby notified that depositions of witness, to be read in evidence in the above entitled Cause, on the part of the defendant will be taken at the Office of Messrs. L & G. Trumbull No. 90 Washington Street, bet. Clark & Dearborn in the city of Chicago in the County of Cook and State of Illinois

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on the twenty fifth day of April 1865, between the hours of eight O'clock in the forenoon and Eight O' Clock in the afternoon, and that the taking of said deposition, if not completed on that day will be continued from day to day at the same place and between the same hours, till Completed Geo. P. Strong

Atty of defendant

I hereby acknowledge the service and the sufficiency of the above notice and waive declinus

Thos. T. Gantt

Certificate of Notary Public

State of Illinois } ss
County of Cook }

I Cyrus M Hawley, a Notary Public within and for the County of Cook aforesaid do hereby certify that at the request of the Counsel for Albert Pearce defendant, I have made inquiry for Warren P. Hecox, a resident of the City of Chicago in said County of Cook, for the purpose of taking his deposition in the cause referred to in the annexed notice in Case of Eliza King Plaintiff and Albert Pearce defendant pending in the St Louis Court of Common Pleas in the State of Missouri. I caused inquiry to be made for said Hecox at his place of residence in said City of Chicago and am informed that he is not within the State of Illinois, but somewhere in the South. I further certify that the said Warren P. Hecox is not at this time within said County of Cook, so that I cannot at this time take his deposition

U.S. Stamp 5 cents

In testimony whereof I have hereunto set my hand and affixed my

Seal

Notarial Seal at Office in the City of Chicago in said County of Cook in the State of Illinois this 25th day of April A.D. 1865 C. M. Hawley, Notary Public

And moved the Court to continue the cause by reason of the matters stated therein: and on the argument of said motion, plaintiff read in opposition to the same the affidavit made by defendant for a continuance of said cause at the November Term 1864 in the words and figures following:—

Second Affidavit for Continuance

Geo. C. Pearce agent of defendant being duly sworn says that Eliza King, the plaintiff whose residence affiant understands to be in the State of Tennessee, who is a planter by occupation, is a material witness for defendant in the above entitled cause whose testimony is material in this cause, and without it defendant cannot safely go to trial; that there is no other witness in attendance or known to affiant or to defendant as affiant is informed and believes whose testimony could have been procured in time, upon which defendant can safely rely, to prove the particular facts, that said Eliza King is expected to prove and affiant believes defendant cannot safely go to trial without the testimony of said absent witness, that she is not absent by the consent connivance or procurement of affiant of defendant as affiant believes. Affiant further states that owing to the existence of Civil war in Tennessee and the presence of guerrillas and hostile forces, at different points in said State and through the

Country this side of and around the residence of said E. King, and to the fact that Civil Government has been overturned in said State, defendant has been unable hitherto to secure the deposition or obtain the testimony of said witness, but hopes that by the next term of this Court the Condition of the Country will be such that her deposition may be taken in time for trial at the said next term of this Court.

Affiant further States that Joseph Artes whose residence is in Quincy Illinois is also a material Witness for defendant, without whose testimony he cannot Safely go to trial and that there is no other witness in attendance, or whose attendance or testimony could have been procured in time for this trial upon which defendant can rely to prove the particular facts said Artees is expected to prove, that he is not absent by the Consent Connivance or procurement of defendant as affiant is informed and believes; that the Testimony of said Artees is important to rebut and Contradict the testimony of a certain witness, upon whom affiant understands the Plaintiff relies to make out her Claim, and said personal attendance is essential to the defense of this action, as he cannot be interrogated properly until it is known what the testimony of Plaintiffs main witness will be. Said Artees has promised to attend this Court in person whenever his testimony shall be wanted and defendant would have had him here at this term of the Court, but for

the fact that he has been unable to secure the testimony of said Eliza King without whose testimony defendant could not safely go to trial.

This application is not made for delay, but that justice may be done Geo. C. Pearce

Sworn to before me this 22d. day of Dec. 1864

L. J. Papin, Clk

The Court overruled the said motion for a continuance, and defendant excepted thereto at the time. A jury being sworn the Plaintiff called as a witness

Testimony of Thos. J. Henly

J. Henly who testified that he knew Plaintiff and defendant. That the following papers:-

Agreement between Pearce & Henly

This agreement made and entered into this the twelfth day of July, Eighteen hundred and sixty two by and between Albert Pearce, party of the first part and Thomas J. Henly, party of the second part, both of the city and County of St. Louis and State of Missouri, to wit: The said party of the second part shall go to West Tennessee and purchase all the cotton he can advantageously for gold, delivered at the most convenient Rail Road Station for Shipment to New York within Sixty days. The said party of the first part or his agent shall receive and pay for all cotton so purchased by said party of the second part in gold at the point of delivery on the Rail Road and ship the same immediately to New York and have it sold for cash and after deducting all necessary charges, such as transportation, Insurance and Commission. One fourth of

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the profits shall be paid over to said party of the second part for his services. The said party of the first part shall furnish said party of the second part all the money necessary to pay his expenses while absent on said trip. The said party of the first part Binding himself in the sum of ten thousand dollars for the faithful fulfilling of his part of this Contract

Witness our hands and Seals, the day and year first above written. It is understood that the said party of the first part shall be notified of purchases of Cotton by said party of the second part by Telegraph, if it can be done, if not, by letter. And said party of first part shall have a reasonable time thereafter, to get the gold to the point he is to receive and pay for it at, on said Rail Road

Witness

Albert Pearce (Seal)

T. J. Henly (Seal)

It is agreed, that the Contract made and entered into on the twelfth day of July, Eighteen hundred and Sixty two, by and between Albert Pearce, party of the first part and Thomas J. Henly, party of the second part, for the purchase of Cotton in West Tennessee shall remain in full force, with the additional authority granted to said party of the first part to said party of the second part to purchase Cotton delivered, delivered at any place he may think proper Albert Pearce

St Louis Missouri, July 21, 1862"

were throughout in the handwriting of Pearce and

signed by him. That witness had an engagement with Pearce to go to Tennessee and buy Cotton for him The Cotton was to be sent to New York, and witness was to have a share of the profits. Witness exhibited both these letters of defendant to Mrs. King who is a widow lady living near Brownsville Tennessee. She had some Cotton and Showed these letters to her. Witness purchased from her 30 bales weighing 14490 pounds at 22½ cents per pound, agreeing to have the price of it deposited to her credit in Bank at St Louis. This Cotton was delivered to Captain Arthur Pearce's agent at Jackson and afterwards came to the hands of Pearce and was appropriated by him. He has never paid for it to me or any one else. Pearce admitted to me that it had come to his hands. It was part of One hundred and ninety six bales by me bought for him in July and August 1862 under my contract. I told him that this Cotton had not been paid for and when he had our Settlement, he settled on the basis of its having been received by him.

On Cross-examination witness stated that on his return to St Louis, he tried to get a settlement with Pearce; that Pearce would exhibit no account, and refused to give any statement of what had been done with the Cotton, which instead of having been sent forward to New York, had been sold or was represented as having been sold, at St Louis. Pearce offered to pay witness $500. Witness slapped him, denounced him as a Swindler

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and threatened to inflict personal Chastisement on him. This was on the pavement in front of the Merchants Bank, about 9 o'clock in the morning Witness refused the $500. offered by Pearce and demanded $1000. which was less than he was entitled to on a fair settlement. Witness demanded the same to be paid before a specified time, and sent the demand by Mr Kercheval and Pearce set back the check for $1000. Mrs. King's husband, now deceased was the Cousin of witness. Witness was 6 or 8 weeks in Tennessee buying Cotton. Bought for no one but Pearce. Never sent any Cotton to Sells or Whittemore or Carter, or any one else but Pearce, and bought none on his own account When witness bought Plaintiffs Cotton, he gave her a receipt which is in possession of her attorney &c was here produced. This is the receipt which witness gave to plaintiff. It is signed by witness and contains the Contract made with her. The receipt was then read in the words and figures following:—

Receipt of Henly to Mrs. King for Cotton

21 Witness proceeded as follows:- I bought no other cotton on credit. Mrs King did not want her money at her home. She wanted it at St Louis. She was afraid that the guerillas would rob her. I had the money with me to pay her, but she would not take it. I returned this money to Mr Phelps who was the agent of defendant. I never rendered a statement of the cotton bought for Pearce, except that as I would buy a lot I would report it, or see it delivered, either to Phelps or Artus, the agents of Pearce. I never represented that the cotton was paid for; never reported it to Artus Phelps or Hecox as paid for. When I came to St Louis I went to the Office of which firm, defendant was a member, to get a settlement, but do not recollect handing in my account of Cotton bought by me. Witness was here handed a paper marked Exhibit "A" and was asked if that was his hand writing; and replied, "It looks like my handwriting. I should say it was my hand writing, but I do not remember making it out. It appears to be a statement of the cotton bought by me. I remember the names of some of the sellers, not all of them". The paper was then read in the words and figures following:-

Exhibit "A"

Bought at Jackson Aug.st 1st /60

	of Mr Taylor	Jackson	14	Bales	Cotton	7728 lbs.	.23 = $1823.44
Aug. 4	of Mr W.B. Bryant	Jackson	17	do	do	8679 "	.26 = $2256.54
Augt 9th	" Sullivan	Brownsville	4	do	do	2202 "	.28 = $616.56
" 10	E. King	do	31	do	do	14490 "	.25 = $3622.50
" "	E Warren	do	7	do	do	3935 "	.25 = $983.75

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Augt 10"	J.C. Chilton	Jackson	3	Bales	Cotton	1637 @ 26½ =	$433.80
" 14	J.R. Palmer	Brownsville	1	do	do	571 " 24	$137.05
" "	H McCoy	Brownsville	11	do	do	6085 " 26	$1582.10
" "	Mr Nolan	Brownsville	2	do	do	930 " 26 =	241.80
" 18	Mr Hotchkiss	Jackson	9	do	do	4756 " 31 =	1474.36
" 25	J R Taylor	Brownsville	16	do	do	8032 " 25 "	2008.00
" "	J R. Palmer	Do	48	do	do	23904 " 25 "	5976.00
" "	E. King	do	9	do	do	3883 " 25 "	970.75
" "	T. B. Claiborn	do	22	do	do	11338 " 25 "	2834.50
" 28	R. S. Thomas	do	1	do	do	440 " 30 "	132.00
" "	J. C. Chilton	Jackson	3	do	do	1566 " 30½ "	477.62

197 Bales

Delivered to Capt J Arlus

The Witness was then shown a paper represented to be his statement before referees in a matter of controversy relating to this Cotton between Rosenfeld & Pearce, and Stated "The Signature to that paper is mine. The paper itself is in the handwriting of — I do not recollect what statements I made before the referees on that occasion, but remember that I did testify: I will not swear positively that this is my signature. It looks like it, but I will not swear to the genuineness of anything coming from that Office. Defendant then offered the paper last referred to in evidence. Plaintiff objected that it was irrelevant. The Court allowed the defendant to read the following sentence, that is to say:- Mr Philips paid for nearly all the Cotton I bought.

The Plaintiff thereupon said that She would prefer

the whole Statement to be read, if any part of it was admitted. The defendant said that if the Plaintiff chose to offer the remainder as her own testimony She might do so, but defendant did not want it: and thereupon Plaintiff declined reading the remainder of said Statement.

On Re-Examination the Witness Stated: Upon a fair Settlement with Pearce according to our contract I was entitled to more than a thousand dollars. I remember buying nine bales of Cotton from Elias King. He is the same man who is named in the paper identified by me. He is a brother of the husband (deceased) of Mrs King the Plaintiff.

Plaintiff here closed her case

Testimony of R. J. Lackland

The defendant called as a witness R. J. Lackland who testified that he was acquainted with the witness Henly and knew his handwriting. That he saw him sign & swear to that Statement made before the referees and here produced. That as to the other paper (Exhibit A) he thought it looked like Henley's writing but he could not identify it as such. Witness knew nothing of the present controversy. This witness was not Cross examined.

Testimony of Charles Buck

The defendant then called as a witness Charles Buck who testified that he brought the receipt given by Henley to the Plaintiff to this city, a few months after it was given, in October, and tried to collect it of defendant. Called at this Counting room, but did not see him. Witness was not present when it was given

24 He received it of Plaintiff. Being asked what she said respecting it: he stated that she said it was the receipt for her Cotton, and that she had the money in Bank at St Louis. Witness thought from what she said that she had a certificate of deposit. asked her for it. She gave him this receipt. Witness has been acting as the agent of Mrs King. Lives in Brownsville Tennessee. She a mile and a half out of Town. Mrs. King told Witness that Henly left the paper with her and she wished Witness to collect the money it calls for. On Cross Examination witness Stated that Mrs. King told him that Henly had been there buying Cotton for Pearce of St Louis, and the money coming from her Cotton was to be deposited for her in Bank at St Louis. At this point, defendant objected to the statements of plaintiff except so far as they were made on the occasions as to which he had interrogated the witness on his examination in Chief, as occurring when this paper was handed to witness. Witness Stated that he had had several Conversations with the plaintiff before he finally got the paper, and had Stated the substance of them all in his examination in Chief. He could not discriminate as to what occurred at the time of the delivery of the paper. The Court directed the witness to confine himself to the Statements made by the plaintiff on these occasions, already referred to and not to give her Statements at any subsequent time; but allowed the plaintiff to cross examine as to any of the Conversations and Statements

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already touched upon in the examination in Chief. The defendant excepted at the time to the ruling of the Court on this head. The witness proceeded:- Elias King was present on one of the occasions spoken of. Mrs. Eliza King stated that Henly had shown her the letters, and they had a discussion whether she should let him have her Cotton: that she did not want the money about the house for fear of guerillas, and therefore she agreed to have it in Bank at St Louis, and as I was coming to St Louis shortly after the receipt was given she wished me to draw the money, and lay part of it out for her. This was about October.

On Re-Examination, witness said that when he came to St Louis, he called on Henly, and afterwards at the Office of Hening & Wooldruff. Did not see defendant. Saw Charles Pearce who told him they had nothing to do with it and refused to pay it.

Testimony of Catlin

Catlin for defendant testified that he had seen the paper marked "A", but did not know the hand writing. Was Book keeper for Henning & Wooldruff in 1863, and had something to do with the settlement with Henley. Cannot say that I ever heard him say that this Cotton was paid for. Heard several Conversations between Henley & Defendant, but Cannot recollect what was said. This paper was in the Office where the settlement was made. Don't know where it came from. I made up the acct for settlement, and suppose I got my figures from this paper. I think from a

Comparison of handwriting that the handwriting of the receipt resembles that of the paper "A", but would not like to swear that they are written by the same person. Paper "A" is not in the handwriting of any one about the House of Henning & Woodruff

Testimony of George C. Pearce

George Charles Pearce Stated that he had the impression that all of the cotton bought in Tennessee by Henley was paid for ~~out~~, but could not say he heard Henly say this, but such was his impression. Would not like to swear positively about it. Witness made the settlement or ordered the check for Henley. He was in the Office several times, but witness did not always take notice of what he said. Cannot state that paper "A" is in Henly's writing. The paper was found in the Office of Henning & Woodruff, and witness has no doubt it was the account of Henley's Cotton transactions. It is not in the handwriting of any one about the Office of Henning & Woodruff.

This was all the testimony in the Cause.

The Court at the instance of the Plaintiff gave the following instruction, the defendant excepting thereto at the time:-

Instruction Given for Plaintiff

If the Jury believe from the evidence that the Plaintiff on the faith of the two letters of the defendant dated 14 & 29 July 1862 respectively, sold and delivered to his agent for him thirty bales of cotton weighing 14490 pounds at 22½ cents per pound and that the agreement was that the price was to be

deposited in Bank at St Louis to her credit - that defendant received the cotton, but some time in October 1862 refused to pay for the same that the price thereof was never been paid to the plaintiff they will find for the plaintiff and give a Verdict for the price of the cotton and interest from the date of the demand and refusal of the price.

The defendant asked the following instructions, which ~~xxxx~~ the Court gave:-

Defendants instruction Given

If plaintiff sold the Cotton to T. J. Henly for his account and not for defendant and took the individual agreement of said Henley to pay for said Cotton when called for, or that he would deposit the money to her credit in Bank at St Louis Mo. then Plaintiff cannot recover of defendant in this action

And also the following which the Court refused:-

Defendants instructions Refused

If plaintiff sold the Cotton to T. J. Henley and took the individual agreement of said Henley to pay for said Cotton when called for, or that he would deposit the money to her credit in Bank at St Louis Mo. then plaintiff cannot recover of defendant in this action

If the defendant or his agents gave to Henley the money to pay for all the cotton he bought and if Mrs. King, the plaintiff, knowing Henley had the money to pay for the Cotton, took Henley's individual agreement to pay her the money, when called for, & to deposit it in Bank at St Louis Mo then plaintiff must look to said Henley, and cannot recover the amount of defend-

ant in this action.

The defendant at the time, excepting to the refusal Within four days thereafter, the defendant filed a motion for a New trial, in the words and figures following:-

Motion for a New Trial

Defendant moves the Court to set aside the Verdict and Judgment in the above entitled cause and to grant a New trial.

1st Because the Court erred in refusing a continuance in said cause on the Affidavit and application of defendant

2nd " Because the Court erred in refusing instructions asked by defendant and in giving the instructions asked by plaintiff

3d " Because the Verdict is excessive

4th " Because the Verdict is against the law and the evidence and against the weight of evidence

which the Court overruled, defendant excepting thereto. And for as much as the foregoing matters do not appear of record, the defendant presents this bill of exceptions and prays that it be signed & made part of the record which is done

Sam'l Reber

Judge &c.

State of Missouri }
County of St Louis } ss I, F. A. H. Schneider, Clerk of the Circuit Court within and for the County of St Louis aforesaid, having Custody of the records and papers of the St Louis Court of Common Pleas, hereby Certify that the foregoing is a true Transcript of the Records & proceedings in the above entitled Cause Viz: Eliza King Vs. Albert Pearce, as fully as the same remain on file and of record in my Office

Witness my hand and the Seal of said Circuit Court at Office in the city of St Louis this 5th day of March A.D. 1866

F. A. H. Schneider Clk

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No. 3 (7)
March Term 1867

Eliza King
Respondent

Vs Transcript

Albert Pearce
Appellant

Appeal from St Louis
Court of Common Pleas
Filed Mch. 1st, 1866.
O. F. Fishback
CR

Geo. P. Strong, Atty
for appellant

J. T. Gantt for
Respondent

17.50 Paid by G. P. Strong.
$10 Paid by G. P. Strong

1866 Mch 29 Assignment of error filed
1867 Mch 30 Sent of Ap. filed
1867 Apl 5 Arg. Sec. Sent & brief by Geo Strong
Ap. filed
" " 15 Assigned Opinion filed

King
vs
Pearce.

Def'ts Points & Authorities

The petition in this case was filed Oct. 7, 1863.

Two writs were issued against deft. but he was not found, & an attachment was then issued.

Apl 22. 1864. defendants answer is filed, verified by an Agent.

It was tried on the 22. of June 1865, a little more than one year after the deft was brot in Court, having been once continued.

Deft. was not required to include in his affy for continuance all his witnesses. If one material witness was absent it was sufficient. There is no inconsistency in the two affidavits.

The last is made by the agent who has had the sole management of the suit. He swears positively as to the impossibility of obtaining Hecox' depn and also as to the facts he will prove, which the Court will see are material.

As early as April, on learning of Decoy's return from the South, notice to take his deposition was given & the papers sent to his place of residence, but he was absent from home, & the attempt to get his testimony failed, & dft was forced by the Court to go to trial without testimony which, if it had been before the jury, would very probably have changed the result of the trial, at least it would have justified the jury in finding for dft.

In refusing to continue the cause, the Court did not exercise its discretion in a reasonable manner.

All that this Court will require is reasonable diligence under the facts of each case, & that the testimony is material.

We think both exist in the case at Bar.

Dunn vs Broadwater 9. Mo. 19.
McKay vs The State, 12 Mo. 492.
Barnum vs Adams. 31. Mo. 532.

In the case cited by Pltffs Counsel. Lackey v Lubke, 36 Mo. 120. the cause had been in Court 6 years, No diligence was shown, see the case 36 Mo.

Buck was allowed an improper latitude in detailing the conversations of Pltff. It did not mend the matter that the Court instructed the witness to confine his statement to certain Conversations, if he was allowed to go beyond, & bring in all Pltff said, at other times.

The reliable testimony in this case shows that Pltff. was dealing with Henley as Principal, & with the testimony of Hecox, that could in all probability have been made to appear.

Geo P Strong
for Deft

40

King
vs
Pearce

Defts Authorities

Filed April 5 1867
A J Fishback Clk
per E M Carly Dep

Geo P Strong
for Defts

King, (Eliza) Respt vs Albert Pearce Defendant and appt

Appeal from St Louis Comt of Common Pleas. This was an action to recover the price of thirty bales of Cotton sold by plaintiff to defendant in the year 1862. The petition alleged that the cotton was sold & delivered to defendant's agent Thomas J Henly upon condition that the price of it should be deposited in Bank at St Louis to the credit of plaintiff: That the agent was specially authorised in writing to purchase on such terms: that he received the cotton and sent it forward from - to the defendant who received and appropriated it. but refused to pay for it. Plaintiff demanded the price (which was $3260 $\frac{25}{100}$) and being refused, brought this action.

The answer of defendant denied the power of the agent - denied that plaintiff sold & delivered the cotton to Defendant: denied the authority of the agent to purchase on such terms. Denied all knowledge &c whether Defendant ever recd any cotton that had belonged to plaintiff, but avers that he paid for all cotton so by him received: Says that he authorised Henly to purchase cotton for him on certain specific terms - that he did so, and defendant settled with him for the same. before hearing of any claim on the part of plaintiff for any part of said Cotton, that Henly's authority was dated 12 July '62. That if plaintiff sold any Cotton to Henly it was on Henly's not, defendant's credit. And denies that Henly had authority to purchase cotton for Defendant to be paid for by deposit in Bank at St Louis.

There was a verdict and judgment for the plaintiff for $3781.89 on June 22d 1865. The motion for a new trial was overruled on the 27 June/65. The appeal was taken on the 18th Nov. 1865.

By the Bill of exceptions it appeared that the case was at the April Term 1865 set for trial on the 27th April. That by Consent of parties and on account of the absence of witnesses it was laid over to be set after the determination of the other cases on the trial docket. and on the 10th day of June/65. the cause was set for trial on the 21st of that month. of which notice was given by the Court to both parties. and that on the 21 June/65 defendant presented ~~the following~~ an affidavit for a continuance. made by Geo. Chas. Pierce the Cashier and confidential clerk of defendant. by which it was shown that defendant had not given his personal attention to this cause. having removed to New York about the time of its commencement. That Warren S. Hecox, a merchant & trader residing in Chicago Illinois was a material witness for Defendant - that he could not go to trial safely without his testimony. & that no other witness was in attendance by whom he could prove the facts that Hecox was expected to prove. which were that all the Cotton bought for plaintiff by Thos J Henly was paid for at the time it was delivered and that no cotton was purchased of plaintiff on credit. and that no such Contract was made with her as is alleged in plaintiffs petition and that Henly has frequently stated that all the Cotton purchased by him had been paid for. That defendant had been unable to take the deposition

of Hecox because ever since the suit was brought and before, he has been spending most of his time in the Southern States, travelling from place to place, and not remaining long enough in any one of them to enable Defendant to ascertain the fact and give notice of taking depositions. That since the 12th June/65 Hecox had returned from the South, remained a few days at home, and then went to New York. That affiant was informed & believes that efforts were made to take Hecox's deposition previous to the last setting of the cause. Also that Hecox had about finished up the business that had kept him from home, and that in all probability his deposition could be had by the next term. That the application was not made for vexation & delay - that the costs of former continuances had been paid

The notice to take depositions was annexed to the affidavit. But it appeared that the notice to take depositions, named the 25th April 1865. at Chicago. Ill.

On the argument of this motion, the plaintiff read to the court an affidavit made by the same agent of the defendant, for a continuance at the November Term/64 - This affidavit set out that the plaintiff was a material witness for Defendant - that she resided in Tennessee - and that no other witness could be relied on to prove the facts which she was expected to prove Also that Joseph Artis, residing at Quincy Illinois was a material witness. without whose testimony defendant could not go to trial &c. Nothing was said

in the former affidavit about the materiality of the testimony of Pecox, and no attempt had been made to take the testimony of plaintiff as Attis— The Court overruled the motion for a continuance founded on the affidavit presented on 21. June 65. and defendant excepted.

A jury was sworn and plaintiff produced as a witness Thomas J Henly, who proved that Albert Pearce sent him to Tennessee to purchase cotton for him (Pearce) and that the following papers all in the handwriting of Pearce and signed by him contained the terms on which the purchases were to be made. viz. "This agreement made and entered into
" this the twelfth day of July Eighteen hundred and sixty two by
" and between Albert Pearce party of the first part and
" Thomas J Henly party of the second part both of the city
" and County of St Louis and State of Missouri, to wit. The said
" party of the second part shall go to West Tennessee and purchase
" all the cotton he can advantageously for gold delivered at
" the most convenient Rail Road Station for shipment to New
" York within sixty days. The said party of the first part on his part
" shall receive and pay for all cotton so purchased by said party
" of the second part in gold at the point of delivery on the Railroad
" and ship the same immediately to New York and have it sold
" for cash, and after deducting all necessary charges such as
" transportation insurance and commission one fourth of the
" profits shall be paid over to the said party of the second part for
" his services. The said party of the first part shall furnish said
" party of the second part all the money necessary to pay his ex-

"penses while absent on said trip. The said party of the first part
"binding himself in the sum of ten thousand dollars for the faith-
"ful fulfilling of his part of this Contract. Witness our hands &
"seals the day & year first above written. It is understood that the
"said party of the first part shall be notified of purchases of
"Cotton by said party of the second part by telegraph if it can
"be done; if not by letter. and said party of first part shall have
"a reasonable time thereafter to get the gold to the point he is
"to receive and pay for it at, on said Railroad Albert Pearce (Seal)
T. J. Henly (Seal)
"It is agreed that the contract made and entered into on the 12 July
"1862 by and between Albert Pearce party of the first part and
"Thomas J Henly party of the second part for the purchase of Cotton in
"West Tennessee shall remain in full force with the additional
"authority granted by said party of the first to said party of the
"second part to purchase cotton delivered at any place he
"may think proper. Albert Pearce. St Louis Mo July 21/62"
—"St Louis July 14. 1862 To whom it may Concern. Mr Thomas J Hen-
"ly has been employed by me to purchase cotton deliverable at Rail
"road stations in West Tennessee this side of the Federal lines. and for
"which I am to furnish money to pay for such purchases on delivery
"as may be agreed upon. Albert Pearce ———
—"St Louis July 29. 1862 T. J. Henly. Gen'l Grant has ordered
"that no more Gold be paid for Cotton on & after 1st August. This will enable us
"to use Treasury Notes. Among your many acquaintances near Bonneville no
"doubt many would like to deposit their funds in Bank here. If you could
"make purchases of Cotton. I could deposit the money whenever required. Gold
"can be purchased with Treasury Notes at 18 a 20 % prem. The burning at Bonneville
"will make it easy for you to buy Cotton. Yours truly Albert Pearce"
—"The prospect is that gold will decline in value" The writing

stated that he showed both these last two papers to Mrs King who is a widow lady living near Brownsville Tennessee. and purchased of her thirty bales of cotton, weighing 14490 pounds, at 22½ cents per lb agreeing that the price should be deposited in Bank to her credit at St Louis. This cotton was delivered to Captain Artus, agent of Pearce at Jackson Tennessee. It came to Pearce's hands and was appropriated by him. Pearce admitted this to witness. It was part of 196 bales bought by witness under his contract. in July & August 1862 for Pearce. Witness told Pearce that the cotton had not been paid for. and when he settled with Pearce. the latter acknowledged that he had received it. Settled accordingly

—— On Cross examination he said that when he returned to St Louis he tried to get a settlement with Pearce: but he would render witness no account and no statement. Instead of sending the cotton to New York Pearce had deposited it in St Louis. Pearce offered witness $500 to settle. Witness slapped him, and threatened him with further chastisement — Refused the $500 and offered to settle for $1000 which was less than he was entitled to. Pearce paid it. The deceased husband of the plaintiff was a cousin of witness. Witness was 6 or 8 weeks in Tennessee buying Cotton - Bought for no one but Pearce - never shipped Cotton to any other person — Witness gave plaintiff a receipt for the cotton. in the words & figures following. "Received Brownsville August the "Eleventh 1862 of Mrs Eliza King thirty bales of cotton weighing "14490 lbs at 22½ cents per pound amounting to $3260.25 to be "paid when called for & deposited in Bank at St Louis Mo "to her credit. Norman J Henly". Bought no other cotton on credit. Mrs King did not want her money at that house.

was afraid of being robbed by guerillas. She refused the money which witness offered and he returned it to Mr Phelps agent for defendant. - Never represented to Peace that this cotton was paid for. On coming back to St Louis called on the firm of which defendant was a member and tried to get a settlement - Don't remember rendering any account of the cotton purchased except that he reported each lot as it was bought. Being shown a paper the witness said it seemed to be in his handwriting. and he believed it was, but did not remember making it out. This paper contained the names of persons from whom and quantity of cotton bought. by witness in many cases that he remembers in '62 Does not recollect all the persons a lot. It is headed

Bought at Jackson Aug 1. /62 of W. Taylor 14 bales 23c $1822.44

Aug. 4. of W W B. Bryant 17 do do. 8679 lbs 26. $2256.54

" 10. E. King 30 do. do. 14490 lbs 25. 3622.50

25. J R Taylor 16 do do. 8032 25 2008.00

" J R Palmer 48. Do Do. 23904 25. 5976.00

E. King do. 9. do do. 3883. 25 970.75

197. bales

Delivered to Capt J. Artus."

The witness was then shown what purported to be a statement made by him during a controversy between Peace & Rosenfeld's about this cotton and stated that the signature to it was his: The body was not his handwriting. Did not remember the statements he made on that occasion. Defendant then offered to read the statement. Plaintiff objected to it as irrelevant. The Court allowed defendant to read the following

sentence "Mr Phelps paid for nearly all the cotton I bought."
– The witness on reexamination said "upon a fair settlement with Pearce I was entitled to more than $1000.00" Bought nine bales of cotton from Elias King. He is brother of the deceased husband of plaintiff. and the purchase from him is mentioned in the paper read in evidence. This was plaintiffs case.

Mr Lackland for defendant testified that the statement from which the sentence above quoted was taken was signed by Henly, and sworn to, in his presence. This witness was not cross examined.

Mr. Chs Buck called by defendant testified that a few months after the receipt given by Henly to plaintiff was given – in October – he brought it to this city and tried to collect it of Defendant. Called at his counting room – could not find him – Witness was not present when this receipt was given. He received it from Plaintiff who told him it was the receipt for her cotton & that the money was in Bank for her at St Louis – that she received the receipt from Henly and that she desired witness who was her agent to collect the money for her.

On cross examination. he said that Mrs King told him that Henly had been buying cotton as agent for Pearce at St Louis. Mrs King said that Henly had shown her the letters of Pearce. and she did not want the money in the house for fear of guerillas. but preferred it at St Louis. in Bank. and as witness was coming to St Louis shortly afterwards desired him to collect it for her. and lay part of it out for her use. On reexamination he said that when he came

of St Louis he called on Henly and then at the office of Henry Woodruff. Did not see Defendant. but saw Charles Pearce who refused to recognize the paper a pay it.

The defendant called as witnesses Catlin and G.C. Pearce who testified that they had seen the paper marked A. Dont know the handwriting. Never heard Henly say that the cotton was paid for. Pearce had the impression that it was all paid for but cannot tell how he got this impression. This was all the evidence.

The Court instructed the jury as follows at the instance of plaintiff

"If the jury believe from the evidence that the plaintiff on the faith of the two letters of the defendant dated 14th & 29th July 1862 respectively sold & delivered to his agent for him thirty bales of Cotton weighing 14490 pounds at 22½ cents per pound. and that the agreement was that the price was to be deposited in Bank at St Louis, to his credit. That defendant received the cotton but sometime in October 1862 refused to pay for the same. that the price thereof has never been paid to the plaintiff. they will find for the plaintiff and give a verdict for the price of the Cotton and interest from the date of the demand & refusal of the price" — To which defendant excepted.

The Court gave the following instruction at defendants request "If plaintiff sold the cotton to T. J Henly for his account and not for defendant

and took the individual agreement of said Bunly to pay for said Cotton when called for & that he would deposit the money to her Credit in Bank at St Louis Mo. then plaintiff cannot recover of Defendant in this action —

And refused the following. Defendant excepting thereto.

"If plaintiff sold the cotton to T. Bunly and took the individual ~~accept~~ agreement of said Henly to pay for said Cotton when called for & that he would deposit the money to her credit in Bank at St Louis Mo. then plaintiff cannot recover of Defendant in this action.

If the Defendant or his agent gave to Henly the money to pay for all the Cotton he bought and if Mr King the plaintiff. Knowing Henly had the money to pay for the Cotton took Henly's individual agreement to pay her the money when called for & to deposit it in Bank at St Louis Mo. then plaintiff must look to said Henly & cannot recover the amount of defendant in this action

Upon the aforegoing record. the respondent Submits.

1° That the question of the propriety of granting or refusing a Continuance is entrusted. and necessarily so. to the discretion of the Court which tried the cause and that, the manner of the exercise of this discretion Cannot be examined into by the Supreme Court. Lubke v Lackey

36 Mo R. p. 115 - 120.

2° If this Court will Consider whether the Court of Common Pleas rightly exercises this discretion, there is abundant reason to Conclude in favor of its action. For, it appeared from the showing of the same affiant, that at the previous term the Cause had been Continued on account of the alleged desire of defendant to take the deposition of Mrs King the plaintiff, residing near Brownsville Tenn. and Captain Artus residing at Quincy Illinois. No effort had been made to take this testimony: and nothing was said in November about the essential Value of the testimony of the coc- nothing at all was said of him then. In November 1864 there were obstacles (according to the affidavit) in the way of taking the deposition of Mrs King. Mrs had disappeared in June 1865. Nothing more could be made out of her testimony, or the want of it - and accordingly a new party is named without whose testimony Defendant "Cannot Safely proceed to trial". - This person had been so busily engaged in the Southern States, travelling about from place to place and not staying long anywhere that defendant had not been able to give notice & take his deposition - but his business in the South was nearly Concluded and there was a "probability" that he Could be examined before the ensuing term.

This is not nearly so strong an affidavit as was pronounced insufficient in Lackey v Lubke. It Confesses negligence - No reason is shown why in the interval between the commencement of this suit (October '63) and its trial (June '65) the testimony of this witness was not taken on interrogatories. It is clear that this Could have been done even since the last Continuance. No suggestion is made of any recent

discovery of his materiality - and the Court may well have been of the opinion that defendant intended to defer the day of reckoning as long as possible, for the mere purpose of delaying payment of a debt against which he had no defence.

3°. When the testimony was taken, this appeared most plainly. The answer of defendant denied in emphatic terms, supported by affidavit (not of defendant however but of his agent) that Henly had any authority to purchase cotton for him, to be paid for by deposit in Bank at St Louis - In fact the burden of the answer and the theory of the defence was that there was but one thing which Henly was authorised to do, viz to collect cotton, take it to Railroad Stations within our lines in Tennessee and there receive the money therefor, in gold. Such was the tenor of the papers dated 12th & 14th July 1862. But there was a letter dated 29th July 1862 of an entirely different kind - This was written by Pearce to Henley: and advising him of an order of Genl Grant, forbidding the payment of gold for the purchase of cotton after 1st August, recommended Henley to buy cotton near Brownsville, to be paid for by deposit in Bank at St. Louis to the credit of the seller. This letter Henley testifies that he showed to Mrs King, and on the strength of it purchased her cotton, amounting to 30 bales: and this cotton came to the hands of defendant and was appropriated by him. - These facts were proved not only by Henley but by Buck whom defendant examined. And the Court instructed the jury that they constituted a good cause of action against defendant - telling them at the same time

that if the Defendant's credit had nothing to do with the purchase, but plaintiff sold Bottenley alone, she cant not recover in this action. Thus instructed the jury found for plaintiff: the facts are therefore settled according to the hypothesis of plaintiff, and it would seem unnecessary to dwell upon the clear case for an affirmance thus made out.

Whether the Court did not go too far in qualifying the liability of defendant, may admit of question. But the appellant cannot complain of this, for the fault, if it be one, was advantageous to him.

Respectfully submitted
Thos F Gantt for
Respondent.

Hecox was travelling about buying Cotton it seems, but Defendants agent had Conversations with him - Where? Here, I suppose. Why not take his deposition?

No. 40.

Eliza King, Res.t
vs
A Pearce. app.t

Statement and ar
gument for respond
ent. Thos T. Gantt
of counsel.

Filed April 8. 1867
O. J. Fishbackelk
per E. McCarty Dep.

Eliza King, Respondent. vs Albert Pearce, appellant. } It is agreed that the record in this Cause is defective and that in order to complete it the following additions are to be made thereto. that is to say

1°. Between the two last lines of the 17th page of the record are to be inserted the following two instruments which were exhibited to the witness Thomas J. Henly. proved by him and read in evidence at the trial. as being throughout in the proper handwriting of Albert Pearce, defendant.

"St Louis July 14. 1862. To whom it may concern. Mr Thomas "J. Henly has been employed by me to purchase Cotton Deliv= "erable at railroad stations in West Tennessee this side of the "Federal lines. and for which I am to furnish money to pay for "such purchases on delivery as may be agreed upon

Albert Pearce. "

"St Louis July 29. 1862. T. J. Henly. Genl Grant has ordered that no more "Gold be paid for Cotton on or after 1st August. This will enable us to use "Treasury notes. Among your many acquaintances near Bronnsville no "doubt many would like to deposit their funds in Bank here. If "You could make purchases of Cotton I could deposit the money "wherever required. Gold can be purchased with Treasury notes at 18 a "20 % prem. The burnings at Bronnsville will make it easy for You "to buy Cotton. Yours truly Albert Pearce." ——————

"—The prospect, that gold will decline in Value" ——————

2°. And on the 19th page of the record the following paper is that called for as the receipt of Henly to Mrs King for Cot= ton. "Received Bronnsville Augst the eleventh 1862 of Mrs Eliza "King thirty bales of Cotton weighing 14490 lbs at 22½c per lb. a= "mounting to three thousand two hundred and Sixty $\frac{25}{100}$ dollars ($3260 $\frac{25}{100}$)

"be paid when called for or deposited in Bank at St Louis Mo. to her
"Credit. Thomas J Henly"
"483. 474. 550. 419. 445. 478. 444. 448. 511. 429. 458. 492. 425. 500. 490
"503. 458. 458. 469. 502. 488. 512. 416. 523. 489. 505. 445. 544. 573, 561." And it is agreed that without a unit of diminution, the record may be amended by inserting the aforegoing papers at the places indicated.

Thomas T. Gantt for Respondent
Geo P Strong
for Deft. Appt

Eliza King Respondent
vs
Albert Pearce, appellant
agreement for amendment
of record. by both parties

Eliza King
vs
A. Peace

The respondent prays the Court here to grant her ten per Cent damages upon the affirmance of the judgment in this Cause. Because.

1st. It is apparent from the affidavit for continuance that the attempt to Continue the Cause was made for the mere purpose of delay and without any expectation of the production of testimony to establish a meritorious defence

2d. Because from the evidence at the trial given both for the plaintiff & the defendant it is plain that the defendants Counsel throughout was unmeritorious, dilatory & vexatious.

Robt T. Gantt for the Respondent.

Eliza King

v

A. Pearce

Motion for 10 % damages on the amt of the judgment below.

Filed April 15. 1867
C. T. Fishbackett
per E. M. Daly Dep

overruled

Eliza King Pltff.
vs
Albert Pearce Deft.
& appellant.

IN SUPREME COURT,
March TERM, 1866

AND now comes the said Defendant, appt. 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 Defendant Pearce assigns the following, to wit:

1. That said Court admitted improper and illegal testimony offered by Plaintiff
2. That said Court rejected proper and legal testimony offered by Defendant
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 Defendant.
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 Plaintiff when it should have been rendered for the Defendant
10. That said Court overruled the motion for a new trial, made by Defendant, That said Court overruled Defendant's motion for a continuance of said cause, and refused to continue said cause.

Geo. P. Strong
Atty of Deft.

And now comes the ~~respondent~~ and for joinder in error say, that there is no error in the record and proceedings of said St Louis Court of ~~Common Pleas~~ in said cause, as assigned by said ~~appellant~~.

~~Thos T. Gantt for~~
~~respondent.~~

And respondent comes and for joinder in error says that there is no error in the record and proceedings of St Louis Court of Common Pleas in said cause as assigned by said appellant Thomas T. Gantt for respondent.

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Sup. Court
March T. 1866

King
vs
Pearce

Assignment of
Errors.

Filed March 29/66
O. T. Hildreth
Clk

Geo. P. Strong
Atty for Deft.

Kirby Plff. & resp.
vs
Peace Deft. Appt.

Supreme Court of Mississippi,
March Term 1867.
Deft's Statement

This was an action to recover $3260.25 for Cotton alleged to have been purchased by deft. of Plff. through the agency of Thos J. Henley. The petition was filed Oct. 7, 1863.

Deft. in his answer denies that he bot the Cotton of Plaintiff or knew anything of her selling Cotton, to Henley, and alleges that all the Cotton he bot was purchased of Henley and that he paid him in full for the same, prior to the Commencement of this suit. The Ans'r was filed Apl 23/64

~~When~~ The deft was a non resident, & an attachment was issued & money garnished to secure the claim,

When the Case was called for trial deft. moved the Court to continue the Cause, for the absence of W. J. Alcox, & filed an affidavit, setting forth that Alcox was a material witness without whose testimony deft could not safely go to trial, The affidavit was in form, as required by the rule of Court, & stated "that defendant expect-

ed to prove (by said Decox,) that all the Cotton purchased for defts. by Thos J. Henly, (who is a relative, by marriage) of Plff. (her principal witness) was paid for at the time it was delivered to defts, or his agents, and that no Cotton was purchased of Plff. on credit, and no such contract made with her as is alleged in Plff's petition. Also that Henly had frequently represented & declared that said Cotton had all been paid for."

Rec. p. 11

The aff't then stated the reasons why Decox testimony had not been secured. that he had been absent from his home in Chicago for several years, in the South, during the war, travelling from place to place defts not knowing where he would be at any one place, long enough to get his deposition; that an effort had been made to take his deposition, at one time when he was supposed to be at home, but that he was not there, & the Notary could not take it.

Rec. p. 13.

On the hearing of defts motion for a continuance, Plff. read defts aff't by Geo C. Penn filed at Nov Term 1864, for a continuance of this cause, for the absence of Plff. & of Capt Curtis, both of whom are alleged to be material witnesses. Rec. p. 14.

The Motion for Continuance was overruled, & deft excepted, & the trial progressed.

Plaintiff Called Thos J. Henly, who proved Contract with deft. to go to Tenn, & buy all the Cotton he could for gold.

Peare agreeing to receive & pay in gold for all the Cotton bot by Henly, & deliver'd to deft's agts at some R. R. Station, Henly was then to have one fourth of all the profits made out. Agreed datin July 12, 1862. Rec. p. 16.

Also letter of deft. of July 29, 1862. in reference to Gen. Grant's order not to pay gold for cotton. See Agreed for amend'g Record.

Also notice of Henly's appointment, &c.

Also the following rec't given by Henly at the time he bot Mrs King's Cotton,

"Rec'd Bromsville Augst 11, 1862. of Mrs Eliza King thirty bales Cotton weighing 14490 lbs at 22½ c per lb, amounting to three thousand two hundred and sixty 20/100 dollars, 3260,20/100 to be paid when called for, or deposited in Bank at St Louis Mo, to her Credit."

(Signed) "Thomas J. Henly"

Same agreed for amend'g Record.

Henly also testified that he showed both the above letters of Peare to plff. & bot 30 bales of Cotton of her. the price to be ~~paid~~ placed to her Credit, in Bank at St Louis, that the Cotton was delivered to Peare's agent, & afterwards

came to Pearce's hands, but had never been paid for.

On cross exn Witness stated that he had a difficulty about the payt of his share of the profits on the Cotton bot & delivered to deft. & had "slapped him, & denounced him as a swindler, & threatened to inflict chastisement upon him." on a public street of St Louis. & finally settled his claim at 1000,-

He stated that he gave pltff. the recd. above copied, & that it contained the contract with her. That he bot cotton for no one but Pearce, "bot none on his own account," Rec. p. 19.

That he had the money with him when he bot this Cotton but Mrs King "would not take it" ~~did not want it~~,

That he never rendered any account of the Cotton he bot. p. 21.

Never represented that all the Cotton was paid for. Witness is shown a paper "Ex. A." & says, "It looks like my hand writing. I should say it was my hand writing, but I do not remember making it out."

Exhibit A. is then read. It contains a detailed statement of Cotton bot by Henly. Among other items is one as follows.

"Augst 10. E. King. do. 30 do. do. 14490. @ 25 = $3622.50"

Witness was then shown a paper, containing his statement before referees, & stated 1. that the signature was his. & next that he

would not swear positively to the signature.
(It was proved by R. J. Lackland & have been signed by Henly in his presence) Rec. 23)

In that statement Witness stated, "Mrs Phelps paid for nearly all the cotton I bot" Rec. 5, 22.

Chas Buck Called for deft. States that he bot the rec't given by Henly to plff. a few weeks after it was given by Henly, & tried to collect it of deft. Called at his Counting room, but did not see him
Red it of plff.

Being asked what plff. said when she gave it to him, he stated that she said it was the rec't for her cotton, & that she had the money in Bank at St Louis. Witness thought from what she said that she had a Certificate of deposit; asked her for it, She gave him this rec't Witness has been acting as Mng't of Mrs King.

Witness was then stated on X examination, Conversations had with Mrs King the plff. on divers occasions, to which deft objected, on the ground that plff. could only require the Witness to state all that Mrs King had said on the occasion of giving him the receipt, which was the only Conversation inquired

about by deft. The Witness was permitted to make general statements as to what pltff. & said, & deft. excepted. Rec. 23. & 24, 25

Cattin testified for deft. that he made up the account for settlement with Henly, & supposes he got his figures from this paper." (Exhibit A.)

G. Chas Pearce, states that he could not say ~~positively~~ that Henly said all the Cotton bot in Tennessee was paid for, but such was his impression.

Witness has no doubt that the paper, marked "A." is the account of Henly's Cotton transactions,

Rec. p. 26.

The Court at the instance of the Plaintiff gave the following instruction, the Defendant excepting thereto at the time:—

Instruction Given for Plaintiff

If the Jury believe from the evidence that the Plaintiff on the faith of the two letters of the defendant dated 14 & 29 July, 1862, respectively, sold and delivered to his agent for him, thirty bales of cotton weighing 14490 pounds at 22½ cents per pound, and that the agreement was that the price was to be deposited in Bank at St Louis, to her credit - that defendant received the cotton, but some time in October 1862 refused to pay for the same that the price thereof has never been paid to the plaintiff, they will find for the Plaintiff and give a Verdict for the price of the cotton and interest from the date of the demand and refusal of the price.

The defendant asked the following instructions which the Court gave:—

Defendants instruction given

If Plaintiff sold the Cotton to T. J. Kenly for his account, and not for Defendant, and took the individual agreement of said Kenly to pay for said Cotton when called for, or that he would deposit the money to her credit in Bank at St Louis Mo, then Plaintiff cannot recover of Defendant in this action.

Defendants instructions refused.

and also the following which the Court refused:—

If Plaintiff sold the Cotton to T. J. Henly and took the individual agreement of said Henly to pay for said cotton when called for, or that he would deposit the money to her credit in Bank at St Louis Mo, then Plaintiff cannot recover of Defendant in this action.

If the defendant or his agents gave to Henly the money to pay for all the cotton he bought, and if Mrs King, the plaintiff, knowing Henly had the money to pay for the cotton, took Henly's individual agreement to pay her the money, when called for, or to deposit it in Bank at St Louis Mo. then Plaintiff must look to said Henly, and cannot recover the amount of defendant in this action.

The defendant at the time excepting to the refusal. Within four days thereafter the Defendant filed a motion for a New Trial in the words and figures following:— Rec. p. 27.

There was a verdict for Pltff.
Motion for new trial, overruled,
Exc. And appeal to this Court.

Geo P Strong, for Deft.

Deft's Points.

1. The testimony of Hecox, was material & all reasonable diligence had been used to secure it;

The Continuance should therefore have been granted.

2. The testimony of Chas Buck, as to general Conversations with Mrs King, should have been excluded.

3. All the instructions asked by deft, should have been granted,

4. The motion for a new trial should have been sustained.

Geo. A. Strong
Atty for Deft.

40.

Supreme Court

Eliza King
vs
Albert Pearce

Ans
Defts. Statement

Filed March 30. 1867
O J Fishback Clk
per E O McCarty Dep

Geo P Strong
for Deft.