Box 466/9426 #2

Edward R. George vs. Thomas E. Tutt et. al.

St. Joseph District 936/6

August 1865

936/6
RG600

① In Buchanan county, the defendants sued to recover a judgment on a promissory note against the plaintiff in 1861. The plaintiff in this case seeks an injunction to set the previous suit aside. He claims the defendants committed fraud & forgery. The defendants claim innocence. The court found for the plaintiff. The defendants ask for an arrest in judgment & a new trial. Overruled. They appeal.

② Statement & Brief - Appellants

③ Brief - Appellee

④ Assignment of Errors

⑤ Opinion - reversed the lower court - The respondent defaulted, claiming the confusion surrounding the ongoings of 1861. The court finds that no excuse to default in court. He could have filed his answer in vacation. He has no claim for a ruling in his favor. The court below should dismiss the petition.

George
vs
Tutt

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At this term comes the plaintiff by
leave of the Court first had had & obtained
makes and files this his amended petition
in the above entitled cause and states
That defendants prior to the 21 day
of November 1861. commenced in this Hon
orable Court against this plaintiff & against
one Thornton S George a suit at law which
said suit was commenced & pending in
this court prior to the November term
of this court for the said year 1861. was
founded upon a promissory note executed
to these defendants by said Thornton S
George which note was executed by said
Thornton S George in the name of Thornton
S. George & Co. That prior to & at the
November term of this court for the
year 1861 the whole country was in a
state of intense excitement The whole
country in the counties of Platte Buchanan
and other adjoining counties being infes
ted with bands guerillas & organized
Soldiers enemies of the country. so much
so that it was considered* and under

dangerous for citizens to travel any considerable distance from home. That courts very nearly all over the country were suspended and Martial law proclaimed throughout the state. That plaintiff made inquiry as to the holding of said term of this court at said time & was informed that there would be no ~~term held~~ court held at said term and in fact plaintiff states that said court was not held for the trial of causes where there was any resistance made to them or any defence put in. That the plaintiff resided at said time about 17 miles from St Joseph. the place where said court was to be holden close to the line of Platte & Buchanan counties that the neighborhood where he resided was at said time in a state of most intense excitement that all prudent people were alarmed for their safety & in fact this plaintiff was in fear of his personal safety if he should have ~~attempted~~ attempted to travel so far from home as to St Joseph & in consequence of the courts in the state being generally suspended & in consequence of the intense excitement in the county it was universally as far as plaintiff is informed & believes

230 be holden at said term of this Court
231 and it was generally understood &
232 plaintiff had so been informed by divers

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233 persons and still believing it to be the
234 fact that the Judge of this court had
235 stated and publicly given it out to the
236 people that there would be no trials of
237 causes at the said term of said court
238 and that in fact no such term would
239 be held. That in consequence of all
240 these facts before stated plaintiff failed
241 to attend at said court and put in his
242 defence to said action Plaintiff states
243 the fact to be that no trials were had at
244 said court but contrary to the expectation
245 of plaintiff and when plaintiff was
246 prevented from appearing in court as
247 aforesaid court was opened for only
248 one or two hours of days & that defen
249 dants taking advantage of the circum
250 stances asked and obtained in said
251 court a Judgment by default against
252 this plaintiff and said Thornton & George
253 for the sum of one hundred & seventy six
254 dollars and 89 cents. with costs of suit
255 A copy of which said Judgment & pro
256 ceedings is herewith filed and asked to
257 be taken as part of this petition
258 Plaintiff further states that he had no
259 knowledge that any Judgment had been
260 rendered in said ~~court~~ cause or that
261 court had in any way been held

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at said term thereof until within ten days prior to the filing of the original petition in this cause. when plaintiff came to this court or to St Joseph in order to employ counsel and prepare his defense to said action. when he ascertained for the first time. that any court had been held at said Term & judgment rendered agst. him in said cause as aforesaid

Plaintiff further states that he has a good & valid defence to said action that he was wrongfully sued on said note: which was the foundation of said action. that he had no reason to believe that a judgment would be rendered against him in the cause as the copy of the petition served in said cause on defendant. was only a petition against Thornton S George. and although plaintiff was served with process he well knew that he had never executed said note. That he was not in company with said Thornton S George in burning when said note was executed that he had no concern with the consideration thereof. that he was at the time of the execution of the note in Texas & knew nothing of the same nor had he any manner of knowledge or business connexion with said George

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at the time in relation to said ~~matter~~ note or the consideration thereof, but that he was and is wholly a stranger thereto and owes defendants no part thereof. That in consequence of the fact & in consequence of the fact that the copy of the petition served was only a suit against said Thornton & George, as it should have been this plaintiff had no right to expect that a judgment would be rendered against him even if court should have been held at said November Term.

Plaintiff further states that since the rendition of said judgment he has ascertained that the said Thornton & George had paid the sum of Seventy three ~~dollars~~ dollars and fifty four dollars on said note, which said sum was paid on the 25 day of September 1860 to defendants.

That at the time of the rendition of said judgment and of the filing of the original petition in this cause this fact was wholly unknown to this plaintiff.

Plaintiff charges that defendants at the time of taking and receiving said judgment fraudulently withheld the fact of said payment having been made on said note & took and thereby received a judgment

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against this plaintiff and said Thornton
S George for the whole amount of said
note and intent not withstanding over
half of the same had been previously paid
to defendants.

Plaintiff further states that unless
said defendants are enjoined & restrained
therefrom they will cause an execution to
be issued on said Judgment and have
the same levied upon the property of
Plaintiff. He therefore prays that defen
dants and their agents & attorneys may be
enjoined and restrained from issuing
any execution upon said Judgment or
otherwise collecting the same and that
upon the final hearing of this cause that
all proceedings upon said Judgment so far
as this plaintiff is concerned be perpetually
enjoined or that said Judgment be set
aside so far as this plaintiff is concerned
and he be permitted to make his defence
to the said action upon such terms as
this court shall direct and as may
be just between the parties and that
this plaintiff may have such other & further
relief as the equity of his case may
demand.

Ensworth & Hill & A H Vines for plffs

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Edward R George makes oath & states that he believes the above petition and the matters therein as stated are true

E R George

Subscribed and sworn to before me June 10. 1864.

W Redinbaugh Clerk
By R S Monroe D C

On the 16 day of June AD 1864 the following motion for an injunction Bond was filed to wit

Motion for injunction Bond

In the Buchanan court of common Pleas for Buchanan county Missouri

Edward R George plaintiff
against
Thomas E Tutt.
Dent G. Tutt &
John F. Baker. } Defendants

Now at this time comes the defendants and moves the court to dismiss this suit & dissolve the injunction heretofore granted in this cause Because there was no Bond filed as required by the statute before said injunction was granted

Owen & Ringo attys for defts

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Thereupon on the 18 day of June AD 1864
the plaintiff filed his Bond which
is in words & figures following to wit

Bond for Injunction

Know all men by these presents that we
Edward R George Henry M Vories &
Samuel Ensworth are held and firmly
bound unto Thomas E Tutt Dent G Tutt
and John F Baker in the sum of four
hundred dollars to the payment of which
we bind our heirs Executors & administrators
Sealed with our Seals & dated
this 18 day of June 1864

The condition of the above obligation is such that whereas the said
Edward R George has heretofore obt
ained an injunction against the said
Thomas E Tutt Dent G Tutt & John
F Baker enjoining a certain Judgment
and Execution in said injunction suit
named and which said injunction
suit is still pending in the Court of
Common Pleas Now if the said
plaintiff will abide the decision
which shall be made thereon & pay
all sum of money damages & costs
that shall be adjudged against him

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if the injunction shall be dissolved then said Bond to be void & of no further effect. otherwise to be & remain in full force

H M Voris Seal

J Ensworth Seal

On the 18 day of June 1864. defendants filed their answer which said answer is words & figures following to wit

Answer of defts

Edward R George. Plaintiff

against

Thomas E Tutt

Dent G Tutt and

John F Baker. Defendants

In the Buchanan Court of Common Pleas for Buchanan county Mo

Defendants in answer to the petition of plaintiff praying that the defendants their agents & attorneys be enjoined and restrained from having an execution issued upon a judgment rendered and entered in this court on the 21. day of November 1861 in favor of these defendants & against

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the plaintiff and Thornton S George or
otherwise collecting the same & that all
proceedings upon said judgment be
perpetually enjoined so far as this plain
tiff is concerned. admit that previous
to the 21 day of November 1861 they
commenced their suit in this court
against one Thornton S George & this
plaintiff. That said suit was com
menced and pending in this court
previous to the November term of this
court for the year 1861. That said
suit was founded upon a promissory
note executed to these defendants
by Thornton S George in the firm
name of Thornton S George & bro.
That plaintiff failed to attend at
said term of this court and put in his
defence to said action & that on ac
count of the failure and neglect of
this plaintiff to attend at said term
of this court and put in his defence
to said action these defendants asked
and obtained judgment by default
in this court against this plaintiff &
Thornton S George for the sum of one
hundred and twenty six dollars
& Eighty nine cents with costs of
suit. Defendants further

17 answering to said petition of Plaintiff
deny that plaintiff has a valid and
good defence to said note. Deny
that plaintiff has any right either in
law or equity to have an injunction
from this court operating in his favor
as prayed for in his said petition on
account of any of the causes set out
in said petition or any other cause
whatever. Deny that he has a right
to any relief whatever from said Judg
ment other than the full true and
complete and faithful payment of
the same to these defendants. Deny
that he was wrongfully sued on
said note which was the foundation
of said suit Deny that he had any
reason to believe that no judgment
would be rendered against him in said
cause at said term of this court
Deny that defendants took any adv
antage of any circumstances in any
manner whatever to ask and obtain
judgment by default in this court
against plaintiff and said Thereton
& George for the sum of one hundred
and seventy six dollars & Eighty nine
cents with costs of suit or any other
sum whatever. Deny that these

defendants asked and obtained judg-
ment in any way except upon fair &
legal grounds. Deny that he was & is
a stranger to said note. Deny that
he was in Texas at the time of the
execution of said note. Deny that said
Thornton & George ever paid the sum
of Seventy three dollars and fifty nine
cents or any other sum whatever upon
said note sued on & executed by said
Thornton & George in the firm name
of Thornton & George & bro. on the 25 day
of September 1861. or any other day
Deny that at the time of taking and
receiving of said Judgment these defen-
dants fraudulently withheld the fact
of the payment mentioned in said
petition of plaintiff having been made
upon said note from the fact that no
such payment or any other payment
ever was made upon said note
Deny that over half of said note had
been paid to defendants or that any
other sum or amount whatever was paid
on said note to Defendants or any one
else. but state the fact to be that the
whole of said note is yet due defen-
dants and unpaid. Deny that suit
was wrongfully brought against this

19 Plaintiff or that said Thornton S George ought to have been sued alone on said note

Defendants further answering say that plaintiff did execute said note that he was in company in business with said Thornton S George when said note was executed that plaintiff did have concern with the consideration thereof. that he did and does owe defendants the whole amount of said note.

Defendants further answering state that as to whether the whole country was in a state of intense excitement or in any other state previous to and at the November Term of this Court for the year 1861. whether the whole country in the counties of Platte and Buchanan and adjoining counties was infested with bands of Guerrillas & organized soldiers enemies of the country so much so that it was considered dangerous for citizens to travel to any considerable distance from home whether the courts were very nearly all over the country were suspended whether martial law was proclaimed throughout the state. whether plaintiff made inquiry as to the holding of

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said term of this court at said time
whether this plaintiff was informed
that there would be no court held
at said term whether said court
was not holden for the trial of causes
where there was any resistance made
to them, or any defence put in. whether
this plaintiff resided 17 miles from
St Joseph. the place where this court
was to be holden. or any other place
whether he lived close to the line of
Buchanan and Platte counties or any
other line whether the neighborhood
where plaintiff resided was in a
state of most intense excitement or in
any other state whether all prudent
people were alarmed for their safety
whether it was a fact that this plain
tiff was in fear of his personal safety
if he had attempted to travel so far
from home as to St Joseph. whether it
was universally understood & believed
as far as plaintiff was informed
and believed that no courts would
be held at said term of this court
whether in consequence of the courts
in this state being reputed to be gene
rally suspended or in consequence

21 580 of the intense excitement in this country
581 it was generally understood and believed
582 as far as plaintiff was informed and
583 believed no courts would be held at said
584 term of this court. whether such intense
585 excitement did exist as to render
586 plaintiff neglectful of his duty in defen
587 ding said suit. Whether the courts in
588 this state were generally suspended
589 thereby placing plaintiff in a condition to
590 take advantage of his own wrong and
591 wilful neglect. whether it was generally
592 understood & believed to be a fact that
593 the Judge of this court had stated & publ
594 icly announced to the people that there
595 would be no trials of cases at said
596 term of this court. whether plaintiff had
597 been informed by divers persons & still belie
598 it to be the fact that the Judge of this court
599 had stated and given out publicly to the
600 people that there would no trials of cause
601 as aforesaid at said term of this court &
602 that no such term would be held.
603 whether in consequence of all these facts
604 if facts they are plaintiff failed to
605 attend at said term of this court & put
606 in his defence to said action. whether
607 there were no trials had at said term
608 of this court. whether trials were

22 609 had contrary to the expectation of Pltff
610 or any one else at said term of this court
611 whether plaintiff was prevented from
612 appearing in this court at said term
613 from any one or more or all of the causes
614 set out in his petition or from any other cause
615 other than wilful neglect & want of due
616 diligence on his part whether court
617 was opened only for one or two parts
618 of days whether plaintiff had no knowledge
619 that any judgment had been rendered in said
620 cause against him or that court had
621 been held in any way at said term of
622 this court until within ten days previous
623 to the filing of the original petition in
624 this cause whether plaintiff has any
625 knowledge of anything else whether Pltff
626 ever came to St Joseph or any other place
627 to employ counsel to put in his defence
628 to said action. whether the copy of the
629 petition in this cause served on this Pltff
630 was only the copy of the petition against
631 Thornton & George whether plaintiff had
632 any means of knowledge or burning
633 connection with said Thornton & George
634 in relation to said ~~note~~ note or the
635 consideration thereof whether plaintiff had
636 no right to expect that judgment

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would be rendered against him for
any of the causes set out & mentioned
in his petition. or from any other cause
whether when plaintiff came to the city
of St Joseph in order to employ counsel
& prepare his defence to said action
he ascertained for the first time that
court had been held at said Term
of this court and that judgment had
been rendered against him in said
action these defendants know not
nor have they any knowledge or information
thereof sufficient to form a belief
But state the fact to be that on the
30 day of April 1861. these defendants
filed their petition in this court & com
menced this suit against Thornton &
George & this Pltff. on said note executed
by said Thornton & George & bro. to these
defendants dated July 30. 1860 at sixty
days for one hundred and sixty five
dollars and 39 cents and that on the
2 day of May 1861 personal service
was had on said Thornton & George &
this plaintiff. that they be & appear befor
the judge of this court on the 20 day of
May 1861 to answer the complaint of
these defendants at which time there being
a term of this court if this plaintiff had

any meritorious defence to said action
he ought to have appeared and pleaded
thereto. That the plaintiff having failed
to appear at said May term of this court
or said November term at which judgment
was taken and until the lapse of some
several terms thereafter of this court is pre
cluded from taking advantage of his own
wrong and gross negligence & having
an injunction from this court operating in
his favor. giving such relief as is only due
to the diligent in a meritorious cause
That having been guilty of gross negligence
& want of due diligence is precluded
from having the relief prayed for in his
petition or any other relief whatever other
than the full true complete & faithful pay
ment of the amount of said judgment &
ten per cent thereon as damages according
to law which these defendants have sent
and by reason of the delay in the collection
of said judgment. That he has failed to
move this court to set aside said judgment
until after the assessment of damages &
the amount of said judgment. But he has
failed and neglected for two or three
years to ask any relief whatever thereby
being guilty of gross negligence & want

of due diligence as aforesaid in
setting up any meritorious defence to
said action as will not be countenanced
or tolerated by the proper rules of law
or equity

Defendants further state that if they
are enjoined and restrained from having an
execution issued upon their said judgment
or otherwise collecting the same & that if all
proceedings upon said judgment be perpetually
enjoined or if said judgment be set aside
so far as this plaintiff is concerned they
will be in great danger of loosing a just
and equitable demand against said Pepp

Defendants therefore pray that they
may have execution issued upon their
said judgment and that the same be
enforced which to the full extent & tenor
thereof in law they have a right with ten
per cent damages thereon: and that the injunc-
tion heretofore granted by this court against
these defendants be dissolved & for such
other and further relief as they are by law
and equity entitled

Owen & Ruiz atty for deft

John F Baker one of the defendants
in the above entitled cause for himself

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State of Michigan
County of Buchanan ss Pleas in the Hon
Buchanan Court of Common Pleas
within and for the County & State afor
said.

Hon Joseph J Wyatt. Judge
W. C. Toole. Clerk
Ransom. Ridge Sheriff

Be it remembered that on the 19th
day of May AD 1862. the Plaintiff by his
attys filed in the office of the Clerk of
said Common Pleas Court in and for the
County of Buchanan & State of Michigan the
following Petition and affidavit viz

Petition and affidavit

In the Buchanan Court of Common Pleas

Edward George. Plaintiff
vs
Thomas E Tutt
Dent G. Tutt &
John F Becker. Defendants

Plaintiff states that defendants
previous to the 21- day of November 1861

and as agent for his co-defendants makes
oath and says he believes the above & foreg
ang answer and the matters as therein
stated are true

John F Baker

Sworn to & subscribed before me this
3 day of June AD 1864

James M Carpenter
Notary Public St Louis County Mo

On the 14 day of June 1864. ~~Plaintiff~~ Defdt filed
his motion to strike amended petition
which is in words & figures following
to wit.

Motion to strike out amended Pet

Edward R George. Plaintiff
against
Thomas E Tutt
Dent G Tutt and
John F Baker. Defendants

Now at this day come the defen
dants by their atty and move the court
to strike out amended petition of Plain
tiff for the following reasons

1st Because said amended petition

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were not filed within the time prescribed by the ruling and ordering of this court.

Owen & Rengo

The following are all the entries made and entered of record in said cause under their respective dates to wit

May 19. 1862

Edward R George
" } Pet
Thomas E. Tutt et al } comes now said plaintiff and files his petition against said defendants

November 20. 1862. the following further proceedings were had in said cause viz

Edward R George
" } Pet.
Thomas E. Tutt
Dent G. Tutt
John H Baker } This cause coming on for hearing and being submitted to court. It is ordered by the court that said defendants their agents & attorneys

be restrained and enjoined from from having
an execution issued upon a judgment
in favor of said defendants & against said
plaintiffs rendered and entered in this court
on the 21 day of November 1861 which
said judgment is for the sum of one hundred
and seventy six dollars & Eighty nine
cents & that all proceedings upon said
judgment so far as said plaintiff is
concerned be stayed until the further
order of this court

March 14, 1864, at a regular term
of said Common Pleas Court the following
proceedings were had in said cause viz

Edward R George
vs } Peth
Thomas E Tutt et al } Come now said
defendants and file their demurrer

March 17. 1864

Edward R George
vs. } Peth
Thomas E Tutt et al } By order of the
court plaintiff has leave to file an
amended petition on or before the 8th day
of the present term

29 808 ~~March~~ June 14. 1864. & 4th day of said
809 Term. of said Court
810
811 Edward R George
812 vs } Pet
813 Thos. E. Tutt et al } Come now said
814 defendants and file motion to strike out
815 amended petition
816
817 June 16. 1864. and 4th day of said
818 Term.
819
820 Edward R George
821 vs } Pet
822 Thomas E. Tutt et al } Come now said
823 defendants & withdraw. their motion to
824 strike out amended Petition & said defendants
825 file motion for injunction Bond
826
827 June 18. 1864. & 6th day of said Term
828
829 Edward R George
830 vs } Pet
831 Thomas E. Tutt et al } Comes said plain
832 tiff and files injunction Bond. & defendants
833 also file answer
834
835 Wednesday June 22. 1864
836

30.

Edward R George
vs
Thomas E. Tutt et al } Pet

Come now said defendants and file motion to dissolve injunction

On plaintiffs motion this cause is placed at the foot of the docket & on the further application of said plaintiff this cause is continued until the next term and attachment awarded against B W Stallard to appear and testify returnable to the next term

December 19. 1864.

Edward R George
vs.
Thomas E Tutt et al } Pet

On motion of defendants it is ordered that attachments be awarded for Jesse Baker & B M Fleming witnesses for defendants to appear & testify Wednesday Morning next at 9 ock A.M. they having been primarily summoned &c

Wednesday March 29. 1865.

The following further proceedings in said cause were made & entered of record

31 865 Edward R George }
866 vs. }
867 Thomas E Tutt } Pet
868 Dent G Tutt }
869 John F Baker. } This day this cause
870 came on for hearing upon the amended
871 petition and answer & the motion of the
872 defendants to dissolve the plaintiffs injunction
873 and the testimony introduced on the
874 trial and the court being sufficiently
875 advised overruled the defendants
876 motion to dissolve the injunction & the
877 case being heard & the court sufficiently
878 advised orders & adjudges that the
879 injunction heretofore made in this cause
880 on the judgment of the defendants Thomas
881 E Tutt and others against the plaintiff
882 Edward R George & Thornton S George
883 set forth in the plaintiffs petition dated
884 the 21. of November 1861. for one hundred
885 and seventy six $\frac{89}{100}$ dollars be & the same
886 is hereby made perpetual in favor of the
887 plaintiff but not to interfere with the
888 defendants rights to collect said judgment
889 off and from the plaintiff's co-defendants
890 in said judgment. to wit, Thornton S George
891 and it is further ordered that the plaintiff
892 recover of and from the defendants his
893 costs herein expended & that he have

execution therefor

March 30, 1865,

Edward R George
vs. Ret
Thomas E Tutt et al Defendants by
their attorneys appear & file their motion
for a new trial herein and also their
motion in arrest of Judgment in this cause
both of which being considered by the court are
overruled

April 13, 1865 The following further
proceedings in said cause were had in
court to wit

Edward R George
vs
Thomas E Tutt Ret
Dent G Tutt &
John F Baker Defendants by their
attorney appear and file Bill of Exceptions
herein which is signed sealed & made
a part of the Record in this cause & also
file their affidavit & Bond for an appeal
to the supreme court which Bond is
approved & appeal allowed

33 On the 18 day of April 1865. defendants filed their Bill of Exceptions which is in words and figures as follows to wit.

Bill of Exceptions

Edward R George. Plaintiff
against
Thomas E Tutt.
Dent G Tutt &. }
John F Baker. } Defendants

In the Buchanan Court of Common Pleas for Buchanan County Missouri

Be it remembered that above entitled cause came on for trial at the March term of said Court of Common Pleas upon oral & written testimony & upon the issue made in the pleadings & upon the motion of defendants to dissolve the injunction which motion was in words following

Motion to dissolve injunction

In the Buchanan Court of Common Pleas for Buchanan County Missouri
Edward R George. plaintiff

vs

Thomas E Tutt
Dent G Tutt
John F Baker. Defendants

Defendants by their attorney move the court to dissolve the injunction heretofore granted in this cause for the following reasons.

1st Because said Judgment complained of and sought enjoined is an entire thing & cannot be set aside as to the one party without setting it aside as to all which would be greatly to the damage of these Defendants

2nd Because no motion was made to set aside said Judgment before the assessment of damages & the rendering of said final Judgment

3rd Because when final Judgment has been rendered in a cause it may be set aside at the term during which it was rendered but not afterwards

4th Because some several terms of this court had lapsed since said Judgment was rendered and before the filing of

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the original petition in this cause

5th Because after having by most gross negligence and want of due diligence suffered judgment by default to go against him this plaintiff comes in to claim that indulgence which can be shown only to the diligent

6th Because if this plaintiff had any defence to this action it is such an action as afforded a free complete & available remedy at law.

7th Because no Notice was given to these defendants that an application would be made to this court for an injunction as is required by law

8th Because no bond was given as by the statute is required in such case before this court made an order granting an injunction

9th Because the neglect of a party to make his defence at law is no ground for equity to interfere

10th Because the legal defence

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Commenced this Suit in the Buchanan Court of Common Pleas against one Thornton F. George and this plaintiff, which said suit was Commenced prior to the November term of said Court for the year 1861 & was founded upon a Note executed to these defendants by Thornton S George & Co. That prior to the November term of said Court for the year 1861 this plaintiff made inquiry as to the holding of the said term of said Court & was informed that there would be no court holden at said term. That owing to the troubled condition condition of the country at said time it was thought to be unsafe to travel to any great extent in ~~that plaintiff resided about 17 miles~~ this country That plaintiff resided about 18 miles from St Joseph. That the condition and excitement in the Counties of Buchanan & Platte & adjoining Counties in this state was very intense. so much so that it was understood and believed that no court would be held at the said November term of said Court. That owing to the said excitement in said Community growing out of the Civil war existing in this state & elsewhere & owing to the fact that the Civil Courts throughout this state were nearly all suspended

must be made unmixed with negligence or fault in the party asking relief

11th Because the injunction heretofore granted in this case is contrary to law and equity

12th Because said injunction was granted upon incorrect erroneous & mistaken grounds

13th Because if there was any remedy at all this case afforded a full complete & available remedy at law if it had not by most gross negligence & want of due diligence been neglected

14th Because the petition of plaintiff does not state that he exercised due diligence in putting in his defence at law,

15. Because said petition does not state that plaintiff had no available remedy at law

Owen & Rungo
attys for deft

The plaintiff offered evidence & the

87 1036 defendants objected to the introduction of
1037 any evidence on the part of the plantiff
1038 because. 1st the petition of plantiff does
1039 not state facts sufficient to give a court
1040 of Chancery Jurisdiction. 2d Because
1041 said petition does not state facts sufficient
1042 to constitute a cause of action which obj
1043 ection was overruled & the evidence ad
1044 mitted to a ruling & ruling of the court
1045 in overruling defendants objection & ad
1046 mitting any evidence defendants at the
1047 excepted

1048 B W Stylard witness on the part
1049 of plantiff was then introduced & stated
1050 I have known E R George about ten years
1051 He started to Texas in the Summer of 1859
1052 and was there at the date of the note
1053 controversy I also knew J S George
1054 I sold goods for him in 1861, He did
1055 business alone, while E. R George was in
1056 Texas. He addressed all his letters to
1057 Thomas E Lutt & co in his own name &
1058 they wrote to him in his name alone
1059 and Bills for goods sold by Thomas E Lutt
1060 & co. to J S George were made out to
1061 J S George alone I do not know whether
1062 the note in controversy was given for goods
1063 bought by J S George alone or whether
1064 it was for goods bought by the old firm

I do not know whether E R George was indebted to Thomas E Lutt & Co on the note in Controversy or not. nor what the note was given for nor whether it was given for a debt of J S George alone or whether it was given for a debt of the old firm which was composed of E R & J S George. I sometimes did the corresponding in regard to business & some times J S George did it. The old firm of E R George & Bro. was dissolved in April 1859

A letter was then shown to witness in the words following

Letter

office of Thos E Lutt & Co
Wholesale Dealers & Commission Merchants No 121. North Second street
St Louis Oct 9. 1860

Mr J S George
Rock House Prairie

Dear Sir your favor of 25 ult. came duly to hand. also we received few days since 4 Bags wool which we sold and now enclose acct sales showing nett proceeds $73 59/100 which we induse on your note for

39 1093 $146.01 due august 9th
1094 We enclose memorandum of balance
1095 due us on your two notes which we
1096 trust you will be able to remit to us
1097 very soon. Awaiting your further
1098 orders we are yours truly
1099 J E Tutt & co
1100
1101 Witness said I think the letter is in the
1102 hand writing of the correspondent of
1103 Thomas E Tutt & co. It is in the hand
1104 writing in which their letters were usually
1105 written. The letter was then offered in
1106 evidence, to the introduction of which
1107 defendants objected for the reason that
1108 the same was irrelevant & illegal
1109 which objection was overruled & the
1110 letter admitted as evidence to which
1111 ruling and opinion of the court in ad
1112 mitting such evidence defendants at
1113 the time excepted. A Bill of goods
1114 was then shown witness who said
1115 I think the Bill looks like the Bills
1116 usually made out by Thomas E Tutt
1117 & co for goods sold by them I do not
1118 know anything about this particular
1119 bill nor do I know positively that
1120 it is from Thomas E Tutt & co but
1121 think it is I cannot state that it is

the Bill of goods for which the note in Contro
very was given The Bill was then offered
in evidence to the introduction of which def
endants objected which objection was overruled
and the Bill admitted in evidence to which
ruling and opinion of the court in admitt
ing such evidence defendants at the time
excepted which said Bill was in words
following

Bill of goods

St Louis July 30. 1860

Mr J S George.

Rock House Prairie

Bought of Thomas & Tutt & Co.

whole sale grocers & Commission Merchants

No 121 North Second Street

30 bbls 40. A O Sugar.	798/60	738.	8¾	6301
2 Bags Coffee		322.	16½	53,13
1 bbl vinegar.		43.	8½	3.66
1 Keg Soda		112.	6.	6.72
1 Box 25 Starch		41.	6.	2.71
1 " 20. Indigo		5.	2 10	5.70
1 " 25 Rice		50.	6.	3.25
2 Box 25 Star Candles		80.	17	14.10
4 do. Dunham Matches			60.	2,40
1 do 25. Sulphur.	27	21.	7	1.72

41	1150	1 doz 2 H Buckets	175.	175
	1151	1 Keg 3rd nails	5.00	5,00
in box with	1152	Rice Cleves 2 lbs	20.	40
	1153	Drayage		60
	1154	64 d Int on $116.		1 24
	1155			$ 165.39
	1156			

1157 Witness further said. I think it was the
1158 general understanding in my neighborhood
1159 that no court would be held at the
1160 November term 1861. I do not know whether
1161 E. R George had such understanding at that
1162 time or not. I never heard him say anything
1163 about it at that time that I remember
1164 I do not remember particularly who said
1165 there would no court at the November term
1166 1861.

1167 Henry Kent.

1168 being introduced said I resided in the
1169 neighborhood of T S George in this county
1170 in 1861. I did not hear anything said
1171 about holding court at the November term
1172 1861 or that court would or would not
1173 be held

1174 Abram Kent being introduced
1175 said I lived in the neighborhood of T S
1176 George in 1861. It was the general under
1177 standing in that neighborhood that no
1178 court would be held at the November

1179 term 1861, I did not hear very many
1180 persons speak about it I had no business
1181 in court myself & did ~~not~~ inquire much
1182 about it, I heard E. R George say he had
1183 ~~a~~ business in court at the November term
1184 1861, but could not attend to it. I usually
1185 travelled about to attend to my business
1186 at St Joseph and other places - went to
1187 St Joseph where I had business. J P
1188 Crabb, Henry Tutt W Jones & S Ens
1189 worth being introduced stated about
1190 as follows. They were in St Joseph in
1191 1861, and were practicing attorneys in
1192 this court. It was the general unders
1193 tanding at one time between the members
1193 of the bar at St Joseph from the statem
1194 ents of the Judge of this court that there
1195 would probably be no court at the
1196 November term 1861. The Judge said
1197 there would be no court But after con
1198 sultation it was thought best to hold
1199 court and take judgments in cases where
1200 there was no defence put in or resist
1201 ance made to them so as to secure liens
1202 on property That the November term of
1203 this court was held in 1861 for that pur
1204 pose and that judgments were rendered
1205 in almost all cases where no defence

43 1206 was put in or resistance made to them
1207 and some of them told several of their
1208 clients that there would be no court
1209 that the Judge had said so.
1210 W M Voris states that the plaintiff
1211 called on him a short time before or after
1213 court. to file his answer. to the suit
1214 of the defendants on the note and
1215 that he told plaintiff to go home that
1216 there would be no court. To all of
1217 the foregoing testimony in regard to the
1218 understanding about hold court
1219 at the November 1861. Defendants
1220 objected because the same was irrel
1221 evant and illegal which objection
1222 was overruled and the same was ad
1223 mitted to which opinion & ruling of the
1224 court in admitting such evidence def
1225 endants at the time excepted;
1226 The original papers in the case of
1227 Thomas E Tutt et al against J S George
1228 & E R George were then introduced as
1229 evidence which are as follows
1230
1231 Original Pet &c
1232
1233 Thomas E. Tutt.
1234 Dent G Tutt and } Plaintiffs
1235 John H Baker. }

44 Thornton S George &
Edward R George } Defendants
In the Buchanan Court of common
Pleas for Buchanan county Missouri May
Term 1861.
Plaintiffs state that defendants
by their promissory note herewith filed dated
July 30. 1860 promised for value received
to pay plaintiffs by the name & Style of
Thos E Tutt & co. a firm composed of the
plaintiffs the sum of one hundred and
sixty five 39/100 dollars sixty days after
the date thereof Plaintiffs state that
said sum of money mentioned in said
note with Interest thereon is due & unpaid
and for which plaintiff asks judgment
Hall & Hall
attys for plffs
George H Hall agent for plaintiff
makes oath and says that the foregoing
petition and matters therein as stated he
believes to be true
George H Hall
Subscribed & sworn to before me this
30 day of April 1861
W Rosenbergh Clerk
By R S Monroe D C

The following is a true & correct copy of the note sued on and attached to said petition to wit

Note

$165 39 St Louis July 30. 1860

Sixty days after date I promise to pay to the order of Thos E. Tutt & Co. (a firm composed of Thos E Tutt Dent G Tutt & John H Baker) one hundred & sixty five 39/100 dollars for value received negotiable and payable without defalcation or discount at the Bank of the State of Mississippi

J S George & Bro

On the 30 day of April 1861. a summons was issued from the Clerks office of said Court of which the following is a true copy, viz

Summons

State of Mississippi County of Buchanan ss, The state of Mississippi to the Sheriff of Buchanan County Greeting

You are hereby required to summon Thornton S George & Edward R George that they be & appear in our

3

and no court being held & owing to the fact that Martial law had been declared in this state and the fact being so far as this plaintiff was informed that the whole community being satisfied that no court would be held at said term and as this plaintiff was informed & believed that the Judge of said court had announced to the public that no trials would be held at said term of said court. said plaintiff failed to appear at said term of said court & answer to said action. when in the absence of this plaintiff on the 21. day of November 1861 a judgment was rendered in said cause by said court against said Thurston S George & this plaintiff for the sum of one hundred and Sixty six dollars & 89 cents with costs of suit.

Plaintiff further states that he had no knowledge that any judgment had been rendered in said court or that any court had been held at said term until within the last ten days when plaintiff came to St Joseph in order to employ counsel & prepare his defence to said action when he ascertained for the first time that court had been held at said term & that judgment had been rendered

Buchanan Court of Common Pleas before the
Judge thereof at the Court House in St Joseph
on the first day of the next term of said
Court. to be begun and held on the 20
day of May 1861. then & there to answer
the petition of Thomas E Tutt Dent G Tutt
and John F Baker. And have you
there this writ Witness William Reavill
Clerk of the Circuit Court
& Ex officio Clerk of the Buchanan
Court of Common Pleas with the
seal thereof affixed at office in
St Joseph this 30 day of April
AD 1861

W Reavill Clerk
By R S Monroe Deputy Clerk

Afterwards the foregoing petition & summons
was by the sheriff with the following
indorsement thereon

Sheriffs Return

Served the within petition & writ by delivering
Thornton S George a copy of the same & by
delivering Edward R George a copy of
the writ Done in Buchanan County Mo
May 2. 1861 M D Morgan Sheriff
By S D Cowan Deputy

47 at a regular Term of said Court
for the year 1861. and on the 21 day
of November of that year. among other
proceedings in said Court were the
following viz

Judgment

Thomas E Tutt
Dent G Tutt &
John F Baker.
" Pet
Thornton S George
Edward R George Come now said
plaintiffs by their attorneys & it appearing
to the satisfaction of the Court that the
defendants have been duly & legally served
with process as the statute require &
failing to answer plaintiffs petition they
pray Judgment. Wherefore
It is considered by the Court that
said plaintiffs recover of said defendants
the sum of ($176.89) one hundred &
Seventy six dollars and Eighty nine
cents as and for their demand
and also their costs and charges
herein expended and have executive

Here plaintiff closed. Defendants

did not introduce any evidence whereupon the cause was submitted & the court made and rendered the following decree

Decree

Edward R George
vs
Thomas E Tutt
Dent G Tutt &
John F Baker

Pet

This day this cause came on for hearing upon the amended petition and answer and the motion of the defendants to dissolve the plaintiffs injunction and the testimony introduced on the trial & the court being sufficiently advised Overruled the defendants motion to dissolve the injunction and the case being & the court sufficiently advised orders & adjudges that the injunction heretofore made in this case on the judgment of the defendants Thomas E Tutt and others against the plaintiff Edward R George and Thornton S George Set forth in the plaintiffs petition dated the 21st of November 1861. for one hundred &

see page 49

42 The following is a true copy of the original petition in the case Thomas E. Tutt et al vs Thornton S George also a copy of the Summons and Sheriffs return to wit

Petition

Thomas E. Tutt
Dent G. Tutt } Plaintiffs
John F. Baker } ~~Defendants~~

against

Thornton S George Defendants

In the Buchanan Court of common pleas for Buchanan County Missouri May Term 1861

Plaintiff state that defendant by his promissory note hereunto filed dated April 6. 1860 promised for value received to pay plaintiffs by the name and style of Thomas E. Tutt & Co the sum of one hundred and forty six 61/100 dollars four months after the date thereof. Plaintiffs state that the money mentioned in said note with Interest thereon are due & unpaid and for which plaintiffs ask judgment

Plaintiffs that they are a firm & do business under the name and style of Thomas E Tutt & Co

Hall & Hall attys for peffs

George H. Hall attorney for plaintiff.

makes oath and says that the foregoing petition and the matters therein as stated he believes to be true

George Hall

Subscribed and sworn to before me this 30. day of April 1861

W Rensselaer Clerk
By R S Monroe D C

Copy of the Note

$146 61/100 St Louis Mo April 6. 1861

Four months after date I promise to pay to the order of Thomas E. Tutt & Co. one hundred and forty six 61/100 dollars for value received negotiable & payable without defalcation or discount at this office in St Louis

F S George

On the back of said note is the following endorsement to wit

" Oct 9. By Mdse $73.59. Cr By cash on the with- note Dec 4. $15.00

The following is a copy of the summons viz

Summons

State of Missouri County of Buchanan. ss
The state of Missouri. To the sheriff of

Buchanan County Greeting

You are hereby required to Summon Thornton S George that he be & appear in our Buchanan Court of Common Pleas before the Judge thereof at the Court House in St Joseph. on the first day of the next term of said Court to be begun & held on the 20 day of May 1861. then & there to answer the petition of Thomas E Tutt Dent G Tutt & John F Baker and have you there this writ Witness William Rennebaugh Clerk of the circuit Court & Ex officio Clerk of the Buchanan Court of Common Pleas with the seal thereof affixed at office in St Joseph. this 30 day of Apr AD 1861.

(Seal)

W Rennebaugh Clerk
By R S Benson D C

Said Petition and Summons were afterwards returned by the sheriff with the following endorsement thereon viz

Sheriffs Return

Served the within petition & writ by delivering Thornton S George a copy of the same Done in Buchanan County Mo

May 2. 1861. M D Morgan Sheriff
By Sam D Cowan. D S

Afterwards On 21. day of November 1861 a Judgment was rendered on the foregoing petition viz

Judgment

Thomas E Tutt Dent G Tutt
& John F Baker. } Ret
vs
Thornton J George } Come now said

Plaintiffs by their attorney & it appearing to the satisfaction of the Court that the defendant has been duly & legally served with process as the statute requires & failing to answer plaintiffs petition they pray Judgment

It is therefore considered by the Court that plaintiffs recover of said defendant the sum of ($157.95) one hundred & fifty seven dollars and Ninety five cents as & for their demand also their costs & charges herein expended and have execution

Seventy six 89/100 dollars be & the same
is hereby made perpetual in favor of the
plaintiff but not to interfere with the
defendants right to collect said Jud
gment off and from the Plaintiff & co
defendant in said Judgment Tom
Thornton & George and it is further
ordered that the plaintiff recover of
and from the defendants his costs
herein expended.
also the original papers in the case of Thomas E Tutt
et al vs Thornton & George were introduced as evidence
* see page 42 to

To which ruling and opinion of the
court in rendering and making such deg
ree overruling defendants motion to
dissolve the injunction & making the
same perpetual as to E R George
defendants at the time excepted

Defendants thereupon filed their mo
tion to set aside the judgment & decree
and for a new trial in words following
viz

Motion for new trial

Edward R George Plaintiff
against
Thomas E Tutt
Dent G Tutt & } Defendants
John F Baker }

In the Buchanan Court of Common Pleas
for Buchanan County Missouri

Now at this time comes the defendants in the above entitled Cause & Moves the Court to set aside the judgment rendered in this cause & grant a new trial Because they say the Court erred in the following particulars to wit,

1st In permitting any evidence to be introduced in the above entitled cause upon the facts as stated in plaintiffs petition because they say that said petition does not state facts sufficient to give a Court of Chancery jurisdiction and that said petition does not state facts sufficient to constitute a cause of action

2nd In permitting evidence to be introduced on the part of plaintiff & objected to by the defendants which irrelevant incompetent & illegal & which had no bearing upon the points in issue

3rd Because the Court erred in

ging Judgment contrary to & against
the weight of Evidence

4th Because the Court erred in
rendering Judgment contrary to the
law and established principals of
Equity ~~governing cases~~ governing in
this Case

5th Because the Court erred in
rendering Judgment against the weight
of evidence & contrary to the law &
the established principles of equity
governing in this case

Jones Owen & Ringo
attys for defts

Which said motion being considered by
the Court was overruled To which
opinion & ruling of the Court in over
ruling the said motion defendants at
the time excepted . Defendants also
filed their motion in arrest of Judgment
in words following

Motion in arrest of Judgment

Edward R George plaintiff
against

4

in said cause as aforesaid

Plaintiff further states that he has a good & valid defence to said action that he was wrongfully sued on said note which was the foundation of said action. That he was not in company in business at the time of the execution of said note nor a partner of said Thornton & George. That he was not a member of the firm or interested in the firm of Thornton & George & Co. nor had he any concern with said firm in any manner whatever nor is he liable in any manner whatever upon said note upon which said suit was brought and said judgment rendered & is a perfect stranger thereto.

Plaintiff states that unless said defendants are enjoined and restrained therefrom they will cause an execution to be issued upon said judgment & have the same levied upon the property of plaintiff. He therefore prays that defendants and their agents & attorneys may be enjoined & restrained from issuing any execution upon said judgment or attempting collecting the same. and that upon the final hearing

52

Thomas E Tutt
Dent G Tutt &
John H Baker. } Defendants

In the Buchanan Court of Common Pleas for Buchanan County Missouri

Now at this time comes the defendants in the above entitled cause and moves the Court to arrest the judgment & decree in this cause & for a review and re-hearing thereof for the following reasons to wit.

1st Because the petition of plaintiff does not state facts sufficient to constitute a cause of action

2nd Because said petition does not state facts sufficient to give a court of Chancery jurisdiction

3rd Because there is no law or evidence upon which to base said judgment

Jones Owen & Runyo
attys for defts

Which said motion being considered by the court was overruled to which opinion and ruling of the court defendants at

58

the time excepted And now the defendants file this their Bill of Exceptions & ask that the same may be signed Sealed & made a part of the record in this cause & that they may have a transcript of the whole record of this cause to the Supreme Court of the state of Mississippi which is accordingly done

Joseph J Wyatt Judge (Seal)

On the 13 day of April AD 1865 defts filed their Bond for an appeal to the supreme which said Bond is in words & figures following to wit

Bond for an appeal

Know all men by these presents that we Thomas E Lutt Dent G Lutt & John F Baker as principals & A M Baxter and L M Lawson as securities acknowledge ourselves to be indebted to Edward R George in the sum of four hundred dollars for the payment whereof we bind ourselves our heirs Executors and administrators upon the condition That whereas Thomas E Lutt Dent G Lutt & John

I Baker have appealed from the
Judgment of the Buchanan Court of Com
mon Pleas for Buchanan County Missouri
in an action pending in that Court
wherein Edward B George was plain
tiff and Thomas E Tutt & Dent G Tutt
and John F Baker were defendants
Now therefore if the said Thomas E Tutt
Dent G Tutt and John F Baker
appellants will prosecute their appeal
with due diligence to a decision in
the supreme Court & shall perform
such judgment as shall be given by
the supreme Court as such as the supreme
Court may direct the Buchanan Court of
Common Pleas to give and if the judgment
of such or any part thereof be affirmed
will comply with & perform the same
so far as it may be affirmed & will
pay all damages & costs which may
be awarded against them as appellants
by the supreme Court then this obligation
to be void otherwise to remain in force

In testimony whereof we have hereunto set our hands and affixed our seals this day of April A D
1865

Thos E Tutt (Seal)
Dent G Tutt (Seal)

55

A M Saxton Dec'd
L M Lawson Dec'd

State of Missouri }
County of Buchanan }

I William C Tool
Clerk of the Buchanan Court of
Common Pleas in and for the County
and state aforesaid do hereby certify
that the foregoing is a true & comp-
lete transcript of the proceedings
in the case wherein Edward R
George is plaintiff and Thomas E
Lutt Dent & Lutt and John H Baker
are defendants so far as the same
are of record and on file in my office

Witness my hand and
the seal of said Court
affixed at office in the
city of St Joseph this 27
day of July AD 1865

W. C. Tool, Clerk
By E. Tool D C

342

George

vs

Dutt

In the Supreme Court, at St. Joseph August Term 1865

Thomas E. Tutt,
Dent G. Tutt and
John F. Baker. } Appellants

Against

Edward R. George Respondent.

Statement of case and brief of counsel for appellants.

On the 30th of April 1861, the appellants filed in the office of the Clerk of the Buchanan Court of Common Pleas a petition for the recovery of a judgment, against the respondent and his brother Thornton S. George, upon a promissory note, purporting to have been executed by Thornton S. George & Bro. The petition charging that respondent was one of the promisors in said note & a member of the firm of Thornton S. George & Bro. A summons was duly issued on said petition against the respondent & Thornton S. George, returnable at the next ensuing May Term of the Buchanan Court of Common Pleas. This summons was executed by personal service on respondent & Thornton S. George, the only defendants in said suit, on the 2d of May 1861, and in ample time for trial at the May Term of said court 1861.

The defendants in said suit made no appearance ~~[illegible]~~ at the May Term 1861 & the cause was permitted to hang over until the November Term 1861, when a judgment was taken by default against the defendants therein for the sum of $174.89. On the 19th of May 1862, six months after the rendition of said judgment, the respondent filed his petition in the Buchanan Court of Common Pleas & prayed for and obtained an injunction in said court restraining appellants and all others from the collection of the judgment aforesaid, until the further order of said court. The petition upon which the injunction aforesaid was obtained, was demurred to by appellants - whereupon the respondent obtained leave of the court to file an amended petition which amended petition was never filed until the 10th of March 1864. The amended petition charged that respondent never signed the note sued on, that he was not at the time the note was executed upon which the judgment was obtained, a member of the firm of Thornton S. George & Bro. that he was in no

were bound to pay said note he having neither signed it or authorized any one to sign it for him. That $73.59 had been paid upon said note to lent that the ~~respondents~~ Appellants in this suit had failed to give a credit for the amount thus paid & in fraud of the rights of the payors in said note, had taken a judgment for the full amount of said note and interest. That the reason he had made no defense to said ~~note~~ suit was that the November Term thereof 1861 was held during the civil war and at a time when it was dangerous to leave home or travel over the country it was so infested with guerillas & robbers, and in addition to the foregoing excuse he further alleged in said petition that it was the general understanding of the country that the November Term of said court would not be held & that the Judge of said court had so stated.

The counsel for appellants insisted in the court below and they insist here, that there was no equity in the respondents

petitions and that the same ought to have been dismissed, and that the court erred in perpetuating said injunction and in refusing to grant a new trial and set aside the judgment obtained by respondent.

By an act of the General Assembly of Missouri, approved February 26th 1861, See Session acts 1861, page 515 the terms of the Buchanan Court of Common Pleas were fixed and ordered to be held for the time being on the 3d Monday in May and November. The 3d Monday in May 1861 was the 20th of the month. The respondent in his petition gives no reason for his failure to file his answer at the May Term. He does not allege or prove that the country was filled with robbers or Guerillas there or that the court was not held at the May term or that the Judge thereof had said that there would be no business done at that term of the court. It is insisted most earnestly that respondent was guilty of such gross negligence in failing making his defence if he had any to the

suit of appellants that he was precluded from setting up any defence thereafter or enjoining said judgment. Upon these points and others made we refer to the following authorities. Norton vs Woods 5 page 249. Revised Statutes 1248 - Sections 6 & 7 - and Section 11 - page 1249. ~~Page [illegible] Section 3~~. Matson vs Field & Cathcart 10 Mo Rep Page 100. Woodsworth vs Van Buskirk 1 John Chan Rep 432 Lansing vs Eddy 1 John Chan Rep 49. Simpson vs Hart 1 John Chan Rep 91. Smith vs Lowery 1 John Chan Rep 320. Barker vs Elkins 1 John Chan Rep 465. Dodge et al vs Strong 2 John Chan Rep 228. Duncan vs Lyon 3 John Chan Rep 351. Foster vs Woods 6 John Chan Rep 86: Second vol Story's Equity Jurisprudence Section 895-6. Mitfords Pleadings page 174 (note). Cadwalader vs Atchison 1 Mo Rep side page 660.

As to the alleged statements of the Court that there would be no Court at the November term 1861 made obiter dictum vide Risher vs Roush 2 Mo Rep side page 96 top page 77.

As to the Country being infested with Guerrillas &c vide Holt's executors vs Graham 2 Bibbs Rep Page 192

A party seeking equitable relief under the new code or system of practice must state such facts in his petition as would have been a ground for such relief under the old system; hence the 14th and 15th points in the motion to dissolve vide Jones vs Brinker 20 Mo Rep Page 87 also 24 Mo Rep Page 31 Vasquez vs Ewing.

The answer of a Defendant in Equity stands in full force and effect as of evidence unless denied by two witnesses or one witness and strong corroborating circumstances vide Roundtree vs Gordon 8 Mo Rep 19. Gamble vs Johnson

5

of this cause that all proceedings upon said Judgment so far as this plaintiff is concerned may be perpetually enjoined or that said Judgment may be set aside so far as this plaintiff is concerned & he be permitted to make his defence to the said action at law & that this plaintiff may have such other relief in the premises as the equity of his cause may justify

H M & A H Voris
for pltff

Edward R George plaintiff makes oath & states that he believes the foregoing petition & the matters there as stated are true

E R George

Subscribed & sworn to before me May 19 1862

W Reddleigh Clerk
By R S Moore D C

Afterwards to wit on the 28 day of November AD 1863 a summons was issued by the Clerk of said court directed to the sheriff of St Louis county requiring him to summon said defendants as there directed &c

9 Mo Rep 597. Hewes vs Music 13 Mo Rep 395. Johnson vs McBride 15 Mo Rep 365. Savage vs Chauvin 2 Mo Rep side page 180 top page 145. Bartlett vs Glascock 4 Mo Rep 62

Owen & Ringo Woodson & Jones
Attys for Appellants

25

Thomas C Tutt } Aplts
Dent G Tutt and }
John F Baker
Against }
Edward R George Aplee

In supreme Court at
St Joseph Mo

Statement and brief
of Counsel for Appellants

Filed
Aug 22 1865
L B Biggers Clk
by W H Chiemann D.C.

In the Supreme Court, August Term 1865.

Thomas E. Tutt,
Dent G. Tutt and } Appellants.
John F. Baker.

Against }

Edward George, } Appellee.

And now this day come the appellants and say that there are manifest errors shewn by the record in the proceedings of the court below, and assign the following.

1st. The court below erred in granting the injunction.

2. In overruling the motion of appellants to dissolve said injunction and dismiss the petition of the plaintiff in the court below.

3 In perpetuating said injunction upon the final hearing of said cause.

4. In failing to grant the new trial asked by appellants.

5 In failing to arrest the judgment and in overruling appellants motions for a new trial & in arrest of judgment.

Owen & Ringo & Woodson & Jones
attys for appellants.

Thomas E. Lutt,
Dent G. Lutt &
John F. Baker
Against
Edward George.

In Supreme
Court at St Joseph

Statu
Assignment
of errors.

Filed Aug 22d 1865
J. B. Briggers Clk
by Wm H Shumeau D.C.

Edward R. George, Plaintiff
against
Thomas E. Tutt & others, Defendants.

This was a Suit of Injunction by Plaintiff to enjoin a Judgment in the Buchanan court of Common Pleas, Mo. against him, and one Thornton S. George so far as Plaintiff was concerned, in favor of Defendants for the Sum of $176.89. said Judgment being founded upon a promissory note executed to Defendants by Thornton S George & Co.

The Petition for Injunction Sets out the fact that Plaintiff never was a member of the firm of Thornton S. George & Co. That ~~from~~ the condition of the country at the time the term of the court was held at which Judgment was rendered was such, that it was generally understood in the country and so proclaimed by the Judge of the court himself, that no term of court would be held. But that the court did meet and Judgment was rendered. The Petition

further charges that Plaintiff was not bound to Defendants as a maker of said promissory note - and that it was against right Justice and conscience that Judgment should be had against Plaintiff, or he be compelled to pay the same. That previous to and at the time of the holding of said court at which Judgment was so rendered against him the whole country was in a State of intense excitement - and the counties of Platte, Buchanan, and the adjoining counties being infested with bands of guerrillas, and organized Rebel Soldiers, enemies of the country - So much so that it was considered and understood and believed that no court would be held at said term - and that the Judge of the court had stated publicly to the people that there would be no trials of causes - and that no such term would be held - That such term was held but only to try causes by consent of parties, or to take Judgment where there was no defence - And that Defendants taking advantage of Plaintiff's absence and the circumstances, obtained said Judgment.

Plaintiff then prays for a temporary and perpetual Injunction -

Defendants answered denying ~~[illegible]~~ only all of the allegations in said Petition - charged that Plaintiff executed the note sued on, and was liable as a partner of the firm of Thornton S. George &c. - That Plaintiff was a maker of said note, along with T. S. George. - That as said Judgment has been obtained. no court of Equity could relieve Plaintiff.

Defendants afterwards filed a motion to dissolve the Injunction. And upon this the whole case was tried.

Upon trial Plaintiff clearly and conclusively established all the Material Allegations in said Petition. see the evidence as detailed on pages 37, 38, 39, 40, 41, 42 & 43 - of Transcript of Record.

The Defendants objected to the court hearing any testimony on the part of Plaintiff. Because the Petition of Plaintiff, they alleged did not State facts sufficient to give a court of Chancery Jurisdiction. And because the Petition did not State facts sufficient to constitute a cause of action. Which objections were overruled, and after the hearing of the evidence ~~the~~ court rendered its decree

perpetually enjoining said Judgment so far as Plaintiff was concerned - but not to interfere with the said Judgment so far as Thornton S. George was concerned.

Defendants then filed their motions for a new trial and Review - and in Arrest, which being overruled, they Bring the case here by appeal -

Varies & Varies
Attys for Appellee.

Points and Authorities for Appellee -
Judgments at Law will be opened or set aside for fraud, or to relieve hardship not otherwise remediable -

See	Summer v.	Whitley	1	Mo	708.
"	Collier "	Easton	2	"	145
"	Yantis v.	Burdett	3	"	457.
"	Toombs "	Sacker	6	"	16
"	Boon "	Miller	16	"	457

" 2 Story's Equity - Sec's 885. 886. 887. 894 and notes and authorities there refered to -

In Supreme Court

" "

Edward R. George
v. appeller
Thomas E. Sutton & others
appellants

Brief of Appeller
By Vories & Vories - attys

Filed Aug 28th 1865
J. B. Biggers, Clerk
by Wm H Sherman D.C.

Edmund R George

vs

Thos E Sutherlin.

The respondent filed his petition in the Court of Common Pleas for Buchanan County, to restrain the appellants from proceeding to collect a judgment, which they had obtained at law, in said Court against him and one Thornton S George

The Court granted a temporary injunction, and on a final hearing of the cause made it perpetual. The facts appear that the appellants brought their suit against the two Georges in the spring of 1861, in the above named Court, that process was duly issued and served, and that at the November term thereafter of said Court judgment was

of which the following is a true copy
as well as the endorsement of the sheriff
thereon to wit.

Summons &c

State of Missouri }
Buchanan County } ss The state of Missouri
to the sheriff of St Louis county Greeting
You are hereby required to
Summon. Thomas E Tutt Dent G
Tutt and John F Baker that they be &
appear in our Buchanan Court of Common
Pleas, before the Judge thereof at the court
House in St Joseph on the first day of the
next term of said Court. to be begun & held
on the 14th day of March. 1864 there &
there to answer the petition of Edward R
George. And have you then & there this writ
Witness William Rennebaugh
Clerk of the Circuit Court & Ex
officio Clerk of the Buchanan Court
of Common pleas with the seal
thereof affixed at office in St Joseph
this 28 day of November AD 1863
William Rennebaugh Clerk

The following is the sheriffs return thereon
viz

rendered by default in favor of appellants and against the respondents.

No appearance or defence was made to the action.

Respondent alleges in his petition, that he has a good and valid defence to the note on which the judgment is founded, and that he was precluded from attending the November term of Court, on account of the intense excitement then prevailing in the County, and that it was dangerous to travel from home.

He also states that it was generally understood there would be no Court at that time, and that the judge of the Court, had said that he would hold no session for the trial of cases. Evidence was introduced tending to prove these facts, but it

is unnecessary to review it here.

No principle is better established, than that a party seeking to be relieved by injunction against a judgment at law, must show that it is not only against conscience to execute such judgment, but that he could not have availed himself of his defence at law, or that he was prevented by fraud or accident, without any fault or negligence in himself, or against (2 Story's Eq Jurisp § 887; 7 Cranch 332)

There is not a single ingredient in this case entitling the respondent to equitable relief. He has had full opportunity to avail himself of any defence he has against the note, at law.

He neither appeared at the return term, nor at the next term, thereafter, at

which time judgment was taken. The excitement existing in the country, in the fall of 1861, was no valid excuse. More than six months had elapsed from the time summons was regularly served on him, and yet it seems he had not even employed counsel to appear in his behalf.

It was not essential that he should have been present in Court, in person, he could either have filed his answer in vacation or instructed his attorney to obtain further time to answer. Under these circumstances, can it be said, that he was without fault, or not guilty of negligence. The remarks of the judge made out of Court, that he would hold no term, for the trial of cases, furnish no ground for relief. There was nothing

inconsistent, in his decl=arations, with his action in rendering judgment.

The language referred to cases that were litigat=ed, and there was nothing to show that there was any conflict in regard to the suit out of which this action arises. It was a motion which plaintiffs were entitled to judgment at the first term, no answer was filed, and no counsel appeared to defend, judgment was therefore rendered as a matter of course.

And if any injury resulted it is justly imputable, to his own gross and culpable negligence.

When a party is served with process, he is immediately put upon inquiry, and it is his imperative duty, to use strict diligence in preparing for his defence. If he fails in this, he has no claim

to the interposition of equitable relief. We can hardly conceive of a case presenting less equity than the one here.

The judgment is reversed, and the cause remanded, with direction to the Court below, to dismiss the petition; the other judges concur.

David Hagner

Ed R George
vs
Thos E Tutt & others

Opinion of the
Court by Haquer.

Reversed & Remanded

Filed Aug. ~~29~~ 31th 1845
J B Biggers Clk
pr Sherman D, Co

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Sheriffs Return &c

Executed this writ in the county of St Louis on the 3rd day of December 1863 by delivering a copy of the writ and petition as furnished by the Clerk to Dent G Tutt & further executed this writ by leaving a copy of the same at the usual place of abode of John F Baker with a white person of his family over the age of fifteen years. Thomas E Tutt not found in my county.

John C Vogel Sheriff
By J Milkis Deputy

On the 10th day of June AD 1864 plaintiff filed his amended petition in said cause which said amended petition is in words and figures following to wit

Amended Petition

In the Probate Court of Common Pleas

Edward R George. Plaintiff
against
Thomas E Tutt
Dent G Tutt &
John F Baker } Defendant