



A. BUKEN, Agent of C. F. W. JANTZEN, Plaintiff-in-Error, v. DAVID KING, Defendant-in-Error.

WRIT OF ERROR TO THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Decided May 8, 1929.

Where the defendant in an action of debt brings a counterclaim or pleads a set-off, all legal evidence from which the court can draw an inference bearing on the case should be admitted and considered by the court.

In an action of debt, the Municipal Court of Monrovia gave judgment in favor of plaintiff. The Circuit Court of the First Judicial Circuit affirmed. On writ of error, this Court *reversed*.

Barclay & Barclay for plaintiff-in-error. *A. B. Ricks* for defendant-in-error.

MR. CHIEF JUSTICE JOHNSON delivered the opinion of the Court.

This was an action of debt brought in the Circuit Court of the First Judicial Circuit, Montserrado County, by David King, plaintiff in the court below, now defendant-in-error against A. Buken, agent for C. F. W. Jantzen, defendant in the said action, now plaintiff-in-error, for the recovery of a sum of money amounting to ninety-one dollars which defendant-in-error claims was due him by the said plaintiff-in-error for services rendered by him to said plaintiff-in-error.

The case originated in the Municipal Court of Monrovia and resulted in a judgment in favor of said plaintiff, defendant being ruled to pay the sum of ninety-one dollars and all cost of the action.

The defendant being dissatisfied with said judgment appealed to the Circuit Court of the First Judicial Circuit, Judge Aaron J. George presiding by assignment.



The said Circuit Court confirmed the judgment of the Municipal Court of Monrovia, whereupon the said defendant brought the case up to this Court for review and final determination.

The history of the case is as follows: The plaintiff in the court below was employed by the firm in the year 1928 as a store keeper in their retail store in Monrovia on the understanding that the said plaintiff was to receive a monthly salary and a certain percentage. It also seems that it was understood further between the parties that the firm was to retain the plaintiff's salary as a security against his shortages, plaintiff having the right to draw a certain amount of cash with the agent's approval.

It appears that after some months' service the stock was taken in May, and it was discovered that plaintiff was short to the amount of £152:0:6; whereupon a balance sheet was drawn up and handed plaintiff showing what was due by him to the said firm after deducting his salary on deposit.

Plaintiff having entered this action of debt in the Municipal Court of Monrovia for the sum of ninety-one dollars which he claims was due him by the said defendant, the latter filed a cross action as a set-off to the plaintiff's claim, and as a support to this set-off, produced the stock books, stock sheets, and account books, the agent of the said firm having identified same to be the books of account of said defendant.

The errors assigned in the petition for writ of error are as follows:

1. Because the court erred in sustaining the objection of plaintiff's attorney and disallowed the balance sheet marked exhibit "A" and the stock sheet marked exhibit "B" to be used as written evidence, because the said balance sheets and stock sheets were not signed by the parties to this action, when the incorrectness of same was not disputed in evidence.
2. And also because the court erred in sustaining the objection of plaintiff's attorney on the ground that

the stock book offered in evidence was not also signed by any of the parties to this action.

3. And also because the court further erred in sustaining the objection of plaintiff's attorney on the ground that the action being one of debt in which the plea of set-off was offered, the balance sheet, stock and stock books are not part of the *res gestae* when a copy of the very stock sheet was supplied plaintiff after the stock taking.
4. And also because the court further erred in overruling the oral testimony of witness A. Buken which was not impeached nor rebutted, being the only deposing witness in the case and ruled that it found not sufficient proof to establish the set-off and that plaintiff should pay the debt and all cost.
5. And also because the judgment of the court was predicated merely upon the objections of plaintiff, now defendant-in-error, and not upon the denials and allegations of the defendant, since defendant-in-error did not appear at the trial to testify.

On inspecting the records of the case we find that at the trial of the said case defendant acknowledged the debt but pleaded a set-off or counterclaim amounting to the sum of £152:0:6.

Witness A. Buken was introduced and testified as to the shortage in plaintiff's stock and identified the stock book of the firm, the stock sheet and the balance sheet.

The court on objections offered by plaintiff's counsel refused to admit them in evidence and also overruled the oral testimony of witness A. Buken:

- (a) Because the stock sheet, stock book and balance sheet were not signed by the parties to this action;
- (b) Because the stock book, stock sheet and balance sheet do not form part of the *res gestae*.

We are of the opinion that the Municipal Court erred in its ruling and that the Circuit Court in confirming the judgment of the said Municipal Court also erred.

Defendant having pleaded a set-off and having testified

that it was agreed between the parties that the shortages of plaintiff should be paid out of the salary of the plaintiff retained by defendant as security, the stock book, stock sheet and the balance sheet were admissible to show the condition of the business transaction between the parties, especially because the evidence of the defendant's witness Alfred Buken was not impeached nor rebutted.

Where the defendant in an action of debt brings a counterclaim or pleads a set-off, all legal evidence from which the court can draw an inference bearing on the case should be admitted and considered by the court. Old Blue Book, ch. X, p. 53, § 27; *Birch v. Quinn*, 1 L.L.R. 309 (1897).

It is highly unfair and inequitable to compel merchants to pay their employees without regard to the state of the account between them; a set-off having been pleaded, all legal evidence relating thereto should have been admitted and considered by the court. To sustain the position taken by counsel for plaintiff that the stock book, stock sheet and balance sheet must be signed by the factor or clerk to render them admissible in evidence would end in placing the merchant at the mercy of his employees who, in most cases, would refuse to sign if they knew that by such refusal they could be exempt from payment.

The judgment of the court below was solely predicated upon the objections offered by counsel for plaintiff, which objections were not well founded.

On inspecting the records in the case we find that plaintiff nowhere gave evidence in rebuttal of the evidence of A. Buken, witness for defendant, or introduced evidence to impeach the testimony of the latter.

In view of the foregoing we have arrived at the conclusion that the judgment of the court below should be reversed, and that defendant-in-error should pay to plaintiff-in-error the sum of \$60.90, being the balance due said plaintiff-in-error, with all legal costs of this action.

Reversed.