Whaley, William & Blackwell, Jeremiah vs Cape, Mason for William 1835 6th Cir 157/11
Adm of Whaley, William Washington Co

14

Debt

Affirmed the seperate parties may not claim set-off on $340 Debt

Tompkins dissent

Contract

State of Missouri
Washington County

Pleas in the Circuit Court began And held at the Court house in the town of Potosi in and for said County before the honorable Judge thereof

Be it remembered that heretofore to wit on the fifth day of may in the year of our lord One thousand Eight Hundred and thirty five William Whaley and Jeremiah Blackwell filed with the Clerk of the Circuit Court his petition in writing against Maston Cape and William B Cape which said petition is in the words and figures following to wit State of Missouri County of Washington ss Sixth Judicial Circuit to wit William Whaley and Jeremiah Blackwell administrators of William Whaley deceased plaintiffs State that they hold a bond on the defendants Maston Cape and William B Cape in substance as follo with "Six Months after date we promise to pay William Whaley and Jeremiah Blackwell administrators of William Whaley deceased the Just and full sum of three hundred and forty dollars for value of them received witness our hands and seals at Potosi this 10th day of July 1832

Test
John Brickey

Maston Cape Seal
William B. Cape Seal

Yet the said debt remains unpaid Wherefore they pry Judgment for their debt and damages for the detention of the same together with Costs

Givens for Plaintiff

Upon which is the following endorsement This is a petition & summons the Clerk will issue a summons to Washington Givens for Plaintiff And afterwards to wit on the day and year afors aid a petition and summons issued from the office of the Clerk of the Circuit Court afors aid which said petition and summons is in the words and figures following to wit State of Missouri County of Washington ss Sixth Judicial Circuit to wit William Whaley and Jeremiah Blackwell administrators of William Whaley deceased plaintiff

State that they hold a bond on the defendants Maston Cape and William B Cape in substance as followeth "Six months after date we promise to pay to William Whaley and Jeremiah Blackwell administrators of William Whaley deceased the just and full sum of three hundred and forty dollars for value of them received witness our hands and seals at Potosi this 10th day of July 1832.

Test
John Bricky

Maston Cape (Seal)
William B Cape (Seal)

Yet the said debt remains unpaid whereon they pray judgment for their debt and damages for the detention of the same together with costs Yevens for Plaintiffs

Washington County The State of Missouri to the Sheriff of said county Greeting We Command you that you summon Maston Cape and William B Cape that they be and appear before the Judge of our Circuit Court at a court to be held at the Court house in the town of Potosi in and for said County on the second Monday of July next on the second day of the said same term and then to answer unto William Whaley and Jeremiah Blackwell administrators of William Whaley deceased of a plea of debt as set forth in the foregoing petition and have you then then this writ In ~~[illegible]~~ witness whereof I Israel McGready Clerk of our said Circuit Court have hereunto subscribed my name and affixed the official seal of our said Court at office in the town of Potosi this 5th day of May 1835 Israel McGready Clerk upon which our said made his return as follows to wit Served the within summons by delivering the within named defendants Maston Cape and William B Cape each an attested copy of said summons together with a copy of the petition in Washington County on the 5th of May 1835

William W Smith
Sheriff of Washington County

And afterwards to wit at a circuit Court began and held at the Court house in the town of Potosi in and for said County on the fourth Monday of July in the year last aforesaid the following proceedings were had in said Cause to wit On Motion of their defendants by their Attorney leave is here given by the Court to file their pleading on the third day of the present Term of this Court. And afterwards to wit on Wednesday the third day of said term the said defendants filed their pleas in the word and figures following to wit Marston Cape William B Cape at William Whaley Jeremiah Blackwell admr. &c. July Term 1835. And the said defendants say that the said plaintiffs ought not to have and maintain their aforesaid action thereof against them because they say before the exhibition of the present suit to wit on the 1st day of March in the year 1835. And at the County aforesaid they will and truly paid the debt aforesaid and all interest that had accrued thereon to the said plaintiffs and this they the said defendants are ready to verify wherefore they pray Judgt. &c.

Plole attd.

2 And for further plea in this behalf according to the statute in such case made and provided the said defendants say that the said plaintiffs ought not to have and maintain their aforesaid action against them because they say that the said plaintiffs before and at the time of the Commencement of this suit to wit at the County aforesaid were and still are indebted to them the said defendants as heirs and distributees of William Whaley deceased in a large sum of money to wit the sum of five hundred and thirty nine dollars and thirty three cents being the two months of 2426 dollars and 99 cents directed and ordered by the County Court of Washington County at the February term thereof in the year 1835. to be paid by the said plaintiffs administrators of William

Whaley deceased to the heirs of said deceased
And the said defendants aver that they are
two of the heirs of said William Whaley deceased and are jointly
entitled to have of said plaintiffs administrators
as aforesaid the said sum of 539 dollars and
33 cents in virtue of their being heirs as aforesaid
being the two months parts of the said sum of
2426 Dollars and 99 cents ordered and adjudged
to be paid as aforesaid as by the record and
proceedings thereof in said County Court more
fully appears which said judgment order and
decree still remains in full force and effect not
reversed annulled discharged satisfied or made
void And which they the said defendants are
ready to verify by the said record which said
sum of money as due and owing from the said
plaintiffs administrators as aforesaid exceeds the
debt in the said declaration mentioned and
out of which said sum of money so due
and owing from the said plaintiffs admr. as
aforesaid to the said defendants they the said
William B Cape and Marston Cape are ready and
willing and hereby offer to sett off and allow
to the said plaintiffs the full amount of the
debt in the declaration mentioned and all interest
that hath accrued thereon And this they are
ready to verify wherefore they the said defendants
pray judgt. &c. Hole atto for defts.

William Whaley and Jeremiah Blackwell admr. of
William Whaley decd. vs William B Cape Marston
Cape in the Circuit Court July Term Mr Thomas J
Givens attorney for plaintiffs in the above action take
notice that the above named defendants William
B Cape on the trial of this cause will give in evidence
and insist that that the above named plaintiffs before
and at the time of the commencement of this suit were
and still are indebted to him the said William
in the sum of thirty five dollars which he the
said William B Cape recovered of the said plaintiffs

by the Consideration and judgment of the County Court of Washington County at the May Term thereof in the Year 1835. as by the record of said Judgment will more at large appear which Judgment is yet in full force and effect and in no wise annulled paid or discharged and which said Sum of money the said William B Cape will on the trial of the above action set off against any demand of the said plaintiffs to be proved on said trial according to the form of the Statute in such case made and provided and the said William B Cape and Mas ton Cape will also set off on the trial of the above action the Sum of forty five dollars which said Sum of money the said plaintiffs were Jointly indebted to them the said defendants before the Commencement of this Suit and are still indebted to them being the two ninths parts of the Sum of one hundred and ninety eight dollars money received by them for an improvement sold in virtue of their being administrators as aforesaid and which said Sum of money appertains of right to the heirs of William Whaley deceased the said defendants being two of said heirs against any demand of the said plaintiffs to be proved on said trial according to the form of the Statute in such case made and provided

28 July 1835 J Cole atto for defendants

3d And for further plea in this behalf according to the Statute in such case made and provided the said William B Cape impleaded with Mas ton Cape as aforesaid says that the said plaintiffs ought not to have and maintain their aforesaid action against him because he says that he the said William became and was bound in the bond in the said declaration mentioned as Security for the said Mas ton Cape who was in fact the principal debtor in the same to wit on the 10th day of July in the year 1834 and at the County of Washington aforesaid and the said William B Cape further in fact says that being Security in this behalf as aforesaid he the said William B Cape

did in order to secure himself against the payment of said debt being only security as aforesaid and in order to the payment of the same by the said Master principal as aforesaid did on the first day of November in the year 1834 at the County aforesaid die action having then and there accrued to the said plaintiffs upon said writing obligatory notice in writing which notice bears date the day and year last aforesaid require the said plaintiffs forthwith to commence suit upon the said bond in the declaration mentioned And the said William further in fact says and avers that the said plaintiffs although notified as aforesaid wholly failed to commence their action aforesaid on the bond aforesaid and to proceed on with the same with due diligence within thirty days after the service of the said notice to do so by reason whereof the said William B Cape is exonerated and discharged from his liability to the plaintiffs in this behalf And this he the said William is ready to verify whereforth prays Judgt &c. T Colle attd

And afterwards to wit the said plaintiffs by their attorney filed their replication and demurrer to the pleas of the said defendants in the word and figures following to wit

Whaley & Blackwell Adm. vs the Capes And the said plaintiffs as to the first plea of the said defendants say that they ought not to barred from maintaining their said action against the said defendants by reason of any thing in that plea alleged Because they that the said defendants did not well & truly pay and satisfy the the said sum of money in the said bond mentioned with the interest thereon in manner & form as the said defendants have in that plea alleged And this the said defendants pray may be enquired of by the Country &c.

Also the defendants deth the like T. Cole attd

And as to the plea of the said defendants thirdly above pleaded the said plaintiffs say that by reason of any thing in that plea alleged they ought not to be

barred from having or maintaining their said action against the said defendant William Because they that the said William did not notify in writing the said plaintiffs to commence suit for thereth on said bond before the commencement of this suit in manner and form as the said William hath above in his said plea alleged And this the said plaintiffs pray may be inquired of by the Country

Givens for Plaintiffs

And the defts doth the like P Cole atty

Whaley et al vs the Capes And as to the second plea of the said defendants the said plaintiffs say that the same and the matters therein contained are not sufficient in law to bar or preclude the said plaintiffs from having or maintaining their said action the said defendants And that they are not bound by the law of the land to Answer the same And this they are ready to verify whereon for want of a sufficient plea in this behalf the said plaintiffs pray Judgment for their debt & damages for the detention &c

Givens for Pltffs

Joinder in demurrer P Cole atty

And afterwards to wit on the said third day of the term last aforesaid the following proceedings were had in said cause to wit William Whaley Jeremiah Blackwell adm. of William Whaley dec. v Masters Cape & William B Cape Now at this day come the parties aforesaid by their respective attorneys and the demurrer of the said Plaintiffs to the second plea of the said defendants being submitted to the Court and by the Court here fully understood and mature deliberation thereupon had its is considered by the Court here that the said plea of the said defendants and the matters therein contained are good and sufficient in law to bar and preclude the said plaintiffs from having and maintaining their action aforesaid against them the said defendants. And neither party requiring a Jury all and singular the premises were by them submitted to the Court and the Court do find that the said defendants

did well and truly pay and satisfy the said sum of money in the said bond mentioned with the interest thereon in manner and form as the said defendants have in their first plea ~~[illegible]~~ alleged and the Court do further find that the said plaintiffs were and still are entitled to the said defendants as heirs and distributees of William Whaley deceased in the sum of five hundred and thirty nine dollars and thirty three cents being the two ninths of two thousand four hundred and thirty six dollars and ninety nine cents directed and ordered by the County Court of Washington County at the february term Eighteen hundred and thirty five to be paid by the said plaintiffs administrators of William Whaley deceased as aforesaid to them as heirs of said deceased and the Court do further find that the said defendants are heirs of William Whaley deceased and are jointly entitled to have of said plaintiffs administrators as aforesaid the said sum of five hundred and thirty nine dollars and thirty three cents in virtue of their being heirs as aforesaid as they in their second plea have alleged and the Court do further find by the adjusting of the said mutual demand that the said sum of five hundred and thirty nine dollars and thirty three cents exceeds the debt in the plaintiffs petition mentioned by the sum of one hundred and forty seven dollars and forty cents and the Court do further find that the said defendant William B Cape did not notify in writing the said plaintiffs to commence suit forthwith on said Bond before the commencement of said suit in manner and form as the said William hath above in his said third plea alleged Therefore it is considered by the Court that the said defendants recover of the said plaintiffs the sum of one hundred and forty seven dollars and forty cents the debt aforesaid in form aforesaid and also their costs and charges by them about their defence in this behalf laid out and expended and afterwards to wit on thursday the fourth day of said

the following proceedings were had in said Cause to wit
William Whaly & Jeremiah Blackwell Admr. of William
Whaly Decd. vs Marston Cape & William B Cape now
at this day come the parties aforesaid by their attorney
and the said defendant by his attorney files the affidavit
of William Whaly one of the above plaintiffs in pursuance
of the statute in such case made and provided and prays
an appeal to the Supreme Court - and thereupon the said
William Whaly as principal acknowledged himself
indebted to the said defendants in the sum of two
hundred and fifty dollars and Albert Blaine John O Scott
and Richard Evans as his securities acknowledged them-
selves indebted to the said defendants in the sum of
two hundred and fifty dollars to be levied of their
respective goods and chattels lands and tenements
upon condition that the said plaintiffs shall
prosecute their appeal with effect - and pay
and satisfy the condemnation money and all costs
or otherwise abide the judgment of the Supreme
Court in said appeal then this recognisance to be
void else to remain in full force and virtue
whereupon the appeal is granted
The following is a copy of the affidavit of William
Whaly for an appeal filed in this Cause
Whaly & Blackwell vs W.B. & M Cape William
Whaly one the above plaintiffs for himself and as
the agent Jeremiah Blackwell the other defendant
being first duly sworn deposeth & saith the
application for an appeal in this Case is not
made for the purpose of vexation or delay but
because this affiant verily believes the applicants
aggrieved by the judgment of this Court in this
Case
William Whaly
Subscribed and sworn to in open Court July 30
1835
J McGuary Clerk

6

Bill of Costs in the forgoing suit

Tax on writ	62½
Israel McGuady Clerk	6.57½
W. W. Smith Sheriff	2.80
P. Cole atto	2.50
Israel McGuady Clk for this transcript	4.63½
	$17.13½

State of Missouri }
County of Washington } ss

I Israel McGuady Clerk of the Circuit Court for the County aforesaid do Certify that the within Six (6) pages contain a full true and perfect transcript of the record and proceedings had in the case of William Whaly & Jeremiah Blackwell adm. of William Whaly against Maston & William Blaser as the same remains of record in my office

In testimony whereof I have hereunto set my hand and affixed my seal of office at Potosi this 7th Sept 1835

Israel McGuady Clk

(14) No 9 749

Supreme Court 3d Judicial District
October Term 1835

William Whaley & Jerh Blackwell
vs
William B Cape & M Cape

Filed 26th September 1835
Joseph C Brown Clerk

749

Judgt affirmed Book D – 48

Fee bill 58

William Whaley &
Jeremiah Blackwell Appellants

Maston Cape &
William Bloape Appellees

And the said Appellants by Gamble their attorney come and say that in the record and proceedings aforesaid and in rendering the judgment aforesaid there is error in this

That by the record aforesaid it appears that the said Circuit Court ~~overruled the demurrer~~ of the said Appellants to the second plea of the said Appellees above pleaded whereas by the law of the land the said demurrer should have been sustained

There is also error in this that ~~the~~ the said Circuit Court rendered a judgment that the Appellees recover of the Appellants the sum of one hundred and forty seven dollars and forty cents when by the law of the land no such judgment could be rendered in said case.

Wherefore for the errors aforesaid as well as for other errors in the record aforesaid appearing the said Appellants pray that the judgment aforesaid in form aforesaid rendered be reversed annulled and for nought held and esteemed and that they be restored &c

H R Gamble
atty for Appellants

There is no error in the record

[illegible]
[illegible] [illegible]

William Whaley &
Jeremiah Blackwell
~~[illegible]~~
vs
Maston Cape &
Wm B Cape

assignment of Error

Filed 19th October 1835
Joseph C Brown Clerk

Joinder in Error Filed 19th October 1835
Joseph C Brown Clerk

Whaley & Blackwell — Appellants
vs
M & W. Cape — Appellees
} On Appeal from the Washington Circuit Court

This was an action commenced in the Circuit Court by Petition & Summons, by the Appellants against the Appellees on a single bill obligatory. The defendants in the Circuit Court pleaded payment & set off. The plaintiffs in the Circuit Court joined issue on the plea of payment & demurred to the plea of set off. The demurrer was overruled & the issues were found by the court sitting as a jury, for the appellees & on the plea of set off a Judgment was given for the defendants against the plaintiffs in the Circuit Court: to reverse which the plaintiffs below have come by Appeal into this court. The plaintiffs were administrators of one William Whaley deceased & the promissory note sued on, was given to them in that character — styling them Administrators &c. The defendants were distributees of the estate of William Whaley deceased. At the February term of the County Court of Washington County 1835. Whaley & Blackwell the Administrators of William Whaley deceased, settled up their administration & were ordered by the court to make distribution of the balance remaining in their hands to the heirs & distributees of said William Whaley dec'd. The Appellees were two of the heirs & distributees & the sum set off against the appellants, was the amount of their joint portions of the sum ordered to be distributed by the County court as aforesaid. The Plaintiffs on the 5th of May 1835 commenced their action against the appellees.

The question submitted for consideration is, whether the demurrer to this plea of set off was

rightly overruled or not. Our statute regulating set off provides "that if two or more persons be mutually indebted to each other by judgments, bills bonds, bargains promises, accounts or the like and one of them commence an action in any court, one debt may be set off against the other, notwithstanding such debts may be deemed in law of a different nature" &c The sums to which the appellees were entitled under the order of distribution by the County Court might have been collected from the Appellants, after the February term of the County Court 1835, on execution or the payment enforced by attachment. It was then a debt due by judgment or by an order or decree so very like a judgment, that the statute would regard it in the same light. It has been objected, that the distributive share to which each of the appellees was entitled under the order of the County Court was a separate debt due from the Appellants to each individually & could not be jointly set off against the joint debt sued for by the plaintiffs. The counsel for the Appellants has not sustained himself in this position. It has been held that a set off may be well pleaded, whenever the plaintiff is individually liable for the debt set off. 2 Esp. ca. 594 - 3 Mark. Ev 1316 & it is clear, from the 61 & 64 Sections of the administration law Rev. Code p 117 & 119. that the Appellants after the order of distribution of the County Court, were personally responsible to the distributees, out of their own proper goods, upon their failure to pay over the sums respectively due. Several authorities have been cited by the counsel for the Appellees which maintain that in an action on a joint note, the individual debts due to either of the defendants may be set off 2. Tyler Rep. 391. 1 Mark. Rep 20. 12 Serg & R. 252. - We cannot see that any injury is likely to arise from this doctrine but on the contrary that justice & convenience may be often promoted & circuity of action prevented thereby. — It has been also objected by the counsel for the Appellants that there

is no mutuality in the edebtedness of the parties. We think differently. The statute does not intend that the parties must be in like condition to coerce the payment of their respective debts, but simply, that the indebtedness shall be such as to entitle the person wishing to set it off, to his action at law. Upon the whole matter therefore, the judgment of the circuit court is affirmed with costs. —

McMcGosh
R Wash

I do not concur in this opinion. The law requires that the parties shall be mutually indebted. The plaintiffs in this action sued on a bond made to them jointly by the defendants. The defendants set off ~~two demands one~~ a sum of money made up of two demands one of which each of the defendants has in own several right against the administrators. But ~~This~~ this is by no means the most serious objection to the claim of the defendants. The plaintiffs hold the money due to the defendants as trustees, and the defendants have no right of action against them till a demand ~~and~~ is made, and a refusal, or what is equivalent takes place. It is said that a plea of set off is in the nature of a cross action. It is strictly speaking a cross action, for the defendants, if the demand set off exceed the demand of the plaintiffs, recover the excess and costs. The defendants, if they had each brought his action against the plaintiffs without proving a demand first made would have been forced to take ~~a~~ nonsuits: but being allowed to set off their several demands against the joint demand of the plaintiffs they force the plaintiffs to pay costs. This is a hardship, because after the order of distribution made by the county court the adminis

trators failing to pay over on demand in obedience to such order is liable to be proceeded against ~~as~~ by attachment as for a contempt See act of 1825 Concerning executors and administrators p 123 Section 76 Whereas they ~~were bound~~ could recover their demand against the defendants by the ordinary course of law only. For these reasons I am of opinion that the defendants ought not to have been allowed to plead their several demands as a set off to the joint demand of the plaintiffs and that the Circuit Court committed error in allowing the plea.

George Tompkins

No. 9 Oct. 3. 1835

Whaley & Blackwell
vs
Jno B & Marston Cape

Filed 30th October 1835
Joseph C Brown Clerk

Copied for the State
Works counted

William Whaley &
Jeremiah Blackwell
appel[ts]

vs

Maston Cape &
William B Cape
appel[ees]

} appeal from the
Circuit Court of
Washington County

Sta of Case.

This was an action of debt by petition and summons, brought by the appellants against the appellees on a single bill obligatory, in which instrument the obligees are styled administrators of William Whaley deceased. To this action the defendants filed several pleas, but it is not material to consider any of them, except the one to which the appellants have demurred in the court below. That court overruled the demurrer and gave judgement for the Capes, and the plaintiffs brought the case up by appeal. There was also an issue taken upon a plea of payment which was found for the defendants. Prior to the setoff the plaintiffs below sue in this action in their own right.

demurr.

The defendants by plea setoff a settlement made by the plaintiffs in the county court of Washington County as administrators of William Whaley dec[d], and an order of distribution made by the court, in which order and settlement a sum of money is found in the hands of said administrators after payment of debts, and is directed by the court to be paid to the heirs of said William Whaley dec[d], the said defendants being two of said heirs or distributees. The only enquiry is, could this defence to the action be legally made? —

In Carpenter vs Butterfield 3 John. Cases 132, Kent says that the doctrine of setoff, was taken from the civil

Law, and was introduced to advance justice, and prevent a circuity of action. And the Authority says that it is an equitable adjustment of accounts. These principles are illustrated by the following dicta. In the case of Schermerhorn vs Schermerhorn 3 Caines S. Rep 190 it is held that a Judgment of a distinct court from the one in which the action is pending may be set off. In Aken vs Wood 2 Sp. Ca 594 3 Stark Ev 1316. the Court say the question is, were the appellants individually liable for the debt set off in the action if they were, then the plea was properly pleaded. In Ashley vs Pillard 2 Tyler Rep 391. & in a case 1 Mass. Rep. 20 it is said that in a suit on a joint note the individual demands of either of the defendants may be set off to the note. Some doctrine 12. Serg & R 252. A set off means a cross claim for which an action might be maintained against the plaintiff 4. Burr. 2133 4. Camph. 134. A Judgment may be set off against a demand not ascertained by Judgement 1. Rawle 227.

It remains to consider the debt and the set off in the present case, with regard to mutuality and in reference to the above principles.

Whaley and Blackwell are in their own right for the debt in the petition mentioned, and Whaley and Blackwell, upon the order of distribution being made by the County Court, became personally responsible to the distributees "de bonis propriis" for the amount ordered to be paid, this is manifest by reference to the 61 S. and 64 Sec of our Law, "Title administration" Digest pages 117 & 119. Then here was such a mutuality as our statute (L. M. 735) contemplates. The Capias owed Blackwell and Whaley the bond in suit. And

Blackwell and Whaley owed them the amount of their distributive shares of the estate of William Whaley decd. the payment of which can and could have been severally enforced by Execution from the County Court against the bodies lands and tenements goods and chattels of the appellants. —

to shew mutuality

If it was the amount payable to all the distributees in this case is found in the aggregate by the county court but it is not a joint right of necessity it is several and divisible by the county Court. — The whole proceeding is unique and sui generis. The Administrator as Trustee of a fund, after paying off debts, presents the remainder in their hands to the Court to be disposed of according to law. The Court settles with them and adjusts their accounts from facts presented by the administrators themselves, ascertains the surplus fund, and the persons legally entitled to it under our laws. The Court finally orders the Administrator to pay the persons entitled to this fund, and these persons severally upon their failure to perform that duty have a right to execution or attachment against them. In this case every fact is confessed by the appellants that is alleged in the plea. The amount of the distributive share appertaining to the capes from the estate of William Whaley decd is confessed, that the appellants owe it to them is also confessed, it is therefore difficult to assign a good reason, drawn even from the technical rules of legal proceedings why the plea of set off in this cause should not be allowed. On the other hand if we should test the case by the principles of right and wrong, truth and justice, the Capes

must succeed, because first the Appellants receive no injury from a decision of this cause in favor of the Capes, by their own confession on the record. Second, such a decision would produce that equitable adjustment of demands between the parties, that our law contemplates in the doctrine of setoff. Thirdly, if the Capes fail, the appellants will recover costs and obtain an execution against the appellees, when they are justly indebted to the appellees by their own shewing, and lastly a circuity of action will be encouraged, which the doctrine of setoff was introduced to prevent. The following authorities appear to have some relevancy upon principle.

Law auth. in a degree analogous. — In White Whittle & co vs Bannisters Execu^r. 1. Was. R. 166 it is said that a Tenant having leased land from an Executor, could not purchase in judgements against the Testator and set them off against the suit; but the court adds, that it might be otherwise if the Executor should have acknowledged

and appo-site. — he had a sufficiency of assets. In Seagin vs Hudspeth 3. M. Rep 123, the court held that the defendant should shew a right to claim the debt setoff. In Wolf vs Beales 6 Serg & R. 244. it is held that the right to setoff must either depend on the right of action or the right of property, that a Cestui que Trust may set off his right of property against a demand on him in his own right; And that a person having the right of action may setoff a debt due to him as Trustee against a debt due by him in his own right. In Gibson Jr; Chitty on Con 331. note (+). In the present case there was both a right of action and a right of property in the Capes to the amount of distributive shares setoff. And agreeably to the

dictum of this court in the case of Scogin vs Hu:
:dspeth before cited, the appellees did shew a
right to claim the debt set off by facts which
are admitted to be true by the appellants on
the record.

Issue - But if the court should consider the decision upon
the plea of set off erroneous yet there is an issue
found of fact upon a plea of payment in the cause, which
issue is found for the defendants. There is no evidence
for saved on the record; and upon principle and
Defts authority this decision of the court below must
be affirmed by this court. The case of Taylor vs
McNight 1. M. Rep 278. is in point. In the
case of Davis vs Hays 16.270. Butcher vs Keil & Butcher
authors Law. 16.262. Collins vs Bowman 2. M. Rep. 195 Bartlett vs
Draper 3. M. Rep 487. the following legal axioms
appear to be recognized, first, that where the
Circuit Court gives an opinion not presented by
an issue of law, it must be saved by exception
and that exception made a part of the record
by a bill. — 2d. that it is a rule of law, when
a bill of Exceptions is doubtful, the court will not
intend anything for the party whose duty it was
to make the matter plain. 3d. The office of a
Bill of Exceptions is to save facts; and our statute
points out the only mode in which they can be
saved. It follows therefore, that if the court below
is to be reversed for an erroneous decision upon an
issue of fact, that the evidence upon which that
opinion was founded, must be presented to
the appellate court in an authentic and legal
form, that is to say by Bill of Exception refused

by the Judge or by bystanders; and thus made a part of the ~~placed upon~~ the record. In the present case the defendants alleged that they had paid the debt sued for. The plaintiffs took issue on this plea and went to trial. The court found the fact to be as the defendants said ~~alleged~~ from the evidence before him. The evidence upon which the court below acted, and which satisfied him that the defendants did not owe but had paid the debt in suit, was not saved. The appellants seemed to acquiesce in the opinion at the time, and this may have occasioned the oversight which cannot now be remedied. The appeal was an after thought, with which justice had little to do, as I think will be most manifest from an inspection of the record itself.

P. Cole Attd.
for appellees.

Master Cape
William B Cape
vs
William Whaley
Jeremiah Blackwell

Appellees
Briefs,
P. Cole Atto.

3 John Cases 152
3 Caines T.R. 190
2 Esp. Cq 594
3 Stark Co 1316
2 Tyler Rep 391
1 Morch Rep 20
12 Leg & R 252
4 Burr 2133
4 Campb 134
1 Rawle 227

Wm Whaley & J Blackwell

Wm B & Thaston Cape

This was an action commenced by petition and summons in the Washington Circuit Court by the Appellants against the appellees on a note given to the appellants as Administrators of William Whaley deceased.

The defendants pleaded two pleas jointly 1st payment 2d set off of ~~allowances made~~ an amount ordered by the County Court of Washington County to be distributed to them as distributees of William Whaleys estate

On the first plea there was issue to the second there was a demurrer The Court below over-ruled the demurrer and then the case proceeded to trial before the Court as a jury. The verdict is that the defendants did pay as in their first plea is alleged and that the plaintiffs were indebted to the defendants as is in the second plea alleged. And the Court then ascertaining the balance to be against the plaintiffs below gave a judgment against them for such balance.

The points are

1 That the Court erred in overruling the demurrer See Administration Act SS 31. 64-65. 66. Set Off Revised law 738

2 That no judgment could be rendered against the plaintiffs for the balance.

H R Gamble
for Appellants

Wm Whaley &
Jere Blackwell

v

Marton Cape &
Wm B Cape

Appellants Brief

H R Gamble