Kribben, Christian v Eckelkamp, Henry 1864

521/5

638/20

34/480

Kribben Dir C P

v

Eckelkamp Pir E D

CD Colman A

PP Kribben

March 64

May 62

STLW

P states that Def used him as an informer

refused to pay $85 - 10 tim
75 Cor

Affirmed Bil

Know all men by these Presents, that We, Henry Eckelkamp as Principal and Isaac A. Letcher and Abednego Moss as sureties are held and firmly bound unto Christian Kribben in the sum of two Hundred dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, Executors and administrators, firmly by these Presents.

Sealed with our Seals and dated this 21st day of May AD 1862.

The condition of the above obligation is such, that whereas Henry Eckelkamp has sued out of the Supreme Court of the State of Missouri a Writ of error upon a Judgment rendered against him in favor of Christian Kribben in the Law Commissioner's Court of St Louis County, for the sum of eighty five dollars together with costs, and has obtained from the Supreme Court an order allowing such Writ of error to stay the Execution upon such Judgment.

Now therefore if the said Plaintiff in error will prosecute such Writ with effect, and pay the money that shall therein be adjudged against him by the Supreme Court, or otherwise abide the judgment of such Court therein, then the above obligation to be void, otherwise to remain in full force.

Approved by Court
May 21st 1862
Attest
A. W. Meadows

H. Eckelkamp (Seal)
Isaac A. Letcher (Seal)
Abednego Moss (Seal)

Bond

The State of Missouri, ss.

The State of Missouri, to the Honorable the Law Commissioners Court of St Louis County **in said State—Greeting:**

WHEREAS, In the record and proceedings in a certain cause lately pending in the Said Law Commissioners Court

wherein Christian Kibben was plaintiff and Henry Eckhamp was defendant

in a Civil action manifest error hath intervened, to the great damage of said Defendant as by his complaint we are informed.

NOW, being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf, COMMAND YOU, that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held in the City of St. Louis, in the County of St. Louis, in said State, on the Third Monday in October next, so that our Judges of our Supreme Court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right, and according to law, ought to be done.

WITNESS, Andrew W. Mead Clerk of our said Supreme Court, at office in the City of Saint Louis, the twenty second day of May in the year of our Lord one thousand eight hundred and ~~fifty~~ sixty two

A. W. Mead CLERK.

In obedience to the within writ, I herewith transmit to the Supreme Court, a full & complete transcript of the Record & proceedings in the within named cause, as fully as the same remain on file and of Record in my Office.

W. C. Huffman,
Clerk Law Com. Court

In the Supreme Court held at St Louis of the State of Missouri
May 21, 1862

Whereas Henry McKlamp the ~~defendant~~ ~~plaintiff in~~ error herein has sued out a writ of error in the within entitled Cause and entered into a Recognizance according to law which recognizance is this day approved by the Court And it appearing to the Court from an inspection of the Record herein that there is error in said cause, the Court therefore orders that the said writ of error stay the execution herein until the further order of this Court

A true Copy from the Record
Attest
Andrew W Mead
Clerk

State of Missouri
County of St Louis ss

Be it remembered that on the 13th day of the month of July, in the year of our Lord, eighteen hundred and sixty one, was filed in the office of the Clerk of the Law Commissioners Court of St Louis County, a petition in a certain cause between Christian Kribben, plaintiff and Henry Eckelkamp, defendant, in the words and figures following to wit:

Petition Christian Kribben, plaintiff
" } To the June Term 1861, of the St Louis Law Commrs Court,
Henry Eckelkamp, defendant,

Plaintiff states that he is an attorney at law and was such in the year 1858, and long before that time and since in the State of Missouri,

That on or about the 12th of January 1858, the defendant employed him as an attorney and counsellor to make an examination of certain Records in Franklin County in the State of Missouri, at Union; that plaintiff did make that examination of title and made his report thereon to defendant; that he was employed therein three days and expended Ten Dollars in going to and returning from said Union to St Louis,

That his services in this behalf are worth Seventy five Dollars, for which and his expenses

2 charged he brings this suit, defendant failing and refusing to pay the same – he asks judgment for Eighty five Dollars, Kribben P.P.

Christian Kribben, plaintiff makes oath and says the above petition and statements therein are true,
Sworn to & subscribed before me this
18th of March 1861, Chr. Kribben
Bertram Kribben, Notary Public

Whereupon, on the 15th day of said month of July, in said last mentioned year, a summons was issued for said defendant, directed to the Marshal of the County of St Louis, as follows to wit:

Summons

The State of Missouri, to the Marshal of St Louis County – Greeting;
We command you to summon Henry Eckelkamp to appear before the Law Commissioner's Court of St Louis County, on the first day of the next term thereof, to be held at the ~~City~~ City of St Louis within and for the County of St Louis, on the first Monday of August next, then and there to answer the complaint of Christian Kribben, as set forth in the annexed petition; & have you then and there this writ,
Witness John M Fulton, Clerk of the Law Commissioner's Court of St Louis County, with the seal of said Court hereto affixed, at Office, in the City of St Louis, this

3 15th day of July, in the year of our Lord, One thousand eight hundred and sixty one,

John M. Fulton, Clerk,

Which summons was returned by said Marshal with the following endorsement, to wit:

Marshal's Return — Executed this writ in St Louis County, July 30, 1861, by leaving a true copy of the ~~summons~~ writ & petition at the usual place of abode of the within named Henry Eckelkamp, with a white person over the age of fifteen years and a member of his family.

Peter Wegman, Marshal

5

And at a Regular term of said Law Commissioner's Court, begun and held at the City of St Louis in & for said County, on Monday, the 2d day of December A.D. 1861, the following proceedings were had in said cause, on Thursday, the 5th day of said month of December, in said last mentioned year to wit;

Judgt by default — Christian Kribben vs Henry Eckelkamp — This day comes the plaintiff in proper person, but the defendant, though duly summoned and called, comes not but makes default, Wherefore it is ordered by the Court that the plaintiff's petition be taken against the defendant as confessed, and that inquiry of the defendant's indebtedness to the plaintiff be had forthwith, Whereupon plaintiff waives a jury and submits the inquiry

6

4 herein to the Court; and the Court, after hearing the proofs & being fully advised of & concerning the premises, doth find that said defendant is indebted to the plaintiff in the sum of Eighty five dollars.

It is therefore ordered and adjudged by the Court that the plaintiff recover of the defendant the debt aforesaid, in form aforesaid by the Court found, also his costs and charges herein expended, and that he have execution therefor.

And, on the 8th day of the month of January, 1862, the defendant filed his motion to set aside the judgment and stay the execution herein, and affidavits in support of said motion, in the words & figures following, to wit:

Mo. to set aside judgt & stay Ex. & Affdts in support of Motion

Christian Kribben, plaintiff
Henry Eckelkamp, Defendant

In the Law Comr's Court of St Louis County, August Term 1861, St Louis County, ss.

Henry Eckelkamp, the defendant in the above entitled cause, being duly sworn, deposes and says that, prior to the time for answering in this cause, at the last August term of this Court, this affiant placed in the hands of Charles D. Colman with instructions to draw an answer therein to be filed; that afterwards and prior to the time it was necessary for affiant to file said answer for said August term, he met with &

5 had an arrangement & settlement in regard to
this cause with the Plaintiff, by which the plaintiff
agreed to dismiss this action & thereupon this
affiant instructed his said attorney to not draw
such answer, upon the faith of such arrangement
9 & settlement; that affiant heard nothing more in
reference to said action until on or about the 28th
day of December, A.D. 1861, when he was called
upon by a deputy of the Marshal of St Louis County
with an execution in this cause in favor of the
plaintiff & against this affiant for the sum of
eighty five dollars and costs of suit, which was the
first intimation this affiant had on any intention
on the part of the said plaintiff not to live up to said
arrangement & understanding as aforesaid; that
10 the Marshall of said County has, or is about to levy
upon the personal property of affiant, with a view
to sell the same to satisfy said execution, and the
same will be sold for such purpose unless an
order shall be granted to stay such execution;
that affiant has plenty of Real Estate in St Louis
County so that the payment of such judgment is
perfectly secured in case the same shall not be
set aside & he permitted to answer therein; that
affiant had & still has a good & substantial defence
on the merits in this action & can establish such
11 defence if permitted to do so and would have
interposed the same except for such arrangement

6 & understanding as above set forth; that the alleged services for which the plaintiff seeks to make this affiant liable were rendered for one Deedore; and against whom the said plaintiff has recovered a judgment for the same services sought to be recovered for in this action, as affiant is informed & believes to be true; that affiant merely went with said Deedore to the office of said plaintiff as a friend and was in no measure interested in
12 the subject matter of said services & in no manner made himself liable therefor to his knowledge or belief, & further says not. H. Eckelkamp

Sworn to & subscribed before me
this 6th day of Jany. 1862,
Norman J. Colman, Notary Public St Louis Co, Mo.

Christian Tribben } In Law Courts Court
August Term, 1861,
Henry Eckelkamp } St Louis County ss,

Charles D. Colman, being duly sworn says that the defendant above named handed this affiant the copy of the Writ & Petition in the above cause to him with instructions to prepare
18 an answer therein in season for the last August Term of this Court, and afterwards let word at affi-
-ant's office not to prepare said answer for the reason that he had arranged & settled the case with the plaintiff; such word being left in the absence

7 of affiant he thought advisable to see the plaintiff on the subject, which he accordingly did, and said plaintiff informed affiant that he had arranged the matter with the defendant and that there was no necessity of preparing an answer therein & thereupon affiant acted accordingly; that such conversation with the plaintiff on the part of this affiant was in season to have prepared & filed 14 said answer in season for said August Term 1861, and further he saith not,

C. D. Colman

Sworn to & subscribed before me,
this 6th day of Jany. 1862
Norman J. Colman, Notary Public St Louis Co, Mo.

Christian Tribben } In the Law Commissioner's
} Court of St Louis County
Henry Eckelkamp } February Term 1862,

Upon the ~~following~~ foregoing affidavits & upon such others as may be hereafter filed in the above entitled cause the defendant moves the Court for an 15 order staying the execution referred to in said affidavits & the one issued in said cause, and also further moves the Court to set aside the judgment rendered in said action and all subsequent proceedings and for leave to answer in such action; and for such other and further rule order & relief as may seem proper, C. D. Colman. Defts. Atty.

Dated January 6, 1862.

8 Christian Kribben } In the St Louis Law [32]
" } Commissioner's Court
Henry Eckelkamp }

Let the execution in the above entitled cause be stayed until the matter set forth in the above affidavits and motion can be heard in the Court. H. Duseubury

16

Law Commissioners

St Louis County January 7th 1861

And at a Regular term of said Court begun & held as aforesaid, on Monday, the Third day of the month of February in the year of our Lord One thousand eight hundred and sixty two, the following further proceedings took place in said cause, on Saturday, the 8th day of said month of February, in said last mentioned year, to wit;

Christian Kribben } This day comes the
" } defendant by attorney
Henry Eckelkamp } and submits to the Court his motion to set aside the judgment herein; and the Court not being fully advised thereof takes time to consider,

Motion to set aside judgt sub & advst, 17

And on the 15th day of said month of February, in said last mentioned year, the plaintiff filed a counter motion in the words & figures following;

9 Christian Kribben, plaintiff } In the Law
Counter Motion } Comrs Court
Henry Eckelkamp, defendant } Feby. Term, 1862.

And now comes said plaintiff on being informed that said defendant has filed his motion to set aside the judgment heretofore rendered in his favor against said defendant in this Court
18 and moves that said motion be not granted,

Because the proceedings prayed for is illegal & void,

Because the defendant has not complied with the proper rules requisite for the ends sought for,

Because the judge of this Court in vacation had no right to stay the execution of the judgment in this cause, and the Court has no authority of the subject matter in this proceeding,

Nor does defendant in now appearing to the proceeding waive any legal right which he has in the premises which he might have in not so appearing but demurring throughout to all proceedings thus far
19 had in the motion & proceedings to set aside said judgment and stay the execution thereof & reserving to himself all the rights to which he may be entitled he makes this his counter motion and submits the annexed depositions in support thereof

Chr. Kribben

In his own proper person

10 Christian Kribben, the plaintiff, being duly sworn says;
That during the first week after the return day of the
original writ of summons in said cause, the defendant,
Henry Eckelkamp and his wife, Mary Eckelkamp,
called on him at his office in St Louis City & then & there
20 endeavoured to expostulate with affiant because of the suit
brought against them, This was in the early summer of
1861, Bertram Kribben, the father of affiant & employed in
the office of affiant was present at said meeting,
Previous to the said meeting — a day or so before — affiant
had met Mr Colman, attorney for defendant, who informed
him of the fact of his being retained in that behalf, as also
that his client would shortly see this affiant in order to
effect a settlement. On meeting the said defendant
it was agreed toward effecting a full settlement that a
21 full account should be stated between the parties not
only in regard to the subject matter of this suit, but also
in regard to other accounts outstanding & unsettled between
them, A full balance was struck — the amount sued
for in this action was agreed upon and declared
a right, and a balance of thirty nine dollars was found
due affiant — on the rest of the account between them
by Eckelkamp the defendant, and ultimately for
avoiding litigation and in order to drop the pending suit
the defendant, Henry Eckelkamp together with his
wife who mainly carries on the financial business of
22 said Henry the defendant agreed to pay this affiant
the whole amount for which this suit is brought, and

11 costs and nine dollars additionally in full settlement of all accounts between the parties this affiant agreeing to throw up thirty Dollars in the other bill in consideration of a settlement. This was finally agreed upon, & Henry Eckelkamp & his wife, in presence of said Bertram Kribben at said time & place agreed to pay the whole of said several sums, costs &c, by Monday following, at the office of affiant
25 and to take his receipt and receive the papers in affiant's possession out and through which to seek recourse against Dierdoth, and it was specially agreed at said time that no further proceedings should be had in the suit pending between said day & the Monday following, Henry Eckelkamp and his wife pledging themselves to pay all of said money on said day. On the strength of this agreement affiant agreed with defendant to let the suit remain in statu quo, & not to take any step until the day fixed, to daw and obtaining any judgment

A day or two later affiant met Mr. Colman, attorney
24 for defendant, casually, and on inquiry whether any thing remained to be done for him as attorney for defendant affiant informed said Colman that there was no need of any answer or other plea in the premises since the defendant & himself had come to a settlement. On the Monday following, the defendant, in company with another person came to the office of affiant according to appointment & Bertram Kribben aforesaid handed said Henry Eckelkamp the papers & receipts agreed upon, but said Eckelkamp and his companion were at the time so beastly drunk as not

13 to be able to transact any business, and said defendant
25 refusing to pay any money as agreed it became necessary to break off all further business with him,
The defendant did not come near affiant again during the whole of said term of Court. During summer 1861, and about a month and a few weeks after said time, affiant called on said defendant at his residence, 11 miles from the City in the County, in order to ascertain what steps to take in the premises,
The defendant & his wife then informed affiant that by the Monday next following they would both call at his office
26 & settle the matter finally. Affiant then & there informed them that unless they did so settle he would at the opening of the next succeeding term, claim his judgment & gave them notice to that effect. On the Monday following, as agreed upon the defendants wife called at affiants office late in the evening & stated she would call with her husband in the course of a few days for settling as agreed upon. Affiant is informed that the defendant did call at his office shortly afterward but failed to make payment in part or in whole as will appear
27 in the affidavit following. Affiant further says that since the rendition of the judgment in this Cause & shortly before the stay of execution by the Judge of this Court in vacation, the defendants wife called again at the office of affiant and prayed affiant for ten days time within which to pay such judgment admitting the correctness of the judgment and the

13 justness of the debt in the premises, which time
this affiant refused, Affiant has a meritorious
& just right in the judgment in the premises. He
obtained the same as the record will more fully
28 elucidate, honestly & according to law — nor has he
used any subterfuge or any means improper tow-
ards obtaining said judgment. Chr Kribben,
Sworn to & subscribed before me,
this 14th day of February, 1862.
Wm J. Kribben, Notary Public for St Louis County

Bertram Kribben, of lawful age being duly sworn says;
I am no more interested in this suit. I am
employed at the Office of Messrs. Kribben & Kehr, attor-
neys, in collecting bills occasionally & attending at the
Office. I know Henry Eckelkamp & his wife. She
does the principal business in all money affairs of
29 defendant. I know the whole origin of the debt in
litigation between plaintiff & defendant, & defendant and
his wife, often, long before this suit was brought promised
to pay me the amount here sued on & settle the balance
of account with Christian Kribben, also a small
amount owing by him to Kribben & Kehr. Shortly
after this suit was brought the defendant & his wife
called at the office of Kribben & Kehr — it was in
late Spring, 1861, to arrange a settlement with Mr.
C. Kribben. I was present at the time, upon a

30 14 lengthy & full settlement, to effect which I had to produce the books & bills, Kribben, the plaintiff, agreed to take the amount sued for in this suit as the Diedorth claim & to deduct thirty dollars from his other account — not including the demand of Kribben & Kehr, which I think was $15,00 (dollars) — so as to leave nine dollars beyond the amount sued on, Eckelkamp agreed to this settlement & promised that on Monday following they would both call and pay the amount sued for, costs & nine dollars for a full
31 balance of debt to said Kribben, There were considerable offsets in the settlement & the casting up of accounts occupied more than an hour. It was also there agreed at the time that Kribben should not prosecute his suit any further as a matter of course on payment next Monday.

On the Monday following the defendant and another person whom I believe to be an employe of defendant, called at the office & asked me for receipt & papers. I offered defendant there & demanded the money as I had been instructed & authorized, Defendant refused to pay any money whatever
32 but insisted in the papers nevertheless & he being drunk & his companion brutally so I was compelled to make a peremptory demand for the payment which being refused I ordered both out of the office, Several months after & shortly before the rendition of final judgment in this cause, I believe in

15 the Fall of 1861, I saw the defendant again and called upon him for the payment of the debt in question, when the defendant told me that this was all right & he would come to the office in a short time & settle all up. Shortly after the rendition of judgment in this case in the early winter of 1861 Mrs. Eckelkamp called at the office & expressed considerable indignation at plaintiffs causing an execution to issue against her husband's property. Plaintiff in my presence told Mrs. Eckelkamp the whole proceeding & claimed that having waited near four years for the money in question he was now entitled to it. Mrs. Eckelkamp then agreed to pay Kribben if he gave her ten days additional time, saying that times were hard & that they had been robbed &c &c — and plaintiff in reply required a peremptory payment of one half at the time in which case he would give her as much time for the balance as she wished. This she refused & thereupon left. This is as nearly a true narrative of the facts of the case as they came under my observation & knowledge as I can give.

Bertram Kribben

Sworn to & subscribed before me
this 14th of February, 1862,
Wm J. Kribben, Notary Public for St Louis County

And at a Regular Term of said Court begun & held as aforesaid, on Monday, the 7th day of the

16 month of April, in said last mentioned year, the following further proceedings took place in said cause, on Wednesday, the 23d day of said month in said last mentioned year, to wit

35

Motion overruled

Christian Kribben vs. Henry Eckelkamp } The Court having duly considered the motion to set aside the judgment herein and being thereof fully advised, overrules the same,

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And at said Regular term of said Court begun and held as aforesaid, the following further proceedings took place in said cause, on Saturday, the 3d day of the month of May, in said last mentioned year, to wit

Christian Kribben
Henry Eckelcamp }

Motion to set aside the order overruling the motion to set the judgt aside & Bill of Ex. filed

16

This day comes the defendant by attorney and files his motion to set aside the order overruling the motion to set aside the judgment herein; and said defendant also files his bill of Exceptions, which is signed by the Court,

Motion to set order overruling motion to set aside judgment

Said motion to set aside the order overruling the motion to set aside the judgment, filed on said last mentioned day, is in the words & figures following, to wit:

Christian Kribben, Plaintiff, v. Henry Eckelkamp, Defendant	In the Law Commissioner's Court of St. Louis County, April Term, 1862,

And now at this day comes the defendant & moves the Court for an order setting aside the order overruling the motion to set aside the judgment & subsequent proceedings therein & for a re-hearing of said motion upon the papers filed herein & upon the accompanying papers & such others as shall or may be filed herein, for the following reasons, viz:

37

1st For the reasons stated & set forth in the papers upon which the original motion was founded.

2°: Because the plaintiff rendered the services & expended the money for which this action is brought for on Francis Diedoth & after the rendition of such services & expenditure of such money brought an action in his own name for the recovery thereof against said Diedoth & recovered therefor before J. Pinkston, a Justice

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18 of the Peace of Franklin County, Missouri, on or about the 22d day of May A. D. 1858, by the consideration & judgment of said Justice upon due issue & service of process upon said Diedoth which judgment still remains in full force not reversed, set aside or vacated,

3d: Because such judgment by default should be set aside & the defendant allowed to interpose his defence in the action, or for such other or further rule, order and relief as to the Court shall or may seem proper in the premises,

C. D. Colman, Defts, Atty,

St. Louis County ss,

Charles D. Colman, being duly sworn, deposes and says that the said plaintiff Christian Kribben commenced an action ~~for~~ before J. Pinkston, a Justice of the Peace of Franklin County against one Francis Diedoth on or about April 26, A.D. 1858, by the filing of an account in said action for the recovery of the sum of sixty Dollars being for the same alleged services & expenditures for which this action is brought & the issue & service of process upon said Diedoth on or about May 3d 1858, returnable on May 22 1858 & such proceedings were afterwards had in said action that the said Christian Kribben recovered a judgment in said action against

19 said Dierdoth on or about the 22 day of May 1858,
for the sum of Sixty dollars debt & $1.68 costs
of suit, which said judgment is still in full
force not reversed, set aside or vacated & was
received for the same alleged cause of action
41 for which this action was brought & not other
or different; that the fact of the recovery of such
judgment by said plaintiff against said
Dierdoth was not known to this affiant or to
said defendant as said defendant has informed
affiant at the time of the making or submission
of the former motion to this Court, but has been
learned since; that unless such motion shall
be granted & such judgment set aside the defendant
will be subjected to great loss & expense & perhaps
remediless in the premises; that affiant never
had but one interview or conversation with the
42 said plaintiff in relation to this suit or any
proceedings therein or in relation to the subject
matter thereof until after the rendition of the
judgment in the case & then only to inquire of
him if he was to dismiss the action as defendant
had informed me, so that no answer would
have to be filed, to which he replied that he &
the defendant had settled, that he had agreed to
& was to dismiss the suit & that no answer would
be necessary, & such conversation was during the
first week of the term, at which the defendant
43 was bound to appear and answer in the

20 action, and affiant never, at any time told said plaintiff that the defendant would call on him for settlement, or any thing of the kind as set forth in his affidavit on that subject, as affiant knew nothing of the existence of the suit until the same or previous day on which said conversation was had with said plaintiff, the defendant then for the first time employing affiant therein & bringing him the papers which were served upon him in the action, which was during the week for answering on the part of the defendant, and further says not, C. D. Colman

44

Subscribed & sworn to
before me this 25th day
of April, 1862,
Norman J. Colman
Notary Public, St Louis Co, Mo.

Bill of Exceptions

Christian Kribben
Plaintiff
v
Henry Eckelkamp
Defendant

In the Law Commissioners Court of St Louis County

April Term, 1862,

Be it remembered that on or about the 18th day of March, A.D. 1861, the plaintiff filed in the Office of the Clerk of this Court the petition in this cause, upon which

21 process issued on or about the 15th day of ~~December~~ July
45 A.D. 1861; that afterwards, on or about the 5th day of December, A.D. 1861, a judgment by default was rendered in this action for the sum of Eighty five Dollars and Costs; that on the 8th day of January, A.D. 1862, the said defendant filed in this Court the following motion & accompanying papers, of which the following are copies viz:

(See page 4, Clerk.)

That afterwards and on the 15th day of February, A.D.
46 1862, the said plaintiff filed upon his part the following papers in opposition to such motion viz:

(See page 9, Clerk.)

That afterwards it was mutually agreed by and between said parties by their respective counsel, in open Court that the Court should pass upon and decide said motion upon the merits, the plaintiff appearing upon said motion the same as if due notice thereof had been given to him of the same, and thereupon by the consent & agreement of parties said motion was held under advisement & not disposed of or decided by the Court until the April term of this Court A.D. 1862 when on the 23d day
47 of April A.D. 1862, as yet of this April term 1862, the Court overruled & denied the motion so made on the part of the defendant to which the defendant

22 then & there duly excepted.

Afterwards and on the 26th day of April A.D. 1862, the said defendant applied to the Court for leave to file a motion in said cause for a rehearing of said motion and to file as an additional reason for setting aside the judgment rendered in
48 said action, & establish the fact that the alleged services & money for which this action was brought were rendered and was expended for one Francis Dierdoth by plaintiff & that plaintiff in May, 1858 recovered a judgment in his favor against said Dierdoth therefor before a Justice of the Peace of Franklin County in this State & to show that the recovery of such judgment was unknown to the defendant at the time of the submission of such former motion & produced & showed to the Court a transcript of such
49 judgment and asked leave of the Court to file such motion, which motion was as follows, & affidavit, viz: (See page 17. Clerk) which leave the Court refused to grant, but at the same time said if the party had the right to file such motion as a matter of right, to do so but the Court would grant no permission to file the same, and the defendant then & there duly excepted, And ~~the same~~ because some of the exceptions so taken to the rulings and decisions of the Court appear by the record of said cause
50 & because such motions & the papers connected

23 therewith do not appear upon the record in said
cause, therefore the defendant has prepared this
Bill of Exceptions & incorporated such motions &
exceptions therein & the Court hath on the prayer
of the defendant signed this Bill of Exceptions
May on this 3d day of May A.D. 1862, as yet of
April Term 1862, according to the statute in such
case made & provided, A. Dusenbury
Law Commissioner (seal)

State of Missouri
County of St. Louis }

I, N. C. Huffman
Clerk of the Law Commissioner's Court of
St. Louis County, certify the foregoing to be a true
and complete Transcript of the record and
proceedings in the above entitled cause, as the
same now remain on file and of Record in
my Office.

In testimony of which I hereto
subscribe my name & affix
the seal of said Court, Done
at Office in St. Louis, this 12th
day of May, A.D. 1862,
N. C. Huffman,
Clerk

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March Term 1864

20

Christian Kribben

Deft in error

vs.

Henry Eckelkamp

Pltff in error

Error to

Appeal from St. Louis

Law Commrs. Court

Filed May 21. 1862

A W Mead Clk

P. P. for Respondent

C. D. Colman for Appellant

$10.00 paid by pltff in error

1862 May 29. Assignment of errors filed

1864 May 16. Sub'td on brief

1864 Jan 8. Affirmed. Opinion filed

Dp 260

Fee $10.50 paid by C

Henry Eckelkamp
Plfft in Error
vs
Christian Kribben
Deft in Error

IN SUPREME COURT,
Oct. TERM, 1862

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

1. That said Court admitted improper and illegal testimony offered by .....
2. That said Court rejected proper and legal testimony offered by .....
3. That the Court gave to the Jury improper and illegal instructions.
4. That the Court refused to give to the Jury proper and legal instructions offered by .....
5. That the verdict was against the evidence.
6. That the verdict was against law.
7. That the verdict was against both law and evidence, and against the law under the evidence.
8. That the verdict was against the weight of evidence.
9. That the judgment was rendered in favor of the Defendant in Error when it should have been rendered for the Plaintiff in Error
10. That said Court overruled the motion ~~for a new trial~~, made by Plaintiff in Error to set aside the Judgment rendered by Default, against the Plaintiff, for irregularity, and in considering and determining the liability of the Plaintiff in error to the Defendant in Error, on such motion instead of setting aside such Judgment and having an issue made and submitted for Trial, for the determination of such question, & in determining such liability upon affidavits & on such motion —

C. D. Coleman
for Plff in Error

And now come the ..... and for joinder in error say, that there is no error in the record and proceedings of said ..... in said cause, as assigned by said .....

Henry Eckelkamp
Plff in Error

vs

Christian Kuhlen
Deft in Error

Writ of Error

C. D. Coleman
for Plff in Error

Filed May 29 1862
A. W. Mead
Clerk

Henry Eckelkamp
Plfftin Error
vs
Christian Kribben
Deftin Error

In the Supreme Court of Missouri
Oct. Term 1862 -

Sir -

You will take Notice that Henry Eckelkamp as Plaintiff in Error has sued out of the Supreme Court of Missouri a Writ of Error upon the Judgment recovered in your favor against him, on or about the 5th day of December A.D. 1861 for the sum of Eighty five Dollars, and Costs which Judgment was so recovered in the Law Commissioners Court of St Louis County, and which the said Law Commissioner's Court refused to set aside; and that the Supreme Court has also granted an order Staying the Execution of said Judgment in said Law Commissioner's Court until the further order of said Supreme Court -

To
Christian Kribben Esqr
Deftin Error in pp -

Yours &c
C. D. Colman
Atty for Plffin Error

Dated May 23 1862 -

St Louis County ss

Charles S. Colman being duly sworn deposes and says, that on the 25th day of May 1862, at the City of St Louis in said County, he served upon Christian Kilbler, the defendant in error, a notice of which the within is a true copy, by delivering the same to him personally, in the Court House in said City & further says not.

Subscribed & sworn to before me this 6 day of June 1862.
Andrew W Mead
Clerk

C. S. Colman

Supreme Court
Oct. Term 1862

Henry Eckhardt
Plff in Error
vs
Christian Kilbler
Deft in Error

Notice of serving out Writ of Error &c.

C. S. Colman
atty for Plff in Error

Served a copy on Kilbler personally May 25th 1862.
C. S. Colman

Filed June 6th 1862
Andrew W Mead
Clk

Christian Kilbern Deft in Error vs Henry Eckelkamp Pltff in Error	In the Supreme Court of the State of Missouri March Term 1864.

Brief, Points & argument on part of the Pltff in Error.

I. The Court below erred in refusing to set aside the Judgment rendered by Default, for want of an answer, for the following, among other reasons, viz:

1st. The agreement which was made and entered into, between the Plaintiff and Defendant, after the institution of the suit, and prior to the rendition of the Judgment, by which an arrangement & settlement of the alleged cause of action is conceded to have been had, and by which, the Plaintiff, in consideration thereof, agreed to dismiss his action, put it out of the power of the Plaintiff thereafter, to take a Judgment in such action, in his favor against the Defendant therein, —

A failure on the part of the Defendant to carry out his part of the arrangement, as claimed by the Plaintiff ~~in Error, did not authorize~~ did not authorize such Plaintiff to violate such agreement on his part, and, if he was damaged by such failure of the Defendant, such Damages constituted a cause of action against the

Defendant and in favor of the Plaintiff, but could not have the effect to reinstate the case which had already been disposed of —

A mere agreement to Submit an action pending in Court, to arbitration, has the effect to discontinue such action, and any proceedings had or taken therein, or any judgment rendered therein, after such agreement, are irregular, and will be set aside by the Court upon the application of the Party against whom such proceedings or Judgment may be taken or had —

18th John 22d — People vs Onondaga Com Pleas — 1st Wendell 314 —
6th Cow 399 — Larkins vs Robbins 2d Wendell 505 — Diedrick vs Richley 19th Wend 108 —
17th Mass 591 — Smith vs Bause 2d Hill 387 —

And a Submission and award, creates a new cause of action, and prevents an action being brought, on the original cause —

Hamlin vs Duke 28th Mo. 166 & cases cited in Appellants Brief in such case —

And, according to the theory of the Plaintiff, as contained in his own affidavit, there was, what was equivalent to a Submission and an award, in the case —

There was a Settlement, not only in regard to the alleged cause of action upon which a recovery was sought, but also of all other matters in controversy between them and a balance agreed upon, which the Defendant agreed to pay, at an agreed time —

His failure, neglect or refusal to pay the amount thus agreed upon, did not enable the Plaintiff to take judgment against the Defendant on the original cause of action, any more than the failure of a Party to a Submission to pay such award would authorize the Party in whose favor the award was given, to continue an action already begun, or to bring an action upon the original claim upon which such Submission and award was had -

A failure of a Party against whom an award had been had, to pay the same does not revive the cause of action upon which the award was made -

Hamlin vs Duke Supra

At least, it could not have the effect to reinstate a cause already out of Court, by the acts of the Parties to the action -

And, can it be successfully urged, that a Settlement of a Suit pending, and an agreement to dismiss such Suit, is not as effectually a discontinuance of the suit, as an agreement to Submit the cause of action to arbitrators followed by an award thereon?

At least, is not the suit as effectually discontinued, as by a mere agreement to submit the cause of action to arbitration?

Is it not as competent for the Parties to an action pending, to arbitrate upon the cause of action and make an award thereon, as it is, for Parties who may be selected and agreed upon by them to do so?

And, is not a Submission of the cause of action, by the Parties to themselves, and the fixing of an amount to be paid, by them, as binding and effective as if done by Arbitrators Selected by such Parties?

A denial of such a proposition, would be a denial of the right of Parties to a pending action, to make such a Settlement of the action, as would be binding, or would have the effect to discontinue the action, by operation of law -

The failure of either Party to comply with the terms of a Settlement thus made, gives no greater right or authority to proceed to a Judgment in such action, than if there had been a complete compliance therewith.

And, whether there has been a compliance or not, cannot properly be determined on a Motion to Set aside proceedings taken or had in violation of such a Settlement, or upon the affidavits of Parties -

The only question for determination is, Was there an agreement of Settlement & for a dismissal of the action, and proceedings taken

in the cause subsequently inconsistent with such Settlement and agreement?

If such has been done, it is, at least the duty of the Court to place the Parties in the condition they were, at the time of the making of such Settlement and agreement—

See Smith vs Base 27 Hill 389 & cases cited—

2nd Because it appeared by the affidavit of the Defendant, not only, that he had a good and Substantial defence on the Merits of the action, but, it also appeared thereby, what such defence was, viz: that the alleged Services for which a recovery was sought, were rendered for one Dindoth, and that the Plaintiff had recovered judgment for such Services against Dindoth, neither of which facts are even attempted to be denied on the part of the Plaintiff—

Such Statement of facts show, that the undertaking of the Defendant, if any existed, was within the Statute of frauds & not enforceable against him—

1st Rev Statutes 1855, 807 § 5—

And, the failure of the Plaintiff to deny such statements, they ought, for the purposes of the motion, to be regarded as true—

3rd Because the motion had been made argued, and Submitted to the Court for determination, on the part of the Plaintiff and upon the Papers presented by him, prior to the presentation of any papers or objections on the part of the Plaintiff, and no leave was asked or granted, by the Court, to file such Papers, or present objections — After the Submission of the motion to the Court for decision, it was too late for the Plaintiff to file Papers or make objections, except on an application to leave of the Court —

And, the Plaintiff have filed such Papers, after such Submission, it was error in the Court to refuse to allow the Defendant to file a motion for a reheaving —

Standard vs Williams 10th Vend 599 —
See Mitchell vs Allen 12th Vend 290 —

4th Because it appears, from the whole Record in the cause, that the Judgment was not only improperly rendered, or the Default improperly taken, on the part of the Plaintiff, but that such Judgment was rendered against the Defendant for alleged Professional Services rendered by the Plaintiff for one Dieudoth, for which the Plaintiff had recovered a judgment in his own name against Dieudoth, before a Justice of the Peace of Franklin Court, a Short time after their rendition —

Can an attorney at Law be permitted, after having rendered Professional Services for one person, and recovered a Judgment against such person therefor, to turn around, and bring an action for the same services, for which such judgment was rendered, against a person, who merely went with the person for whom such Services were rendered & against whom such judgment was rendered, to the office of such attorney, as a friend, and recover a Judgment against such other person, by an allegation that such Services were rendered for him?

It would be a mighty convenient way of avoiding the Statute of frauds, it only being necessary to have a convenient witness, to establish a cause of action against any number of persons -

The act of the Plaintiff in bringing an action against Dindorth to recover for the same Services for which this action was brought, & the recovery of a judgment in such action was a Solemn blinding affirmation on his part, that such Services were rendered for Dindorth, and the Plaintiff cannot, afterwards, be permitted to say, such Services were not rendered for Dindorth, but were rendered for the Defendant -

The Judgment should be reversed -

C. D. Coleman
atty for Pltff in Error

Kribben

vs

Eckelkamp

Statement & Briefs

C. S. Coleman
atty for Plff in Error

Filed May 18. 1864
D. W. Mead
Clk

Ribben
vs
Eckelkaap

This was a suit in the Law Commissioners Court, to recover compensation for services as an attorney at law. The summons was returnable to the August Term 1861, & was then returned properly served. No answer was filed, and at the December term 1861 a judgment was taken by default. The defendant filed a motion to set aside the judgment, which motion was subsequently overruled, and the defendant appealed to this Court from the judgment overruling the motion. Affidavits were filed in support of the motion and other in opposition to it.

The defendant's own affidavit stated that he had a meritorious defence to the action, and also that he retained counsel to defend the suit, and that prior to the time it was necessary for him to file his answer he met with the plaintiff and had an arrangement and settlement with him in regard to the cause, by which the plaintiff agreed to dismiss the action, and thereupon he instructed his attorney not to draw an answer, and that he heard nothing more of the matter until an officer called upon him with an ex-

execution issued upon the judgment.
The affidavit of his attorney showed that, in his absence from his office, word was left there for him not to prepare the answer for the reason that the matter had been settled and that he then saw the plaintiff on the subject who informed him that he had arranged the matter with the defendant and that there was no necessity for preparing an answer.
The affidavit of the plaintiff stated that after the suit was brought, the defendant and his wife called at his office, and it was agreed toward effecting a full settlement, that an account should be stated between the parties, not only in regard to the subject matter of this suit but also in regard to other accounts outstanding and unsettled between them. A full balance was struck - the amount sued for in this action was agreed upon and declared right and a balance of thirty nine dollars was found due plaintiff on the rest of the account, and for avoiding litigation and in order to grab the pending suit defendant together with his wife, who mainly carries on his financial business, agreed to pay the plaintiff the whole amount for which this suit is brought and costs and nine dollars additionally in full settlement of all accounts between the parties, the plaintiff agreeing to

throw up thirty dollars in the other bill in consideration of a settlement, and the defendant agreed to pay the whole of said sums by the Monday following, and it was specially agreed that no further proceedings should be had in the suit between said day and the said Monday following.

Several days afterward plaintiff, meeting the defendant's attorney told him that there was no need of an answer since the defendant and himself had come to a settlement.

The defendant failed to pay as agreed, and the plaintiff went to his house in the country to ascertain what steps to take in the premises, and the defendant and his wife then ~~agreed~~ again promised to pay by a time named, and the plaintiff "then and there informed them that unless they did so settle he would at the opening of the next succeeding term claim his judgment, and gave them notice to that effect."

They wholly failed to pay and he took the judgment.

An affidavit of another person sustains the plaintiffs statements as to the settlement and its terms, the affiant stating as part of the agreement at the settlement "that Kribben should not prosecute his suit any further as a matter of course on payment next Monday."

Motions of this character are addressed very much to the discretion of the Court in which they are made and nothing is found in this record to show that the discretion was exercised unsoundly in this case.

Judgment affirmed. Barton Bates

Judges Bay & Dryden concur.

100

Kribben
v.
Eckelkamp

Opinion
Affirmed

Filed June 8. 1864
A.W. Mead
Cl

Bates

Christian Kribben Deft in Error vs Henry Eckelkamp Plff in Error	In the Supreme Court of Missouri - March Term 1864 - Statement of case, on the part of the Plaintiff in Error.

On the 13th of July A.D. 1861, the Deft in Error commenced an action against the Plff in Error in the Law Commissioners Court of St Louis County, to recover the sum of Eighty five Dollars, for alleged Services rendered, and expenses paid, as an Attorney and Counsellor at Law, on or about January 12th 1858; the Process being served on July 20th 1861, and being returnable the 1st Monday of August 1861 -

On the 5th day of December A.D. 1861, a Judgment was rendered in said action, by Default, for the amount of the claim & for costs -

On the 8th day of January A.D. 1862, at a Sess of December Term 1861, the Plaintiff in Error filed a Motion to set aside the Judgment, & for a Stay of Execution, and affidavits in support thereof -

The affidavits on the part of the Plff in Error show, that the Deft below, in proper time for answering in such action, placed the Papers as served upon him, in the hands of his Counsel, with instructions to prepare an answer to be filed; that afterwards & prior to the time he was required to file such answer, he met with, and had an arrangement & Settlement in regard to the

cause, with the Plaintiff below, by which the Plaintiff agreed to dismiss the action, whereupon he notified his attorney not to draw the answer upon the faith of such arrangement & settlement; that the first intimation he had of any intention on the part of said Plaintiff to take judgment, was when the officer came with the execution to collect it, on or about December 28th 1861; that said Defendant had a good and substantial defence on the merits, and would have interposed the same except for such arrangement and settlement; that the alleged services for which he was sought to be made liable in such action were rendered for one Drodore, and that Plaintiff had recovered a judgment for the same services sought to be recovered in such action, in his favor against the said Drodore, as he was informed and truly believed; such facts appearing by the affidavit of the Plaintiff in error.

The affidavit on the part of the Defendants attorney shows that the Petition was handed him in due season, with instructions to prepare an answer by said Defendant, and that afterwards, word was left at his office in his absence not to prepare such answer, for the reason that the case was arranged & settled; that on account of such word being left in his absence, he thought it advisable to see said Plaintiff on the subject, which he accor-

dingly did, and said Plaintiff informed him that he had arranged the Matter ~~the matter~~ with said Defendant, and that there was no necessity of preparing an answer in the action, and thereupon he acted accordingly, such conversation being in season for the filing of said answer at said August Term 1861.

Upon such Motion and affidavits, the Court made an order Staying the Execution until the hearing of the Motion, which was so heard and Submitted to the Court, on the 8th day of February 1862, & held under advisement.

Afterwards and on the 15th day of February 1862, said Plaintiff appeared and filed his objections to such Motion by Defendant, and also affidavits of himself and of his Father.

The affidavit of said Plaintiff not only does not attempt to deny the fact alleged in the affidavit of Defts Atty, but affirms the same thing. And seeks to avoid the effect thereof, by showing the promise on the part of the Defendant to pay the claim, & his failure to do so, & that he gave him notice, that unless he did so pay, he would proceed to take judgment against him, but makes no pretence of having given any such Notice to the attorney of the Defendant, and claims to have obtained such judgment "honestly and according to law", and that he did not use "any Subterfuge or any means improper towards obtaining said judgment".

The Plaintiffs affidavit does not even attempt to deny, "that the alleged services for which the plaintiff seeks to make" the Deft "liable were rendered for one Drodore, and against whom the said Plaintiff" had "recovered a judgment for the same services sought to be recovered in this action"; or that Defendant "merely went ~~to plaintiff's office~~ with said Drodore to the office of said Plaintiff as a friend, and was in no manner interested in the subject matter of said services, and in no manner made himself liable therefor," but says, that Defendant was to "receive the papers in" his "possession out and through, which to seek recourse against Dirsloth", and shows other matters, not consistent with the Record in the cause.

It shows, "that during the first week after the return day," the Defendant this wife "called on him at his office", that "this was in the early summer of 1861," when it was in the month of August; that "the Defendant did not come near him again during the whole of said" August "Term of Court," and that "During Summer 1861, and about a Month and a few weeks after said time", he "called on said defendant at his residence 11 Miles from the city" "in order to ascertain what steps to take in the premises", and then gave him Notice, that, unless he ~~paid~~ settled, he would claim to take his judgment in the cause that the wife did call, & agreed to come again but failed to do so -

The affidavit of the Father, shows nothing in addition to what appears in that of the Plaintiff, affecting the rights of the Parties -

This motion was held over until April 23d 1862, when the Court overruled the same -

On the 3d day of May 1862, the Defendant ~~[illegible]~~, as appears by the Record, filed a Motion to set aside the order overruling the Motion to set aside the Judgment, & for a re-hearing of said Motion, which Motion will be found on pages 17 & 18 of Manuscript, and an affidavit in support thereof, setting forth the date and amount, of the Judgment in favor of Plaintiff against Dierdorff, before whom the same was rendered &c -

The Bill of Exceptions filed in the case incorporates such Motions and affidavits into the Record; that afterwards, on the 26th day of April 1862, the Court was applied to for leave to file a Motion for a rehearing, & an additional reason, for setting aside said Judgment, ~~the recovery of said Judgment~~ which leave the Court refused to grant, but left the Party to his rights under the law, and the Defendant duly excepted -

Although such Motion appears to have been subsequently, filed May 3d 1862, it does not appear to have been acted upon, and the Bill of Exceptions purports to have been signed on the same day of the filing of such Motion, and, as ~~the~~ that part of the Manuscript which sets forth

the filing of such second motion by the Defendant appears to have pencil marks over the entry, and as the Court refused to permit such motion & papers to be filed, and as Defendant Excepted for such refusal, & the Bill of Exceptions was filed on the same day, it seems that such entry is wrong, and was intended to be erased.

It is apparent, from the whole record, that the Court undertook, to determine the question of the rights of the Parties in the action, upon the affidavits, instead of having such question determined upon a proper issue in the cause, and a full & fair trial upon such issue —

It is also apparent, that the Plaintiff obtained a judgment in the action, by Default, in his favor, against the Defendant, which he could not have succeeded in obtaining, upon an issue and trial, and which he ought not to be allowed to retain —

His own affidavits show the imbecillity & incapacity of the Defendant to transact business, and, good faith, required him, after having informed the Defendants attorney, that he had settled the case, and that he need not file an answer, before taking such judgment, to have notified such attorney, so as to have enabled him, if he saw proper, to have filed an answer in the cause —

His failure to do so, connected with his long delay to take judgment, shows that