No. 8441

Supreme Court of Illinois

Thomas G. Allen

---

vs.

John Breusing

71641

Page 1

Randolph County Circuit Court September term A D 1863

Record proceedings in the Circuit Court of Randolph County Illinois in the case wherein

John Browning is plaintiff and

Thomas G Allen is Defendant

The following is the Declaration

State of Illinois } September Term 1863 of the Randolph
Randolph County } County Circuit Court

John Browning plaintiff complains of Thomas G Allen defendant of an action of trespass on the case on promises.

For that the said deft by the abreviation and description of Thos G Allen Col 80th Regt Ills. Vol. heretofore to wit on the 4th day of September 1862 at the County aforesaid made his certain due bill of that date and then and there delivered the same to said plaintiff whereby the said defendant by the description and abreviation aforesaid, then and there acknowledged that there was due from said deft to, said plaintiff or order, three hundred dollars for value received which sum of money said deft, then and there undertook and promised to pay to said pltff, on request yet although often requested so to do, he has refused to pay the same to wit at the County aforesaid

And for that also the said deft. heretofore to wit, on the 8th day of September 1862 at the County aforesaid

[8441-d]

2.

was indebted to said pltff in the sum of four hundred dollars for goods wares and merchandize sold and delivered by said pltff to said deft. at his request.

And in the sum of four hundred dollars for money paid laid out and expended by said pltff for the use of said deft at his request

And in the sum of four hundred dollars for money lent and advanced by said pltff to said deft at his request.

And in the sum of Four hundred dollars for money found to be due and owing from said deft to said pltff on an account had and stated between them.

And the said deft being so indebted afterwards to wit, on the day and year last aforesaid at the County aforesaid in Consideration of the premises respectively undertook and promised to pay said moneys to said pltff on request, yet although often requested so to do, said deft has neglected and refused to pay the same to said pltff and all of the moneys mentioned in this declaration mentioned remain wholly due and unpaid to the damage of said pltff of four hundred dollars and therefore he sues &c

Underwood & Noetling
Attys for pltff

3

(Copy of Instrument sued on)

"Sept 4 1862"

" Due John Breusing or order Three hundred
" Dollars value received

" Thos G Allen"

" Col 80th Regt Ill. Vol "

(Copy of Account sued on)

Thomas G Allen

To John Breusing Dr

To goods, wares & Merchandize sold & delivered you $400 cts

" Money paid, laid out and expended for your use $400 cts

" " Lent & advanced you $400.00

" " Due me on an account had & Stated $400 cts

Filed August 21st 1863

S. St Orwin Clerk

The following is the Plea

John Breusing
vs
Thomas G Allen
} Assumpsit
Sept T 1863.

And now Comes the defendant and defends the wrong and injury when &c and says that after the making and delivery of said due bill in said plaintiffs 1st Count in said declaration mentioned to wit on the 15th day of Sept. 1862 at the City of Louisville Ky to wit at

4. the County of Randolph in the State of Illinois said plaintiff being at that time settler in the 80th regiment Illinois volunteer Infantry of which regiment said defendant was the Colonel, said plaintiff became indebted by means of giving out certain Check promises to pay in Change for large sums of legal current money obtained for his good and wares from the enlisted soldiers of said regiment to the said enlisted soldiers in a large amount to wit in the sum of $500.- and being so indebted the said plaintiff requested the defendant to guarranty to said soldiers the payment of said indebtedness by said plaintiff promising and then and there obligating himself to extend the time of payment of said due bill in said 1st Count of said declaration mentioned until he the said plaintiff should be free and discharged of all indebtedness to the aforesaid enlisted soldiers, and the defendant did then and there, to wit, at the time and place aforesaid in Consideration of said plaintiffs said agreement to extend the time of payment of said due bill as aforesaid guarranty the payment of said plaintiffs aforesaid indebtedness to said soldiers and afterwards to wit at the time and place aforesaid said plaintiff left said regiment without paying and has since that time hitherto wholly neglected and refused to pay his aforesaid indebtedness to said soldiers by reason of which and said

5.

defendants guaranty as aforesaid defendant has had to pay a large amount of said plaintiffs indebtedness to said soldiers to wit the sum of $350. which sum has not been paid defdt and this defdt is ready to verify &c

Thos G Allen
Defdt in person

And for a plea to the Common Counts of plaintiffs declaration said defdt says he did not undertake and promise as said plaintiff in said Counts has alledged and of this he puts himself upon the Country

Thos G Allen
per Defdt

Filed Sept 15th 1863
S. Sc Orvin Clk

The following is the Demurrer

Brensing
v
Allen
} Assumpsit

Pltff says defts Special plea is not sufficient in law.

1st Because it purports to answer the whole declaration & only answers the Special Count

2d Because it is neither a plea of set off or accord & satisfaction nor does it show how long

[944-3]

6-

Pltff ware to give time

Wm H Underwood

Atty for Pltff

Filed Sept 15th 1863

S. St Vrain Clk

The following is the order and judgment of Court

Randolph County Circuit Court September term A D 1863

Sept 15th 1863

Olen Breeding
vs
Thomas G Allen
} Assumpsit

And now on this day comes the said plaintiff by Underwood & Noelling and the defendant in his proper person who files his pleas to the declaration on file herein, Whereupon the plaintiff by his attorney files his Demurrer to the first plea herein, which demurrer is by the Court sustained, Whereupon on the 15th Instant and of the present term this Cause coming on again the Plaintiff by his attorney abandons the Common Count in his declaration, and the Defendant elects to stand by his Demurrer, And judgment is hereby entered in favor of the plaintiff for Amount due upon the instrument sued on, and the instrument herein sued upon is by the Court ordered to the Clerk of this Court for Computation and report &c Whereupon Comes the Clerk of this Court and files his report of Computation in writing whereby it

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appears that there is of principal due on said instrument the sum of Three hundred dollars and the further sum of Eighteen dollars and seventy cents interest due on said instrument, making in the aggregate the sum of Three hundred and Eighteen dollars and seventy cents, which report is by the Court accepted and ordered to be filed It is thereupon ordered that said plaintiff have and recover of and from said defendant the said sum of Three hundred and Eighteen dollars and seventy Cents and Costs of suit, and ordered that execution issue herein for the same &c Whereupon the defendant prays an appeal to the Supreme Court, appeal granted with an order for a bond in the sum of Seven hundred dollars with security to be approved by the Clerk of this Court within thirty days from this date

The following is the appeal Bond

Know all men by these presents that we Thomas G Allen and Gabriel S. Jones are held and firmly bound in the sum of Seven hundred dollars lawful money to be paid to John Breuning his heirs executors, administrators or assigns; to which payment well and truly to be made and done, we do bind ourselves our heirs executors, administrators and legal representatives, and every of them, firmly by these presents; Sealed with our seals and dated this twelfth day of October A D One thousand eight hundred and sixty three

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The condition of the above obligation is such that Whereas, the said John Brensing did at the September term of the Randolph County Circuit Court in the State of Illinois in the year 1863 recover a judgment against the said Thomas G Allen for the sum of three hundred & eighteen dollars and seventy Cents and costs of suit from which judgment the said Allen has prayed an appeal to the Supreme court of said State of Illinois: Now if said Thomas G Allen shall pay said judgment, cost interest and damages in case said judgment shall be affirmed and also duly prosecute the said appeal then this obligation shall become null and void, otherwise to remain in full force and effect

Thos G Allen (Seal)
G. S. Jones (Seal)

Approved by me and filed
this 12th day of October A.D. 1863
G. W. Irwin Clerk of the
Circuit Court of Randolph
County Ills

State of Illinois }
Randolph County } ss

I Savinien St Orain Clerk of the Circuit Court within and for the County and State aforesaid, do hereby Certify that the foregoing to be a full true and Complete Copy of the whole Record in Cause of John Browning vs Thomas G Allen (excepting the writ of Summons) as appears of Record and on the files in my office

In Testimony whereof I have hereunto Subscribed my hand and affixed the Official Seal of my office at the City of Chester Illinois this 12th day of October A D 1863

Savinien St Orain Clerk

[Illegible]

Thomas G. Allen,
Appellant
vs.
John Brensing.
Appellee.

State of Illinois
Supreme Court
1st Grand Division
November T. 1863.

And now comes the appellant, in person, and assigns the following errors, apparent in the record and proceedings of the circuit court of Randolph county, in the foregoing case, to wit:

1. The circuit court erred in sustaining the plaintiff's demurrer to the defendant's special plea.

2. There is error in the judgment of the circuit court in reciting, that the "defendant elect to stand by his demurrer" without stating what demurrer, when it does not appear by the record the defendant had filed or interposed any demurrer.

3. The circuit court erred in entering the judgment against the defendant and in ordering an execution, without a trial and verdict on the issues formed by the defendant's plea to the common counts of plaintiff's declaration.

Wherefore the appellant prays that the judgment of the circuit court may be reversed, &c.

Thos. G. Allen
Appellant

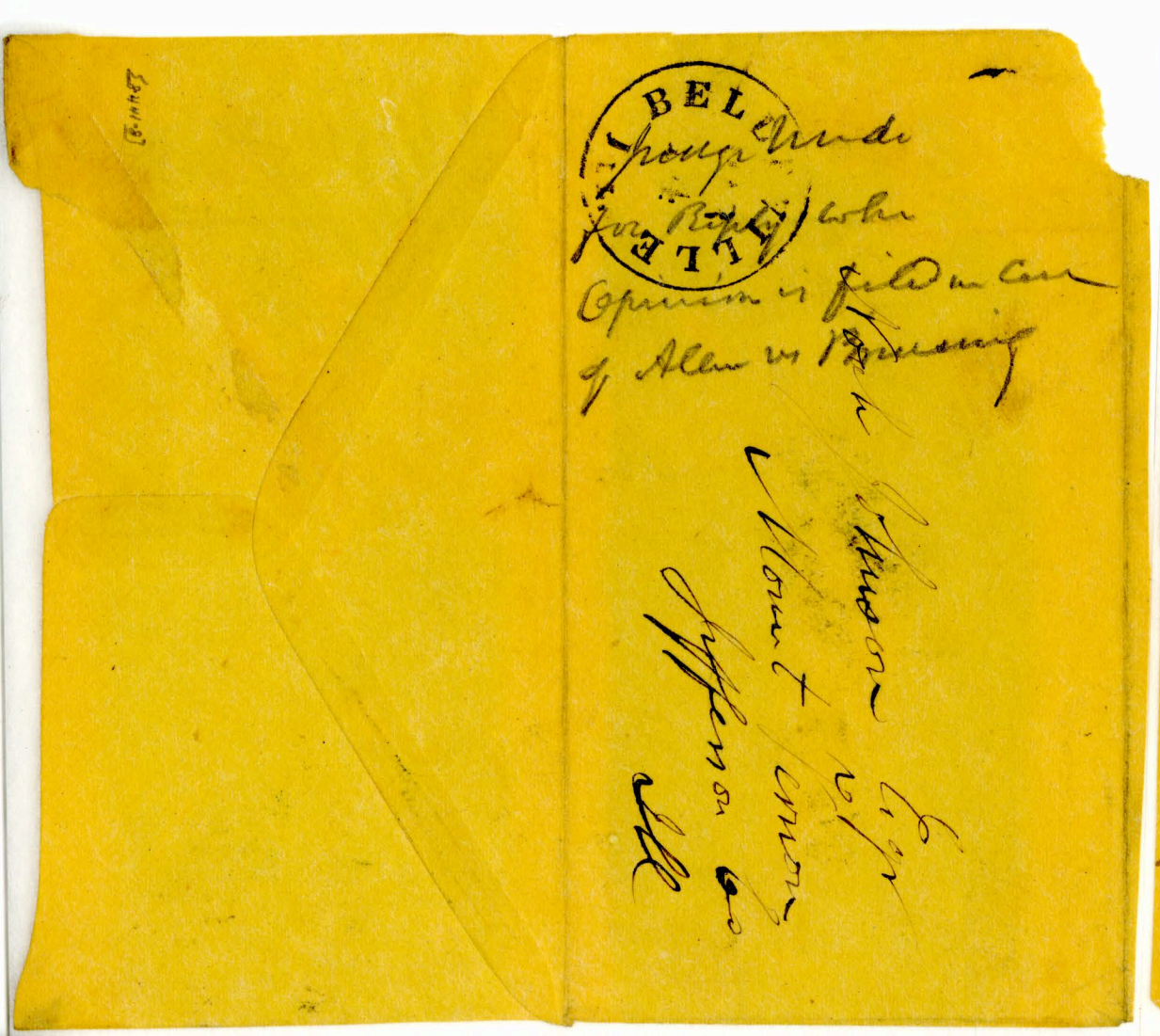
[5441-6]

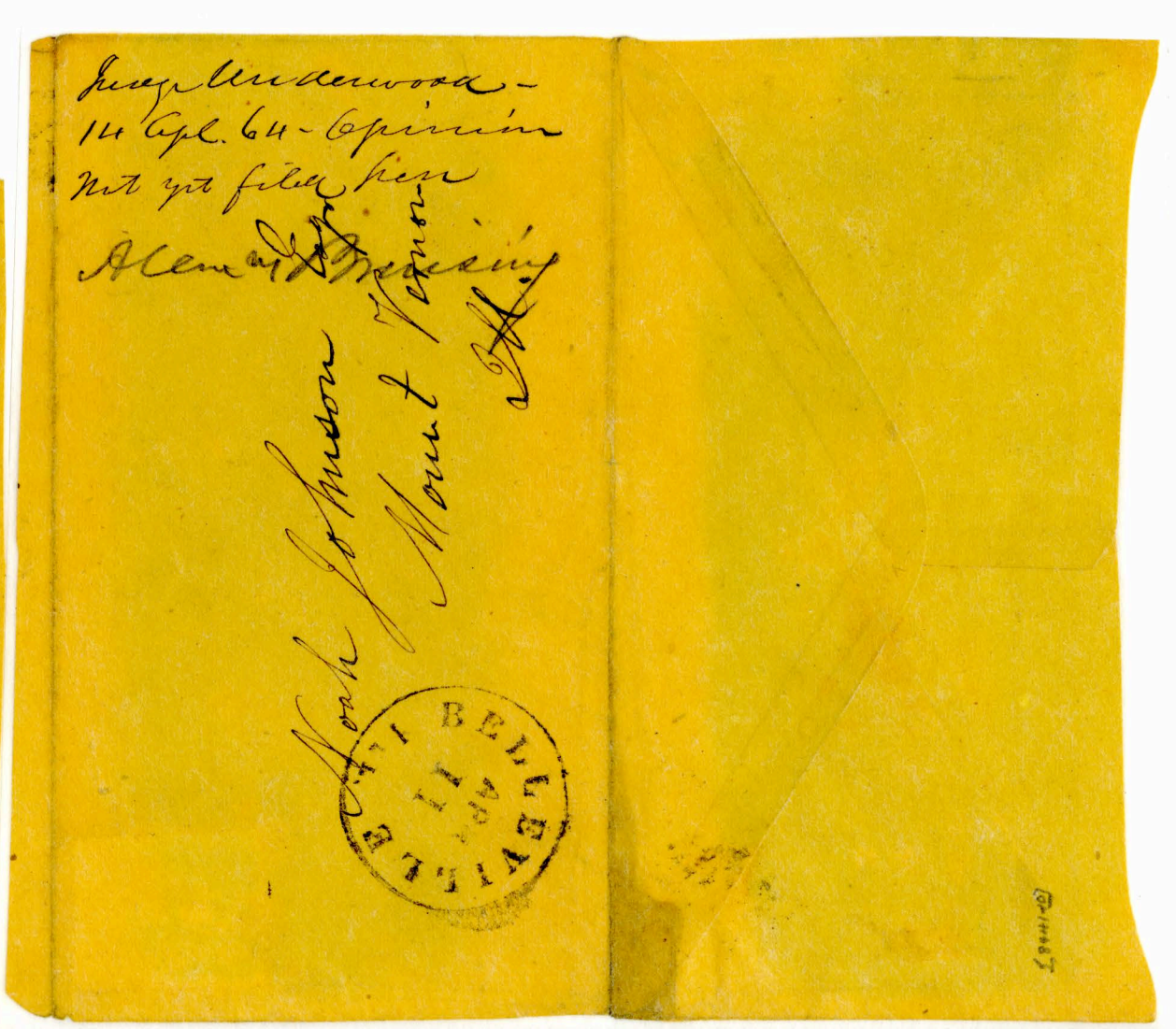
31 5

Thos. G. Allen -
Appellant
vs
John Breusing
Appellee

Appeal from
Randolph

Filed Nov. 10. 1863 -
St. Johnston Clk
Paid by Allen $ 11.00
Clerks fee $ 1.50


BELLEVILLE
Thompson
Jno Rapp Cohn
Opinion filed in case
of Allen vs Fleming


Judge Underwood -
14 Apl. 64 - Opinion
not yet filed here
Allen & Fleming
Mont Johnson
Mount Vernon
BELLEVILLE

Belleville, April 10, 1864.

Dear Sir:

In the case of Allen vs. Brewsing - Please send to the Clerk of Chester Circuit Court a certified copy of the order & opinion as soon as the opinion is filed.

Yours truly

W W Underwood

[B441-1]

Belleville, March 14, 1864.

Dear Sir; -

As soon as the opinion is filed in the case of Allen vs. Brewsing please send it and the order to the Clerk of Randolph Circuit Court. Let me know the fee and Brewsing will enclose them.

Yours truly

W. W. Underwood.

[B441-2]

31

STATE OF ILLINOIS,

SUPREME COURT.

THOMAS G. ALLEN, Appellant,

vs.

JOHN BREUSING, Appellee.

Appellant's Abstract and Argument.

Democrat Book and Job Office, Chester, Ill.

Filed Nov. 10-1863.
A. Johnston Clk

[5461-12]

STATE OF ILLINOIS,

SUPREME COURT.

FIRST GRAND DIVISION.

November Term, 1863.

THOMAS G. ALLEN, Appellant,

vs.

JOHN BREUSING, Appellee.

APPEAL FROM RANDOLPH.

APPELLANT'S ABSTRACT.

This was an action of Assumpsit, instituted and decided in the circuit court of Randolph county, September term, 1863.

The plaintiff's declaration contains one special count on a due bill, 1* of which the following is a copy:

* The Figures on the margin refer to the pages of the Record certified from the Circuit Court.

"Sept. 4, 1862.

"Due John Breusing. or order, three hundred dollars, value received. (Signed,)

THOS. G. ALLEN,
Col. 80th Regt. Ill. Vol."

2 And also four common counts. One for goods, wares and merchandise; one for money laid out and expended; one for money lent and advanced, and one for money due plff. on an account stated.

The defendant filed the following special plea to the special count of plaintiff's declaration:

3 "And now comes the defendant and defends the wrong and injury, when, &c. And says that after the making and delivery of said due bill in said plaintiff's 1st count, in said declaration mentioned, to-wit, on the 15th day of Sept., 1862, at the city of Louisville, Ky., to-wit,
4 at the county of Randolph in the State of Illinois, said plaintiff being at that time sutler in the 80th regiment Illinois volunteer infantry, of which regiment said defendant was the colonel, said plaintiff became indebted, by means of giving out certain check promises to pay in change for large sums of legal current money obtained for his goods and wares, from the enlisted soldiers of said regiment, to the said enlisted soldiers, in a large amount, to-wit, in the sum of $500. And being so indebted, the said plaintiff requested the defendant to guaranty to said soldiers the payment of said indebtedness by said plaintiff, promising and then and there obligating himself to extend the time of payment of said due bill in said 1st count of said declaration mentioned until he, the said plaintiff, should be free and discharged of all indebtedness to the aforesaid enlisted soldiers. And the defendant did then and there, to-wit, at the time and place aforesaid, in consideration of said plaintiff's said agreement to extend the time of payment of said due bill, as aforesaid, guaranty the payment of said plaintiff's aforesaid indebtedness to said soldiers; and afterwards, to-wit; at the time and place aforesaid, said plaintiff left said regiment without paying and has since that time, hitherto, wholly neglected and refused to pay his aforesaid indebtedness to said soldiers;
5 by reason of which, and said defendants guaranty as aforesaid, defendant has had to pay a large amount of said plaintiff's indebtedness to said soldiers, to-wit, the sum of $350, which sum has not been paid defendant; and this defendant is ready to verify, &c."

5 To each of the common counts of plaintiff's declaration, the defendant filed a plea of the general issue.

The plaintiff made no reply to defendant's pleas other than what is contained in his demurrer, of which the following is a copy:

"Plff. says deft's special plea is not sufficient in law. 5

"1st. Because it purports to answer the whole declaration & only answers the special count.

"2d. Because it is neither a plea of set-off or accord & satisfaction, nor does it show how long plff. was to give time."

The following record shows what further proceedings were had in the circuit court, in said case:

"JOHN BREUSING, vs. THOMAS G. ALLEN. } Sept. 15, 1863, ASSUMPSIT. 6

"And now on this day comes the said plaintiff by Underwood & Nœtling, and the defendant in his proper person, who files his pleas to the declaration on file herein. Whereupon the plaintiff by his attorney files his demurrer to the first plea herein, which demurrer is by the court sustained. Whereupon on the 18th instant, and of the present term, this cause coming on again, the plaintiff by his attorney abandons the common count in his declaration, and the defendant elects to stand by his demurrer, and judgment is hereby entered in favor of the plaintiff for amount due upon the instrument sued on; and the instrument herein sued upon is by the court referred to the clerk of this court for computation and report, &c. Whereupon comes the clerk of this court and files his report of computation in writing, whereby it appears that there is of principal due on said instrument the sum of three hundred dollars and the further sum of eighteen dollars and seventy cents interest due on said instrument, making in the aggregate the sum of three hundred and eighteen dollars and seventy cents, which report is by the court accepted and ordered to be filed. It is therefore ordered that said plaintiff have and recover of and from said defendant the said sum of three hundred and eighteen dollars and seventy cents and cost of suit, and ordered that execution issue herein for the sum, &c. Whereupon the defendant prays an appeal to the supreme court. Appeal granted with an order for a bond in the sum of seven hundred dollars, with security, to be approved by the clerk of this court, within thirty days from this date."

The appeal bond was executed, and approved, as required by the 7 order.

The following are the errors assigned by the appellant:

1. The circuit court erred in sustaining the plaintiff's demurrer to the defendant's special plea.

2. There is error in the judgment of the circuit court in reciting, that the "defendant elects to stand by his demurrer," without stating what demurrer, when it does not appear by the record the defendant had filed or interposed any demurrer.

3. The circuit court erred in entering the judgment against the defendant, and in ordering an execution, without a trial and verdict on the issues formed by the defendant's plea to the common counts of plaintiff's declaration.

Appellant's Argument, &c.

OF THE 1st ERROR.

1. As to the 1st point in the plaintiff's demurrer, it is without force. Defendant's special plea is to the special count only of plff's declaration.

2. And as to the objection that the plea is neither a plea of set-off or accord and satisfaction, it is sufficient to say, it matters not whether it is defined to be a plea in suspension of the plaintiff's cause of action, or in bar of the action by way of confession and avoidance. The statute gives the right to plead as many matters of fact in several pleas, as the defendant may deem necessary. Chap. 83, Sect. 14, R. S.

3. The demurrer presents another objection in that the plea does not state "what time was given." If this objection is well taken it applies with equal force to the plaintiff's demurrer. What *time* is meant by the plaintiff? The objection is inexplicit. We are not to presume more in favor of the demurrer than will be allowed in favor of the plea. The demurrer is special. Even where the plea is insufficient in form, the court will not look beyond what is pointed out by the special demurrer for reasons to reject the plea. If the special exceptions intended to be relied on are not clearly and minutely set forth, the court will only enquire whether there is enough in the plea, if admitted or proved, to constitute a substantial defense. Stephens on Pld., *142; *Bogardus* vs. *Trial*, 1Scam., 63; Chap. 5, Sect. 10, R, S.

4. In determining the question whether or not the circuit court decided properly in sustaining the demurrer, we are brought, then, to consider the sufficiency of the plea without regard to its technical form. The appellant believes the plea to be a good one, both in form and substance.

It was argued in the circuit court that there was no mutuality in the alleged contract between the plaintiff and defendant. That as the defendant had not shown that his guaranty of the payment of the plaintiff's indebtedness to the soldiers of the regiment was in writing, it was void, by the statute of frauds, and hence the plaintiff received no consideration for his promise made to extend the time of payment of the due bill until he, the plaintiff, should be free and discharged of said indebtedness to said soldiers. As such an argument may be advanced in this court, the appellant will anticipate it by showing it is without force. The plaintiff's demurrer is not broad enough or explicit enough to include such a defense to the defendant's plea.

Neither the statute of frauds or the statute of limitations avail as a defense in this State, unless specially pleaded.

This court has said, "It is a well settled rule, both in law and equity that those who would avoid a parole contract by reason of the statute (of frauds,) must set up the statute by way of defense, or rely on it by pleading in some way; if not they impliedly waive it." *Lear* vs. *Chouteau et al.*, 23 Ill., 40. And in *Gebhart* vs. *Adams*, 23 Ill., 397, the same rule was held in regard to the statute of limitations.

But in no event, in this case, could the statute be of service to the plaintiff, who is here the appellee. It might be set up as a defense by the appellant in a suit brought by the soldiers on the guaranty—provided the appellant should be so disposed and mean enough to interpose such a defense. The appellant is bound by his guaranty, in good morals, and by law; nor does it lie in the power of the appellee to avoid his contract with the appellant, by showing how the appellant may release himself from his liability to the soldiers. The appellant has already paid a part of the appellee's indebtedness to the soldiers and will pay all that he has guaranteed to pay, be it little or much, rather than shirk his liability by a plea of the statute of frauds.

It does not appear to the appellant how he could well have a stronger or better defense to the action of the appellee.

He is not able to perceive any force in the vague objection that the plea does not "show how long plff. was to give time," The demur-

rer admits the fact that there was a contract between the appellee and appellant. The appellee was indebted to the soldiers of the regiment; the appellant was indebted to the appellee. The appellee agreed, if the appellant would guaranty the payment of his indebtedness, he, the appellee would extend the time of payment of appellant's indebtedness on the due bill until he, the appellee, should be free and discharged of all indebtedness to the soldiers. To this the appellant assented, and then and there, in consideration of said agreement, did guaranty the payment of appellee's indebtedness, and has since paid a part of it to the soldiers, and is, as we have seen, bound for the balance, if it should not be paid by the appellee. There was a plain mutuality between the appellee and the appellant. There is nothing ambiguous or unfair in such a contract. The appellee had it in his power to terminate the time of extension he had agreed to give the appellant. He had only to pay off his indebtedness to the enlisted soldiers of appellant's regiment and his cause of action and right to demand and enforce the payment of appellant's due bill would be instant and complete. He has not seen proper to pay his indebtedness to the soldiers whose money he got by giving them "promises to pay," and now he urges, as a last resort, that there was no specified time as to how long he was to extend the time for the payment of the due bill! If the time had been left to the will of the appellant, it might be urged with a good show of consistency in reply th the appellant's plea. In view of the contract as set forth in the plea, it is an objection that will hardly find favor here.

This court has said "Contracts should receive a reasonable interpretation, according to the intention of the parties executing them; if the intention can be gathered from their language. *Crabtree* vs. *Hagenbaugh*, 25 Ill., 233.

In this case, the contract is clearly set forth in the special plea. It discloses an agreement which comes within the well settled rule of law, (approved by this court, in the ease of *Capps* vs. *Smith et al.*, 3 Scam., 179): "That where the undertakings of the parties to a contract are mutual, one in consideration of the other, as in this case, and no time is fixed for their performance, they are to be regarded as dependent contracts, which neither party can enforce without averring and proving a performance, or at least an offer to perform, on his part."

Before the appellee will be entitled to recover of the appellant on

the due bill, (the time for payment of which he had extended,) he must show that he is discharged or that he had legally offered to pay and discharge himself from all indebtedness to the enlisted soldiers of the 80th regiment of Illinois volunteers. His demurrer shows no such fact, and it was therefore improperly sustained.

OF THE 2d ERROR.

That there is error in the record of the proceedings in the circuit court in reciting that the "defendant elects to stand by his demurrer" is too apparent to require argument to show it. The circuit clerk has certified the record brought to this court "to be a full, true and complete copy of the whole record," (excepting the writ of summons,) "as appears of record and on the files" of his office. The defendant had not filed a demurrer. He could not, therefore, stand by what was not in existence. It was the pleas he elected to stand by, and that fact should so appear in the record.

It is true certain defects are cured by the statute of amendments. Chap. 5, Sect. 2, R. S., permits of amendments "in affirmance of judgments of such records." But where the amendment, if allowed, would clearly establish an error in the proceedings of the inferior court, it is submitted it is as much the right of the appellant or plaintiff in error to insist upon the error as a cause for a *reversal* as it would be the right of the appellee or defendant in error to claim an amendment, under the statute, in *affirmance* of the judgment.

The appellant only asks, that this apparent error in the record shall not preclude him, in this court, from the benefit he expects to derive by a reliance on the merits of his pleas.

OF THE 3d ERROR.

Where the plaintiff fails to join issue by adding the *similiter*, and judgment goes against him, he cannot assign error; for his failure to so complete the issue, amounts to a discontinuance. Stephens on Pld., 109; *Williams* vs. *Bunton et al.*, 3 Gilm., 625. And so where there has been a trial and verdict, the joinder in issue, by the *similiter*, even though it may not appear, will be presumed. *Furness* vs. *Williams*, 11 Ill., 237.

But in this case there was no verdict. The record shows the plaintiff abandoned but one of his common counts. The defendant had filed his plea to all of them. The only complete issue was the joinder in demurrer as to the sufficiency of the special plea. As there was a judgment on that demurrer, that joinder in demurrer will be

presumed, though it may not otherwise appear of record. *Wilcox* vs. *Woods*, 3 Scam., 51; *Waters et al.* vs. *Simpson et al.*, 2 Gilm., 577.

The presumption of joinder does not apply to the common counts which were not withdrawn or abandoned by the plaintiff. There was no verdict or judgment on them. The defendant by joining in the demurrer, did not waive his pleas. "The rule is, that a plea to the merits is a waiver of a demurrer, but a demurrer does not waive a plea." And this court has held it was irregular, in view of that rule, to render final judgment in a case, on a demurrer, while there were unanswered pleas, when it did not appear from the record they had been withdrawn. *Marshall et al. Duke*, 3 Scam., 67. This principle has been repeatedly recognized and affirmed by subsequent decisions. *Bradshaw* vs. *McKinney*, 4 Scam., 54; *Steelman et al.* vs. *Watson et al.*, 5 Gilm., 249; *Moore* vs. *Little et al.*, 11 Ill., 549; *Chapman* vs. *Wright*, 20 Ill., 126; *Riley* vs. *Loughrey*, 22 Ill., 99.

It is submitted the errors have been properly assigned, and that the judgment of the circuit court should be reversed.

THOMAS G. ALLEN,
Appellant.

37

STATE OF ILLINOIS,

SUPREME COURT.

THOMAS G. ALLEN, Appellant,

vs.

JOHN BREUSING, Appellee.

Appellant's Abstract and Argument.

Democrat Book and Job Office, Chester, Ill.

Filed Nov. 10. 1865.

A. Johnston Clk

4

STATE OF ILLINOIS,

SUPREME COURT.

FIRST GRAND DIVISION.

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THOS. G. ALLEN,
Col. 80th Regt. Ill. Vol."

2 And also four common counts. One for goods, wares and merchandise; one for money laid out and expended; one for money lent and advanced, and one for money due plff. on an account stated.

The defendant filed the following special plea to the special count of plaintiff's declaration:

3 "And now comes the defendant and defends the wrong and injury, when, &c. And says that after the making and delivery of said due bill in said plaintiff's 1st count, in said declaration mentioned, to-wit, on the 15th day of Sept., 1862, at the city of Louisville, Ky., to-wit,
4 at the county of Randolph in the State of Illinois, said plaintiff being at that time sutler in the 80th regiment Illinois volunteer infantry, of which regiment said defendant was the colonel, said plaintiff became indebted, by means of giving out certain check promises to pay in change for large sums of legal current money obtained for his goods and wares, from the enlisted soldiers of said regiment, to the said enlisted soldiers, in a large amount, to-wit, in the sum of $500. And being so indebted, the said plaintiff requested the defendant to guaranty to said soldiers the payment of said indebtedness by said plaintiff, promising and then and there obligating himself to extend the time of payment of said due bill in said 1st count of said declaration mentioned until he, the said plaintiff, should be free and discharged of all indebtedness to the aforesaid enlisted soldiers. And the defendant did then and there, to-wit, at the time and place aforesaid, in consideration of said plaintiff's said agreement to extend the time of payment of said due bill, as aforesaid, guaranty the payment of said plaintiff's aforesaid indebtedness to said soldiers; and afterwards, to-wit; at the time and place aforesaid, said plaintiff left said regiment without paying and has since that time, hitherto, wholly neglected and refused to pay his aforesaid indebtedness to said soldiers;
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The plaintiff made no reply to defendant's pleas other than what is contained in his demurrer, of which the following is a copy:

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" 1st. Because it purports to answer the whole declaration & only answers the special count.

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The following record shows what further proceedings were had in the circuit court, in said case:

" JOHN BREUSING, vs. THOMAS G. ALLEN. } Sept. 15, 1863, ASSUMPSIT. 6

" And now on this day comes the said plaintiff by Underwood & Nœtling, and the defendant in his proper person, who files his pleas to the declaration on file herein. Whereupon the plaintiff by his attorney files his demurrer to the first plea herein, which demurrer is by the court sustained. Whereupon on the 18th instant, and of the present term, this cause coming on again, the plaintiff by his attorney abandons the common count in his declaration, and the defendant elects to stand by his demurrer, and judgment is hereby entered in favor of the plaintiff for amount due upon the instrument sued on; and the instrument herein sued upon is by the court referred to the clerk of this court for computation and report, &c. Whereupon comes the clerk of this court and files his report of computation in writing, whereby it appears that there is of principal due on said instrument the sum of three hundred dollars and the further sum of eighteen dollars and seventy cents interest due on said instrument, making in the aggregate the sum of three hundred and eighteen dollars and seventy cents, which report is by the court accepted and ordered to be filed. It is therefore ordered that said plaintiff have and recover of and from said defendant the said sum of three hundred and eighteen dollars and seventy cents and cost of suit, and ordered that execution issue herein for the sum, &c. Whereupon the defendant prays an appeal to the supreme court. Appeal granted with an order for a bond in the sum of seven hundred dollars, with security, to be approved by the clerk of this court, within thirty days from this date."

The appeal bond was executed, and approved, as required by the 7 order.

The following are the errors assigned by the appellant:

[8H4W19]

1. The circuit court erred in sustaining the plaintiff's demurrer to the defendant's special plea.

2. There is error in the judgment of the circuit court in reciting, that the "defendant elects to stand by his demurrer," without stating what demurrer, when it does not appear by the record the defendant had filed or interposed any demurrer.

3. The circuit court erred in entering the judgment against the defendant, and in ordering an execution, without a trial and verdict on the issues formed by the defendant's plea to the common counts of plaintiff's declaration.

Appellant's Argument, &c.

OF THE 1st ERROR.

1. As to the 1st point in the plaintiff's demurrer, it is without force. Defendant's special plea is to the special count only of plff's declaration.

2. And as to the objection that the plea is neither a plea of set-off or accord and satisfaction, it is sufficient to say, it matters not whether it is defined to be a plea in suspension of the plaintiff's cause of action, or in bar of the action by way of confession and avoidance. The statute gives the right to plead as many matters of fact in several pleas, as the defendant may deem necessary. Chap. 83, Sect. 14, R. S.

3. The demurrer presents another objection in that the plea does not state "what time was given." If this objection is well taken it applies with equal force to the plaintiff's demurrer. What *time* is meant by the plaintiff? The objection is inexplicit. We are not to presume more in favor of the demurrer than will be allowed in favor of the plea. The demurrer is special. Even where the plea is insufficient in form, the court will not look beyond what is pointed out by the special demurrer for reasons to reject the plea. If the special exceptions intended to be relied on are not clearly and minutely set forth, the court will only enquire whether there is enough in the plea, if admitted or proved, to constitute a substantial defense. Stephens on Pld., *142; *Bogardus* vs. *Trial*, 1Scam., 63; Chap. 5, Sect. 10, R, S.

4. In determining the question whether or not the circuit court decided properly in sustaining the demurrer, we are brought, then, to consider the sufficiency of the plea without regard to its technical form. The appellant believes the plea to be a good one, both in form and substance.

It was argued in the circuit court that there was no mutuality in the alleged contract between the plaintiff and defendant. That as the defendant had not shown that his guaranty of the payment of the plaintiff's indebtedness to the soldiers of the regiment was in writing, it was void, by the statute of frauds, and hence the plaintiff received no consideration for his promise made to extend the time of payment of the due bill until he, the plaintiff, should be free and discharged of said indebtedness to said soldiers. As such an argument may be advanced in this court, the appellant will anticipate it by showing it is without force. The plaintiff's demurrer is not broad enough or explicit enough to include such a defense to the defendant's plea.

Neither the statute of frauds or the statute of limitations avail as a defense in this State, unless specially pleaded.

This court has said, "It is a well settled rule, both in law and equity that those who would avoid a parole contract by reason of the statute (of frauds,) must set up the statute by way of defense, or rely on it by pleading in some way; if not they impliedly waive it." *Lear* vs. *Chouteau et al.*, 23 Ill., 40. And in *Gebhart* vs. *Adams*, 23 Ill., 397, the same rule was held in regard to the statute of limitations.

But in no event, in this case, could the statute be of service to the plaintiff, who is here the appellee. It might be set up as a defense by the appellant in a suit brought by the soldiers on the guaranty—provided the appellant should be so disposed and mean enough to interpose such a defense. The appellant is bound by his guaranty, in good morals, and by law; nor does it lie in the power of the appellee to avoid his contract with the appellant, by showing how the appellant may release himself from his liability to the soldiers. The appellant has already paid a part of the appellee's indebtedness to the soldiers and will pay all that he has guaranteed to pay, be it little or much, rather than shirk his liability by a plea of the statute of frauds.

It does not appear to the appellant how he could well have a stronger or better defense to the action of the appellee.

He is not able to perceive any force in the vague objection that the plea does not "show how long plff. was to give time," The demur-

rer admits the fact that there was a contract between the appellee and appellant. The appellee was indebted to the soldiers of the regiment; the appellant was indebted to the appellee. The appellee agreed, if the appellant would guaranty the payment of his indebtedness, he, the appellee would extend the time of payment of appellant's indebtedness on the due bill until he, the appellee, should be free and discharged of all indebtedness to the soldiers. To this the appellant assented, and then and there, in consideration of said agreement, did guaranty the payment of appellee's indebtedness, and has since paid a part of it to the soldiers, and is, as we have seen, bound for the balance, if it should not be paid by the appellee. There was a plain mutuality between the appellee and the appellant. There is nothing ambiguous or unfair in such a contract. The appellee had it in his power to terminate the time of extension he had agreed to give the appellant. He had only to pay off his indebtedness to the enlisted soldiers of appellant's regiment and his cause of action and right to demand and enforce the payment of appellant's due bill would be instant and complete. He has not seen proper to pay his indebtedness to the soldiers whose money he got by giving them "promises to pay," and now he urges, as a last resort, that there was no specified time as to how long he was to extend the time for the payment of the due bill! If the time had been left to the will of the appellant, it might be urged with a good show of consistency in reply th the appellant's plea. In view of the contract as set forth in the plea, it is an objection that will hardly find favor here.

This court has said "Contracts should receive a reasonable interpretation, according to the intention of the parties executing them; if the intention can be gathered from their language. *Crabtree* vs. *Hagenbaugh*, 25 Ill., 233.

In this case, the contract is clearly set forth in the special plea. It discloses an agreement which comes within the well settled rule of law, (approved by this court, in the ease of *Capps* vs. *Smith et al.*, 3 Scam., 179): "That where the undertakings of the parties to a contract are mutual, one in consideration of the other, as in this case, and no time is fixed for their performance, they are to be regarded as dependent contracts, which neither party can enforce without averring and proving a performance, or at least an offer to perform, on his part."

Before the appellee will be entitled to recover of the appellant on

the due bill, (the time for payment of which he had extended,) he must show that he is discharged or that he had legally offered to pay and discharge himself from all indebtedness to the enlisted soldiers of the 80th regiment of Illinois volunteers. His demurrer shows no such fact, and it was therefore improperly sustained.

OF THE 2d ERROR.

That there is error in the record of the proceedings in the circuit court in reciting that the "defendant elects to stand by his demurrer" is too apparent to require argument to show it. The circuit clerk has certified the record brought to this court "to be a full, true and complete copy of the whole record," (excepting the writ of summons,) "as appears of record and on the files" of his office. The defendant had not filed a demurrer. He could not, therefore, stand by what was not in existence. It was the pleas he elected to stand by, and that fact should so appear in the record.

It is true certain defects are cured by the statute of amendments. Chap. 5, Sect. 2, R. S., permits of amendments "in affirmance of judgments of such records." But where the amendment, if allowed, would clearly establish an error in the proceedings of the inferior court, it is submitted it is as much the right of the appellant or plaintiff in error to insist upon the error as a cause for a *reversal* as it would be the right of the appellee or defendant in error to claim an amendment, under the statute, in *affirmance* of the judgment.

The appellant only asks, that this apparent error in the record shall not preclude him, in this court, from the benefit he expects to derive by a reliance on the merits of his pleas.

OF THE 3d ERROR.

Where the plaintiff fails to join issue by adding the *similiter*, and judgment goes against him, he cannot assign error; for his failure to so complete the issue, amounts to a discontinuance. Stephens on Pld., 109; *Williams* vs. *Bunton et al.*, 3 Gilm., 625. And so where there has been a trial and verdict, the joinder in issue, by the *similiter*, even though it may not appear, will be presumed. *Furness* vs. *Williams*, 11 Ill., 237.

But in this case there was no verdict. The record shows the plaintiff abandoned but one of his common counts. The defendant had filed his plea to all of them. The only complete issue was the joinder in demurrer as to the sufficiency of the special plea. As there was a judgment on that demurrer, that joinder in demurrer will be

presumed, though it may not otherwise appear of record. *Wilcox* vs. *Woods*, 3 Scam., 51; *Waters et al.* vs. *Simpson et al.*, 2 Gilm., 577.

The presumption of joinder does not apply to the common counts which were not withdrawn or abandoned by the plaintiff. There was no verdict or judgment on them. The defendant by joining in the demurrer, did not waive his pleas. "The rule is, that a plea to the merits is a waiver of a demurrer, but a demurrer does not waive a plea." And this court has held it was irregular, in view of that rule, to render final judgment in a case, on a demurrer, while there were unanswered pleas, when it did not appear from the record they had been withdrawn. *Marshall et al. Duke*, 3 Scam., 67. This principle has been repeatedly recognized and affirmed by subsequent decisions. *Bradshaw* vs. *McKinney*, 4 Scam., 54; *Steelman et al.* vs. *Watson et al.*, 5 Gilm., 249; *Moore* vs. *Little et al.*, 11 Ill., 549; *Chapman* vs. *Wright*, 20 Ill., 126; *Riley* vs. *Loughrey*, 22 Ill., 99.

It is submitted the errors have been properly assigned, and that the judgment of the circuit court should be reversed.

THOMAS G. ALLEN,
Appellant.

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Rendrick

Remove to
Removed

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Costs on page 572
and my fee paid

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