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NEW-JERSEY COURT OF ERRORS AND APPEALS.

SAMUEL EVANS
ads.
THE INHABITANTS OF THE CITY OF TRENTON,

In Case.
In error to the Supreme Court.

STATE OF THE CASE.

This was an action upon the case, brought by the Inhabitants of the City of Trenton against Samuel Evans, in the Supreme Court of the term of July, A. D. 1847.

The declaration contains two counts:—1st count charges, that in consideration that the said plaintiffs, at the request of the defendant, had authorized and empowered the said defendant to receive divers large sums of money belonging to the said plaintiffs, the said defendant undertook, and then and there faithfully promised the said plaintiffs, to hold the said sums of money to the use of the said plaintiffs, and to pay over the same to the said plaintiffs, or to their use, whenever afterwards he, the said defendant, should be thereunto requested: yet the said defendant hath not, as yet, paid over, or in any way accounted for, a large sum of money of the said plaintiffs, received by him, *to wit*, the sum of $500, although requested, &c.

2d count, for money had and received; on an account stated; for interest.

The pleas were as follows, *viz:*

1. General issue.
2. Statute of limitations.
3. Payment and notice of set off.

The cause was tried at the Mercer circuit, before his Honor Justice Randolph, on the 15th day of March, in the term of March, A. D. 1851, and a verdict was given in favor of the plaintiffs, and judgment thereupon in the Supreme Court.

Upon the trial of the cause at the circuit, the defendant tendered the following bills of exception:

"Be it remembered, that on this fifteenth day of March, in the year of our Lord one thousand eight hundred and fifty-one, before a circuit court holden at Nottingham, in and for the county of Mercer, before his Honor Joseph F. Randolph, esquire, one of the justices of the Supreme Court of New Jersey, in the presence of the

attorneys of the respective parties, before a jury duly empannelled and sworn, came on to be tried the issues joined in this cause (*pro ut* the pleadings); and thereupon the plaintiffs, to prove the issues joined on their part, offered in evidence a printed copy of the acts of the legislature of New Jersey, of the year 1837, containing the charter of the city of Trenton," (*pro ut* the same).

The plaintiffs then called as a witness—

Alexander M. Johnston, who, being duly sworn, said—I am clerk of the city of Trenton, and have held that office for some time past. The book shown to me is the minutes of the common council of the city of Trenton; I have the custody of it. The defendant was treasurer of the city in the years 1837, 1838, 1839, and 1840. His term of office ended in the spring of 1841.

And the books being shown to witness, he said—This book is the book of ordinances of the city of Trenton; I have the custody of it. The parchment roll shown to me contains the official oaths of the treasurers of the city of Trenton.

The plaintiffs then offered the said book of minutes and the said ordinance book, the former for the purpose of showing the election of the defendant to the office of treasurer in the several years above stated, and the appointment of James Ewing, George S. Green, and Benjamin S. Disbrow on finance committee, in the month of April, 1841; and also a resolution, passed by the common council of the city of Trenton on 6th September, A. D. 1841; and the said ordinance book, for the purpose of proving certain ordinances, *to wit*, an ordinance, passed in 1828, relative to the treasurer's salary; an ordinance, passed 6th June, 1837, directing a loan of $20,000; and an ordinance, passed 20th February, 1838, (*pro ut* the same).

The plaintiffs then offered as a witness—

Jonathan Fisk, who, being sworn, said—I am treasurer of the city of Trenton; by virtue of this office, I have charge of the books containing the accounts of the city. The book shown to me is the book in which are kept the treasurer's accounts; the accounts, in 1837, 1838, 1839, and 1840, were kept by defendant, as treasurer. These are his receipts for his salary as treasurer. The receipt, in 1837, is for $10, and in 1840, for $25.

The plaintiffs then called, and offered as a witness—

George S. Green, who, being duly sworn, said—I was a member of the common council of the city of Trenton in the year 1842, and in that year was a member of the finance committee. I remember calling on defendant, in company with Mr. Disbrow, who was also a member of said committee. (An account, *pro ut* the same, being shown to witness, he said)—This account I take to be the account produced to us by defendant, when we called; can't say certainly that this is the one, but think it is. This account is in the handwriting of the defendant; I made a memorandum of the account at the time; this is the memorandum (*pro ut* the same); the defendant gave me the account, and I believe it was handed over to the common council by the committee.

And being cross-examined, the witness further said—Before I went to call on defendant, in 1842, I heard a report that he had made this charge of $500. We, the committee, went to the defendant to destroy the balance of the tickets in his hands; and I made the memorandum when the tickets were destroyed. We were there, I think, a few weeks before the 21st February, 1842. We were there more than once previous to that date, and on these occasions we examined the accounts of defendant; and this is the account, I think. When the tickets were destroyed, we referred to the account. There was a large quantity of tickets; they were all in packages tied up, each bundle containing a certain sum of money, the amount being endorsed on it. There had been a previous settlement, to a large amount. This settlement is the first one appearing on the account of defendant, and the settlement made by myself and Mr. Disbrow is the second settlement, also appearing in the account. This account of defendant was handed in to the common council by the committee, and was afterwards published. We found the bundles of tickets which we examined correct. The tickets were put up, according to their denominations, in bundles by themselves. (Several unsigned tickets and one signed ticket were here produced to the court and jury, and were admitted to be similar to those signed by the plaintiffs under the ordinance of 1837, (*pro ut* the same).

Being re-examined in chief, the witness said—When we were at defendant's, we made no settlement of the items of the account; we were not sent there to settle the account, but to examine and cancel the tickets. Neither did the common council allow or settle this account at any meeting which I attended. I don't think Mr. Evans exhibited any books of account to the committee. I went out

of council in the spring of 1843; this item, of $500, remained unsettled as long as I was in council; the defendant claimed the item, and the council denied it.

The plaintiffs thereupon offered as a witness—

Benjamin S. Disbrow, who, being duly sworn, said—I was a member of the finance committee in 1841, and called on defendant, in company with Mr. Green. Defendant furnished us with a statement of his account.

The account being shown to witness, he further said—I believe this is the account then rendered to us. I was elected in the spring of 1840, and went out in the spring of 1843.

And being cross-examined, the witness said—I think we requested this statement of account, not thinking we had authority to settle any thing. It was in reference to the whole ticket business that we were sent there. I don't recollect taking the account down to Mr. Evans, or that it was before common council before we went there. I heard of this $500 charge by defendant before we went to him, but not very long before; but I had not seen it or heard of it in any account.

The plaintiffs thereupon further offered as a witness—

Henry W. Green, esq., who, being duly sworn, said—In the year 1843, I was employed as counsel for the city of Trenton against the defendant. (The account of defendant being shown to witness, he said)—This account came into my hands from a member of the common council, I think from my brother George S. Green. In November, 1843, I had the account, and brought suit upon it. The writ was returnable the 30th November, 1843. This writ was quashed on the personal application of defendant, on account of an irregularity in the service of the sheriff. I returned the account to the city authorities; my impression is that it was to the treasurer.

The plaintiffs then called as a witness—

William C. Howell, who being sworn, and the account being shown to him, said—This account was put in my hands by Chief Justice Green, and I delivered it to Barker Gummere, esq.; I was treasurer of the city at the time.

The plaintiffs then offered as a witness—

Barker Gummere, who, being duly affirmed, said—I received

this account from the treasurer of the city, William C. Howell, and it has remained in my possession pretty much ever since.

The plaintiffs thereupon offered the account in the handwriting of defendant, above referred to, excepting, nevertheless, to the charge of $500, contained in it, (*pro ut* said account).

The plaintiffs thereupon rested their case.

Whereupon the counsel for the defendant moved to nonsuit the plaintiffs, because the only evidence to prove the debt due from the defendant to them (being an item in his account of $500) was the account rendered by the defendant; and the same account exhibited a payment of the said debt by the services of the defendant.

The court overruled the motion to nonsuit, and thereupon the counsel of the defendant prayed a bill of exceptions to the opinion of the court; and it is allowed and sealed accordingly.

The counsel of the defendant then opened the defence to the court and jury, and offered to prove the following facts:

That the defendant had performed for the plaintiffs certain services, for which he claimed compensation; that these services were not performed by him as treasurer of the city of Trenton, but as treasurer of the finance committee; that said services consisted in preparing for circulation certain tickets, of the denominations of 5 cents, 10 cents, 12½ cents, 15 cents, 25 cents, and $1, $2, to the amount, in the aggregate, of $20,000; that, at great labor, he separated and trimmed these tickets, numbered them and issued them from time to time, and loaned out the money thus obtained to various persons, and then for more than two years, at the instance of the plaintiffs, kept the tickets in circulation, redeeming them when called upon, and then reissuing them, and changing them at all times during said period, and finally paid them off; that during all this time the common council recognised the defendant in the discharge of the duties as treasurer of the finance committee, and not as treasurer of the city; that during all this period, his accounts, as treasurer of the city, were annually settled, but comprised no part of said business; that in the performance of this business he was recognised and employed by the finance committee as their treasurer, and was so recognised on the minutes of the common council; that his accounts, as treasurer of the finance committee, were always kept distinct in the banks and elsewhere from his accounts as treasurer of the city, and that there was an express understanding between the defendant and the finance committee, who had the entire charge of this business, that he was to have compensation for

his said services; that this business was left in his hands unsettled for nearly two years after he had ceased to be treasurer of the city, and his accounts, as such treasurer of the city, had been fully settled.

And the said counsel of the said defendant offered to show further, that although the said ordinance of 1837, on its face, purports to be (*pro ut* the same) "for the purpose of raising money for the building of the City Hall and for other purposes," that in point of fact, and according to the real design of the ordinance, the said money was illegally raised and appropriated under said ordinance, in exchange for tickets issued by him, at the instance of the plaintiffs, for banking purposes, and that it was put into the hands of the defendant to be used for this purpose, and was so used, and that defendant retained the sum sued for on account of services rendered in said banking business (*pro ut* the account).

And the defendant, for the purpose of proving said opening, called as a witness Mrs. Sarah A. Reading, whereupon the counsel of the plaintiffs objected, and insisted, before the court, that the said facts were not admissible in law, and that the said opening, even if proved, constituted no legal defence to this action, and ought not to be permitted to go to the jury, and moved the court to overrule the same. And the counsel of the said defendant did then and there insist, that the said matters offered, as aforesaid, to be proved on behalf of the said defendant, were lawful and admissible, and that the said opening, if proved, constituted a good defence to this action, and ought to be permitted to go to the jury; but the court held and affirmed that the said matters were not admissible, and that the said opening, if proved, constituted no defence, and would not permit the said defendant to prove the same to the jury; whereupon the said counsel of the said defendant prayed a bill of exceptions to the said opinion of the said justice, and it is allowed and sealed accordingly.

And the counsel for the defendant then insisted, that, according to the case proved by the account of the defendant, and which was offered in evidence on the part of the plaintiffs (*pro ut* the same), it appeared that the account was stated, and a balance struck in June, 1839, between the plaintiffs and defendant, the disputed item in said account being prior to that date. And the said counsel insisted, that if there had been an account stated at that time, or more than six years before the commencement of the suit, that the subsequent dealings between the parties would not take the disputed item out of the operation of the statute of limitations, and requested the said

justice to inform the jury, that if they believed, from the evidence, that the said account was stated, and a balance was struck as aforesaid, more than six years before the commencement of this suit, that the claim of the plaintiffs was barred by the effect of the said statute of limitations; but the said justice held and affirmed, and so instructed the jury, that there was no evidence of a stated account and balance struck between the parties, and that the plaintiffs were in law entitled to recover, notwithstanding the defendant's plea of the statute of limitations; whereupon the counsel of the defendant prayed a bill of exceptions in this behalf, and it is allowed and sealed accordingly.

The counsel for the plaintiffs thereupon claimed interest on the account, from the 3d day of January, A. D. 1842. The counsel for the defendant objected, and insisted that there was no evidence of a demand by the plaintiffs from the defendant of the moneys sued for, and that the plaintiffs were, therefore, not entitled to interest from this said period, and requested the said justice to charge the jury to this effect. And the said justice held, and so instructed the jury, that the said plaintiffs were entitled to interest on their said account from the time of the closing of their accounts; but, as they chose to waive the interest up to the 3d January, 1842, they were entitled to interest on their account from the said 3d day of January, 1842, and instructed the jury to find the interest accordingly; whereupon the counsel of the defendant prayed a bill of exceptions in this behalf, and it is allowed and sealed accordingly.

(Signed) JOS. F. RANDOLPH, [L. S.]

Upon the judgment rendered in this case, a writ of error was brought, returnable to the November term of this court, A. D. 1851, and at the same term the following errors were assigned:

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} *On error to Supreme Court.*

And thereupon afterwards, *to wit*, in the term of November, in the year of our Lord one thousand eight hundred and fifty-one, before the Court of Errors and Appeals, in the last resort in all causes of law, comes the said Samuel Evans, the plaintiff in error, by Mercer Beasley, his attorney, and says, that in the record and pro-

ceedings aforesaid, and also in the matters recited and contained in the said bills of exceptions, and also in the giving of the judgment aforesaid, there is manifest error, in this, *to wit :*

For that it appears in the bills of exceptions, sealed by the said justice of the said supreme court, who tried this cause before the circuit court holden in and for the county of Mercer, that, on the trial of this cause, he, the said justice, refused to nonsuit the said plaintiffs in the court below (who are the defendants in error), on the motion of the said plaintiff in error.

There is error, also, in this, *to wit*, that, by the record aforesaid, and the bills of exception aforesaid, it appears that the said justice, at the said trial of the said cause, overruled legal and competent evidence, offered by the said plaintiff in error.

There is error, also, in this, *to wit*, that, by the record aforesaid, and bills of exception aforesaid, it appears that the said justice, at the said trial, refused to leave it to the jury to decide whether or not, from the evidence in the cause, it appeared that an account had been stated, and a balance struck between the parties to the cause, more than six years before the commencement of this suit.

There is also error in this, *to wit*, that, from the record aforesaid, and bills of exceptions aforesaid, it appears that the said justice, on the trial of the said cause, refused to charge the jury, at the request of the said plaintiff in error, upon the law involved in the facts in evidence.

There is also error in this, *to wit*, that, by the record aforesaid, and the bill of exceptions aforesaid, it appears that the said justice, on the trial of the said cause, instructed the jury that the said defendants in error were entitled to interest on their claim from the third day of January, A. D. 1842.

There is also error in this, *to wit*, that, by the record aforesaid, and bill of exceptions aforesaid, it appears that the said judgment was given for the said defendants in error; whereas, by the law of the land, the said judgment ought to have been given for the said plaintiff in error.

There is also error in this, *to wit*, that, the declaration aforesaid, and the matters and things therein contained, are not sufficient in law for the said defendants in error to have or maintain their aforesaid action thereof against him, the said plaintiff in error.

There is also error in this, *to wit*, that, from the record and proceedings aforesaid, it appears that the verdict of the said jury does not sufficiently find the issues joined in this cause.

And, therefore, the said plaintiff in error prays that the judgment aforesaid, for the errors aforesaid, and others, as well in the bills of exceptions as in the record and proceedings aforesaid, may be reversed, annulled, and altogether for nothing holden, and that he may be restored to all things which he hath lost by occasion of the said judgment.

MERCER BEASLEY,
Attorney of plaintiff in error.

Warrant of attorney.

Joinder in error by

BARKER GUMMMERE,
Attorney for defendants in error.