BURGEN *vs.* DWINAL.

Where, on appeal from a judgment of a justice of the peace to the circuit court, the defendant interposes matter in abatement, as the infancy of plaintiff, and it is adjudged against him, and he does not rest upon it, but proceeds to trial upon the merits, such ground of defence is waived, and is not available in error.

Under our statute (*Digest* 806) a party having a cause of action against a firm of individuals on a partnership contract, may sue one or more of the parties at his election, as held in *Hamilton vs. Buxton,* (1 *Eng. R.* 24,) and where the plaintiff elects to sue one, and it turns out in evidence that he has a partner who is jointly liable with him, this is no grounds of defence.

Suit for work and labor: the evidence shows that defendant hired plaintiff, with

other hands at a specified price per day, to raft and float timber for him; after the hands had worked several days under this hiring, L. & B. made a bargain with the defendant to do the whole of the work for a certain price,—plaintiff refused to continue to work with L. & B. unless defendant would continue bound for his pay, and defendant said he would see him paid—he then continued to work, making no new contract with L. & B.: HELD, That he continued in the employment of defendant, and that he was bound to him for his wages under the original contract.

L. & B. gave the plaintiff an order to defendant for the amount of his wages, which defendant refused to accept or pay, and plaintiff brought suit against defendant on the original contract without returning the order to L. & B.: HELD, That the failure of plaintiff to return the order was no bar to his recovery, as it was merely in the nature of a certificate from L. & B. to defendant as to the length of time plaintiff had labored.

Appeal from the Jackson Circuit Court.

Allen Burgen sued Harrison Dwinal, before a justice of the peace in Jackson county, on an account for 18 days' work at $1 per day, credited with $4, and leaving a balance of $14, and obtained judgment, on default, for the amount of the account. Defendant appealed to the circuit court. At the appeal term of the circuit court, (Hon. WILLIAM C. SCOTT, presiding,) defendant moved to dismiss the case because plaintiff was a minor, and had not sued by his next friend. Plaintiff also moved to dismiss because the transcript of the justice was not properly authenticted. The court sustained the motion of the plaintiff, but, on motion of defendant, permitted the justice to come into court and amend his transcript; and the "case was then continued by operation of law.

At the next term (May, 1848) defendant renewed his motion to dismiss on the ground of the infancy of plaintiff; the court sustained the motion, but, on motion of the plaintiff, reconsidered its decision, and set the case down for trial *de novo,* at the next term, There was a failure to hold the following term of the court. At the May term, 1849, defendant renewed his motion to dismiss on the ground of the infancy of plaintiff, but the court overruled the motion because it interposed matter in abatement, and was not

sworn to, and ruled that defendant should not again interpose the motion, or discuss the matter thereof, but the case should be tried on its merits. The case was then continued, on motion of defendant, for want of a witness.

At the November term, 1849, the case was submitted to the court, sitting as a jury, and finding and judgment for defendant, Dwinal. The plaintiff, Burgen, moved for a new trial, on the ground that the finding was contrary to law and evidence. The court overruled the motion, and plaintiff excepted, and set out the evidence.

The bill of exceptions shows that, on the trial, the following testimony was introduced:

Wm. Brown, witness for plaintiff, testified that, some time in the winter of 1846-7, Dwinal employed him to go out and hire hands to float and raft some timber he had down about Bayou De Paty. Witness asked him if he should hire experienced floaters, and Dwinal told him to hire all he could get. Witness told him the price of floaters was $1 per day.

Witness accordingly went out hiring hands for Dwinal, and hired Burgen, the plaintiff, to go and work for Dwinal at floating timber, promising to give him $1 per day, pursuant to authority from Dwinal. Plaintiff went and worked for Dwinal, as witness thought, seventeen days, besides working one day on a canoe before he went to the timber. He was an excellent hand, worked faithfully, and received a premium which Dwinal had left to be given to the best floater.

Cross-examined.—After the plaintiff, and the other hands hired for Dwinal, had worked three or four days, Dwinal told witness that William Lankford had agreed to get out his timber, raft, and delivery it at the mouth of De Paty at $1 per tier. Witness told Lankford he would go with him to get out the timber. The hands (the plaintiff with them) continued working, and Dwinal told him he was still to see the hands paid; and that he would pay the orders which Lankford and the witness should give to the hands. Witness and Lankford went on to get out and raft timber in partnership. They directed and controlled

the plaintiff and the other hands in the work. Witness did not know that plaintiff knew of the arrangement between Dwinal and Lankford about getting out the timber, but believed he did. No other arrangement or contract was made by Lankford and witness to pay the plaintiff than that made by the witness for Dwinal, as before stated. Witness and Lankford gave the hands orders to Dwinal, some of which he paid and others he did not. Witness hired the plaintiff as the agent of Dwinal, who said nothing about his being in partnership with Bailey or any other person, nor did witness know that Dwinal and Bailey were in partnership about the timber referred to.

John McElroy testified that, in the forepart of the winter of 1847, the plaintiff was working for Dwinal in floating and rafting timber from Bayou De Paty to White river. Plaintiff worked some seventeen or eighteen days, and, as witness understood, at $1 per day. After the plaintiff had worked three or four days, Lankford agreed with Dwinal to get out the timber and deliver it to him at the mouth of De Paty at $1 per tier. "Dwinal then said, after the agreement between him and Lankford, when any of the hands wanted to quit, to give orders, and that he would pay them off, and that plaintiff, Burgen, was then present." Witness was to work for Dwinal in the same work with the plaintiff, on a contract with Dwinal, and, after the arrangement between Lankford and Dwinal, he was not hired anew, but worked on under the hiring of Dwinal. What Dwinal stated, about paying the hands, was in reply to what some of the hands said, that they would not work longer if Lankford was to pay them. Witness did not know whether this was said by Burgen, or some of the other hands.

Isaac Burgen testified that, in the winter or spring of 1847, his son, the plaintiff, was to work for Dwinal in rafting and floating timber; that, soon after plaintiff went to work for Dwinal, witness heard that Lankford & Brown were to get out the timber; that plaintiff and others had gone down the river to get out the timber; and knowing that Lankford & Brown were not

responsible, he went to Dwinal and told him he had heard that they were getting out the timber, and asked him how his son, the plaintiff, and the other boys were to get their pay, and Dwinal told witness that he would see the boys paid. Witness said he felt it to be his duty to talk to Dwinal about the matter, as his son was a minor.

William Lankford, a witness for defendant, testified that, in winter of 1847, plaintiff was working for Dwinal, in getting out and rafting timber in Bayou De Paty. That, in three or four days after the work began, witness agreed with Dwinal to float and raft the timber from De Paty to White river, at the mouth of De Paty, for $1 per tier. That he controlled and directed the plaintiff and the other hands in the work, together with William Brown, whom he took into partnership with him; and that he and Brown gave orders to Dwinal to pay off certain of the hands. Whether one was given to the plaintiff, he did not recollect. When witness made the agreement with Dwinal, plaintiff was present, and Dwinal said he would pay the orders witness and Brown would give to him when any of the hands wanted to quit; and whether he, or he and Brown ever gave any order to plaintiff he did not recollect. The plaintiff and other hands continued to work after the agreement between witness and Dwinal, but no new hiring or contract took place as witness knew of. He did not himself hire them, or make any agreement with them, though he considered the hands in his employ, and himself and Brown responsible for their pay. The understanding of the witness was, that, out of what Dwinal was to pay him and Brown for getting out the timber, Dwinal would retain what he paid the hands on the orders of himself or himself and Brown, though nothing of the kind was agreed upon between the witness and Dwinal. Witness did not know that Dwinal and Bailey were in partnership in the timber referred to, but had heard it spoken of, and such was the general understanding.

William McMillon, witness for defendant, testified that, in the winter of 1847, he lived in Batesville, and learned, from both

Bailey and Dwinal, that they were in partnership in some timber on Bayou De Paty, and that such was the general reputation.

Two other witnesses testified that they knew, from Bailey and Dwinal, and from general notoriety, that they were in partnership in said timber. One of said witnesses also testified that he was acquainted with plaintiff, and never knew him to live any where but with his father.

Plaintiff admitted that Lankford & Brown had given him an order on the defendant for $14, which he refused to pay. The order was dated 8th March, 1847. And that, upon the refusal of Dwinal to pay said order, he commenced this suit against him, retaining the order, "and putting it in this case."

"To such parts of the testimony of all the witnesses as related to the agreement between Lankford and Dwinal, Lankford & Brown and Dwinal, and the alleged partnership between Bailey & Dwinal, the plaintiff, at the time it was offered, objected, but the court refused to exclude the same, alleging that though the testimony were illegal, the court, sitting as a jury, would disregard the illegal testimony, which the court did not do, as the plaintiff alleges."

BEVENS & FAIRCHILD, for the appellant. The evidence of a partnership between Dwinal and Bailey was illegal, and the court should have disregarded it, and found on the legal testimony, (*Barraque & wife vs. Price, Siter & Co.*, 4 *Eng.* 548); it was matter in abatement and amounted to nothing on a trial upon the merits. (*Hamilton vs. Buxton*, 6 *Ark.* 26. *Odle vs. Floyd, &c.*, 5 *Ark.* 249. *Taylor vs. The Auditor*, 2 *Ark.* 174. 1 *Ch. Pl.* 53, (7 *Amer. Ed.*) *Kinsman vs. Dallam*, 5 *Mon. R.* 384. 1 *Litt. Rep.* 77.) But if partners, the plaintiff might, under our statute, sue one or both. *Hamilton vs. Buxton*, 1 *Eng.* 24. *McLain & Badgett vs. Carson's ex.*, 4 *Ark.* 166.

CONWAY B, contra, relied upon the facts that, during the progress of the trial in the circuit court, it appeared from the evi-

dence that the plaintiff was an infant at the time of the institution of his suit, (*Rev. Stat., ch.* 87, *p.* 497, *sec.* 38-9,) and that the defendant was in partnership with Bailey; and contended that the contract of hiring between the plaintiff and defendant had ceased, and that Lankford and Brown were responsible for the plaintiff's claim.

Mr. Justice SCOTT delivered the opinion of the court.

This was an appeal from a justice of the peace to the circuit court of Jackson county, where, upon a trial on the merits, judgment was for the original defendant, and the case is brought here on bill of exceptions to the overruling of a motion for a new trial.

The matter of the infancy of the plaintiff, insisted upon here, is matter of abatement and not in bar of his suit; and having been adjudged against the defendant in the circuit court, his failure to rest upon that decision and his proceeding to a trial upon the merits exclude him now from this defence on well established principles of law. Nor can any question as to this matter be raised here for the additional reason that this ruling of the circuit court was not one of the grounds of the motion for a new trial which is alone before us for review.

Nor is the second ground assumed here well taken, nor was it tenable in either of the courts below in any stage of the proceeding; it having been settled by this court in the case of *Hamilton vs. Buxton,* (1 *Eng.* 24,) sustained in principle by the case of *McLain & Badgett vs. Carson's ex.,* (4 *Ark.* 164,) that, under our statute, a party, having a cause of action against a firm of individuals on a partnership contract, may sue one or more of the partners at his election.

The remaining position, that the plaintiff received from Lankford & Brown an order on the defendant for the $14, sought to be recovered, and did not return, but retained it, although acceptance and payment were refused, has more of plausibility. But when the whole of the testimony is considered, this fact is by no

means of controling import, nor is the legal result by any means conclusive against the plaintiff's rights in the premises. It is perfectly clear, from the testimony, that there was a contract of hiring between the plaintiff and the defendant. And, from facts and circumstances proven, both affirmatively and negatively, it is scarcely less clear that this contract was continued and was not abrogated by the arrangement of the defendant with Lankford & Brown. It is true that, after this arrangement, Lankford & Brown superintended and controled the labor of the plaintiff and received the benefit arising; but this was by no means inconsistent with a continuance of the contract between the plaintiff and the defendant.

It is also true that Lankford "considered the hands in his employ, and himself and Brown responsible to them for their pay;" but, at the same time, he testifies that, after the arrangement spoken of, the plaintiff and the other hands continued to work as before, and that "no new hiring or contract took place as he knows of. 'That he did not himself hire them or make any engagement with them," and that, at the time of the making the arrangement, the defendant said in the presence of the plaintiff, that, "when any of the hands wanted to quit, he would pay the orders that he (Lankford) and Brown would give them."

McElroy testifies to the same facts, and also that what was said by the defendant "about paying the hands was in reply to what some of the hands said, that they would not work longer if Lankford was to pay them."

Isaac Burgen (the father of the plaintiff) testified that, having heard of the arrangement between the defendant and Lankford & Brown, and "knowing that (the latter) were not responsible, he went to the defendant and asked him how his son and the other boys were to get their pay, and that the defendant told him that he would see the boys paid." And Brown, that, after the arrangement between the defendant and Lankford which he subsequently went into as a partner of Lankford, the defendant told him that "he was still to see the hands paid, and that he would pay the orders which Lankford and the witness should

give to the hands," that the hands "continued working," and "that no other arrangement or contract was made by Lankford and the witness to pay the plaintiff than that made by the witness for the defendant," in the first instance, as his authorized agent.

The testimony, then, not only establishes a continuance of the contract of hiring between the plaintiff and the defendant, but shows clear enough that the office of the orders, that Lankford and Brown were to draw upon the defendant in favor of the hands, was simply that of a voucher to be used in a settlement between the defendant and Lankford & Brown, and that in that drawn in favor of the plaintiff he had no interest whatsoever further than as an exhibit to the defendant of the number of days he had worked under his contract. And it is fairly inferable from the testimony that the inducements for the defendant's continuing the contract of hiring and remaining thereby himself responsible to the hands he had hired, was that, otherwise, Lankford and Brown, for want of credit, would have been unable to hire the necessary hands to carry out their undertaking: and the defendant, doubtless, contemplated that he would be safe in doing so, as the personal services of Lankford and Brown, for which he was not responsible, would fully compensate for any sharpness of his bargain with them.

If, then, it turned out that his bargain was too sharp, and that the per diem of the hands amounted to more money than the one dollar per tier for the timber, or, if he was so unwise as to pay off Lankford and Brown before he had paid off the hands, it was his own misfortune and voluntary act, of which he cannot legitimately complain either in this court or any other.

Upon a view of the whole case, as presented in the record, we are of opinion that there is abundant testimony to authorize the recovery the plaintiff seeks, and little or none among the whole mass of relevant and irrelevant testimony to sustain the finding and judgment of the court. The court, therefore, erred in refusing the motion for a new trial, and the judgment must be reversed, a new trial awarded, and the cause remanded to be proceeded in.