

WHITMAN *v.* HITT.

Opinion delivered May 27, 1905.

JUDGMENT—EFFECT.—A complaint was filed and summons issued against the Whitman-Zook Lumber Company, and the sheriff returned the summons, saying that he had executed it by delivering a copy to Whitman, and Whitman answered, denying that he was indebted to plaintiff. A judgment was rendered against the company, which failed to show whether it was a firm or corporation. Held, that there was no judgment against Whitman.

Appeal from Crittenden Circuit Court.

ALLEN HUGHES, Judge.

Reversed.

*R. G. Brown*, for appellant.

The judgment rendered by the circuit court of Monroe County, Miss., was not a valid judgment against the appellant, even under the Mississippi Code. Rev. Code, Miss. (1890), § 3436; 62 Miss. 350; 41 Miss. 102; 1 How. (Miss.), 527. In the absence of a statute permitting suits against a partnership as such, the name of the members of a partnership should be set

out in the summons as well as the complaint. 15 Enc. Pl. & Pr. 898; 17 Ore. 256; 41 Mich. 138; 44 Ala. 584; 60 Ala. 269; 17 Md. 74; 33 Md. 107; 41 Miss. 102; 1 How. 527; 62 Miss. 350; 43 Miss. 167; 17 Ore. 256; 43 Cal. 571. The issue raised by the answer must in some way be disposed of before judgment against the defendant. 42 Ark. 268; 4 Ark. 526. No judgment was ever rendered against Whitman. 63 Miss. 112. The judgment must be certain. 11 Enc. Pl. & Pr. 948; 42 Cal. 571. The record alone can be looked into. 1 Green. Ev. § 305; 10 S. & M. 552. The statute of jeofails cures only defects of pleading—not of proofs. 70 Ark. 150. And does not extend to a case where the allegations fail to state a cause of action. 5 How. 484; 25 Miss. 242; 44 Miss. 413; 65 Miss. 41; 44 Miss. 418; 5 How. 492.

*J. W. Buchanan* and *S. A. Wilkinson*, for appellee.

The judgment rendered in Mississippi against appellant was valid. Black, Judg. § 222; 16 Ark. 54; 11 Ark. 162; 15 Enc. Pl. & Pr. 844; 11 *Id.* 1107; Code of Miss. § 3436; 55 Miss. 254; 63 Miss. 280; 69 Miss. 263; Miss. Code, § 746; 11 How. 189.

BATTLE, J. This is an action brought by R. P. Hitt against C. T. Whitman upon a judgment recovered by plaintiff in the circuit court of Monroe County, in the State of Mississippi, against Whitman-Zook Lumber Company. The plaintiff recovered judgment in this case against Whitman; and he appealed.

In the complaint or declaration in the action in which the judgment sued upon was recovered it was not shown or alleged who the Whitman-Zook Lumber Company is—whether a firm or corporation, and, if a firm, who compose it. In the summons issued in the case the sheriff was directed to summon the Whitman-Zook Lumber Company, and he returned it, saying he had executed it by reading it to C. T. Whitman, of the Whitman-Zook Lumber Company, and delivering him a copy thereof. Whitman answered, and denied that he was indebted to the plaintiff for the sum sued for. Judgment was rendered against Whitman-Zook Lumber Company, but it does not show that the lumber com-

pany was a firm or corporation, and if a firm who composed it. The answer or plea of Whitman was not disposed of. Upon this judgment this action was based. The evidence fails to show that Hitt recovered a judgment in the Mississippi court against Whitman.

Reversed and remanded for a new trial.

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