
Hutchinson vs. Hutchinson.

HUTCHINSON VS. HUTCHINSON.

1. STATUTE OF LIMITATIONS. *Demurrer for, at law.*

The statute of limitations can not be availed of at law by demurrer to the complaint, but must be pleaded in bar; unless the complaint shows upon its face not only that sufficient time has elapsed to bar the action, but also the non-existence of any ground of avoidance.

APPEAL from *Arkansas* Circuit Court.

Hon. J. A. WILLIAMS, Circuit Judge.

Pinnell for appellants.

ENGLISH, C. J. Thomas H. Hutchinson sued John H. Hutchinson in the circuit court of Arkansas county, upon an open account for balance, after allowing credits, of \$375.66.

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The account filed with the complaint is made up of numerous items, running from July 5, 1870, to February 26, 1876, amounting to \$554.68; and the credits are entered at various dates during and after the same period.

Defendant filed an answer of two paragraphs, the first denying that he was indebted to plaintiff as alleged, or in any sum; and the second, pleading a set-off or counter-claim upon open account, for \$950.14, filing bill of particulars made up of running items covering about the same period embraced in plaintiff's account. Plaintiff filed a replication, disputing the set-off.

There was a trial, and verdict in favor of plaintiff for \$300.

The defendant filed a motion for a new trial, which was granted by the court.

Afterwards the defendant demurred to the complaint on the following grounds:

"1. That so much of the said account sued upon, and each and every item thereof mentioned in said complaint, accruing in the years 1870, 1871, 1872 and 1873, did not accrue within three years next before the commencement of this suit, and that the same are barred by the statute of limitations.

"2. This court has no jurisdiction of the cause of action," etc.

Plaintiff moved to strike the demurrer from the files; the court overruled the motion, gave defendant leave to withdraw his answer, etc., and sustained the demurrer to the complaint, and dismissed the cause for want of jurisdiction, and plaintiff appealed.

In *Collins v. Mack*, 31 Ark., 686, this court decided that in an action at law the statute of limitations can not be availed of by demurrer to the complaint, but must be

pleaded in bar, unless the plaintiff should be foolish enough not only to show upon the face of his complaint that a sufficient time had elapsed to bar his cause of action, but also the non-existence of any ground of avoidance, which was not done in that or this case.

The sum claimed in the complaint was within the jurisdiction of the court.

Reversed, and remanded for further proceedings.
