CASES DETERMINED

IN THE

ST. LOUIS AND THE KANSAS CITY

COURTS OF APPEALS

OF THE

STATE OF MISSOURI,

FROM APRIL 18, 1893, TO NOVEMBER 7, 1893.

REPORTED BY
DAVID GOLDSMITH, of the St. Louis Bar,
AND
BEN ELI GUTHRIE, of the Macon City Bar,
OFFICIAL REPORTERS.

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JUDGES OF THE

ST. LOUIS COURT OF APPEALS.

HON. RODERICK E. ROMBAUER, *Presiding Judge.*

HON. WILLIAM H. BIGGS,
HON. HENRY W. BOND, } *Judges.*

JOHN LEWIS, *Clerk.*
DAVID GOLDSMITH, *Reporter.*

JUDGES OF THE

KANSAS CITY COURT OF APPEALS.

HON. JACKSON L. SMITH, *Presiding Judge.*

HON. JAMES ELLISON,
HON. T. A. GILL, } *Judges.*

L. F. MCCOY, *Clerk.*
BEN ELI GUTHRIE, *Reporter.*

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CASES DETERMINED

BY THE

ST. LOUIS AND THE KANSAS CITY

COURTS OF APPEALS.

MARCH TERM, 1893.

THE CITY OF BILLINGS, Plaintiff in Error, v. CHARLES DUNNAWAY, Defendant in Error.

St. Louis Court of Appeals, April 18, 1893.

1. **Evidence:** JUDICIAL COGNIZANCE OF THE INCORPORATION OF A CITY. *Held, arguendo,* that all the courts of this state should take judicial notice of the reorganization of a village as a city of the fourth class.

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2. **Municipal Corporations:** QUESTIONING CORPORATE EXISTENCE. Whether a municipal organization, recognized by the state as a city of the fourth class, is such a city, cannot be questioned by the defendant in a prosecution for the violation of one of its ordinances, but only by proceedings of ouster on behalf of the state.

Error to the Christian Circuit Court.—HON. W. D. HUBBARD, Judge.

REVERSED AND REMANDED.

G. J. Bradfield, for appellant.

It was not necessary for the plaintiff to prove, it was the duty of the court to take, judicial notice of the fact that the city of Billings was a city of the fourth class and situated within the territory over which the

court had jurisdiction. Revised Statutes, 1889, sec. 1579; *City of Savannah v. Dickey*, 33 Mo. App. 522. Even the defendant himself cannot raise the question as to the legal existence of a municipal corporation whose ordinances he is charged with violating. Such question can only be raised by the state by *quo warranto* or other direct proceedings. *The Inhabitants of Fredericktown v. Fox*, 84 Mo. 59.

No brief filed for respondent.

ROMBAUER, P. J.—The proceeding is one to uphold a conviction of the defendant for a violation of an ordinance of the city of Billings. The defendant was convicted before the mayor, but, upon appeal to the circuit court, he was acquitted under an instruction given by the court to the jury to find him not guilty. The ruling out of the plaintiff's evidence is the error complained of.

At the inception of the trial in the circuit court the plaintiff requested the court to take judicial notice of the fact that the plaintiff is a city of the fourth class. This the court declined to do. The plaintiff thereupon proceeded to give evidence of the reorganization of the village of Billings into a city of the fourth class under the provisions of sections 975, 977, 1579, of the Revised Statutes of 1889. This evidence was excluded by the court, as were also the various ordinances offered in evidence tending to show that the act charged against the defendant was a violation of an ordinance legally adopted by the municipal authorities. These entries were read from the books of the corporation, which were evidence of its official acts both at common law and under the statute. 1 Greenleaf on Evidence, sec. 493; *Andrews v. Boylston*, 110 Mass. 214; Revised Statutes, 1889, sec. 4846.

The statute touching the reorganization of cities of the fourth class (Revised Statutes, 1889, sec. 1579) provides that all courts in this state shall take judicial notice of such reorganization. It is true that the power and duty thus imposed upon the courts to take judicial notice of the existence of a fact implies the power and duty to take judicial notice of its non-existence, if the fact does not exist. In this case, however, the evidence offered by the plaintiff had a tendency to show that the fact did exist and no tendency to show that it did not exist. We are, therefore, at a loss to see on what theory the court declined to take judicial notice of the fact that the city of Billings was a city of the fourth class.

We mention this simply as a matter of argument, because, in the view which we are compelled to take of the proceedings similar to the present, the question cannot be raised in the manner in which it was sought to be raised by the defendant. The plaintiff was acting as a city of the fourth class. For aught that appears it was recognized by the state as such, and whether it was or was not such a corporation could not be questioned by the defendant in a proceeding for a violation of one of its ordinances, but only by proceedings of ouster on behalf of the state. The cases of *Board v. Shields*, 62 Mo. 247, 251, 252; *Inhabitants of Fredericktown v. Fox*, 84 Mo. 59, 65; *Pierce v. Town of Lutesville*, 25 Mo. App. 317, 320, and *Eubank v. City of Edina*, 88 Mo. 650, 654, necessarily lead to that conclusion. In *Whalin v. City of Macomb*, 76 Ill. 49, it has been expressly decided that the question whether a municipal charter has been forfeited cannot be raised in defending against the ordinance, but only in direct proceedings by *quo warranto*.

It results from the foregoing that the judgment of the circuit court must be reversed and the cause remanded. So ordered. All the judges concur.

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ROBERT C. GREER, Appellant, v. ISABELLA NUTT, Respondent.

St. Louis Court of Appeals, April 18, 1893.

1. **Written Contract:** EXTRINSIC EVIDENCE OF CONSIDERATION. It is always competent in a controversy between the original parties to a written contract to show the existence of a valuable consideration therefor by extrinsic evidence.

2. **Administration:** VALIDITY OF AGREEMENT FOR DIVISION OF COMMISSIONS. A contract by an administrator made subsequently to his appointment and having no connection therewith, by which he agrees for a valuable consideration to divide his future commissions with another person, is not illegal.

Appeal from the St. Louis City Circuit Court.—HON. LEROY B. VALLIANT, Judge.

AFFIRMED.

David Murphy, for appellant.

(1) The traffic in public offices is unlawful at common law, as being against public policy, and is also provided against by statutes; consequently no valid contract can arise out of a transaction tainted with such illegality. Keener on Selection on Contracts, p. 820; *Hopkins v. Prescott*, 4 C. B. 578; *Flarty v. Odlum*, 3 T. R. 681; *Lidderdale v. Duke*, 4 T. R. 248; *Wells v. Foster*, 8 M. & W. 149. A promise, made in consideration of the appointing power being prevailed upon by the promisee to appoint the promisor to an office, is contrary to public policy and void. *Faurie v. Morin*, 4 Mart. 39. And an agreement after the appointment on the same terms is void, as being in pursuance of

the original contract. *Hunter v. Nolf*, 71 Pa. St. 282; *Stout v. Ennis*, 28 Kan. 706. Although the office (administrator) is not a public office, it is nevertheless a public trust just as sacred, and arises from an appointment to be made by a public court or officer. The note sued on in this case, and the agreement upon which it was based, must be taken together and viewed as one instrument. As they amounted to a trading in the appointment of an administrator, they are void as against public policy. This seems well settled by the authorities. The principle is not limited, but applies to all cases where it is against public policy. *Porter v. Jones*, 52 Mo. p. 403. (2) There was no consideration for the contract sued upon.

D. P. Dyer, for respondent.

ROMBAUER, P. J.—The plaintiff brought suit against the defendant for a balance claimed to be due on a running account. The defendant answered by way of general denial, and set up a counter-claim for $2,026.73. On the trial of the cause before a jury, such proceedings were had that the defendant recovered judgment on the plaintiff's cause of action, as well as on her counter-claim. The plaintiff appeals from the judgment on the counter-claim only, and assigns for error that the court should have declared the contract, on which such counter-claim was founded, illegal and contrary to public policy, and that the court also erred in admitting oral evidence in support of a subsequent consideration of the alleged contract.

It appeared in evidence that the defendant's husband died intestate in the year 1888, leaving a very large estate, on which the statutory commissions of an administrator would amount to $35,000 or more. The defendant thereupon executed the following paper:

"ST. LOUIS, December 10, 1888.

"I, the undersigned, widow of Charles H. Nash, late of the city of St. Louis, deceased, do hereby relinquish all right, claim or preference I may have to administer the estate of said deceased, and hereby request that letters of administration on said estate may be granted to Robert C. Greer of said city.

"The children of said deceased, and the only remaining distributees of his estate are minors.

"ISABELLA NASH.

"ROBERT C. GREER."

Upon this paper being filed in the probate court, letters of admininistration were granted on the estate to the plaintiff. There is no substantial evidence in the record that this relinquishment of right on part of the defendant to administer on her husband's estate was brought about by any promises on part of the plaintiff. About one month thereafter the plaintiff and defendant met, and, upon the suggestion of a mutual friend, it was agreed that the plaintiff should pay to defendant one half of the commissions which he would receive as administrator. An instrument in writing to the effect was drawn up and signed and sealed by the parties. This instrument recited, "that the said Greer for a good and valuable consideration to him paid from Isabella Nash, full payment and satisfaction of which consideration has heretofore been made," sold and assigned to her one half of the commissions which he was to receive as administrator, "after first deducting from the gross commissions allowed him the sum or sums paid to said American Security Company for its said suretyship." A prior clause of the agreement recited that the American Surety *(sic)* Company, of New York, was one of the sureties on the plaintiff's bond as administrator, and charged him certain amounts for the risk.

There was evidence tending to show that at this meeting it was agreed between the parties that, in consideration of the plaintiff's paying to the defendant one half of the commissions, the defendant should pay one half the amount charged by the security company for its suretyship. There is no controversy touching the fact that, shortly after this meeting, the plaintiff, who had charge of the defendant's individual property, likewise charged against her account on his books the sum of $2,000, being one half of the amount charged by the security company to the plaintiff for the first year of its risk.

When the testimony touching this oral agreement as to each party paying one half of the costs of the suretyship was offered, the plaintiff objected thereto as contradictory of the written agreement. The court overruled the objection, and this ruling is one of the errors complained of.

This assignment is based on a misconception of the law. The instrument sued on, being a written promise to pay money, imports a consideration under our Revised Statutes, 1889, section 2389. Being an instrument under seal, it imports a consideration at common law. Of course it was competent for the plaintiff to prove that the consideration was either illegal or insufficient, but on what principle the defendant is precluded from showing by extrinsic evidence that there was a valuable consideration for the promise is not apparent, since consideration or its want may always be shown by extrinsic evidence in a controversy between the original parties to the contract, even though the evidence tends to vary the consideration stated in the instrument. 1 Greenleaf on Evidence, sec. 304; 1 Parsons on Contracts, 290; 3 Washburn on Real Property, 399; *Sexton v. Anderson*, 95 Mo. 373. This assignment of error, therefore, must be overruled.

Proceeding to the consideration of the main proposition in this case, we readily concede to the plaintiff that, while the office of an administrator in this state is not a public office, yet trafficking in this office is equally contrary to the policy of the law and is impliedly prohibited. It has been decided in *Porter v. Jones*, 52 Mo. 399, 403, that contracts based upon such a traffic are unenforceable. But, as we have stated above, no substantial evidence was given that the defendant recommended the plaintiff as administrator on faith of his promise *subsequently* made that he would divide his commissions with her, or that she even anticipated that he would make such a promise in the future. The plaintiff had been appointed, had qualified and was acting as administrator for some time, when the promise was made. That the defendant paid half of the cost of his sureties is not even seriously controverted. With the adequacy of this consideration we have nothing to do. It is one which the law regards as valuable and which is sufficient to support the contract, although, as above seen, the instrument itself made a *prima facie* case for the defendant.

It appeared in evidence that the plaintiff did pay to the defendant one half of the commissions which he earned as administrator during the first year. His refusal to do so during the second year appears to have no other foundation than that she resisted a claim of his for a balance on account, which, as the jury found, was without foundation.

There is no merit in the appeal, and, all the judges concurring, the judgment is affirmed.

D. P. PHARIS, Administrator of W. G. Hobbs, Respondent, v. HENRY SURRETT *et al.*, Appellants.

St. Louis Court of Appeals, April 18, 1893.

1. **Foreclosure of Mortgage:** PROCEDURE ON FAILURE OF MORTGAGEE TO FILE NOTES SECURED. It is proper for the defendant mortgagor in an action for the foreclosure of a mortgage to plead that the mortgage was given to secure his promissory notes, and to then move for a dismissal of the action, when the petition does not disclose that fact and the plaintiff omits to file the notes therewith or to account for their absence.

2. ———: NON-PRODUCTION OF NOTES SECURED AT THE TRIAL. Though the defendant mortgagor fails to thus avail himself of the omission, he is nevertheless entitled to the production of the notes at the trial; and the rendition of a decree of foreclosure without such production of them, when it is insisted upon by him, and without any accounting for their absence, is prejudicial error.

3. **Recovery of Purchase Price of Lands:** FAILURE OF CONSIDERATION. Proof that, at the time of the sale and conveyance of land, there was an outstanding title, is not sufficient to support a plea of the complete failure of the consideration in an action to foreclose a mortgage given to secure the purchase price. If such a defense is available at all, it is certainly not so without a showing that the vendor conveyed neither a marketable title nor the possession.

Appeal from the Barry Circuit Court.—HON. JOSEPH CRAVENS, Judge.

REVERSED AND REMANDED.

N. Gibbs and *T. M. Allen*, for appellants.

(1) The mortgage filed with plaintiff's petition, which he was in this action seeking to foreclose, was given expressly to secure the payment of two certain promissory notes, executed by one of the defendants to plaintiff's decedent; said notes were not alleged to

be lost or destroyed, and were not filed with the petition and no verified copy of said notes was filed with the petition, and defendants' motion to dismiss the action should have been sustained. *Burdsal v. Davies*, 58 Mo. 138; *Peck v. Bell*, 65 Mo. 224; *Dyer v. Murdoch*, 38 Mo. 224. (2) The two notes mentioned in the mortgage that plaintiff was seeking to foreclose, and to secure the payment of which notes said mortgage was given, were not filed with the petition, and no reason was given for not filing them; and defendants' motion to require plaintiff to file said notes should have been sustained. 1 McQuillin's Pleading & Practice, sec. 279, and note 113; *Railroad v. Knudson*, 62 Mo. 569; *Christie v. Railroad*, 94 Mo. 453; *Kingsland, etc., Mfg. Co. v. Iron Co.*, 29 Mo. App. 526; *Rothwell v. Morgan*, 37 Mo. 107. Between the original parties to a negotiable note, or to any other instrument, the consideration may be inquired into, and if consideration fail there can be no recovery. *Klein v. Keyes*, 17 Mo. 326; *Baile v. Ins. Co.*, 73 Mo. 371; *Liebke v. Knapp*, 79 Mo. 22; *Fontaine v. Boatman's Savings Bank*, 57 Mo. 552; *Hollocher v. Hollocher*, 62 Mo. 267; *Hacker v. Brown*, 81 Mo. 68.

T. D. Steele and *W. Cloud*, for respondent.

ROMBAUER, P. J.—This is a statutory proceeding to foreclose a mortgage. The trial was before the court and resulted in a judgment of foreclosure with award of special execution, and execution over for the residue. The defendants, appealing, assign for error that the court erred in not requiring the plaintiff to produce the notes secured by the mortgage before rendering judgment, and also erred in not sustaining defendant's plea of a total failure of the consideration of said notes, and that the judgment is unwarranted by the evidence and excessive.

The plaintiff's petition states that the mortgage was given to secure an indebtedness of $96.50, without stating, however, that such indebtedness was evidenced by any notes. The mortgage, which was filed with the petition, disclosed the fact that the indebtedness consisted of two promissory notes, one for $46.50 payable in one year, and one for $50 payable in two years. The defendant Henry Surrett filed an amended answer to the petition, stating that the promissory notes, described in the mortgage filed with the petition, were given in part payment of certain land to the plaintiff's intestate Hobbs, and that Hobbs had neither the possession of nor any title to the land, but that the title thereto at the date of the conveyance to defendant was in the heirs of John F. Bartlett, whose grantees thereafter conveyed the same to his wife and co-defendant Susan A. Surrett. Susan A. Surrett also filed a separate answer substantially stating the same facts. After these answers were filed, both defendants jointly filed motions to dismiss the plaintiff's petition, and also to compel the plaintiff to file the mortgage notes, which motions were overruled by the court, such ruling constituting the first error complained of.

This assignment of error is based upon a misconception of the pleadings. The petition does not purport to be founded upon any notes, but upon a debt evidenced by the mortgage alone. The defendants' answers and motions are not directed to the petition, but to an instrument filed with the petition as an exhibit, and forming under our practice no part of the record. *Kearney v. Woodson*, 4 Mo. 114; *Bowling v. McFarland*, 38 Mo. 465; *Kern v. Ins. Co.*, 40 Mo. 19.

On the other hand the respondents' claim that these motions were properly overruled, because not made before the filing of the answers, is equally untenable. Had the petition shown that the action was founded

on a mortgage securing promissory notes, the defendants might have moved to dismiss, even after answer filed (*Rothwell v. Morgan*, 37 Mo. 107), although the petition would have been good on motion in arrest of judgment. *Burdsal v. Davies*, 58 Mo. 138. The defendants' proper way of proceeding was to set out in their answer the mortgage, or so much thereof as showed the fact that it was given to secure certain promissory notes, and then move to dismiss, because they were not filed with the petition, nor their absence satisfactorily accounted for.

As, however, there is no controversy touching the fact that the mortgage did secure two promissory notes, which were neither filed with the petition nor produced at the trial, nor their absence accounted for, we ought not uphold the judgment, notwithstanding these technical defects in defendants' pleadings. When the mortgage was given in evidence, the court was bound to take notice of the fact that it was given to secure two notes, and the defendants then asked a declaration of law renewing the objection which they had formerly made by a motion to dismiss. It became the duty of the court to dismiss the case at that stage of the proceedings, as it was then again asked to do, unless the notes were produced or their absence satisfactorily accounted for.

Under the well-settled rule in this state a debt is the principal thing in a mortgage given to secure it, and a transfer of the debt carries with it the security. *Mitchell v. Ladew*, 36 Mo. 526; *Watson v. Hawkins*, 60 Mo. 550. The plaintiff's petition fails even to allege that the debt is still due *the plaintiff*, and it nowhere appeared in evidence that the plaintiff held any of the notes at the date of the institution of the suit. To permit a recovery under such circumstances might subject a defendant to a judgment at the instance of

the holder of the mortgage, and to other judgments at the instance of the holder of the notes. If the notes are lost, no recovery can be had thereon without the execution of an indemnifying bond. Revised Statutes, 1889, sec, 2185; *Barrows v. Million*, 43 Mo. App. 79.

The record is not in any shape to pass intelligently on the question presented by the defendants' second assignment of error. There is no evidence in the record what title, if any, the plaintiff's intestate had when he conveyed the land to the defendant Henry Surrett. The defendants did give evidence of a title in the heirs of John F. Bartlett by a chain of conveyances from the government and by descent, but they gave no evidence that those were the only conveyances of record touching this land. *Non constat*, but the title of the plaintiff's decedent was a marketable title when he conveyed the land to Surrett. If the attempted defense is available at all, it is clearly not available without showing that the mortgagee conveyed neither a marketable title nor the possession. Whether it is available at all in the absence of fraud we need not decide. The excess in the judgment, and error in the form of the judgment entry, are conceded by the respondent.

For error in the court's action in rendering judgment upon a debt evidenced by notes, without requiring either the production of the notes or a satisfactory reason for their non-production, as well as for excess in the judgment and error in the judgment entry, the judgment will be reversed and the cause remanded. So ordered. All the judges concur.

MICHAEL A. HAMMEL *et al.*, Respondents, v. JOHN WEIS, Appellant.

St. Louis Court of Appeals, April 25, 1893.

1. **Justices' Courts:** NOTICE OF APPEAL: PRESUMPTIONS. The transcript of a justice of the peace recited the rendition of judgment for the plaintiff, also that the defendant had, on the same day, filed the affidavit and signed the bond for an appeal, and that the justice had on the next day approved the bond and allowed the appeal. The approval of the bond bore the latter date. *Held*, that it must be presumed that the bond was not executed by the surety thereto until the date of its approval, and accordingly that statutory notice of the appeal was requisite.

2. ———: ———. When notice of an appeal from a justice of the peace is required under the statute in relation thereto and is not given, it is the imperative duty of the circuit court at the second term after the appeal is taken to either affirm the judgment or dismiss the appeal, as the plaintiff may elect.

Appeal from the St. Louis City Circuit Court.—HON. W. W. EDWARDS, Special Judge.

AFFIRMED.

I. C. Terry, for appellant.

J. L. Hornsby, for respondents.

BIGGS, J.—The statute (Revised Statutes, 1889, sec. 6342) regulating appeals from judgments rendered by justices of the peace, provides in substance that, if an appeal is not allowed on the same day on which the judgment is rendered, the appellant shall serve the appellee, at least ten days before the first day of the term at which the cause is to be determined, with a notice in writing, stating the fact that an appeal has been taken. Section 6344 of the statute reads: "If the appellant shall fail to give such notice at least ten

days before the second term of the appellate court after the appeal is taken, the judgment shall be affirmed or the appeal dismissed, at the option of the appellee."

In the case at bar the plaintiffs obtained a judgment against the defendant before a justice of the peace. An appeal was taken which was returnable to the June term of the circuit court. At the October term of said court, on motion of the plaintiffs, the judgment was affirmed for failure to give notice of the appeal. The defendant appeared during the term, and moved the court to set aside the judgment of affirmance for the reason that the appeal was taken on the day of the trial. The court overruled the motion, and the defendant has appealed.

The judgment before the justice was rendered on the second day of May, 1892. That portion of the transcript of the justice, which is material, reads: "May 2, 1892, the defendant, John Weis, makes and files affidavit praying for an appeal, also *signed bond* for appeal. May 3. Bond approved, and appeal *allowed* to the circuit court of the city of St. Louis, Missouri." The appeal bond shows that it was attested and approved on the third day of May, 1892.

If the transcript showed affirmatively that the bond was signed by the surety on May second (the day of trial), then we might well consider the argument that, as the defendant had done everything the law required of him in order to perfect his appeal, he could not be prejudiced by the delay of the justice in approving the bond and noting the allowance of the appeal on his docket. The record, however, only recites that the *defendant* signed the bond on May second. When it was signed by the surety does not appear. As the statute provides that no appeal shall be *allowed* by a justice, unless the appellant or some one for him with one or more solvent sureties shall enter into a recognizance to

be approved by the justice, the presumption arises in the present case that the defendant's appeal bond was *not completed* until May third, the day on which it was approved and the appeal allowed. Such presumption rests on the theory of right action, which supports the official acts of all public officers when there is no evidence of actual dereliction of official duty.

The conclusion necessarily follows that the appeal was not taken on the day of trial but on the succeeding day; hence notice of the appeal was required, and, as it was not given, it was the imperative duty of the circuit court at the second term after the appeal was taken to either affirm the judgment or dismiss the appeal, as the plaintiffs might elect. *Rowley v. Hinds*, 50 Mo. 403; *Purcell v. Railroad*, 50 Mo. 504; *Page v. Railroad*, 61 Mo. 78; *Town of Brownsville v. Rembert*, 63 Mo. 393; *Town of Carrollton v. Rhomberg*, 78 Mo. 547; *Dooley v. Railroad*, 83 Mo. 103; *Cooksey v. Railroad*, 17 Mo. App. 132; *Holdridge v. Marsh*, 28 Mo. App. 283; *Earl v. Hart*, 89 Mo. 263.

By the affirmance of such a judgment is not meant, as counsel argues, a vitalizing of the judgment before the justice, for the effect of the appeal was to absolutely vacate such judgment. The judgment of the circuit court is new and independent, and is one of recovery against the appellant and surety on the appeal bond. It is analogous to a judgment by default. The appellant having entered his appearance by taking his appeal and having failed to give notice of the appeal, the appellee is entitled upon the record itself without the introduction of any evidence to a judgment.

With the concurrence of the other judges the judgment will be affirmed. All the judges concur.

In Re Final Settlement of Estate of CHARLES SWAN, Deceased; JAMES C. THOMPSON, Administrator, Appellant, v. WILLAM CUNNINGHAM *et al.*, Objectors, Respondents.

St. Louis Court of Appeals, April 25, 1893.

1. **Administration**: SALE OF DEFENDANT'S EQUITY OF REDEMPTION IN MORTGAGED LANDS: EFFECT ON LIABILITY FOR THE MORTGAGE DEBT. When a debt allowed against the estate of a decedent is secured by a mortgage of land of the decedent, and the equity of redemption is sold by the administrator of the decedent's estate under an order of the proper probate court, the land becomes primarily liable for the payment of the mortgage debt.

2. ———: ———: LIABILITY OF ADMINISTRATOR FOR NEGLECT TO SECURE LIQUIDATION OF MORTGAGE DEBT BY PURCHASER OF EQUITY OF REDEMPTION. Accordingly, if dividends upon the debt are paid by the administrator out of the decedent's estate after such sale of the land, it is his duty to recover the amount of these payments from the purchaser. And where he has refused and failed so to do, notwithstanding that the land was sufficient in value to pay the debt, he should on his final settlement be treated as having made the claim his own, and, therefore, be charged with the amount of the payments which he has thus failed to recover.

3. ———: ———: RIGHT OF PURCHASER ON PAYMENT OF MORTGAGE DEBT. Moreover, if the purchasers pay the debt after purchasing the land, such payment will operate as a satisfaction of the debt so as to debar the purchasers from further dividends thereon from the estate.

4. ———: APPEALS. It is not necessary that all the distributees who file objections to the final settlement of an administrator should join in an appeal from the judgment of the probate court on that settlement.

5. ———: ———. An objection, that the appellants from such a judgment have no interest in the estate, cannot be raised by an objection by the appellee to the introduction of evidence in the appellate court.

6. ———: ———. A surety on demands allowed against the estate of the decedent may join in such an appeal when, though he was not a party to the objections filed to the settlement in the probate court, the order granting the appeal treats him as an objector.

7. ———: ———. The heirs of an intestate may appeal from the judgment on such final settlement, notwithstanding that the estate in course of administration is insolvent.

Appeal from the Cape Girardeau Circuit Court.—HON. H. C. O'BRYAN, Judge.

REVERSED AND REMANDED *(with directions.)*

R. B. Oliver and *J. W. Limbaugh*, for appellant.

Linus Sanford, for respondents.

(1) If the administrator has paid the notes secured by the deed of trust, the estate of Swan has a clear equity to be reimbursed, which the administrator should enforce. He cannot apply the funds now on hand to pay this note. *Greenwell v. Heritage*, 71 Mo. 459; *Welton v. Hall*, 50 Mo. 296; *Jackson v. Magruder*, 51 Mo. 55; *Grayson v. Weddle*, 51 Mo. 523. (2) Any party aggrieved by a decision may appeal; and it is especially provided that the right to appeal shall extend to any person having an interest in the estate under administration. *Estate of McCune*, 76 Mo. 200; *Murphy v. Murphy*, 2 Mo. App. 156; *Gray v. Dryden*, 79 Mo. 106.

BIGGS, J.—The appellant presented to the probate court of Cape Girardeau county his final settlement of the estate of Charles Swan, deceased. Mary Swan, as guardian of the minor children of the decedent, and Louisa T. Cunningham and William Cunningham, her husband, filed exceptions to certain credits and to the proposed order of distribution. The probate court overruled their objections and approved the settlement. Cunningham, acting for himself, his wife and Linus Sanford, filed an affidavit for an appeal to the circuit court, which appeal the court granted. On a

trial *de novo* the circuit court sustained the objections, restated the account and approved the settlement as thus modified. From that judgment the appellant has prosecuted this appeal.

In his annual settlements the appellant had taken credit for $177.75 and 129.04, which sums were paid by him on a demand allowed against Swan's estate in favor of Elizabeth Davis. The final settlement, as presented in the probate court, showed a balance due the estate of $483.85. As this balance was insufficient to pay the demands of the fifth class in full, the appellant asked the court to order the amount to be distributed ratably among the holders of such demands, including that allowed in favor of Mrs. Davis.

The objections made to the final settlement pertain solely to the credits in the annual settlements on account of payments on the demand of Mrs. Davis, and to the proposed final order of distribution which included that demand.

The objections rest on the following state of facts: On January 17, 1877, the deceased executed his note to Greer W. Davis for $400, with David T. Pace and B. F. Wigginton as sureties. For the purpose of securing this note, and also to indemnify Pace and Wigginton against the liability assumed by them, Swan gave a deed of trust on forty acres of land. This conveyance is in the usual form, and, after reciting the execution of the note by Swan as principal and Pace and Wigginton as sureties, it proceeds: "Now, therefore, if the said parties of the first part * * * shall well and truly pay and discharge the debt and interest expressed in said note and every part thereof, when the same becomes due and payable, * * * then this deed shall be void. * * * But should the first parties fail to pay the said note or the said interest or any part thereof, * * * then the whole shall

become due and payable, and this deed shall remain in force, and the said party of the second part, * * * at the request of the legal holder of the said note or said securities or either of them, may proceed to sell the property. * * * And such trustee shall out of the proceeds of said sale pay first the costs and expenses of executing this trust, * * * and next he shall apply the proceeds remaining over to the payment of said debt and interest, or so much thereof as remains unpaid; and the remainder, if any, shall be paid to the said parties of the first part or their legal representatives," etc.

Davis died, and Elizabeth Davis, his executrix, procured the allowance of the balance due on the note, which at the date of the allowance (1881) amounted to $355.52. At the November term, 1881, of the probate court, the appellant asked for an order for the sale of land to pay the debts of the estate. The petition for the order of sale included the forty acres above mentioned, which was therein designed as lot 3, and it contained the following statement in reference thereto: "Which land is incumbered with a deed of trust executed to David T. Pace and B. F. Wigginton by the deceased in his lifetime; and the amount secured is now $355, and is the same allowed in the name of Elizabeth Davis." After referring to another tract of land, which was also incumbered, the petition contains the following: "The said administrator further states that there are no means in his hands that can properly be applied to the redemption of said lands, and besides he does not believe it would be for the best interest of said estate to redeem; therefore, he prays that an order may be entered of record directing him to sell the *equity of redemption* in said lands for the purpose of paying the debts of said deceased at public sale." The order of sale recites the incumbrance on lot 3,

and directed its sale subject to it. In pursuance of this order of sale the appellant on the ninth day of May, 1882, sold lot 3 to James F. Brooks and R. B. Oliver for $10, and, the sale having been approved at the succeeding August term of the probate court, the appellant made and delivered a deed conveying to said purchasers the interest of the deceased in said land. Subsequently Brooks and Oliver conveyed the land by warranty deed to a third party, but they failed and refused to pay the Davis debt. Eight or ten years afterwards, but anterior to the final settlement, Pace and Wigginton advertised the land for sale under the deed of trust to reimburse them for the balance due on the Davis debt, which they had been compelled to pay. In order to prevent liability under his warranty, Oliver paid to Wigginton and Pace the amount which they had been compelled to pay, and stopped the sale of the land. Appellant made no attempt to obtain reimbursement for the estate for the amounts paid by him on the Davis debt, which payments were made subsequently to the purchase by Brooks and Oliver. There was evidence tending to prove that the value of the forty acres of land was in excess of the Davis debt. Under this proof the circuit court not only rejected the contested credits and refused to allow Oliver to share in the final distribution, but it charged the appellant with the balance due on the Davis debt.

Although Mrs. Davis had the right to demand, and it was the duty of the appellant to make, payments on her demand out of the general assets of the estate, yet it does not necessarily follow that the appellant is entitled to credit for such payments. Brooks and Oliver bought the land subject to the mortgage. The petition and order for its sale show that the *equity of redemption only* was sold. After the purchase, the land stood as security to the estate for the satisfaction

of the Davis debt. The right to reimbursement out of the land for any payments thereafter made by the appellant on the Davis demand is beyond question. *Greenwell v. Heritage*, 71 Mo. 459; *Welton v. Hull*, 50 Mo. 296; *Jackson v. Magruder*, 51 Mo. 55. As the assets were insufficient to pay the other debts in full, it was the duty of the appellant to enforce this equity. Having failed and refused to do so, he must be held to have elected to make the claim his own. To hold otherwise would necessitate the extra expense of an administration *de bonis non*, which we do not think ought to be imposed on the creditors or other parties interested in the estate.

The argument that the deed of trust was collateral merely to the principal contract, *i. e.*, the note, and that no liability could arise against the land until Wigginton and Pace should have paid the note, is fallacious The deed of trust expressly states that the land was conveyed to secure the *payment of the note*, and by the terms of the instrument the *holder of the note* in case of default could authorize a sale of the land, and when sold the proceeds were to be applied to the satisfaction of the note.

Brooks and Oliver bought the right to pay the Davis demand and to take the land. As they obtained the immediate possession of the land and received the benefit of its resale, in equity and good conscience they ought in the outstart to have paid or assumed the payment of said demand. They did neither, but ten years afterwards Oliver, to prevent a sale under the deed of trust, thereby protecting himself from liability under his warranty deed, paid to Pace and Wigginton the amount which they had been compelled to pay. The payment by Pace and Wigginton of the balance due on the Davis demand operated in equity as an assignment of the claim to them, thus entitling *them* to

share in the remaining assets of the estate. *Furnold v. Bank*, 44 Mo. 336; *Berthold v. Berthold*, 46 Mo. 557; *Benne v. Schnecko*, 100 Mo. 250. But Oliver did not succeed to the equities in favor of Pace and Wigginton, for the simple reason that, as to the estate, he only did that which he ought in equity to have done in the beginning, that is, paid the Davis demand. It would be a strange equity indeed that would allow him to be reimbursed out of the assets of the estate. The Swan note was paid by this last transaction, and is not entitled to share in the distribution.

We think that the action of the court in rejecting the two contested credits, and in refusing to allow Oliver to share in the final distribution, was clearly right. But upon what principle the appellant is to be charged in his accounts as administrator with the balance due on the Davis demand we cannot conceive. If the estate is protected against its payment, then no one can complain. To this extent only is the estate interested.

The appeal from the probate court was prosecuted by Cunningham and his wife (the latter being a daughter of the deceased) and by Linus Sanford. The order of the probate court granting the appeal recited that the appeal was taken on behalf of Cunningham and wife and "Linus Sanford, a party interested in said estate." Previous to this Sanford was in no way connected with the litigation as a party. The appellant objected to the introduction of any evidence for the reasons: *First.* That all the objectors did not join in the appeal. *Second.* That the present objectors have no interest in the estate. The objection was overruled, and this action of the court is assigned for error.

It was not necessary for all the heirs to join in the appeal. Any one of them could have made the objections in the first instance, and we know of no reason

why one or more of them could not prosecute the appeal without the others joining. Nor is there any merit in the second ground of objection. If the objectors had no interest in the litigation and the evidence so showed, it would have afforded ground for the dismissal of the appeal. As an objection to the admission of any evidence it was untenable, because the court could not know until the evidence was heard whether the objectors were proper parties or not.

On the hearing Sanford testified that he was security on one or two notes for the deceased. This entitled him to join in the objections to the settlement. It is true that the transcript of the proceedings in the probate court does not show that he was a party to the original exceptions, neither does it show that his name was formally entered as an objector, but the order granting the appeal treats him as such, which we think is sufficient. Therefore, the argument, that the objectors had no substantial interest in the settlement of the estate by reason of its admitted insolvency, goes for nothing. We think, however, that the heirs, although the estate was insolvent, had such an interest in the payment of the debts of their father as entitled *them* to carry on the litigation. Other assets of the estate might be discovered, and they should be permitted to protect their interest in view of such a contingency.

On account of the error in charging the appellant with the balance of the Davis demand, we are compelled to reverse the judgment. The judgment will therefore be reversed and the cause remanded with directions to the circuit court to restate the administration accounts of the appellant in conformity with this opinion. We would suggest that the settlement and final order of distribution should be fully set forth in the decree, and that the record as thus made be certified to the probate court for final adjustment. The

costs of this appeal will be equally divided between the appellant and the objectors. It is so ordered. All the judges concur.

S. W. PIERCE, Appellant, v. G. W. LOWDER, Respondent.

St. Louis Court of Appeals, April 25, 1893.

1. **Fraudulent Conveyances:** PREFERENCE OF CREDITORS: INSTRUCTIONS. An instruction in an action involving the validity of a preference by an insolvent by the transfer of property in payment of a debt is erroneous, if there is a conflict in the evidence as to whether more property was transferred than was reasonably necessary to pay the preferred debt, and it directs a verdict upholding the preference as against other creditors without requiring a finding on that subject.

2. **Replevin:** RECOVERY BY DEFENDANT HAVING A SPECIAL INTEREST IN PROPERTY. When the general owner of property replevies it from a person having a special interest therein, such as a sheriff holding it under writs of attachment, and has possession of the property when the cause is tried, the recovery of the defendant, if the verdict is in his favor, is limited to the value of his special interest.

3. **Practice, Appellate:** REMITTITUR OF DAMAGES. When an instruction on the measure of damages is erroneous, and the facts determining the amount of the damages are conceded, the error may be corrected on appeal by *remittitur*.

Appeal from the Barry Circuit Court.—HON. JOSEPH CRAVENS, Judge.

REVERSED AND REMANDED *(nisi)*.

H. C. Pepper and *H. W. Hicks*, for appellant.

(1) Instruction 1 is erroneous for the reason that this was a transfer of property by a creditor in payment of an antecedent debt, and it does not matter whether Haggerty made the sale with the intent to hinder or delay or defraud his creditors, unless the plaintiff knew of and participated in such fraud-

ulent intent or purpose. *Shelly v. Boothe*, 73 Mo. 74; *Albert v. Besel*, 88 Mo. 150; *Frederick v. Allgaier*, 88 Mo. 601; *Morgan v. Wood*, 38 Mo. App. 255. (2) The instruction asked by the plaintiff should have been given. *Frederick v. Allgaier*, 88 Mo. 601, and cases cited.

A. V. Darragh and *Henry B. Davis*, for respondent.

Plaintiff's instruction was properly refused. It deals with the transaction involved as a "sale" by Haggerty to plaintiff. If the transaction was a sale, the proposition of law is not correct. In case of a fraudulent sale it is sufficient if the purchaser knows of the vendor's fraudulent purposes without actually participating in it. *Shelly v. Boothe*, 73 Mo. 76; *Frederick v. Allgaier*, 88 Mo. 602; *Morgan v. Wood*, 38 Mo. App. 264; *Deering v. Collins*, 38 Mo. App. 73. The instruction makes no reference to any indebtedness or any intention to pay it by an assignment of the goods. The instruction as it stood was clearly a bad declaration of law, and properly refused.

Biggs, J.—This is an action of replevin to recover the possession of certain personal property from the defendant, from whose possession it was taken and delivered to the plaintiff. The defendant in his answer, after denying the plaintiff's right to the property, alleged that he held it under several writs of attachment against one C. H. Haggerty, aggregating in amount the sum of $430.

On the trial the issues were found for the defendant, and the value of the property assessed at $550. Thereupon the court entered judgment for the return of the property, or that the plaintiff and his sureties should pay its assessed value, as the defendant should elect. The plaintiff has appealed.

The assignments of error pertain solely to the instructions. The plaintiff asked the following instruction, which the court refused to give: "The court instructs the jury that, although they may believe from the evidence that said C. H. Haggerty sold the goods mentioned in the evidence to plaintiff for the purpose and with the intent to hinder, delay and defraud the creditors of said C. H. Haggerty, yet they will find for the plaintiff, unless plaintiff bought and took possession of said goods with the intent or for the purpose of hindering and delaying or defrauding t! › said creditors."

Plaintiffs' claim to the goods is predicated on a purchase of them from Haggerty in payment of an alleged indebtedness due from Haggerty to him. Whether the goods exceeded in value the alleged debt was a matter of serious conflict in the evidence. Therefore, the instruction was properly refused, because it did not require the jury to find that no more goods were taken than were reasonably necessary to pay the debt.

The defendant asked no instructions. Those given by the court on its own motion concerning the right of recovery were authorized by the evidence, and, when read as a whole, presented the issues fairly to the jury. The jury was told in substance that, if at the time of the alleged purchase Haggerty was justly indebted to plaintiff in the amount claimed, and that for the purpose of paying such debt Haggerty sold and delivered the property in controversy to the plaintiff, and that the goods were reasonably worth the amount of said debt and no more, then the issues should be found for the plaintiff; on the other hand, if the jury found that Haggerty made the sale for the purpose of cheating, defrauding and delaying his other creditors, and that the plaintiff participated therein, or if within a reasonable time after the sale, regard being had to the

nature and situation of the property, the actual possession thereof was not taken by the plaintiff, or if the property was delivered to the plaintiff under an agreement that he was to sell it and pay ten per cent. of the proceeds to Haggerty, then the issues should be found for the defendant.

As to the measure of damages or the extent of the recovery, in the event the verdict was for the defendant, the court gave the following instruction: "The jury are instructed that, if you find for the defendant, you will find the value of the goods replevied herein at the present time, and state the amount in your verdict." The jury assessed the value of the property at $550.

Although the debts of the attaching creditors were undisputed, and although the plaintiff admitted that the writs of attachment were valid, yet this instruction was erroneous in so far as it was incomplete. The jury should have been instructed to find not only the value of the goods at the date of trial, but also the value of the defendant's special interest in the property, in the event that such special interest was less than the value of the goods. It has been the law of this state since the decision of *Dilworth v. McKelvy*, 30 Mo. 149, that, when the general owner replevies property from a person having a special interest therein, and the property is in the plaintiff's possession when the cause is tried, the defendant's recovery is limited to the amount of his special interest. *Gentry v. Templeton*, 47 Mo. App. 55; *Boutell v. Warne*, 62 Mo. 350; *Dougherty v. Cooper*, 77 Mo. 528; *Kerr v. Drew*, 90 Mo. 147. This error would necessarily lead to a reversal of the judgment and a remanding of the cause, if there were any controversy as to the extent of the defendant's special interest. That interest, however, is conceded by the testimony to have been been $434 at the date of trial. Where an instruction on the measure of damages is

erroneous, and the facts constituting the element of damages are conceded, the error may be corrected on appeal by *remittitur*.

If the defendant will within twenty days remit the sum of $116, which is the difference between the amount of the judgment and the amounts due on the demands of the attaching creditors at the time of the trial, the judgment will be affirmed for the residue; otherwise the judgment will be reversed, and the cause remanded. All the judges concur.

JOHN MESSICK, Appellant, v. WILLIAM FAIRBURN, Respondent.

St. Louis Court of Appeals, April 25, 1893.

Practice, Appellate: BILL OF EXCEPTIONS. In order to entitle an appellate court to look into the evidence, and review rulings thereon or instructions founded thereon, the bill of exceptions must either contain the evidence or have a copy thereof attached to it when it is signed.

Appeal from the Lawrence Circuit Court.—HON. M. G. MCGREGOR, Judge.

AFFIRMED.

Cloud & Davies, for appellant.

William B. Skinner and *Henry Brumback*, for respondent.

BIGGS, J.—The plaintiff sued before a justice of the peace to recover $200, alleged to be due to him from the defendant as commissions for the sale of a farm. The defendant had a judgment before the justice, and on a trial *de novo* in the circuit court the plaintiff was again defeated. He has brought the case here, and

complains of the defendant's instructions and the action of the court in excluding certain evidence offered by him.

It is impossible to review the assignments of error upon the transcript of the record before us. The evidence taken at the trial was not properly preserved in the bill of exceptions. The original bill of exceptions, which we have before us, does not contain the evidence; nor was the evidence set forth in a separate paper and attached to the skeleton bill; nor is there anything to show that the judge had the evidence before him at the time he signed the bill. The bill merely calls for the insertion of the stenographer's notes of the evidence. The clerk certifies that the paper was filed in that condition, unaccompanied by any other documents, and that the paper purporting to be the stenographer's copy of the evidence was filed in his office some time afterwards.

It has been decided by this court (*Gorwyn v. Anable*, 48 Mo. App. 297), and by the supreme court (*State ex rel. v. Wear*, 101 Mo. 414; *Crawford v. Spencer*, 92 Mo. 510; *Tipton v. Renner*, 105 Mo. 1) that, to entitle an appellate court to look into the evidence, it must either be inserted in the bill of exceptions or it must appear that a copy of it was attached to the bill at the time of the signing.

Rejecting the evidence, nothing is left for review. No questions can arise on the pleadings or the form of the judgment, and we cannot consider the instructions when there is no evidence. Therefore, the judgment of the circuit court will have to be affirmed. All the judges concur.

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THE STATE OF MISSOURI *ex rel.* JOHN C. MOORE, Prosecuting Attorney, Appellant, v. T. P. EDEN *et al.*, Respondents.

St. Louis Court of Appeals, April 25, 1893.

1. **Division of School District:** POSTING OF NOTICE OF PROPOSED DIVISION. Compliance with the statutory requirements for the posting of notice for a proposed division of a school district is a condition precedent to the validity of such division.

2. ———: ———: SUFFICIENCY OF NOTICE. The petitions for two different proposed divisions of a school district, each signed by the requisite number of qualified voters and then by the clerk of the district in his official capacity, were attached to the clerk's notice of the annual meeting, and this notice, among other things, stated that the propositions embodied in these petitions would be submitted to the voters at that meeting. *Held*, that, in determining the validity of a division in accordance with one of these propositions, the two petitions should be considered as a part of the notice.

3. ———: RECORD OF ANNUAL MEETING. While it is the better practice for the clerk of a school district to enter upon the records of the district an exact copy of the record of the annual meeting kept by the secretary, inclusive of the signature of the chairman of that meeting, his failure to do so will not, in the absence of any evidence attacking the regularity of the proceedings, render his record inadmissible in evidence.

4. ———: NOTICE FOR FIRST MEETINGS IN NEW DISTRICTS. It is not a condition to the validity of the division of a school district that notice for a first meeting in each of the new districts should be posted in accordance with the provisions of section 7977 of the Revised Statutes. The corporate existence of the new districts dates from the meeting whereat they were substituted for the old district.

Appeal from the Scotland Circuit Court.—HON. BEN. E. TURNER, Judge.

AFFIRMED.

John C. Moore and *John D. Smoot*, for appellant.

(1) The notice of annual meeting introduced in evidence is insufficient to give the annual meeting jurisdiction to make the division of the district as it is alleged was made. *State ex rel. v. Young*, 84 Mo. 90; *Mason v. Kennedy*, 89 Mo. 22; *Perryman v. Bethune*, 89 Mo. 158; *Fluty v. School District*, 4 S. W. Rep. 278; *State ex rel. v. Riley*, 85 Mo. 156; Revised Statutes, 1889, secs. 7970, 7972, 7977, 7979, 8012; *School District v. School District*, 94 Mo. 612; *State v. Evans*, 83 Mo. 319; *Stamper v. Roberts*, 90 Mo. 683; *Whitney v. Platt Co.*, 73 Mo. 30; *Dougherty v. Brown*, 91 Mo. 26; *Railroad v. Young*, 96 Mo. 39. (2) The record of the annual meeting introduced in evidence is incompetent as a record, and insufficient to show a division of the district, or to operate as a division. *Maupin v. Franklin Co.*, 67 Mo. 327; *Johnson v. School District*, 67 Mo. 319; *Dougherty v. Brown*, 91 Mo. 26; *Railroad v. Young*, 96 Mo. 39; *Ellis v. Railroad*, 51 Mo. 200; *Jefferson Co. v. Cowan*, 54 Mo. 234; *Whitley v. Platt Co.*, 73 Mo. 30; *Zimmerman v. Snowden*, 88 Mo. 218; *Anderson v. Pemberton*, 89 Mo. 61; *Colvill v. Judy*, 73 Mo. 615; *Railroad v. Campbell*, 62 Mo. 585; *Fisher v. Davis*, 27 Mo. App. 321; *Blize v. Castlio*, 8 Mo. App. 290. (3) There was no proper or competent evidence of the organization of the new school districts offered or introduced. *Perryman v. Bethune*, 89 Mo. 158; *School District v. School District*, 94 Mo. 612; *Mason v. Kennedy*, 89 Mo. 23; *Whitney v. Platte Co.*, 73 Mo. 30; *Dougherty v. Brown*, 91 Mo. 26; *Railroad v. Young*, 96 Mo. 39; *Ellis v. Railroad*, 51 Mo. 200: *Jefferson Co. v. Cowan*, 54 Mo. 234; *Zimmerman v. Snowden*, 88 Mo. 218; *Anderson v. Pemberton*, 89 Mo. 61; *Colville v. Judy*, 73 Mo. 615; *Railroad v. Campbell*, 61 Mo. 585; Revised Statutes, secs. 7970, 7972, 7977, 7979, 8012, 8015.

Mudd & Wagner, for respondents.

BOND, J.—This is an information in the nature of a *quo warranto*, filed by the prosecuting attorney of Scotland county, to determine the validity of certain proceedings for the division of a certain school district into two new districts, and to inquire into the right of the persons exercising the offices of school directors in the two school districts formed by such division to hold and enjoy such offices and franchises. The relator on appeal from the judgment of the circuit court assigns three grounds of reversal: *First.* Insufficient notice of the annual meeting, when the division was had. *Second.* Insufficient record of the annual meeting to show a division. *Third.* No competent evidence of the organization of the new school districts.

As to the first assignment: Two petitions were addressed to the board of directors and the district clerk of the school district which it was therein proposed to divide, signed by the requisite number of qualified voters and describing in each petition the boundaries of the proposed division. The district clerk thereupon posted the following notices at the places required by law:

"Annual School Meeting.

"Notice is hereby given to the qualified voters of district number 2, township number 61, range 11, county of Scotland, state of Missouri, that the annual school meeting of said district will be held on Tuesday the seventh day of April, 1891, commencing at two o'clock P. M., and, among other things specified by law, the following will be proposed and considered:

"*First.* To choose by ballot one director. *Second.* To determine by ballot the length of school term. *Third.* To decide by ballot a proposition to divide tho

district as requested in petition. *Fourth.* To vote by ballot to raise $600 to enlarge and improve the schoolhouse now situated in the district. *Fifth.* To choose by ballot one road overseer for the above district. *Sixth. To vote by ballot to divide district on March 14, 1891, township line by petition number 2.*

"W. C. McManama, Clerk."

The italicized portion of the notice was added by the district clerk, and posted March 20, 1801.

Annexed to said notice below was a petition for division, dated March 14, 1891, proposing a plan of division with boundaries and signatures as required by law. Tacked at the side of said notice was a petition for division undated, proposing the township line as a boundary, signed as required by law. Each of these petitions as thus annexed to said notice was signed, after setting out their respective contents and signatures of qualified voters thereto, as prescribed by law, by "W. C. McManama, clerk" of the old school district.

The evidence seems to indicate that the part of the foregoing notice not italicized and the subjoined petition were posted up on or about March 14, 1891. It further shows that all of said notices and both petitions were posted up and signed in their final state on or about March 20, 1891. As there is no dispute that such posting would have been sufficient in point of time, the only question on this assignment of error is whether such posting was sufficient in point of substance to warrant the subsequent division of the old school district into the new ones proposed in the aforesaid subjoined petition.

It is competent to divide school districts by the observance of certain statutory conditions. Revised Statutes, 1889, sec. 7972. One of these conditions, (and the one relevant to this assignment of error) is

that "it shall be the duty of the district clerk of each district affected, upon the reception of a petition desiring such change, and signed * * * to post a notice of such desired change in at least five public places in each district interested fifteen days prior to the time of the annual meeting; and the voters when assembled shall decide such question by a majority vote of those who vote upon such proposition."

We have no doubt that the statutory notice thus prescribed is mandatory and jurisdictional, and that a division of school districts made at an annual meeting not within the scope of an antecedent notice given for the time, and at the places, and in the manner fixed by law, is void. *School District v. School District*, 94 Mo. 612, 618; *Mason v. Kennedy*, 89 Mo. 23; *State ex rel. v. Young*, 84 Mo. 90. In the case of *School District v. School District, supra*, neither the petition nor the notices showed the change desired, "or of what territory the new district was to be composed." On these facts the court held: "These notices must necessarily be as comprehensive as the proposition to be voted on, and must inform the voter what change it is proposed to make in the boundaries of his district; this is the one thing that he is personally interested in knowing. *Mason v. Kennedy*, 89 Mo. 22. And unless the notice is such as to give this information, it is no notice at all. It is not sufficient that the voters be notified that at the annual meeting they will be called upon to vote upon the question whether or not *a* new district shall be formed, and *a* change made in the boundary lines of the old districts; they must be notified of *the* change proposed, of what territory the new district is to be composed, of what change is to be made in the boundaries of the old ones." The important question, therefore, is whether or not the record shows that these tests as to what a notice should contain were met by the

notices introduced in evidence. We are of opinion that the notice (if it be taken as comprehending the two petitions annexed below, and at its side, both of which were concluded by the signature of the clerk) complied with all the conditions prescribed by law for a valid notice of the contemplated formation at an annual election of two new school districts out of the territory of a former school district.

Nor do we understand appellants as controverting that each of the annexed petitions set forth in itself an explicit showing of all the averments which should be made in such cases; nor that said statements contained in such petition would be sufficient to authorize the annual meeting to take action, provided they had been set forth under distinct heads of the notice to which they were attached.

The proposition, therefore, is whether or not the notice with two petitions attached and the signature of the clerk both to the notice and the attached petitions was anything more than one paper in the eye of the law. We think a negative answer to this question is only putting a reasonable construction on the papers so attached together, and so signed by the officers whose duty it was to do the posting. Revised Statutes, 1889, sec. 8015. We are confirmed in this view from the fact that the actual appearance of the matter thus posted up bore evidence of its oneness, and necessarily acquainted any one reading it with its entire connection and dependence, by the recitals in the third and sixth specifications of the things to be considered at the annual meeting, that two propositions set forth in petitition number 1 and petition number 2 would be decided by ballot. It was impossible to read the specifications of the business to be considered at the annual meeting without reading these two items, and it was equally impossible not to be informed of the contents

of both the petitions without turning away from their inspection, since they were pasted and tacked to the notice and made a part thereof by the signature of the clerk. That in themselves they contain more than was necessary, if an abstract of their statement had been inserted in the form of a notice, is unquestioned. We therefore rule this point against appellant.

The second assignment of error is that the record of the annual meeting, whereat the division of the school district was voted, was insufficient, *first*, because the proceedings before record were not signed by the chairman; *second*, in not setting forth of record the posting of notices, and not showing by itself what was done.

When the record of *that* meeting was offered in evidence, the plaintiff objected to it on the ground that it does not purport to be the proceedings of the annual meeting *duly approved and attested by the signature of the chairman of the board*, and because it was not the best evidence. These objections were overruled, and the plaintiff excepted and still excepts. This objection rests upon a misconstruction of section 7979 of the Revised Statutes of 1889. That section provides that the annual meeting shall elect a chairman and *secretary*, who shall keep an accurate record of the proceedings of the meeting, which, when duly approved and attested by the signature of the chairman, the clerk shall enter upon the record of the district. The record offered in evidence was not the record of the proceedings of the annual meeting kept by its secretary, but the record was finally entered by the *clerk* of the district upon its books under the provisions of section 8012 of the Revised Statutes of 1889. That record recited that the proceedings of the annual meeting were read and approved, which, on the presumption of right acting, meant that they were approved in a lawful

manner. The statute does not require that the records of the *district* should be approved by the chairman of the board, nor does it require that the record of the proceedings of the annual meeting should be approved by the chairman of the *board*. The objection, therefore, was properly overruled. As the record evidence was sufficient to show that a vote was taken and resulted in the proposed division of the district by a vote of thirty-two to three, and the proceedings of the meeting were regular in other respects, the oral evidence admitted, tending to show that the proposed division was fully understood at the meeting and that the meeting was regular in all respects, was mere surplusage, and its admission could not constitute reversible error. We do not wish to be understood as holding that it is not the better practice for the district *clerk* in these cases to spread upon the record an identical copy of the proceedings of the annual meeting as he receives them from the *secretary* of that meeting, inclusive of the signature of the chairman of that meeting, but we do mean to say that his failure to do so cannot, in the absence of any evidence attacking the regularity of the proceedings, render the record inadmissible as evidence.

The third assignment of error is, that there was no proof that notices of the first meeting of the two new school districts was given as required by section 7977, *supra*. This section in effect prescribes that it shall be the duty of the voters (newly created districts) to assemble "within fifteen days *after the formation* thereof" at a point designated by notice, signed by two resident freeholders and posted in at least five public places, and such meeting "shall be invested with the same powers and be conducted as prescribed for the first annual district meeting" for school districts. This section does not condition the corporate existence of

the newly created districts upon a complianee with its regulations as to the calling of the meeting. It merely defines the steps to be taken in calling such a meeting, and the scope and power of the meeting after it is thus called. The case of *Perryman v. Bethune*, 89 Mo. 158, 162, cited by appellants, is an adjudication upon the necessity of notices provided for in a different section (7970). The section construed in that case relates to the steps to be taken to *create* a corporation; hence it was held, with reference to the notices required, that "proper notices given by qualified persons are conditions precedent to the *creation* of these corporations under the general law. Whether these conditions have been complied with is a proper subject of inquiry when the corporate existence is put in issue."

In the case at bar the records of the two newly created school districts show that each held a first meeting within the statutory time (fifteen days) after their formation; that each elected directors, determined the rate to be levied for school purposes and length of term; that they reported divisions and plat of each new district to the county court, and were designated by that body as numbers 6, 64, 11, and numbers 2, 64, 11, respectively; and that schools were conducted and expenses paid by each district, and one of the districts issued its bonds for a loan of $1,000 to build a school house.

On the twenty-sixth day of September, 1891, by and through the advice of the county court and the prosecuting attorney, the relator herein, and of the treasurer, a special meeting was called, and a warrant ordered and issued for $140 on the teachers' fund, and $29.58 on the incidental fund in favor of new district number 6, being its just part of moneys belonging to the old original district number 2, which was divided at last annual meeting. The state had appor-

tioned and paid to each of said new districts the public money to which the enumeration entitled them. The enumeration of new district number 2 was 62, and the valuation thereof $39,900, and the enumeration of number 6 was 48 and the valuation $41,860.

Appellant does not deny these facts, showing that the two newly created districts are beneficently at work, but he claims that because there was not preliminary proof that notices of the first meetings of these districts had been given (Revised Statutes, 1889, sec. 7977), therefore, the subsequent records of such meetings are inadmissible in evidence. We cannot sustain this theory. We may concede that such notice was proper for the calling of the first meeting (and in the records of the meeting held by district number 2, 64, 11, is an affirmative showing that the notices were given); still there is no warrant for the contention that the records of such meetings are not evidence of what was done thereat. The binding force or legal efficacy of the transactions at a meeting held without notice is one thing, and the proof of the actual proceedings of such meetings is another thing. The competency of this evidence is not affected by want of notice, which merely goes to the legal effect of the meeting. Again, the corporate existence of these two districts was not evidenced from their first meetings, but dates back to prior meetings wherein they were substituted for the old school district. The language of the statute is, that, after the voting for division, the "district shall be deemed formed." Revised Statutes, 1889, sec. 7972.

In this case the corporate existence and organization of these two school districts has been recognized by the state in disbursing its public money for educational purposes. There was a pressing necessity for their organization, owing to the number of children

and the want of room for them in the existing schoolhouse. They have been of great advantage to the people of Scotland county for two years, and no complaint is made of the faithfulness or fitness of respondents in the discharge of their trust. We are not, therefore, inclined on account of the irregularities set forth to disturb the judgment of the trial court. It is, therefore, affirmed. All the judges concur.

M. D. WELLS & COMPANY, Respondents, v. THE THOMPSON MANUFACTURING COMPANY *et al.*, Defendants; JOHN FOLEY, Stockholder, Appellant.

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168s 643
168s 645

St. Louis Court of Appeals, April 25, 1893.

1. **Manufacturing Corporations:** LIABILITY OF SHAREHOLDERS. The failure of the corporators of a manufacturing corporation to pay one half of the capital stock, as required by section 2768 of the Revised Statutes, will not avail a shareholder as a defense to a proceeding against him by a creditor of the corporation to enforce his liability on unpaid shares.

2. ———: ———: ADMISSIBILITY OF STOCK BOOK OF CORPORATION AS EVIDENCE. The stock book of the corporation is held to be admissible in evidence in such a proceeding, not for the purpose of showing that the person proceeded against was a stockholder of the corporation, but, that appearing *aliunde*, for the purpose of showing that he appeared as such stockholder on the books of the corporation, and was the proper person to proceed against.

3. ———: ———: OVER-ISSUE OF STOCK BY CORPORATION. An arrangement by which a stockholder releases his shares to a corporation may be valid as between himself and the corporation, and yet invalid as to creditors of the latter. Such a surrender and the reissue of the shares by the corporation to another person, do not create an overissue, and will not constitute a defense to such other person in a proceeding against him to enforce his liability on these shares.

4. ———: ———: ———. But *held* by BOND, J., dissenting, that the evidence in this cause failed to establish such surrender and reissue, and that, the shares issued to the defendant being therefore an overissue of stock, he could not be held by creditors of the corporation for the amount remaining unpaid thereon by him.

Appeal from the Greene Circuit Court.

AFFIRMED *(Bond, J., dissenting.)*

White & McCammon, for appellant.

Among the condition of the defendant's subscription was one that the capital stock should all be *bona fide* subscribed *and one half thereof paid up in lawful money*. Revised Statutes, 1889, sec. 2768. This requirement is declared by the authorities to be condition precedent, the performance of which must be shown before the subscriber shall become a stockholder, or liable for his subscription. *Haskell v. Worthington*, 94 Mo. 560, 572, 573; *Railroad v. Swartz*, 53 Cal. 110; *Wells & Co. v. Jones*, 41 Mo. App. 1, 13; Waite on Insolvent Corporations, sec. 608; *Hale v. Sanborn*, 20 N. W. Rep. 97; 2 Morawetz on Private Corporations [2 Ed.] secs. 78, 79, pp. 737, 740; 2 Beach on Private Corporations, secs. 532, 534, 535. (2) The stock book of the company was not proper evidence against the defendant. Such books, while they are sometimes admissible in evidence against stockholders, cannot be admitted against the person who denies that he is a stockholder. Waite on Insolvent Corporations, secs. 603, 606; 1 Morawetz on Private Corporations [2 Ed.] secs. 75, 76; Thompson on Liability of Stockholders, sec. 371. The books are not evidence against one whose name appears upon them without his consent. *Simmons v. Hill*, 96 Mo. 687.

James R. Vaughn and *Hefferman & Buckley*, for respondents.

The evidence in this case shows that the corporation was properly organized and all of its capital stock

subscribed. The articles of association which were of record and to which only creditors are required to look so showed, and after it been incorporated the defendant, either with actual knowledge, or with knowledge which he is conclusively presumed to have had as against subsequent creditors, took his stock and has always held it. *Schloss v. Montgomery Trade Co.*, 13 Am. St. Rep. 57; *Shierenberg v. Stephens*, 32 Mo. App. 327; *Kansas City Hotel Co. v. Hunt*, 57 Mo. 126; 2 Beach on Private Corporations, sec. 545. A stockholder may be liable to creditors under circumstances under which the corporation itself could not collect the subscription. *Ollesheimer v. Thompson Mfg. Co.*, 44 Mo. App. 172.

ROMBAUER, P. J.—The plaintiffs recovered a judgment against the defendant company, on which an execution was issued and returned *nulla bona*. They thereupon moved for an execution against the defendant Foley under the provisions of section 2517 of the Revised Statutes of 1889. Upon the trial of this motion, there was evidence tending to show that Foley held two shares of stock of the par value of $50 each in the insolvent corporation, on which he had paid $10 and no more, and that he had executed his notes to the corporation for the residue. The plaintiffs produced and surrendered the notes upon the trial of the motion. The court thereupon ordered execution to issue against Foley for $90, and he took an appeal from this order.

The errors assigned are numerous, but may be summarized as follows: *First.* That the subscription for the stock was conditional, and that a non-compliance with the conditions upon which it was made rendered the subscription nugatory. *Second.* That the court erroneously admitted the stock book of the

defendant corporation in evidence. *Third.* That the judgment is against the evidence.

Upon the trial of the motion, it appeared that the corporation was formed with a capital stock of $50,000, divided into one thousand shares of $50 each; but that, although the stock was all subscribed for, yet only a very nominal amount thereof was paid for in cash or its equivalent to the corporation. The defendant Foley claims that the payment of the fifty per cent. of the subscription by the subscribers was a condition precedent to a valid organization of the company, and that, such payment not being made, the company was never organized. Revised Statutes, 1889, sec. 2768. This argument loses sight of the fact that such a defense is inadmissible even as against the corporation itself or one claiming through it (*McDermitt v. Donegan*, 44 Mo. 85; *Joy v. Manion*, 28 Mo. App. 55), much less in a proceeding by a creditor who may hold the defendant liable even in cases where the corporation could not. *Schaeffer v. Home Ins. Co.*, 46 Mo. 248; *Skrainka v. Allen*, 7 Mo. App. 434; s. c., 76 Mo. 384, 392; Morawetz on Corporations, secs. 767, 818. This disposes of the first error assigned.

The stock book of the corporation was admissible in evidence, not for the purpose of showing that the defendant Foley was a stockholder of the corporation, but for the purpose of showing that he so appeared on the books of the corporation and was the proper person to proceed against, if it was shown *aliunde* that he was a stockholder. It was shown *aliunde* that he was a stockholder by showing that he bought two shares of stock in the corporation, and received certificates therefor from the secretary, which he still held when the execution against the corporation was returned *nulla bona*. The second assignment of error, therefore, is equally untenable.

We might disregard the third assignment as being too vague, but will dispose of it, since by the cases cited under that head the defendant evidently intended to raise the proposition, that the two shares issued to him were an over-issue of stock, and hence could not constitute him a stockholder. Morawetz on Corporations, sec. 840; Beach on Corporations, sec. 733. The question arises in this manner. It appeared from the stock book of the company offered in evidence by the plaintiff that the names of the original subscribers appeared thereon for the full amount of the capital stock of the corporation, and in addition thereto the names of sixty or seventy other persons who had subsequently taken stock to the amount of $7,800 in the aggregate. Among the latter the appellant's name appeared as that of the stockholder of two shares. Had the proof stopped there it would have raised a doubt as to the validity of this judgment, because it would have had a tendency to show an over-issue of stock beyond the amount which the corporation was authorized to issue, the over-issue consisting of these $7,000 or $8,000 in shares. But the defendant read the deposition of the secretary of the corporation, from which it appeared that for $23,750 of the stock taken by the original subscribers no certificates had ever been issued, or that, if issued, they had been surrendered to the corporation in conformity with a previous understanding.

Now an arrangement by which a stockholder releases his shares to the corporation may be valid as between himself and the corporation, and yet invalid as to creditors who seek to enforce his statutory liability. Thompson's Liability of Stockholders, sec. 205. Such surrender and reissue, therefore, create in no sense an over-issue. If the shares were surrendered to the corporation under a contract valid between it and the shareholder, and it sold them to another share-

holder, he became liable to creditors *pro tanto*. Whether the former shareholder became discharged *pro tanto* must depend, as we decided in *Ollesheimer v. Thompson Mfg. Co.*, 44 Mo. App. 172, upon the completeness of the substitution and the good faith of the entire transaction. There is, therefore, no merit in this assignment. Seeing no error in the record, the judgment is affirmed. Judge BIGGS concurs; Judge BOND dissents.

BOND, J. *(dissenting.)*—I am constrained to dissent to the disposition of this case made by my associates. The result reached by the majority of the court appears to be upon their construction of the testimony of Frizzell, the secretary of the corporation. I cannot concur in that construction. My understanding of his testimony and the facts in this record will appear in the course of this opinion.

This was a motion (Revised Statutes, 1889, sec. 2517,) to charge appellant as the holder of unpaid stock in the Thompson Manufacturing Company. This proceeding is in the nature of an independent and original action, based upon motion and notice thereof to the stockholder. This notice has been held to be "*in substance and effect a process of garnishment.*" On its trial two issues are presented, to wit, "whether the person sought to be charged is indeed a stockholder, and if he is indeed indebted to the insolvent corporation." *Wilson v. Railroad*, 108 Mo. 588, 602. The proof of both of these issues necessarily devolves upon the plaintiff in the execution sought to be enforced against a stockholder.

Under the facts in this record the right of the execution creditor to recover is dependent on his proof of the first issue. This question is raised both in the motion for a new trial and the errors assigned on appeal. The general rule is, that "shares issued by a corporation

in excess of the amount authorized by its charter or articles of association are legally null and void, although the holder may have acted as a shareholder. No person would be entitled to give the company credit on the faith of such excessive issue of shares, because all persons dealing with the company would be bound at their peril to take notice of the terms of its charter or articles of association." 2 Morawetz on Private Corporations, sec. 849. To the same effect is Beach on Private Corporations, sec. 494, where it is said: "And a note, the consideration whereof is stated therein as being shares of the capital stock, is held to be non-collectible if there has been an over-issue of stock; inasmuch as it cannot be shown but that the shares delivered to the purchaser were among those illegally issued."

In the application of these principles of law to the facts in this proceeding on appeal, this court has the same power to make findings which it would have in a case in equity. *Ollesheimer v. Mfg. Co.*, 44 Mo. App. 172, 176; *Erskine v. Loewenstein*, 82 Mo. 301, 305. From the evidence, I find the fact to be that the Thompson Manufacturing Company was incorporated on May 19, 1888, with a capital stock of $50,000, divided into one thousand shares belonging to the several persons named in its articles of association. I find further from the testimony of the secretary that certificates of stock for the full amount so subscribed by said incorporators were either delivered to them, or retained in his possession, and have never been canceled nor annulled by the corporation. I also find that the recital in the articles of association that one half of the sum therein subscribed has been paid was substantially untrue. I further find that, at the trial of this proceeding the stock book of said Thompson Manufacturing Company disclosed that the list of its shareholders embraced all of its incorporators for the full amount subscribed by

each, and sixty or seventy other persons who had subsequently subscribed for stock to the amount of $7,000 or $8,000 in the aggregate, and among these latter appellant's name as that of the holder of two shares. From these findings and the facts in the record, I conclude that the Thompson Manufacturing Company made an over-issue of stock, and that the two certificates handed appellant on May 25, 1888, as shown by his receipt, were a part of such over-issue; that such stock is void, and that it confers on the holder no rights, and subjects him to no liability. This is not only the effect of the evidence in this case, but is in accordance with the direct adjudication of this court in *Ollesheimer v. Mfg. Co., supra.* There James Abbott, one of the original incorporators of said company, was adjudged liable *in solido*, by virtue of his signature to the articles, to a creditor of said corporation moving against him as a stockholder for his unpaid subscription; despite the fact that said Abbott had never received his certificate as a stockholder, and the further fact that the evidence tended to show that this subscription was to be transferred to other solvent citizens of Springfield, whom he had induced to subscribe for stock in the corporation, and that the officers of the corporation had *orally* agreed to take these other citizens as subscribers in his stead, and had further agreed that his stock should be canceled by this substitution. It was there said: "But there was no evidence from the records of the defendant corporation or otherwise of any corporate action on the part of that corporation by which such substitution was made or attempted. This evidence, as a matter of law, disclosed no defense on the part of the defendant stockholder. Nothing is more firmly settled in the law in this state and elsewhere than that a person who with

others subscribes to the stock of a corporation must perform his contract according to its form and substance by paying for his shares the full value stated in the contract of subscription, either in money or in money's worth."

In the present proceeding there is not a particle of evidence that the certificates issued to the appellant were in *substitution* for those of any one of the original subscribers, who had together taken *all* the shares (*i. e.*, $50,000) which the corporation could lawfully issue. The stock books showed an excess of stock issue ranging between $7,000 and $8;000 of stock. The testimony of the secretary, while it disclosed an *intention* on the part of the original incorporators to use some of their subscription to cover stock which it was expected would be subscribed in Springfield, wholly fails to show that any part *was* so used, and least of all that Foley's certificate was given in lieu of that of any other subscriber. The proper place for such facts to be noted is on the corporate records. "Persons whose names are found to be registered thereon as holders of the stock are presumed to be the regular and lawful owners of the shares and as such liable for the company's debts." Beach on Private Corporations, sec. 125.

In the case at bar the stock book affirmatively showed that the original stock subscribers were still stockholders in the company of *all* of its authorized shares. Nor is there in this record any evidence whatever that any part of the stock or stock subscription of any one of the stockholders has been transferred to appellant; on the contrary the evidence and receipt of appellant disclosed that his dealing was *directly* with the corporation. The unauthorized act of the secretary in issuing stock to appellant and others beyond the limit fixed by law created no obligation against the

holders of the overissued shares, and did not make them in law stockholders.

I, therefore, hold that the judgment holding appellant as a stockholder should be reversed.

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DAVID BAILEY, Appellant, v. THE A. SIEGEL GAS FIXTURE COMPANY, Respondent.

St. Louis Court of Appeals, April 25, 1893.

1. **Instructions:** SUBMISSION OF SEVERAL CAUSES OF ACTION. When several causes of action sued upon by the plaintiff are before the jury, the instructions authorizing a recovery by him should indicate specifically to which of these causes of action they are severally addressed, and should not direct a finding generally for the plaintiff upon a given state of facts.

2. **Trespass to Realty:** LANDLORD'S RIGHT OF ACTION. A landlord can maintain an action of trespass for injury to the freehold committed by a stranger while his tenant is in the possession of the land.

3. ———: MEASURE OF DAMAGES. *Held*, in the course of discussion, that the measure of damages for a trespass to land and asportations injurious to the freehold is the consequent depreciation in the value of the freehold.

Appeal from the St. Louis City Circuit Court.—HON. JAMES E. WITHROW, Judge.

REVERSED AND REMANDED.

Christian & Wind, for appellant.

(1) All the permanent improvements made by lessees for purpose of fitting establishment as a Russian bath house became the property of the plaintiff. *State to use v. Marshall*, 4 Mo. App. 29; *Goodin v. Hall Ass'n*, 5 Mo. App. 289; *Donnewald v. Turner, etc., Co.*, 44 Mo. App. 350; *Rogers v. Crow*, 40 Mo. 91; *State Savings Bank v. Kercheval*, 65 Mo. 682; *Thomas v. Davis*, 76 Mo. 72. (2) As the taking of the fixtures

was an injury to the freehold, the landlord can sue, although the tenant was in the actual possession. 3 Wait's Actions & Defenses, pp. 393–394; Ewell on Fixtures, pp. 323, 428–429; Waterman on Trespass, sec. 950; 2 Woodfall on Landlord & Tenant [14 Ed.] star p. 632; *Davis v. Nash*, 32 Mo. 411. The court therefore erred in confining recovery to damages done after plaintiff had taken possession. (3) The verdict is manifestly inadequate and should be set aside. *Watson v. Harmon*, 85 Mo. 443.

T. J. Rowe, for respondent.

(1) If the court erred in giving instruction number 3, it was led into the error by plaintiff's action in asking a similar instruction. *Loomis v. Railroad*, 17 Mo. App. 353; *Noble v. Blount*, 77 Mo. 235; *Walker v. Owen*, 79 Mo. 568; *Holmes v. Braidwood*, 82 Mo. 617; *Davis v. Brown*, 67 Mo. 313. (2) There is no evidence tending to prove that plaintiff had any title to the personal property put in building, 611 Lucas avenue, by Reinfeld; and the lease, dated November 1, 1886, only gave plaintiff a title to the improvements made by Reinfeld when he extended the building to the alley. The steam pipes, boiler, bath tubs and wash-stands were not improvements on the building and did not revert to lessor after the termination of lease. *Baldwin v. Merrick*, 1 Mo. App. 281; *Dryden v. Kellogg*, 2 Mo. App. 87; *Ambs v. Hill*, 10 Mo. App. 108; 13 Mo. App. 585.

ROMBAUER, P. J.—This is an action of trespass on realty. The petition contains two counts, one for wrongfully carrying away certain property attached to the freehold, and the other for forcibly entering the premises and injuring them and carrying away certain other property. The jury under the instructions of

the court found a verdict for the defendant on the first count, and a verdict for $25 for the plaintiff on the second count. The plaintiff appeals, and assigns for error the refusal of his own instructions, illegal instructions given by the court of its own motion, and the inadequacy of the verdict.

The testimony tended to show the following facts. The plaintiff let the premises in question to one Reinfeld for a period of five years for the purposes of a Russian bath establishment. The lease contained this provision: "The lessees agree to immediately expend not less than $500 in improvements on said building and premises, and all said improvements to belong to lessor or his assigns at the termination of the lease." The lessee made material improvements on the premises by extending the building, subdividing it by partitions, and putting in fixtures to fit it for a Russian bath house. These fixtures were put in by the defendant, but as to whether they were permanently attached to the freehold the testimony is conflicting. The lease had run for about six months, when a fire broke out in the premises and materially injured their interior. The lessee thereupon surrendered the lease to the plaintiff, but delivered the keys to the defendant to enable the latter to remove the fixtures it had placed into the premises. The defendant had removed part of the fixtures, when the plaintiff took actual possession of the house and locked it up. The defendant afterwards forcibly broke into the house and removed the residue of the fixtures. The two counts in the petition have reference to these two entries by the defendant, one occurring before and the other after the plaintiff had taken actual possession. Touching the question, whether in the removal of these fixtures the freehold was injured, the testimony was conflicting.

We deem it unnecessary to set out the plaintiff's instructions in full. It suffices to say that they were properly refused, because they did not address themselves specifically to the complaints of either count, but concluded with the statement that the finding of certain facts by the jury entitled the plaintiff to a recovery. The instructions were furthermore erroneous in stating to the jury the plaintiff's measure of damages. There was, therefore, no error in refusing plaintiff's instructions. There was, however, error in the following instructions given by the court of its own motion.

"If the jury find from the evidence that plaintiff had possession of building number 611 Lucas avenue, and had the doors of same fastened by locks or otherwise, and that defendant by its agents or employes entered said building without his authority, they will find for plaintiff and assess his damages at such sum as shown by the evidence plaintiff sustained by the unlawful act of defendant in entering the premises, and they may take into consideration any injury done by them to the property mentioned in the first count of the petition while they were in said premises. Unless you so believe from the evidence, you will find for the defendant.

"If the jury find from the evidence that plaintiff and Reinfeld and wife entered into the lease read in evidence, and that thereafter, and about the month of August, 1887, said Reinfeld and wife surrendered said lease to plaintiff, and that plaintiff thereupon resumed possession of the premises known as 611 Lucas avenue, and that thereafter, and while plaintiff was in possession thereof, the defendant by its officers, agents or employes, entered upon said premises without authority from the plaintiff, and that while there they did any injury to said premises or to the property mentioned in

the first count in the petition, you will find for the plaintiff. Unless you so find from the evidence, you will find for the defendant."

These instructions are predicated on the theory that there could be no recovery by the plaintiff, even though the injury was one to the freehold, unless the plaintiff was in the actual possession of the premises. Such is not the law. For an injury to the freehold done by a stranger, the landlord may sue, though his tenant is in possession. *Parker v. Shackelford*, 61 Mo. 68; *Austin v. Coal Co.*, 72 Mo. 535; *Cramer v. Grossclose*, 53 Mo. App. 648. The defendant claims that this error was brought about by an instruction asked by the plaintiff predicating his right of recovery upon actual possession, and hence that the plaintiff should not now be heard to complain, when he himself led the court into error. This, however, is not tenable. The plaintiff's instruction, which was given by the court in a modified form, did not conclude with a direction to the jury to find for the defendant, unless they did find actual possession in the plaintiff at the time of the alleged tresspass. Had this concluding part been omitted from the court's instructions, the point now made by the defendant would be well taken.

The court also gave the following instruction to the jury:

"The jury are instructed that, while this is an action for an alleged trespass to real estate, still the taking and carrying away of the personal property mentioned in the first count of the plaintiff's petition may be considered in estimating the damages for trespassing on the real estate, if the jury find from the evidence that the defendant by its officers, agents or employes, were guilty of trespassing upon the real estate in question, while said premises were in the pos-

session of plaintiff, and that they did take and carry away such personal property."

This instruction is also erroneous. It tells the jury that the property mentioned in the first count of plaintiff's petition was personal property. Whether it was such or not, was one of the very issues to be found by the jury. It is true that, if any of the property attached to the premises in any manner was carried away by the defendant after the plaintiff had taken actual possession, then it is immaterial whether the property as between the landlord and tenant was personal property or part of the freehold. The instruction was, therefore, correct to the extent of conveying to the jury that information.

As the judgment must be reversed for error in these instructions, and remanded for new trial, we will add for the guidance of the trial court that the plaintiff's measure of damages in case of recovery is the depreciation in the value of the freehold by the defendant's trespasses and asportations, and that the jury should be instructed to find separately on each count the damage, if any, so done.

The judgment is reversed, and cause remanded. Judge BIGGS concurs. Judge BOND does not sit.

THOMAS M. FOLKS, Respondent, v. CHARLES C. YOST *et al.*, Appellants.

Kansas City Court of Appeals, May 1, 1893.

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1. **Special Tax Bill:** LIMITATION. Under the charter of Kansas City, Laws of Missouri, 1875, p. 251, the two years' limitation against the lien of a special tax bill commences to run from the date of its delivery to the contractor and not from the date of bill itself.

2. **Definitions:** TO ISSUE TAX BILLS. To issue is to send forth, to put in circulation, to emit, and to issue tax bills as ordinarily understood necessarily includes delivery to some one.

Appeal from the Jackson Circuit Court.—HON. J. H. SLOVER, Judge.

AFFIRMED.

J. B. Hamner and *Henry N. Ess*, for appellants.

(1) There was no lien on these lots at the time of the trial of this cause. The court below erred in holding that such lien existed. The tax bills were issued October 8, 1889, receipted for October 11, 1889, suit brought October 10, 1891, not within two years after their issue, October 8, 1889. City Charter, Session Acts, 1875, art. 8, secs. 3, 4, pp. 251–2. (2) Within the meaning of our city charter these tax bills were issued October 8, 1889, when the city engineer made the necessary computation and made out and signed the tax bills. Sec. 3, p. 241, *supra*. The delivery is not a part of the issue. (3) The date of the tax bill is the date of issue, for this statute requires the pleader to state in his petition "the date and contents thereof." Sec. 4, p. 252. (4) The tax bill itself, whose date is required to be stated in pleading, is *prima facie* evidence "of the validity of the bill, of the doing of the work and of the furnishing of the material charged for, and of the liability of the property to the charge stated in the bill." The date of the tax bill is the date of issue, from which time interest is to be computed. The interest to be paid is as much a part of the charge as the principal, which charge for principal and interest the tax bill is *prima facie* evidence, hence the date of the tax bill must be pleaded. (5) This suit was not brought within two years from the issue of the tax bills, hence the lien expired October 11, 1891, notwithstanding suit was brought October 10, 1891, for that is not within two years from the issue of the tax bill, October 8, 1889. Session Acts, 1875, sec. 4, art. 8, p. 252.

William C. Scarritt, for plaintiff.

The suit was commenced during the continuance of the two years' lien given by the charter, and the lien continues until the determination of this legal proceeding.

GILL, J.—This is an action to enforce certain special tax bills issued by Kansas City for the construction of sidewalks in front of defendants' property.

The only question is whether, at the institution of the suit, the lien had expired by reason of the two years limitation provided in the charter. The facts as agreed are as follows: On completion of the work, the city engineer computed the cost of the work, apportioned same among the lots to be charged therewith according to frontage, and made out the tax bills. The engineer's certificate appended to the bills was dated October 8, 1889. The tax bills were delivered to and receipted for by the contractor October 11, 1889, and were then indorsed on the back by the city engineer, "Issued October 11, 1889." The suit was begun October 10, 1891. On this state of facts the circuit court held the plaintiff entitled to recover, and defendants appealed.

The portions of the Kansas City charter as it existed when these bills were issued and necessary to be here construed read as follows: "When any work shall be completed * * * the city engineer shall compute the cost thereof and apportion the same among the several lots or parcels of land to be charged therewith, and charge each lot or parcel of property with its proper share of such cost, according to the frontage of the property. The city engineer shall, after so apportioning and charging the cost of any work, make out and certify special tax bills, according to such apportion-

ment, and charge in favor of the contractor to be paid, against the several lots or parcels of lands charged, and register the same in full in his office, and deliver such bills to the party in whose favor issued for collection, and take his receipt therefor at the foot of the register thereof in full of all claims against the city on account of said work." Laws, 1875, sec. 3, p. 251. Again, section 4, page 252, reads: "Every such tax bill shall be a lien on the property therein described, against which the same may be issued on the date of the receipt to the city engineer therefor, and such lien shall continue for two years thereafter, but no longer, unless suit be brought to collect the same within two years from the issue thereof, in which case the lien shall continue until the determination of the legal proceedings to collect the same, * * * and each tax bill shall bear interest from its issue at the rate of fifteen per cent. per annum, if not paid in thirty days after the issue thereof."

It will be seen that the right to enforce this special tax lien is limited by the statute to two years after the *issue* of the same. Defendant's contention is that when the tax bill is made out and certified to by the city engineer, it is then *issued* regardless of the time of delivery to the contractor; while plaintiff insists that the tax bill is not *issued* until delivered to the contractor. If defendant's position is correct, then, since the engineer's certificate as to the correctness of the bill is of date October 8, 1889, and this suit was commenced October 10, 1891, it is clear that the lien had expired before suit brought. However, the trial court held with the plaintiff on this question and decided that the tax bills were not issued until delivered to the contractor on October 11, 1889, and we find little difficulty in coming to the same conclusion.

The ordinary and commonly accepted meaning of "to issue" is to send forth, to put into circulation, to emit, as to issue bank notes, bonds, etc. Anderson's Law Dictionary, 569; Webster's Dictionary. To issue tax bills then, as ordinarily understood, necessarily includes delivery to some one; just as municipal bonds may be written out or printed and signed, but they are not issued until sent out, delivered or put into circulation. Now, is there anything in the foregoing statute that indicates any intention by the legislature to use the term *issue* (when referring to the execution and delivery of special tax bills) in any different sense than as usually understood? We think not. Counsel for defendants, at the oral argument, seemed to place much emphasis on the clause directing the engineer to "deliver such bills to the party in whose favor *issued*," etc., arguing, as we gathered his meaning, that this necessarily meant that the bills had already been issued before delivery. We regard such an interpretation of the word "*issued*" as too narrow and not in keeping with the general context of the act. As we understand it, the charter directs the engineer to compute and apportion the cost of the improvement, to make out the tax bills in accordance with such computation and apportionment, and to verify the same by attaching to the bills his certificate. It is then the engineer's duty to register the same in a book kept in his office. The tax bills *then* are prepared for delivery to the contractor who shall take the same and give his receipt entered on the face of such register. It is not till then they are *issued*. And when so issued they become at once a lien or charge on the property, carrying along and as incidental to the main charge interest at the rate of fifteen per cent. from such issue (unless paid within thirty days after such issue). Then appears the statute of limitation for such

cases and requires the holder of the bill to sue within two years from said *issue* or lose the lien.

The construction placed on the statute by the learned counsel for the defendants would present this remarkable feature; there would be a lien in favor of the owner of the tax bill for a period of two years from "the date of the receipt to the city engineer," though for a portion of that time no suit could be maintained to enforce it. For it is clear that under section 4 the tax bill is a lien for two years beginning with the date of the delivery to the contractor; and if then the limitation for the institution of a suit to foreclose the lien ends two years after the tax bill is made out and certified by the engineer, there would clearly in the case at the bar and those similarly situated be a period of an existing lien but no right for enforcing same—a right indeed without a remedy.

The judgment will be affirmed. All concur.

ROBERT L. GREGORY, Respondent, v. WILLIAM S. SITLINGTON, Appellant.

Kansas City Court of Appeals, May 1, 1893.

1. **Instructions:** CONFLICT. There should be no conflict in instructions given for the different parties.

2. **Fraudulent Conveyances:** CONSIDERATION GOOD IN PART AND BAD IN PART: CONFLICTING INSTRUCTIONS. Plaintiff's instructions required the jury to find that the bill of sale in question was without consideration, and defendant's instructions required them to find that only a part of the consideration was wanting before they could find the transaction faudulent. *Held*, they were in fatal conflict and the error is not cured by other instructions though they were good, since it cannot be said which instructions the jury followed. Besides the rule is: A conveyance made in bad faith by collusion between the debtor and creditor to cover up property by professing to secure an indebtedness not really existing is void as to creditors, and that it secures a real debt, will not save it.

Appeal from the Jackson Circuit Court.—HON. J. H. SLOVER, Judge.

REVERSED AND REMANDED.

T. B. Buckner and *J. W. Gillespie*, for appellant.

(1) Instructions numbers 4 and 6 are both erroneous, number 4, in that it requires that both Gregory and White be found guilty of fraud, and number 6 in that it required defendant to show the bill of sale was "without consideration" and in requiring defendant to show "that plaintiff (Gregory) knew of and participated in such fraudulent purpose." The instructions should have included White who was the instrument by which the fraud was perpetrated. "If any part of the consideration of the said bill of sale was fraudulent and void it would taint the whole transfer and render such instrument entirely void." *State ex rel. v. Hope*, 102 Mo. 428; Authorities cited in paragraph 4 of above case. (2) The erroneous instructions given plaintiff are in direct conflict with the instructions given defendant. It is reversible error to give inconsistent or conflicting instructions. *Frederick v. Allgaier*, 88 Mo. 598; *Stevenson v. Hancock*, 72 Mo. 612; *Price v. Railroad*, 77 Mo. 508; *Singer S. C. Co. v. Hudson*, 4 Mo. App. 145; *Spillane v. Railroad*, 20 S. W. Rep. 294. (3) A contradiction between two instructions so far from correcting the evils of either multiplies them both. *State v. Nauert*, 2 Mo. App. 295; *Welch v. Railroad*, 20 Mo. App. 477. (4) Even though the law is correctly declared for one party if they are inconsistent or in conflict with instructions given the other party, it is reversible error. *Welch v. Railroad, supra; Spillane v. Railroad, supra; Goetz v. Railroad*, 50 Mo. 474.

W. C. Scarritt, for respondent.

(1) Plaintiff's fourth instruction is not justly subject to criticism. *Frederick v. Allgaier*, 88 Mo. 603; *Shelly v. Boothe*, 73 Mo. 74; *Reilly v. Railroad*, 94 Mo. 601; *Railroad v. Vivian*, 33 Mo. App. 583; *Harrington v. City of Sedalia*, 98 Mo. 583; *Wetzell v. Wagoner*, 41 Mo. App. 509. (2) The sixth instruction is not subject to the objection urged against it by the appellant. (3) Plaintiff's fifth instruction was right and defendant's fourth instruction was clearly wrong; consequently defendant is not harmed by getting a declaration of law more favorable than he was entitled to. *Mastin, Adm'r, v. Fox*, 40 Mo. App. 668; *Vail v. Railroad*, 78 Mo. 377; *Alexander v. Clark*, 83 Mo. 488; *Hanna v. Finley*, 33 Mo. App. 650; Jones on Chattel Mortgages, sec. 22; Cobbey on Chattel Mortgages, sec. 75, and cases cited.

GILL, J.—In November, 1891, and for several years prior thereto, Scott was engaged in the retail grocery business at Kansas City. Becoming at that time financially embarrassed he executed a bill of sale to plaintiff and turned over his entire stock of goods as an alleged payment of $628.16 he owed the Gregory Grocery Company, and a $1,000 note against him held by one White who was a salesman for the Gregory company. Plaintiff Gregory at once took possession of the goods; but immediately thereafter several other creditors of Scott who had not been provided for instituted attachment suits against the common debtor and caused the defendant sheriff to seize the goods. Gregory thereupon brought this action in damages for the alleged wrongful conversion of his property. The sheriff in behalf of the attaching creditors in answer to the petition alleged in substance that the pretended

sale to Gregory was made to defraud and defeat other creditors of Scott, was without consideration, etc., and therefore void. On a trial by jury there was a verdict and judgment for plaintiff and defendant appealed.

Owing to the court's action in giving certain faulty and inconsistent instructions, we feel compelled to send this case back for a new trial. In the first place, in plaintiff's number 4, the court told the jury that it was *immaterial* whether the bill of sale to Gregory was made and intended as *an absolute sale* or as a *mortgage*, and that if Gregory & White (whose claims were paid or secured) acted in good faith, etc., that the verdict should be for the plaintiff; while in an instruction given for defendant the jury were told that if they believed "that the bill of sale of the stock of goods in controversy was taken merely as a security for the debts of the Gregory Grocery Company, and for the note of J. A. White, and was not an absolute and unconditional sale, then the plaintiff cannot recover." Here is a manifest conflict in these instructions; but as the plaintiff's instruction was correct in that regard, while that of the defendant was erroneous, we should not reverse the judgment for an error into which the court was led by the appellant's counsel.

However a more serious conflict appears when plaintiff's number 6 is compared with defendant's number 5. At plaintiff's instance the court gave to the jury this instruction: "The court instructs the jury that, before you can find for defendant in this case, it devolves upon the defendant to show to your reasonable satisfaction, by a fair preponderance of the evidence, that the bill of sale from Scott to plaintiff, dated November 18, 1891 and introduced in evidence, was *without consideration* or was made for the purpose of defrauding the creditors of Scott, and that *plaintiff* knew of and participated in such fraudulent purpose."

And at defendant's request the following was given: "If the jury shall believe from the evidence in the case that at the time the bill of sale in question was executed, A. G. Scott did not owe the witness, J. A. White, $1000, then plaintiff cannot recover in this case, and your verdict must be for the defendant, although you may further believe from the evidence in the case the said A. G. Scott did owe the full amount of the bill claimed to be due the Gregory Grocery Company."

The first of these two instructions declares the law quite differently from the last. Indeed under the above instruction given on the motion of the plaintiff it was next to impossible for the jury to find otherwise than for the plaintiff. They were in effect advised to find for the plaintiff unless they should believe that the bill of sale to Gregory was wholly without any consideration to support it, or unless the sale was made to Gregory for the purpose of defrauding Scott's creditors and that *he* (Gregory) knew of and participated in such fraudulent purpose. Now the attaching creditors (represented by defendant) made no attack whatever on the *bona fides* of the Gregory company's account of $628, but the genuineness of White's $1,000 charge was assailed. Clearly then there was not an entire absence of consideration for the transfer of Scott to Gregory and the jury could not have so found. And if in making said bill of sale there was any fraudulent design to cheat Scott's creditors there was little, if any, evidence tending to implicate Gregory individually. If there was such a conspirancy, it was between Scott & White, and not in fact between Scott and Gregory though of course Gregory will be charged with the fraud of White since he was acting as Gregory's agent in the matter.

This much is said that the vice of the above instruction given at the plaintiff's request may be more readily seen. The jury may have believed that the $1,000 note put into the consideration of the sale was fictitious, and a mere pretense to assist in covering up the assets of Scott—and there was evidence tending to prove this—and yet, since the remainder of the consideration, to-wit, the account of Gregory company for $628 was unquestionably genuine, the jury were bound in the light of that instruction to give plaintiff their verdict. This is not the law; for, as has been well said, "though a conveyance made in good faith is not void merely because it delays some creditors or because it is intended to delay them, yet a conveyance made in bad faith, by collusion between the debtor and creditor to cover up property, by naming and professing to secure an indebtedness not really existing, is void as to creditors; and the fact that it also names a real, existing indebtedness, and is made to secure that real debt, will not save the deed." *State ex rel. Robertson v. Hope*, 102 Mo. 429–431, and cases there cited.

Plaintiff's sixth instruction then was clearly wrong and ought not to have been given. Nor will it do to say that its vice was cured by other instructions, particularly number 5 given for defendant. As already said these two instructions are irreconcilable and cannot stand together. We cannot undertake to say which of the two the jury may have adopted as a guide.

It results then that the judgment herein must be reversed and the cause remanded. All concur.

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HATTIE ALEXANDER, Appellant, v. THE GRAND AVENUE RAILWAY COMPANY, Respondent.

Kansas City Court of Appeals, May 1, 1893.

1. **Practice, Trial:** MOTIONS: REASONS CONSIDERED. Motions addressed to the trial court should be specific; and no reason not specified shall be urged in support of the motion.

2. **Rescission:** TENDER BACK OF CONSIDERATION. The return or offer to return the money paid on the compromise of a suit is a prerequisite to the right to annul the settlement and to sue on the original cause.

3. ———: VOID AND VOIDABLE CONTRACTS: STATUS QUO. Where the contract of settlement is absolutely void, there may in some jurisdictions be no need of a rescission or a restoration of the *status quo ante* in order to sue on the original contract, but in this case the compromise is not void but merely voidable and the tender must be made.

4. ———: ———: GREATER SUM DUE. The rule that one is not bound to restore to the other party what he received under the contract, when the other party is indebted to him in larger amount, has no application in a case like this where a liability is denied.

5. **Attorney and Client:** LIEN ON JUDGMENT: CLAIM. An attorney has no lien on a judgment obtained by him, much less on a claim before it becomes a judgment.

6. **Action:** SURVIVOR OF: ASSIGNMENT: STATUTE. No actions are assignable except those that survive, and an action for personal injury does not survive. Whether section 4426, Revised Statutes, 1889, which allows such action to survive the death of plaintiff, is assignable, —— *quaere.*

7. ———: ASSIGNMENT OF PORTION OF DEMAND: UNLIQUIDATED. The alleged assignment in this case is at most for only a part of the claim, and a part cannot be assigned without the consent of the debtor, and, if it amount to an equitable assignment, it is invalid since the claim is an unliquidated one.

Appeal from the Jackson Circuit Court.—HON. J. H. SLOVER, Judge.

AFFIRMED

W. J. Hollis and *S. E. Cheeseman*, for appellant.

(1) Plaintiff's application to sue as a poor person must be disposed of before a judgment for costs could be rendered against her. Revised Statutes, 1889, sec. 2918, 2919. (2) This written dismissal was obtained by unfair means and is not binding upon plaintiff. *Girard. v. St. Louis Car Wheel Co.*, 46 Mo. App. 74, and authorities therein cited; *Blair v. Railroad*, 89 Mo. 383; *Maher v. Railroad*, 105 Mo. 320; *Bank v. Crandall*, 87 Mo. 208. (3) Rights of attorneys must be respected in settlements of this character when defendant has notice. *Bussman v. Railroad*, 56 Wis. 325; *Watkins v. Brant*, 46 Wis. 419; *Weeks v. Wayne*, 41 N. W. Rep. (Mich.) 269, and authorities therein cited; *Aspinwall v. Sabin*, 34 N. W. Rep. (Neb.) 72; *Rooney v. Railroad*, 18 N. Y. 368; *McGregor v. Comstock*, 28 N. Y. 237; Revised Statutes, 1889, art. 1, ch. 98, sec. 6561.

Karnes, Holmes & Krauthoff, for respondent.

(1) She filed a motion to set aside the judgment dismissing the action and based this motion on two grounds and no other: *First*, she was defrauded, and *second*, her attorneys were defrauded. The overruling of this motion is the error complained of in this appeal, and no ground not therein mentioned can be considered by this court. (2) Before plaintiff can thus repudiate the settlement and rescind the compromise, she must return the consideration she received. *Cahn v. Reid*, 18 Mo. App. 115 123; *Downing v. Stone*, 47 Mo. App. 144, 147; *Bibb v. Means*, 61 Mo. 284, 290; *Jeffers v. Forbes*, 28 Kan. 174, 180; *Estes v. Reynolds*, 75 Mo. 563; *Clough v. Holden*, 20 S. W. Rep. 695, 697, and cases cited; *Kinne v. Webb*, 49 Fed. Rep. 512, 513; *Taylor v. Short*, 107 Mo. 384, 392; *Clarke v. Dickson*,

Ellis, Blackburn & Ellis's Reports, 148, 155; *Brown v. Morgan*, 65 Miss. 369, 376; *Gould v. Bank*, 86 N. Y. 75, 79; *Sanborn v. Osgood*, 16 N. H. 112, 114; *McMahon v. Plummer*, 50 N. W. Rep. 480; *Regensburg v. Notestine*, 27 N. E. Rep. 108; 1 Bigelow on Fraud, pp. 75, 77; Bishop on Contracts [2 Ed.] secs. 679, 833; Leak on Contracts, p. 395; 2 Parson on Contracts, 679; Maxwell on Code Pleading, pp. 193, 431; 5 Lawson on Rights & Remedies, sec. 2579; *Brown v. Ins. Co.*, 117 Mass. 479; *Potter v. Ins. Co.*, 63 Me. 440; *Ins. Co. v. McRogers*, 121 Ind. 121; *Railroad v. Hayes*, 83 Ga. 558; *McLean v. Clapp*, 141 U. S. 429, 432; *Ins. Co. v. Howard*, 111 Ind. 544, 547. (3) An attempt is sometimes made to avoid restoring the consideration received in a compromise, on the theory that a compromise obtained by fraud is void, and, consequently, absolutely void. But, see *Cahn v. Reid*, 18 Mo. App. 115, 126; *Candy & Cracker Co. v. Ins. Co.*, 41 Mo. App. 530, 544; *Railroad v. Hayes*, 83 Ga. 558; *Mixer's Case*, 4 DeGex & Jones, 575, 586; *Nickel Co. v. Unwin*, 2 Q. B. Div. 214, 223; *Dawes v. Harness*, L. R. 10 C. P. 166, 167; *Urquehart v. MacPherson*, 3 Appeal Cases, 831, 837, 838; *Tennant v. Bank*, 4 Appeal Cases, 615, 620; 1 Beach on Equity Jurisprudence, sec. 82; *Blair v. Railroad*, 89 Mo. 383, 395. (4) This brings us to a consideration of the last point made by appellant: "Rights of attorneys must be respected in settlements of this character when defendant has notice." It is worthy of note that appellant has not cited any Missouri cases in support of this point. The leading case in Missouri, one always followed and never doubted, is *Frissell v. Haile*, 18 Mo. 18; *Lewis v. Kinealy*, 2 Mo. App. 34; *Roberts v. Nelson*, 22 Mo. App. 28, 31; *Nichols v. Pool*, 89 Ill. 491, 494; *Humphreys v. Browning*, 46 Ill. 268; *LaFramboise v. Grow*, 56 Ill. 197, 201; *Hill v. Brinkley*, 10 Ind. 102; *Irwin v. Workman*, 3 Watts, 357, 362; *Walton v.*

Dickerson, 7 Pa. St. 367, 378; *Weakley v. Hall*, 13 Ohio, 167, 175; *Ex Parte Kyle*, 1 Cal. 331, 332; *Hogan v. Black*, 66 Cal. 41, 42; *Parker v. Blighton*, 32 Mich. 266, 267; *Waters v. Waters*, 49 Mo. 385, 388; *Ins. Co. v. Rider*, 22 Pick. 210, 211; *Currier v. Railroad*, 37 N. H. 223, 227; *Phillips v. Stagg*, 2 Edw. Ch. (N. Y.) 108, 109; *Newbert v. Cunningham*, 50 Me. 231, 236; *Cozzens v. Whitney*, 3 R. I. 79, 82; *Humphrey v. Browning*, 46 Ill. 476, 486; *Sanders v. Anchor Line*, 97 Mo. 26, 30; *Venable v. Railroad*, 20 S. W. Rep. (Mo.) 493, 499; *Pulver v. Harris*, 52 N. Y. 73, 76. (5) A plaintiff has the right to settle an action for personal injuries without the consent and even against the protest of his attorneys. *Coughlin v. Railroad*, 71 N. Y. 443; *Averill v. Longfellow*, 66 Me. 237; *Wood v. Anders*, 5 Bush, 601, 602; *Swanston v. Mining Co.*, 13 Fed. Rep. 215; *Lamont v. Railroad*, 2 Mackey, 502; s. c., 47 Am. Rep. 268; *Miller v. Newell*, 20 S. C. 122; *Pulver v. Harris*, 52 N. Y. 73, 76; *Hutchinson v. Pettes*, 18 Vt. 614, 618; *Henchey v. Chicago*, 41 Ill. 136, 141; *Kusterer v. City of Beaver Dam*, 56 Wis. 471, 475; *Abbott v. Abbott*, 18 Neb. 503, 505. (6) The test of the assignability of a cause of action is: Does the action survive? *Snider v. Railroad*, 86 Mo. 613, 616; *Davis v. Morgan*, 97 Mo. 79; *Foot v. Tewksbury*, 2 Vt. 97, 100; *Hutchinson v. Pettes*, 18 Vt. 614, 618; *Henchey v. Chicago*, 41 Ill. 136, 141; *Coughlin v. Railroad*, 71 N. Y. 443, 450; *Pulver v. Harris*, 52 N. Y. 73, 78; *Platt v. Jerome*, 19 How. 384, 385; 1 Jones on Liens, sec. 141; *Casey v. March*, 30 Tex. 180, 185; *Potter v. Mayo*, 3 Me. 34, 36; *Ellwood v. Wilson*, 21 Iowa, 523, 527.

ELLISON, J.—The plaintiff sued defendant for $2,500 on account of personal injuries received while a passenger in one of its cable street cars. She made application to sue as a poor person. Afterwards she

settled her claim with defendant by accepting $125 in discharge thereof and gave to defendant a written order of dismissal of the suit. This order was presented in court and the cause in compliance therewith was dismissed, a judgment being entered discharging defendant without day and for costs against plaintiff. Plaintiff afterwards, during same term, came into court by her attorneys (the same who brought the action originally) and filed her written motion to set aside the order and judgment rendered as aforesaid. There were only two grounds stated in the motion and these were that the order of dismissal was obtained from her by the fraud and deceit of defendant's agents, and in violation of the rights of her attorneys who instituted the action for her.

I. It is now insisted that the court erred in entering judgment for costs against plaintiff in dismissing her suit without first having passed upon her application to sue as a poor person. It is enough to say of this objection that it is not one of the reasons stated in the motion, and will, therefore, not be considered. Motions addressed to the trial court should be specific; and no reason not "specified shall be urged in support of the motion." Revised Statutes, 1889, sec. 2085.

II. We are relieved of the necessity of passing upon any question of fraud alleged to have been practiced upon plaintiff from the following consideration: It is conceded that in the settlement she received from defendant the sum of $125 in money as a consideration for the settlement. She has not returned or offered to return this sum. Such return or offer to return is a prerequisite to her right to annul the contract of settlement and to sue upon the original cause. This principle was fully discussed in *Cahn v. Reid*, 18 Mo. App. 115, and has found frequent expression in a variety of cases in both the courts of appeals and the supreme

court of the state. *Jarrett v. Morton*, 44 Mo. 245; *Estes v. Reynolds*, 75 Mo. 563; *Clough v. Holden* (not yet reported); also *McLean v. Clapp*, 141 U. S. 429.

But it is frequently said that a contract absolutely void need not be rescinded, as there is nothing to rescind. And in such cases it is frequently held that there need be no offer to restore the *status quo* in order to sue on the original cause of action. This is the natural result, perhaps, in those jurisdictions which hold such contracts absolutely void. Such was the case of *Railroad v. Lewis*, 109 Ill. 120. The contract of settlement of personal injury in that case was said to have been executed when the party was wholly incapacitated by pain resulting from the injury. In the case at bar there can be no question that the contract of settlement was merely voidable at the election of plaintiff, and not void. She executed it and can elect to stand by it or disaffirm it. If the latter, she must restore what she received under it. This phase of the case was fully discussed in *Cahn v. Reid, supra*. See also the recent case of *Taylor v. Short*, 107 Mo. 384.

But it is said that one is not bound to restore to the other party to the contract what he has received under it when the other party is indebted to him in a larger amount; that in such case the sum compromised upon is at least due and need not be returned. This rule can, however, have no application in a case where *all* liability is denied as is the case before us. The question has been directly passed upon in cases of the character we have here. *Girard v. Car Wheel Co.*, 46 Mo. App. 116; *Railroad v. Hayes*, 83 Ga. 558; *Home Ins. Co. v. Howard*, 111 Ind. 544; *Gould v. Cayuga Nat. Bank*, 86 N. Y. 75.

III. The remaining reason specified in the motion is that the settlement was in violation of the rights of plaintiff's attorneys, of which defendant had notice.

The rights of the attorneys and other notice thereof here referred to arose on the following papers:

"Know all men by these presents that I, Hattie Alexander, have made, constituted and appointed, and do by all these presents hereby make, constitute and appoint W. J. Hollis and S. E. Cheeseman my true and lawful attorneys, sole and absolute, with all the powers, privileges and authority incident thereto, to prosecute, negotiate, settle or compromise for me and in my name, place and stead a certain claim for personal damages, viz: Being thrown from a car at Flora avenue and Fifteenth streets, on the Grand Avenue Railway Company road, July 31, 1892, by the carelessness of the servants of said company; that I do grant and give exclusive power to my said attorneys to institute and prosecute such suits and actions and accept such terms, amounts and conditions in compromise or settlement as in his judgment is best, right and proper in defense of my rights in these premises. That I do furthermore hereby give and grant to my said attorneys full and sole power and authority to do and perform all and every act and thing whatsoever requisite to be done in and about the premises as fully and to intent and purposes as I might or could do if personally present at the doing thereof, to receive and receipt for all and any money or property received or recovered on account of or by these premises. That for said services of said attorney one half of whatever judgment, compromise or settlement may ultimately be effected shall be retained by my said attorney in full and complete settlement for their services in these premises." (Duly signed).

"To the Grand Avenue Railway Company: Take notice:

"That Hattie Alexander has employed the undersigned as attorneys to prosecute a suit against you for

damages for injuries claimed to have been sustained by her on the thirty-first day of July, 1892, at Kansas City, Missouri, by reason of the negligence of your servants in starting a car, in which she was a passenger, before she could alight. That said attorneys, for their services in said cause, have taken an interest in whatever judgment or compromise may be obtained. That said attorneys have the exclusive power to make any compromise they deem best for their client and themselves in the premises." (Duly signed).

The claim to which these papers refer must have for its foundation either a lien in favor of the attorneys or an assignment of a part of the claim. That an attorney has no lien for his services, on a judgment obtained by him was long since determined in this state. *Frissell v. Haile*, 18 Mo. 18; *Roberts v. Nelson*, 22 Mo. App. 28. And it could scarcely be pretended that an attorney, merely as such, would have a lien on the claim before it became a judgment in the absence of a statute conferring such a lien, as the attorney can have no lien on the suit. *Parker v. Blighton*, 32 Mich. 266; *Coughlin v. Railroad*, 72 N. Y. 448; *Henchey v. Chicago*, 41 Ill. 136. Though there seems to have been a rule or practice adopted arbitrarily by some of the courts enforcing such liens. The court said in the foregoing case from New York, that "the courts invented this practice and assumed this extraordinary power to defeat attempts to cheat the attorneys out of their costs." But, as stated in that case and in the case cited from 18 Mo., attorneys' fees in those jurisdictions were "fixed sums, easily determined by taxation," and this power was exercised to secure them their fees.

But there is a suggestion of assignment of the cause of action. This is met by the statement that no actions are assignable save those which may survive (*Snider v. Railroad*, 86 Mo. 613), and that this action is

not such as would survive. *Davis v. Morgan*, 97 Mo. 79. The former case does make the right of survival a test of assignability, but the latter case holds that an action for personal injuries does not survive the death of the *defendant*. The statute, however (Revised Statutes, 1889, sec. 4426), allows such actions to survive the death of the *plaintiff*. Since it is not necessary to say whether such a right of survivorship would make the cause of action assignable we will not do so. The point here suggested may be disposed of without that. The paper executed by plaintiff to her attorneys does not purport to be an assignment for value of the claim itself; and at most can only be looked upon as assignment of a part thereof, that is, that part which the attorneys should retain as fees if a recovery was had. This phase of the matter is quickly determined against plaintiffs and the attorneys from the fact that with us there can be no assignment of a part of a claim (though it was a definite and fixed claim or sum) without the consent of the debtor.

But if it be suggested that the agreement between plaintiff and her attorneys amounted to an *equitable* assignment of a portion of the claim such suggestion is met by the fact that this claim is an unliquidated one; from its nature *indefinite* and *indeterminable* except by the agreement of the parties or the verdict of a jury. More than this, *all liability is denied* by the defendant. "The debt or fund as to which such an equitable assignment can be made must be some recognized or definite fund or debt in the hands of a person who admits the obligation to pay the assignor; or at least it must be some liquidated demand capable of being enforced in a court of justice. We apprehend that the doctrine has never been held that a claim of no fixed amount nor time or mode of payment—a claim which has never received the assent of the person against

whom it is asserted, and which remains to be settled by negotiation or suit at law, can be so assigned as to give the assignee an equitable right to prevent the original parties from compromising or adjusting the claim on any terms that may suit them." *Kendall v. United States*, 7 Wall. 113; *Burnett v. Crandall*, 63 Mo. 410, 416.

It follows that the circuit court was right in overruling the motion to reinstate the cause, and its action will be affirmed. All concur.

THOMAS P. BROWN, Respondent, v. WILLIAM H. HAWKINS, Appellant.

Kansas City Court of Appeals, May 1, 1893.

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1. **Chattel Mortgage:** LEVY OF EXECUTION: DUTY OF CONSTABLE. So long as the possessory right of a mortgagor remains, his interest in the mortgaged chattels is the subject of seizure and sale at the instance of creditors, and until the breach of some condition the mortgagee is not entitled to the possession, and it is the duty of the constable with execution to both levy and sell.

2. ———: ———: BREACH OF CONDITION: RIGHT OF POSSESSION. The levy of an execution by a constable on mortgaged property is such breach of the condition of the mortgage against a sale or attempted sale as to authorize the mortgagee to take possession.

Appeal from the Jackson Circuit Court.—HON. JOHN W. HENRY, Judge.

REVERSED AND REMANDED.

O. T. Knox and *Jos. S. Brooks*, for appellant.

The right of a mortgagee to take possession of personal property, by virtue of a chattel mortgage, which provides that "in case of a sale or disposal, or attempt to sell or dispose of said property," the mortgagee or

his assigns, etc., may take the said property or any part thereof into his possession, arises when a constable takes possession of the property under an execution against the mortgagor, for the purpose of selling the property to satisfy such execution. *Kennedy v. Dodson*, 44 Mo. App. 550; *Bank v. Metcalf*, 29 Mo. App. 384; 40 Mo. App. 494; *State ex rel. v. Carroll*, 24 Mo. App. 358; *Lewis v. D'Arcy; Bailey v. Godfrey*, 54 Ill. 507; *Spalding v. Mozier*, 57 Ill. 148; *Beach v. Derby*, 19 Ill. 617.

Vandorston & Green, for respondent.

(1) Until the possessory right of the mortgagor ceases, his interest in the chattels mortgaged is the subject of seizure and sale at the instance of his creditors. *State v. Carroll*, 24 Mo. App. 361; *Hall v. Sampson*, 35 N. Y. 274; *Barnett v. Timberlake*, 57 Mo. 501; *Bank v. Metcalf*, 29 Mo. App. 391; 40 Mo. App. 501. (2) Until there has been default in payment of principal or interest, or breach of some condition contained in the mortgage, the mortgagee is not entitled to possession of the property and cannot maintain replevin. *Kennedy v. Dodson*, 44 Mo. App. 552; *Bank v. Metcalf*, *supra*; *Shinner v. Brill*, 38 Wis. 649. (3) The contention of attorneys for appellant, that the right of the mortgagee to take possession of the personal property by virtue of a chattel mortgage, which provides that, "In case of a sale or disposal, etc.," arises when a constable levies on same, is not supported by the authorities cited. (4) The rights of the mortgagee must be expressed in the mortgage. If he fails to protect himself by sweeping safety clauses, the courts will not, by their decisions, interject clauses for the benefit of the mortgagee. (5) The levy of the execution was not antagonistic nor hostile to the mortgagee's rights. *Beach v.*

Derby, supra; Pipe v. Colvin, 67 Ill. 230. The sale would not interfere with mortgagee's rights. *Hunly v. Carnly*, 17 N. Y. 202; *Gonlet v. Asseler*, 22 N. Y. 225; *Manning v. Monahan*, 28 N. Y. 585.

SMITH, P. J.—Action of replevin to recover the possession of certain specific personal property. The facts which the evidence in the case tends to establish are, that one Bowman executed a mortgage to plaintiff on the property sued for to secure two promissory notes for $600. The mortgage contained this provision amongst others, viz: "The property hereby sold and conveyed to remain in mortgagor's possession until default be made in payment of said debt and interest or some part thereof; but in case of a sale or disposal, or *attempt to sell or dispose of said property*, or a removal of or attempt to remove the same from Kansas City, Missouri, or an unreasonable depreciation in the value thereof, the said Thomas P. Brown or assigns or legal representatives may take the said property or any part thereof into his possession." Before the plaintiff's mortgage debt became due a judgment was obtained before a justice of the peace against Bowman the mortgagor, and an execution was issued thereon to the defendant who was a constable and who levied the same on the mortgaged property. The plaintiff mortgagee thereupon brought this suit for the recovery of the possession of the property, contending that he was by the terms of the mortgage entitled to its possession by reason of the seizure thereof by the defendant under the execution.

The question and the only question which we are called upon to decide is whether the plaintiff's contention should be upheld. The law is that until the possessory right of a mortgagor ceases his interest in the mortgaged chattels is the subject of seizure and

sale at the instance of his creditors. The *State v. Carroll*, 24 Mo. App. 361; *Hall v. Sampson*, 35 N. Y. 274; *Barnett v. Timberlake*, 57 Mo. 501; *Bank v. Metcalf*, 29 Mo. App. 391; 40 Mo. App. 501. And until default in the payment of the debt or interest or the breach of some condition contained in the mortgage, the mortgagee is not entitled to the possession of the mortgaged property. *Kennedy v. Dodson*, 44 Mo. App. 552; *Bank v. Metcalf*, 29 Mo. App. 391.

It was the duty of the defendant constable not only to levy on the mortgaged property in this case but to sell the same to satisfy his writ. He made the levy for no other purpose. Was the action of defendant constable an "attempt to sell or dispose of the property" within the meaning of the safety clause, already quoted, of the mortgage? Manifestly this clause was inserted in the mortgage for the benefit and protection of the mortgagee, and its words must be construed with reference to that object. It is argued that while an attempt to sell or dispose of the property by the mortgagor would constitute a breach of the mortgage that such an attempt by the defendant constable would not. The seizure of the property by the defendant was occasioned by the omission of mortgagor to satisfy the execution against him in defendant's hands.

So far as the plaintiff is concerned the effect is as to him the same whether the mortgagor himself attempts to sell or dispose of the property or whether it be occasioned by his direction or by some act or omission of his. The terms used in the clause do not limit the attempt to sell or dispose of the property by the mortgagor alone. Undoubtedly the constable acting in pursuance of the command of the writ of execution would have sold the property had it not been that the plaintiff prevented the same by taking it out of the former's possession by the writ of replevin. We think

this attempt to sell or dispose of the property by the defendant as constable constituted such a breach of the special condition of the mortgage as authorized the plaintiff to take possession of the property covered by it. *Kennedy v. Dodson*, 44 Mo. App. 550, lends support to this interpretation of the meaning of this condition of the mortgage.

It follows that the trial court erred in giving the defendant's instructions in the nature of a demurrer to the evidence. The judgment will be reversed and the cause remanded. All concur.

THE FIDELITY LOAN GUARANTEE COMPANY, Plaintiff in Error, v. JOSIE M. BAKER, Defendant in Error.

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Kansas City Court of Appeals, May 1, 1893.

1. **Guaranty**: PAYMENT: NOTE: MORTGAGE. A mortgage securing a note given as payment for the guaranty of a mortgagor's note to a third person may be enforced.

2. **Usury**: NOTES GIVEN AS GUARANTY FEES: AGENCY. Notes for usury cannot be enforced though in form they appear to be given in payment of guaranty fees, nor where the guaranteed note is made for the benefit of the guarantor and the fee note is taken merely to represent the interest on the guaranteed note.

3. ———: PROOF OF: EVASION OF STATUTE. It is not necessary to prove an agreement to pay usury by positive testimony, for such an agreement may be inferred from all the facts and circumstances in the case; and there is no devise or shift to evade the statute under or behind which the law will not look in order to ascertain the real motive of the transaction, and no act, however solemnly executed, will stand in the way of getting at the truth.

Appeal from the Jackson Circuit Court.—HON. R. H. FIELD, Judge.

AFFIRMED.

William J. Scott, for plaintiff in error.

(1) There is not a particle of evidence in this case that brings it within the class of cases to which the usury acts, pp. 169, 70, 71, Laws of 1891 apply. (2) The burden of proof is on the defendant to show that plaintiff exacted usurious interest. Usury Act, pp. 170, 171, approved April 21, 1891; is repealed by Interest Act, pp. 169, 170, Laws, 1891, approved April 23, 1891.

Garner & Walsh, for defendant in error.

(1) The defendant insists that the lien of the mortgage under which plaintiff claims the right to possession of the property is invalid and cannot be enforced for the reason that plaintiffs exacted usurious interest for the indebtedness secured by the mortgage. Laws of Missouri, 1891, sec. 2, p. 171; *Wetherell v. Stewert*, 35 Minn. 496; *Meyer Bros. v. Cook*, 85 Ala. 417. (2) The question as to whether the notes secured by the mortgage were given for usurious interest, was properly a question for the jury. Parsons on Contracts [7 Ed.] pp. 117, 118, 119; *More v. Clymer*, 12 Mo. App. 19; *Wickersham v. Jarvis*, 2 Mo. App. 281; *Chase v. N. Y. Mortgage Co.*, 51 N. W. Rep., p. —. (3) The express agreement to pay usury need not be proven by positive testimony, but the same may be inferred from circumstances. *Train v. Collins*, 2 Pick. 144; *Stein v. Stevenson*, 46 Minn. 360; *Sylvester v. Swan*, 5 Allen, 134; *Pulnam v. Churchill*, 5 Mass. 516; *Stevens v. Davis*, 3 Met. 21; *Snow v. Nye*, 106 Mass. 413; 3 Parsons on Contracts [7 Ed.] pp. 117–18–19.

SMITH, P. J.—The evidence covering over a hundred pages of the abstract of the record, which we have

been obliged to peruse, tends to establish substantially this state of facts. The defendant and her husband had executed a note for $150 secured by a mortgage on their boarding house furniture. Some time after this the defendant procured a divorce from her husband. On the thirtieth of November, 1891, the holder of the note which had been given by defendant and her husband sent the defendant word that he was going out of the loan business and to come to his office, as he wanted to transfer his mortgage. The plaintiff went to the office of the holder of the mortgage where she met a Mr. Davis, who afterwards turned out to be the manager of the plaintiff corporation, and who informed her that he would take up the mortgage. The plaintiff then executed a note for $151.25, payable to Paul Teutsch due May 12, 1892, and a mortgage on the property covered by the mortgage given by her husband and herself. On the same day she executed five promissory notes to plaintiff for $7.50 each to secure which she executed another mortgage on the same property. At the time she executed these obligations she paid Mr. Davis $10.50 in cash.

The evidence is conflicting as to whether the five notes and the cash paid was for the monthly interest on the large note or was the consideration for the services of the plaintiff in procuring the $151.25 loan for six months and guaranteeing its payment. It is made doubtful under the evidence whether Paul Teutsch was the true or assumed name of a person. His relation to the plaintiff does not appear except by inference. He seems to have resided in Chicago, and by an arrangement with Davis agreed to loan money on Kansas City chattel mortgages if Davis would get the plaintiff to establish a branch office in that city, and when so established it would guarantee the payment of such chattel

mortgages. The plaintiff thereafter opened an office in Kansas City and Davis became its business manager. The manner in which Teutsch carried on his business relations with plaintiff was that when plaintiff would negotiate a loan on a chattel mortgage Teutsch was made mortgagee. The mortgage note was taken to the Metropolitan bank, where Teutsch kept money on deposit, and where it would be taken and the amount of it less eight per cent. would be charged to Teutsch's account and the note sent to him. The plaintiff when taking the note and mortgage for Teutsch would also take notes and a mortgage to itself to secure such notes, the notes corresponding in number to the number of months the Teutsch mortgage debt in any case would have to run, the amount of each of these smaller notes being equal to five per cent. and upwards of the principal mortgage debt. There was evidence, too, to the effect, that, when any mortgage note so taken by Teutsch was not paid at maturity, the plaintiff would take up such note under its guaranty and then proceed to enforce the mortgage as owner of the debt. It was by this course of dealing that plaintiff acquired the larger mortgage note in this case.

The plaintiff itself seems nearly as much of a myth as Teutsch. The business methods of both of these parties appear from the evidence to have been strangely devious and complex. It is made to appear that Teutsch, a Chicago capitalist, was in the habit of loaning his money at the modest rate of eight per cent. in Kansas City on chattel mortgages covering such personal property as old and well-worn boarding-house furniture when guaranteed by the plaintiff corporation, whose capital as far as the evidence discloses is invisible. It appears that the plaintiff is the only party that realized any profit or advantage from the Teutsch transactions. Whether Teutsch was interested in the

plaintiff corporation or whether the latter was the agent of the former or in any way participated in the profits of the plaintiff or what was the business scheme of these parties or their purposes, were largely matters of inference to be deduced from the evidence by the triers of the fact.

The court by an instruction given on its own motion told the jury that the plaintiff had the legal right to guarantee the payment of the defendant's note and charge the fees therefor evidenced by the five notes, provided this was the real consideration for which such notes were given.

And at the instance of the defendant it instructed the jury if they believed that plaintiff's agents were also agents of Teutsch in procuring the loan of the money, and that the claim of plaintiff, the five notes in question, were each received by plaintiff as a consideration for guaranteeing the payment of the note to Teutsch, was a mere pretext and attempt to evade the law against taking more than eight per cent. per annum by way of interest and commission brokerage under the form of a guarantee, or, that even if the mortgage and note were in the first instance made payable to Teutsch, yet if it was really made for the benefit of plaintiff and that the five smaller notes were taken merely to represent the interest on the Teutsch note, the verdict should be for the defendant. These instructions, we think, announced correct rules of law as applicable to the facts which the evidence tended to establish. Whether or not the five small notes were given for usurious interest was a question for the jury to determine under the evidence and instructions.

And it was not necessary to prove an express agreement to pay usury by positive testimony, for such an agreement may be inferred from all the facts and circumstances in the case. *Train v. Collins*, 2 Pick.

144. And whether or not the five small notes and mortgage claimed by plaintiff to have been received as a consideration for guaranteeing the payment of the Teutsch note was a mere pretext and attempt to evade the statute prohibiting the taking of more than eight per cent. interest was, too, a question for the jury which was properly submitted to them. *Avery v. Crugh*, 35 Minn. 456. There is no device or shift to evade the statute under or behind which the law will not look in order to ascertain the real motive of the transaction, and no act, however formal however solemnly executed, will stand in the way of the court getting at the truth in order to ascertain whether there has been an attempt to evade the statute. And the contract will not be held good merely because upon its face and by its words it appears free from the taint of usury. 3 Parsons on Contracts, 117, 118 and 119; *Stein v. Swensen*, 46 Minn. 360; *Sylvester v. Swan*, 5 Allen (Mass.), 134. No error was committed by the court in either giving or refusal of instructions.

Nor is it perceived that the court erred in respect to the admission or rejection of any evidence.

The defense in this case was in its nature that of fraud and the court was justified in permitting it to take, as it did, quite a wide range with the view of uncovering what seems to have been an artful scheme to evade the provisions of the statute prohibiting the receiving or exacting of usury. Session Acts, 1891, p. 170.

The judgment is manifestly for the right party and must be affirmed. All concur.

W. F. TYGARD, Guardian, Etc., Appellant, v. THOMAS McCOMB, Administrator, Etc., Respondent.

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Kansas City Court of Appeals, May 1, 1893.

Gifts: CAUSA MORTIS: INTER VIVOS: ACCEPTANCE: INTENTION. A father in his lifetime, while in good health and living with his second wife, drew out his deposit in his bank and placed it to the credit of his minor daughters, the children of his first wife, taking a pass book in their name therefor. He subsequently deposited small amounts and drew checks, signing the daughters' names himself. He at one time drew out $600 and loaned the same taking a note in his own name. He died, leaving the book and note with his other papers. *Held:*

(1) If the transaction placing the money to the credit of the daughters was a valid gift, they were entitled to the note as well as the remainder of the deposit.

(2) The transaction was not a gift *causa mortis*, as it was not made in his last illness and in contemplation of and expectation of death.

(3) To make it a gift *inter vivos* there must have been an absolute and unequivocal intention to pass the title and possession to the girls, without the happening of any contingency whatever; and if it was the intention of the father that the gift should take effect as a sort of *post mortem* benefaction to be his while he lived and the girls' at his death, then it was not an executed and valid gift to which the courts will give effect.

(4) The transaction being for the benefit of the children their acceptance will be assumed and the delivery of the pass-book to the father, their natural guardian, is a delivery to them.

(5) As the evidence in this case shows the intention of the father was that if anything happened to him the girls should get the money, the transaction was testamentary in its character, an attempt at a nuncupative will under circumstances not permitted.

Appeal from the Bates Circuit Court.—HON. JAMES H. LAY, Judge.

AFFIRMED.

Holcomb & Smith and *J. F. Smith*, for appellant.

(1) The evidence shows that the deposit and those made subsequently in the names of the two children, were clearly intended to be gifts to the children, and should be given the legal force and operation of gifts absolute and complete to them. *Minor v. Rogers*, 40 Conn. 512, Am. Rep. 69; *Schooler v. Schooler*, 18 Mo. App. 69; *Vogel v. Gast*, 20 Mo. App. 107; *McCoy v. Hyatt*, 80 Mo. 130. The last case cited recognizes the doctrine that the husband, father or donor may be regarded as the trustee to hold the property or thing given, as trustee for the wife, donee or beneficiary; that the relation of trustee supercedes the necessity of an actual delivery. The trustee's possession is the donee's possession. *Howard v. Bank*, 40 Vt. 597; *Ray v. Simmons*, 11 R. I. 266. (2) The deposits were made by the father for the benefit of his minor children, and his retaining the pass-book does not defeat his intention to make an executed gift to them. *Gardner v. Merritt*, 32 Md. 78; 3 Am. Rep. 115; *Kerrington v. Rantigan*, 43 Conn. 17; *Minor v. Rogers*, 40 Conn. 512, *supra; Hill v. Stevenson*, 18 Am. Rep. 231; *Blasdel v. Locke*, 52 N. H. 238; *Howard v. Bank*, 40 Vt. 597. (3) Wilson checked on deposits in his own name, and directed the bank to place it to the credit of his two girls, declaring at the same time that he meant it to be theirs; and he had the pass-book made out in their names, and took charge of it himself. This clearly constituted him their trustee, and that money and all other money afterwards deposited by him to their credit became perfected gifts to them. *Ray v. Simmons*, 23 Am. Rep. 447; *Fowler v. Bank*, 21 N. E. Rep. 172; *Scott v. Bank*, 140 Mass. 157; *Miller v. Clark*, 40 Fed. Rep. 15;

Howard v. Bank, 40 Vt. 597; "Gift Bank Deposit," American Annual Digest, 1892, sec. 23; Appeal of Buckingham, 60 Conn. 143. (4) The evidence shows that Wilson was acting as trustee for his children in holding the deposit book, and no delivery of it to them was necessary, Bolles on Banks and their Depositors, sec. 160, p. 147; sec. 161, p. 150. (5) In this case even though the court may find there was no gift of the deposit, yet from the evidence a voluntary trust for the benefit of the children was created and will be enforced. Such trust does not require a delivery of the subject of the trust to the beneficiary, but the trustee may retain it for their benefit. *Atkinson, Petitioner*, 16 R. I. 413; 27 Am. St. Rep. 745; *Estate of Smith*, 144 Pa. St. 428; 27 Am. St. Rep. 641. (6) If the money loaned by Wilson to Hill belonged to the two children, or was impressed with a trust by their father, then the note is theirs, though the nominal payee may have been Wilson; and if theirs, then this suit ought to be maintained by them. *Philips v. Overfield*, 100 Mo. 466; *Atkinson Petitioner, supra.* (7) The father was the natural guardian of the children, and as such it was his right and duty to keep possession of the deposit book, and have the control of the funds during their minority. *Williams v. Walton*, 29 Am. Dec. 122; *Daniel v. Rector*, 50 Am. Dec. 242; 10 Ark. 211; *Hillebrant v. Brewer*, 55 Am. Dec. 757; 6 Tex. 45; *Easthano v. Powell*, 11 S. W. Rep. 823.

Silas W. Dooley, for respondent.

(1) This is not a gift *inter vivos* or a gift *donatio causa mortis*, as all the witnesses say; it was not to take effect unless something happened to deceased and hence was not reported. *Dunn v. Bank*, 18 S. W. Rep. (Mo.)

1139, not reported; *Brabrook v. Bank*, 104 Mass. 228. Not being complete a court of equity will not decree it a declaration of trust. (2) The essentials of a gift *inter vivos* are: The gift must be complete, with nothing left undone; the property must be delivered by the donor and accepted by the donee; and the gift must go into immediate and absolute effect. If not completed during the lifetime of the donor, his death revokes the part which has been performed. American & English Encyclopedia of Law, 1313; *McCord v. McCord*, 77 Mo. 166; *Walters v. Ford*, 74 Mo. 195; *Doering v. Kenamore*, 86 Mo. 588. (3) Delivery of the property in question with the intention to give is absolutely necessary to the validity of the gift. *Dunn v. Bank, supra;* 8 American & English Encyclopedia of Law, p. 1314; *Hamilton v. Clark*, 25 Mo. App. 428; *Nasse v. Thomas*, 39 Mo. App. 178; *Gartside v. Pahlman*, 44 Mo. App. 160; *Brabrook v. Boston, supra.* Words of gift are not sufficient. *Spencer v. Vance*, 57 Mo. 427. The circumstances must be such as to show that a present gift is intended. A gift to take effect at a future time is void. 8 American & English Encyclopedia of Law, p. 1315; *Vogel v. Gast*, 20 Mo. App. 104. (4) That part of the fund withdrawn and represented by note in dispute as loaned to Mr. Hill surely was a revocation, at least to that extent, as the note was taken in Wilson's own name. Until the gift is so completed by the delivery to the donee, the donor can revoke an agent's authority and resume possession of the gift. 8 American & English Encyclopedia of Law, 1318. (5) If the transaction amounts to a testamentary disposition it is void unless in the form of a will. *Dunn v. Bank*, 18 S. W. Rep. 1139, *supra; Huey v. Huey*, 65 Mo. 689; *Sherman v. Bank*, 138 Mass; *Nutt v. Morse*, 142 Mass. [2 Eng. Ed.] 243; *Smith v. Speer*, 34 N. J. Eq. 336; *Smith v. Bank*, 4 N. Eng. Rep. 527.

GILL, J.—On September 5, 1888, and for years prior thereto, Alexander Wilson resided at Rich Hill, Missouri. He was then married to the second wife and had four living children, all by his first wife. Two of these children were of age, and two, the above named plaintiffs, Isabella and Anna, were minors.

On said September 5, 1888, Wilson went to the Rich Hill Bank, where he did business, and transferred the entire balance of his account, to-wit, $1302.97, to the joint credit of his two minor daughters, Isabella and Anna. He got from the bank a pass-book, made out in the names of these children, wherein was entered the above deposit. He retained this in his own possession till his death in January, 1890. In addition to this other smaller sums were deposited, and he checked out from time to time different amounts, in every instance signing the names of the two girls by Alexander Wilson. The last check on the account made by him was in August, 1889, and this was on account of a loan of $600 that day made to one Hill. For this he took Hill's note payable to himself. Hill's note was renewed from time to time always made payable to Alexander Wilson, and the same, together with the bank book, was found among Wilson's papers at his death in January, 1890.

The above facts have given rise to two suits; this one being brought by the guardian and curator of the two minor children seeking to have the court declare them entitled to the Hill note, on the ground that the money thus loaned by the father belonged to them, and the second suit was brought by the administrator against the guardian of the two infant children, asking that the balance left in the bank ($724.97), and to the nominal credit of Isabella and Anna, be decreed and held as assets of the estate of said Alexander Wilson.

Both suits are in equity, and the court below decided each case in favor of the administrator and against the infants, and their guardian appealed.

When we have settled the character of the transaction of September 5, 1888, where Alexander Wilson drew his money out of the bank at Rich Hill and replaced it to the credit of his two minor children, the determination of both these cases becomes easy. If that was a valid and effective gift, then the two children were vested with a title to the money thus deposited; and they are entitled not only to the $724.97, balance to their credit, but as well to the Hill note given for the loan of the $600.

The trial judge in terms declared, in his finding and judgment, "that the moneys so deposited by Alexander Wilson in the names of his said minor children, Isabella and Anna Wilson, was not a complete gift to them during his life, as contended for by plaintiff herein, but that the same was deposited by said Alexander Wilson subject to his own order and control, and was not intended to vest in said minors until his death." The correctness of this holding is the question here.

This was in no sense a gift *causa mortis;* it was not made if at all "in his last illness and in contemplation and expectation of death" as is necessary to constitute a gift *causa mortis*. 2 Kent's Commentaries, 444. Hence, much that is said in briefs of counsel may be eliminated. If anything, it was a gift *inter vivos*. Mr. Wilson made this deposit some eighteen months before his death and while in perfect health, it seems. His death was from an accident in a mine.

As to what will constitute a gift, or such as the courts recognize, has been so often declared that repetition is tiresome. We had occasion to say in *Keyl v. Westerhouse*, 42 Mo. App. 57, that "a gift *inter vivos* is a parting with the title of personal property *in præ-*

senti absolutely and irrevocably. As said by Chancellor Kent, 'gifts *inter vivos* have no reference to the future, and go into immediate and absolute effect.' In order to constitute a valid gift there must be a complete and irrevocable transmutation of title and possession, perfect in all things at the time the gift is made, dependent on no circumstances or condition in the future. 1 Parsons on Contracts, 234." There must be a complete delivery of the thing given; such a delivery of possession as works an immediate change of dominion over the property. *Gartside v. Pahlman*, 45 Mo. App. 160, and cases cited. There must be an absolute and unequivocal intention by the donor to pass the title and possession at once over to the donee. To constitute a valid gift it will not do to have it go into effect on the happening of some event in the future or at the death of the donor. In the latter case the gift would be testamentary in character and would violate the wise provisions of the statute of wills.

In view now of these well established principles, I would state the law as applicable to this case to be this: If, when Alexander Wilson placed this money in the Rich Hill bank to the credit of his minor children, he intended thereby to make an absolute gift *in præsenti*, intended to part with the money *at once*, and vest the title thereto in said Isabella and Anna, and no longer to retain dominion thereof on his own account, then it became a valid gift, absolute and irrevocable. But if when such deposit was made said Wilson did not intend at once to part with the title and possession, and simply placed the money to the credit of the children to take effect as a kind of *post mortem* benefaction, to be his while he lived and theirs at his death, then it was not an executed and valid gift, and the courts will not give it effect.

No importance is attached to the mere fact that he kept the pass-book and never gave it over to the children, never notified them of the deposit to their credit, and that therefore no such delivery for these reasons as would answer the purpose of a valid gift. For as the transaction was clearly for the benefit of the children their assent and acceptance of the gift would be assumed. And besides a delivery of the pass-book to their father, who was their natural guardian, would be a delivery to them. A delivery therefore to the father on their account was, under the circumstances of the case, all that could be expected. If then we were to decide this case, looking alone to the deposit in the bank and retention by the donor of the evidence of such deposit, we should not hesitate to award the money to these minor children. The following well considered adjudications would warrant the decision. *Martin v. Funk*, 75 N. Y. 134; *Willis v. Smyth*, 91 N. Y. 297; *Mabie v. Bailey*, 95 N. Y. 207; *Bobb v. Bobb*, 7 Mo. App. 508; *Minor v. Rogers*, 40 Conn. 513; *Kerrigan v. Rantigan*, 43 Conn. 17; *Gardner v. Merritt*, 32 Md. 78; *Howard v. Goodell*, 40 Vt. 597; *Ray v. Simmons*, 11 R. I. 266; *Atkinson, Petitioner*, 16 R. I. 414; *Blasdell v. Locke*, 52 N. H. 238; *Danley v. Rector*, 5 Eng. (Ark.) 224; *Hillebrant v. Brewer*, 6 Tex. 45; *Williams v. Walton*, 8 Yerg. 387; *Eastham v. Powell*, 51 Ark. 530; *Sneathen v. Sneathen*, 104 Mo. 202.

But the question arises, what was Alexander Wilson's *intention* in the matter of this deposit in the names of his minor children. Did he intend thereby to transfer the property to his infant children at once, or was it a mere attempted testamentary disposition? The *intention* is the important element in determining the character of such transactions, and such intention may be manifested by acts or words or both. *Sneathen v. Sneathen, supra*, 210; *Standiford v. Standiford*, 97 Mo.

231; *Ells v. Railroad*, 40 Mo. App. 165. After a careful consideration of the evidence adduced at the trial, we conclude with the trial court that Alexander Wilson did not make a complete gift of that money to said minor children during his life, "but that the same was deposited by him subject to his own order and sole control and was not intended to vest in said minors until his death." Wilson stated to the bank officers, when he transferred the money to the credit of the girls, that he wanted it so fixed that the money would be theirs *if anything happened to him*. He stated also to his daughter, Mrs. Watson, that the money was so placed that the stepmother should not handle it and that *if anything happened to him*, the girls would get it. Witness Hill, speaking of the loan represented by the note in controversy (and which loan was clearly from this deposit in the names of the minor children) testified: "When Mr. Wilson came over to the club rooms, and gave me the $588 in money, he said, this is some of the money that I checked out of the girl's account. Says I, what do you mean? Well, he says, just this, there is quite a number of persons here after me all the time wanting to borrow, and, in order to get rid of them, I tell them that I have no money, and what surplus funds I have on hand I just deposit to the credit of my girls."

The testimony shows conclusively too that he treated this money all the time as if his own, checking on it at pleasure. In short, the circumstances all the way through show that when he placed the deposit in the bank to the credit of the children he still regarded it as his money, but that it was his desire, *if anything happened to him*, to have it go to the said minor children. At most then Mr. Wilson attempted a *noncupative* will under circumstances by law not permitted, and it is not in the power of the courts to give it effect. In

addition to cases *supra* the following are in point: *Geary v. Page*, 9 Bosw. 290; *Sherman v. Bank*, 138 Mass. 581.

The judgment of the circuit court will be affirmed. All concur.

THE SCHELL CITY BANK, Appellant, v. DAVID REED *et al.*, Respondents.

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Kansas City Court of Appeals, May 1, 1893.

1. **Subrogation:** SUBSEQUENT MORTGAGE: RIGHTS OF SURETY. A surety need not pay off a subsequent mortgage in order to be subrogated to the rights of his principal on the debt for which he is surety. On the payment of the debt, the surety stands as against his principal in the shoes of the creditor and has a right to all the securities, and no subsequent deal without his consent can affect his rights which accrued at the time he entered into his obligation of surety. Authorities discussed and distinguished.

2. ———: EQUITABLE ASSIGNMENT: RELATION: SURETY. Payment of the debt operates as an equitable assignment of all securities relating back to the time the surety's obligation was incurred.

3. ———: MORTGAGES: TACKING. The rule of tacking is not recognized in this country and is no longer in vogue in England.

Appeal from the St. Clair Circuit Court.—HON. D. P. STRATTON, Judge.

AFFIRMED.

William O. Mead, for appellant.

(1) The defendant Taylor is not entitled to be subrogated to the rights of Burch, the beneficiary in the deed of trust given by Reed to Burch, now held by plaintiff until he has satisfied all the debts due from Reed to plaintiff, for which the land is mortgaged to secure. 1 Hilliard on Mortgages [2 Ed.] sec. 35, p. 33; Jones

on Mortgages [2 Ed.] sec. 884; 1 Story's Equity Jurisprudence [12 Ed.] sec. 502*a*; *Wilcox v. Bank*, 7 Allen, 270. (2) The defendant Taylor is not entitled to be subrogated to the mortgage lien of the plaintiff under the mortgage to Burch, for the reason that upon the face of the note he is a joint maker and not a surety, and even though he may be a mere surety he is not entitled to subrogation unless it shall so appear upon the face of the note or mortgage. Sheldon on Subrogation, sec. 129, p. 148; 1 Hilliard on Mortgages [2 Ed.] secs. 42–43, p. 317; *Orvis v. Neville*, 17 Conn. 97. (3) The defendant Taylor's claim to subrogation is through Burch and his assignee, and they had a right to make such disposition of the deed of trust as they saw fit, and Taylor as the surety for Reed cannot justly complain, and cannot be subrogated to any rights under the deed of trust from Reed to Burch. *Stone v. Furber*, 22 Mo. App. 498; *Logan v. Mitchell*, 67 Mo, 524.

John H. Lucas, for respondents.

(1) "When a junior incumbrancer redeems from a prior lien, intermediate or subsequent incumbrancers in equity must refund the redemption money or pay all liens anterior to theirs, before they can enforce their claims upon the property." Jones on Mortgages [3 Ed.] sec. 879; 1 Hilliard on Mortgages [3 Ed.] secs. 30–31, 343–4. And the creditor is bound to preserve the security unimpaired. *Leggett v. Humpreys*, 21 How. U. S. 66–80; Brandt on Suretyship & Guaranty, secs. 275, 276, p. 371; *Brown v. Kirk*, 20 Mo. App. 532; *Wolff v. Walter*, 56 Mo. 295; *Orrick v. Durham*, 79 Mo. 174; *Taylor v. Tarr*, 84 Mo. 426; *Reyburn v. Mitchell*, 106 Mo. 380. (2) The English rule (now abandoned) of "Tacking" has never found favor in

America under our registry laws. Jones on Mortgages, secs. 310, 569, 1082. (3) The appellant had constructive and actual notice of the existence of the second mortgage, and respondents' relation thereto, and no equitable principle is known that would justify its contention herein. Brandt on Suretyship & Guaranty, secs. 271–275, *supra*. (4) Appellant's final contention is, that, because Burch assigned to it, Taylor cannot complain, and cites in support of this contention: *Stone v. Furber*, 22 Mo. App. 498; *Logan v. Mitchell*, 17 Mo. 524. We apprehend that the court will experience some difficulty in the application of the above cases to any question in the case at bar. 1 Hilliard on Mortgages [3 Ed.] sec. 31, p. 344; Brandt on Suretyship & Guaranty, sec. 370, p. 498.

ELLISON, J.—The following are the facts over which this litigation has arisen. Defendant Reed gave a first mortgage on his land to St. Clair county to secure a loan of $1,000. He afterwards borrowed $805 of one Burch and gave him a note and second mortgage therefor on the same land, the defendant Taylor also signing as his (Reed's) surety. Afterwards defendant Reed being indebted to one Maus in the sum of $1,200 executed his note and third mortgage on the land to him for that amount. Plaintiff afterwards purchased the Burch note, secured by the second mortgage and by defendant Taylor, and the Maus note secured by the third mortgage. Plaintiff afterwards foreclosed the third mortgage and bid in the land at much less than the note secured thereby. That afterwards in order, as plaintiff states, to protect its title to the land thus acquired, it paid off the judgment which had been obtained foreclosing the first mortgage to St. Clair county.

Plaintiff thereupon began the present suit against Taylor for the amount of the note of $805 secured by the second mortgage, and which, as before stated, had been assigned to plaintiff, and upon which Taylor was surety. Taylor conceded his liability on the note, but claims a right of subrogation and demands to be subrogated to the rights of the mortgagees in the first and second mortgages, that is, the county mortgage and the Burch mortgage securing the note on which he was surety. Taylor offered to pay the debts secured in both these mortgages on being so subrogated. Plaintiff denies this right unless Taylor will also pay the debt in the third mortgage.

The question arising on the foregoing facts is whether a surety must pay off a subsequent mortgage (securing a distinct debt) in order to be subrogated to the rights of his principal on the debt for which he was surety? We think he need not do so. It is a clear principle of equity that a surety has the right of subrogation to all the securities which the creditor has against the principal debtor. *Reyburn v. Mitchell*, 106 Mo. 380; *Taylor v. Tarr*, 84 Mo. 426; *Orrick v. Durham*, 79 Mo. 174. The surety on the payment of the debt stands as against the principal debtor, whose debt he has paid, in the shoes of the creditor and can make available to his benefit all rights which the creditor could have enforced. In this case the creditor held a mortgage. It was a junior mortgage to that held by the county of St. Clair. The creditor's rights in respect to these was a right to redeem the prior county mortgage and to foreclose his own. To these rights the surety succeeded. No *subsequent* deal or manipulation of the securities without the consent of the surety could affect his rights, for such rights of his accrued *at the time* he entered into the obligation of

surety. All mortgages or other securities held by the creditor are held by him as a trustee when dealing with the rights of the surety. He cannot without the surety's assent divert the securities to other purposes. Especially he cannot burden the securities with subsequent debts, for if he could the surety would be wholly in his power; nor can his assignee, with notice of the suretyship, do so. The surety may have entered into the obligation on the strength of the other securities held by the creditor. And whether his rights be partly contractual or wholly equitable they have been long recognized and well established.

But we are cited by plaintiff to some authority in seeming contradiction to what we have said, viz: 1 Hillard on Mortgages [4 Ed.] 342; 1 Jones on Mortgages, sec. 834; Sheldon on Subrogation, sec. 148. Each of these authors, although the law is stated by them in other parts of their works in conformity to the principles we have mentioned, yet on the authority of an English case (*Williams v. Owens*, 13 Sim. 597) they state that a mortgagee who also has a surety for the debt may afterwards make a further advance on the mortgage to the mortgagor, and the surety cannot be subrogated to the mortgage without paying both the original sum and the subsequent advance. This statement can only be upheld under the rule of tacking, a rule not recognized here and no longer in vogue in England. Such is the view taken by the master of the rolls in *Drew v. Lockett*, 32 Beav. 499, and by the supreme court of New York in the case of *National Exchange Bank v. Silliman*, 65 N. Y. 475, cases wherein the law is stated in keeping with what we have said in this opinion. The master states in *Drew v. Lockett*, that the surety in the case of *Williams v. Owens*, would be assumed to have entered upon his suretyship with a knowledge of the right of the creditor to tack.

This question ought to be clearly determined from a consideration of the time when the sureties' rights accrue. We have stated that the rights of the surety accrue *at the time he enters into the obligation.* And when he pays the debt it operates as an equitable assignment of all securities in the hands of the creditor *relating back to the time his obligation was incurred*, and carrying such securities as may be in the hands of the creditor's assignees, if they had notice of the relations. *McArthur v. Martin*, 23 Minn. 74; *Atwood v. Vincent*, 17 Conn. 575; *Scott v. Timberlake*, 83 N. C. 382; *Drew v. Lockett*, 32 Beav. 499; Sheldon on Subrogation, secs. 87, 100, 102; Harris on Subrogation, secs. 16, 255, 453. And this rule applies where on the face of the papers the surety appears as principal, if in fact a surety, of which fact the assignee has notice. *Rogers v. Trustees*, 46 Ill. 428; Sheldon on Subrogation, sec. 111.

We have discussed the surety's rights with reference to such securities as the creditor took or had at the time the surety entered into his obligation. What rights the surety would have in securities which the creditor might take after the surety entered into his obligation we have not considered. The cases of *Stone v. Furber*, 22 Mo. App. 498, and *Logan v. Mitchell*, 67 Mo. 524, have no application to the facts of this case. Those cases have relation to the equities in favor of the creditor as to securities which have been taken of the principal debtor by the surety. Neither is the case of *Wilcox v. Fairhaven*, 7 Allen, 270, at all applicable to this case. In that case a security was taken by the creditor to secure several debts, some of which were signed by sureties and some not. It was held that the creditor could apply the proceeds of the security (insufficient for all) to the debts which had no sureties, and that the sureties if they wished to be subrogated

to the securities must pay all the debts which it was given to secure. In such case it is plain that the surety was attempting to rob the creditor of a part of his security. The surety knew when he entered into his obligation that the security taken by the creditor secured *all* the debts, and that the creditor had a right to apply it to any of those debts he chose, if insufficient to pay all.

The result of our conclusion is, that since Burch, the creditor, with the second mortgage securing his debt on which Taylor was surety, had a right to subject the land to the payment of his mortgage debt; and that as holder of such second mortgage he had a right to redeem the first mortgage to St. Clair county, that Taylor, as surety, succeeded to Burch's rights; and that these rights remain unaffected in the hands of the plaintiff as assignee, who took the Burch note with notice of Taylor's suretyship. The judgment will therefore be affirmed. All concur.

VIRGINIA GOLDEN, Defendant in Error, v. THE CITY OF CLINTON, Plaintiff in Error.

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Kansas City Court of Appeals, May 1, 1893.

1. **Pleading**: PERSONAL INJURY: STREET: EVIDENCE. In an action for personal injury received in a street of a city, it is not necessary to allege that the street had been formerly laid out by ordinance; and the fact that it is a public street may be shown by evidence of dedication, acceptance and user as well as by ordinance.

2. **Municipal Corporations**: EMBANKMENT: AUTHORIZED STREET: NOTICE. If an embankment in a street authorized by ordinance is so constructed and maintained as to render travel over it dangerous and by reason thereof injury results, the city is liable therefor, and notice of its condition is unnecessary.

3. ———: DEDICATION: ACCEPTANCE: ESTOPPEL. To constitute a dedication there is only required the assent of the owner and the fact of use for public purpose; and when a municipality has treated land within its limits as a public street it is charged with the same duties as if it were legally laid out, is liable for damage, for neglect to keep in repair and is estopped to deny it is a highway.

4. ———: THIRD CLASS CITY: GRANT TO STREET RAILWAY: PRESUMPTION. It is competent for a third class city to grant the right of way to a street railway through its streets at any time, but the right cannot be exercised without the consent of the abutting property owners and damages paid. Where the grant is made and the road constructed, it will be presumed that the owners consented and the damages were paid.

5. ———: EVIDENCE: RECORD AS TO STREET. In an action for personal injury in a street, it is not error to refuse to admit the city records to show that the street has never by ordinance been established, graded, defined or improved.

6. ———: EVIDENCE: STREET: FORMER ACCIDENT. In an action for personal injury in a street, it is proper to admit evidence of different accidents previously occurring in such street to show the dangerous character of the place.

7. ———: DUTY AS TO STREETS: INSTRUCTIONS: HARMLESS ERROR. A municipality is not required to keep all its streets in repair, but only such as are necessary for the convenience and use of the traveling public; and an instruction set out in the opinion is subject to criticism, but, as the error is contained in a mere abstraction needlessly prefacing the instruction on the facts of the case, it is *held* harmless.

8. ———: ———:———: OFFICE OF COURT. An instruction telling the jury the city had assumed control of a street when its ordinance had granted a franchise therein to a railway is proper since the interpretation of an ordinance is the function of the court and not of the jury.

9. ———: ———: NOTICE. A city is liable without notice for a defect in its street occasioned by the act of a party it has authorized to use the street.

10. ———: ———: WHETHER OPEN: PHYSICAL CONDITION. A city can open a street to travel without an ordinance, and in determining whether the street was open for use by the public depends upon its physical condition.

11. ———: MEASURES OF DAMAGE: PROSPECTIVE: LOSS OF TIME: VARIANCE. In actions for injuries to the person by the person injured it is not essential to specifically allege that the injury is permanent to recover therefor, as prospective damages are considered the immediate and natural consequences; and the same rule applies to loss of time and services, etc. But if in this case there was a variance, objection should have been made to the introduction of the evidence

12. ——: ——: "ROUND." The term "round" is equivalent to that of "large, great or considerable" and should not be employed in an instruction on damages, though its use will not reverse the judgment in this case.

Error to the Henry Circuit Court.—HON. JAMES H. LAY, Judge.

AFFIRMED.

W. R. Jeffries and *B. G. Boone*, for plaintiff in error.

(1) The petition is fatally defective. There is no averment in the petition directly or by implication that the city of Clinton had ever opened or established Allen street by ordinance or otherwise. Revised Statutes, 1889, secs. 1495, 1498, 1514, art. 4, ch. 30; 2 Dillon on Municipal Corporations [3 Ed.] secs. 949, 1041, ch. 23. No liability attaches to a city of the third class for nonrepair of streets until the street has been opened or established as such by ordinance and the public invited to use it as and for a street for public travel. *Thrush v. Cameron*, 21 Mo. App. 394; *Rowland v. Gallatin*, 75 Mo. 134; *Stewart v. Clinton*, 79 Mo. 603; *Worth v. Springfield*, 78 Mo. 107; *Rumsey v. Schell City*, 21 Mo. App. 175. (2) The court erred in not giving defendant's instructions in the nature of a demurrer to the evidence. (3) The court erred in admitting the several deeds from Samuel Vail and others purporting to convey or dedicate the lands in said deeds described for public use. None but the absolute owner can legally dedicate, and to make these deeds material evidence in plaintiff's case it was essential to show title in the grantors and an acceptance on the part of the city (2 Dillon on Municipal Corporations [3 Ed.] sec. 635; *McShane v. Moberly*, 79 Mo. 41; *City of Hannibal v. Draper*, 36 Mo. 332; 2 Greenleaf

on Evidence [8 Ed.] secs. 662, 663), because there is no evidence on part of plaintiff proving or tending to prove an acceptance on the part of the city of these deeds. (4) The court erred in admitting the plat known as the "Moberly plat." *First.* Because there was no evidence that the platter, Moberly, had any title, interest or ownership or estate in the land embraced and described in the plat. *McShane v. Moberly, supra; Hannibal v. Draper, supra;* Greenleaf on Evidence, *supra. Second.* Because said plat does not cover or embrace that portion of the alleged Allen street where the accident occurred. (5) The court erred in admitting the ordinances granting the franchise to the Clinton Street Railway Company; because the city had no authority to grant a franchise until a majority of the resident owners of land abutting on said street shall first assent thereto in writing and the damages, if any, to the abutting land owners were ascertained and paid. 1 Revised Statutes, 1889, sec. 1576, art. 4, ch. 30, p. 443. (6) The court erred in refusing to permit the defendant to show by the records and journals of the city council that no ordinance or order had ever been passed opening, establishing, grading or defining Allen street or ordering said street worked or improved. Revised Statutes, 1889, secs. 1495, 1498, 1514, 1526; *Moore v. Cape Girardeau,* 103 Mo. 470; *Bassett v. St. Joseph,* 53 Mo. 290; *Brown v. Glasgow,* 57 Mo. 156; *Craig v. Sedalia,* 63 Mo. 417; *Beaudean v. Cape Girardeau,* 71 Mo. 392; *Keating v. Kansas City,* 84 Mo. 415; *Kemper v. Collins,* 97 Mo. 644; *McCormick v. Patchin,* 53 Mo. 33; *Brinck v. Collier,* 56 Mo. 160. (7) The court erred in permitting plaintiff to show by the witness Greenhalge that other and different accidents had previously occurred on said embankment. *Phillips v. Willow,* 70 Wis. 6; 5 Am. St. Rep. 114; *Parker v. Pub. Co.,* 69 Me. 173; 31 Am. Rep. 262; *Hudson v.*

Railroad, 59 Iowa, 581; 44 Am. Rep. 692; *Branch v. Lilly*, 78 Me. 321; s. c., 57 Am. Rep. 810; *Moulton v. Scruton*, 29 Me. 288; *Tem. Hall Ass'n v. Giles*, 33 N. J. Law, 260; *Railroad v. Wynant*, 114 Ind. 525; 5 Am. St. Rep. 644; *Stoker v. Railroad*, 91 Mo. 509; *Ramsey v. Railroad*, 81 Ind. 394; *Collins v. Dorchester*, 6 Cush. 396; *Hubbard v. Concord*, 35 N. H. 52; 69 Am. Dec. 520; *Maguire v. Railroad*, 115 Mass. 239; 110 Mass. 110; 118 Mass. 420. (8) The court erred in giving instruction number 1 on behalf of plaintiff. The instruction is not the law—it is too broad and comprehensive. *Craig v. Sedalia*, 63 Mo. 417; *Brown v. Glasgow*, 57 Mo. 156; *Bassett v. St. Joseph*, 53 Mo. 290. This instruction wholly omits the question of notice. It also declares the city to be liable if Allen street was opened and used by the public—whether said street was opened by the city or not, or whether said city had any knowledge of such uses, if any—and allows a recovery on a cause of action not stated in the petition. 71 Mo. 514; 72 Mo. 212, 414; 77 Mo. 34. (9) The court erred in giving instruction number 2. This instruction declares as a matter of law that to make the city liable it was not necessary that there should have been an order, ordinance or action of any kind of the city opening said Allen street, "but simply that its physical condition was at the time of the accident such as to admit of public travel; and that it was free from fences, houses and other obstructions such as to prevent travel." (10) The court erred in giving instruction number 3 on the measure of damages. It authorizes a recovery for permanent injury when no such injury is alleged in the petition. *Melvin v. Railroad*, 89 Mo. 106; *Kenney v. Railroad*, 70 Mo. 252; *Wade v. Haady*, 75 Mo. 394; *Ely v. Railroad*, 77 Mo. 34. And said instruction also authorizes and directs the jury to find for loss of time and services and

inability to earn a livelihood for herself and family, when no such injuries are stated in the petition and not even inferentially stated in the petition. *Rhodes v. Nevada*, 47 Mo. App. 499; *Duke v. Railroad*, 99 Ala. 347. And said instruction is also erroneous in telling the jury that they might find in such sum as in their judgment would be a *round* compensation.

C. E. Miller, *C. C. Dickinson*, for defendant in error.

(1) There was no error in failing to aver in the petition how Allen street was opened. *Rose v. St. Charles*, 49 Mo. 510; *Beaudean v. Cape Girardeau*, 71 Mo. 396; *Pierce v. Town of Lutesville*, 25 Mo. App. 321; *Haniford v. City of Kansas*, 103 Mo. 181. (2) The court did not err in not sustaining a demurrer to the evidence because the evidence shows the embankment on Allen street was constructed by the Clinton Street Railway Company and not by the city. *Maus v. Springfield*, 101 Mo. 617, and cases cited; 7 Lawson on Rights, Remedies & Practice, sec. 4018, p. 6304; *Haniford v. City of Kansas*, 103 Mo. 181; *Bonine v. Richmond*, 75 Mo. 437; *Carrington v. St. Louis*, 89 Mo. 208; *Taubman v. Lexington*, 25 Mo. App. 225; *Hines v. Marshall*, 22 Mo. App. 214; *Russell v. Columbia*, 74 Mo. 480; 2 Dillon on Municipal Corporations [2 Ed.] sec. 790, p. 912. (3) The admission of the various deeds in evidence conveying to the city of Clinton the sixty feet of land constituting Allen street for a public street, to be used by the public and for public uses forever, and for street purposes, as set forth in the different deeds, was no error. 2 Greenleaf on Evidence [13 Ed.] sec. 662, pp. 591–592. No ordinance or formal acceptance is necessary. *Gamble v. St. Louis*, 12 Mo. 617; *Taylor v. St. Louis*, 14 Mo. 20; *Rose v. St. Charles*, 49 Mo. 509; *Strainkel v. Oertel*, 14 Mo. App. 481. A dedi-

cation of land to public use may take place by use and assent without a deed. *McShane v. City of Moberly*, 79 Mo. 41. (4) The admission of the Moberly plat was also no error for the same reason that the deeds were admissible, said plat having been duly approved by ordinance number 160 of the city of Clinton and certified as required by law. It was the assumption of control and authority over Allen street, and a recognition and an acknowledgment of the same as a public highway. A plat of a city addition, duly acknowledged and recorded, is a dedication sufficient to constitute a street. *Meyer v. Railroad*, 35 Mo. 352; 11 Revised Statutes, 1889, sec. 7309, ch. 127, p. 1700. (5) The admission of ordinance number 31, granting franchise over Allen street to Clinton street railway, was entirely competent. 2 Dillon [2 Ed.] sec. 1009, p. 1025, and cases cited in note 1; *Potter v. Castleton*, 53 V. T. (1881) sec. 435; *Taubman v. Lexington*, 25 Mo. App. 224; *Russell v. Columbia*, 74 Mo. 480; *Swenson v. Lexington*, 69 Mo. 167; *Stephens v. Macon*, 83 Mo. 345; 2 Herman on Estoppel & Res Judicata, sec. 1226, p. 1369; sec. 1223, p. 1367; sec. 1222, p. 1363. (6) The permission to show by the records and journals of the city council that no ordinance or order had ever been passed or adopted by the city council, opening, establishing, grading or defining Allen street, or ordering said street worked or improved, was properly denied. *Rose v. St. Charles*, 49 Mo. 511; *Taylor v. St. Louis*, 14 Mo. 20; *Brinck v. Collier*, 56 Mo. 165; *Kemper v. Collins*, 97 Mo. 644. (7) Plaintiff in error complains that evidence of a similar accident, previously occurring at the same place, was admitted. Where there are conflicting decisions, we think the ruling of the court is supported by the best and most numerous authorities. Jones on Negligence of Municipal Corporations, sec. 242, p. 475-478; *District of Columbia v. Armes*, 107 U. S. (1882)

519; *Brady v. Railroad*, 127 N. Y. (1891) 46. The same doctrine is held in Whittaker's Smith on Negligence, p. 259; and said doctrine is sustained by the following leading authorities in their several states: *Darling v. Westmoreland*, 52 N. H. 401; *Moore v. Burlington*, 49 Iowa, 136; *Kent v. Lincoln*, 32 Vt. 591; *City of Chicago v. Powers*, 42 Ill. 169; *Quinlan v. Utica*, 11 Hun, 217; 74 N. Y. 603; *City of Augusta v. Hafers*, 61 Ga. 48; *City of Delphi v. Lowry*, 74 Ind. 523; *Railroad v. Wright*, 115 Ind. 378; *Railroad v. Richardson*, 91 U. S. 454; *Gilmer v. Atlanta*, 77 Ga. 688; *Gilrie v. Lockport*, 122 N. Y. 407; *Pomfrey v. Saratoga Springs*, 104 N. Y. 469, *House v. Metcalf*, 27 Conn. 631; *Hill v. Portland*, 55 Me. 438; *Myers v. Iron Co.*, 150 Mass. 125; *Hoyt v. Jeffers*, 30 Mich. 181; *Aldridge v. Railroad*, 3 M. & G. 515; *Huyet v. Railroad*, 23 Pa. St. 373; *Railroad v. Chase*, 11 Kan. 47; *Longabaugh v. Railroad*, 9 Neb. 271; *Railroad v. Stranahan*, 79 Pa. St. 405; *Railroad v. Gantt*, 39 Md. 115; *Dongan v. Champlain, etc., Co.*, 56 N. Y. 1; *Field v. Railroad*, 32 N. Y. 339; *Railroad v. Ruby*, 38 Ind. 294; *Railroad v. Newell*, 104 Ind. 264; *Delphi v. Lowery*, 74 Ind. 520; *Fort Wayne v. Coombs*, 107 Ind. 75. (8) Instruction number 1 states the law correctly and there was no error in giving it. *Basset v. St. Joseph*, 53 Mo. 298; *Russell v. Columbia*, 74 Mo. 490; *Loewer v. City of Sedalia*, 77 Mo. 443; *Blake v. City of St. Louis*, 40 Mo. 569; *Staples v. Town of Canton*, 69 Mo. 592; *Hull v. Kansas City*, 54 Mo. 598; *Buesching v. Gas Co.*, 73 Mo. 220; *Smith v. St. Joseph*, 45 Mo. 449; 7 Lawson on Rights, Remedies & Practice, sec. 4018, pp. 6304–6305; 2 Dillon on Municipal Corporations [2 Ed.] sec. 790, pp. 919; *Hines v. Marshall*, 22 Mo. App. 214; *Swenson v. Lexington*, 69 Mo. 167; *Stephens v. Macon*, 83 Mo. 345; *Crane v. Railroad*, 87 Mo. 588, 594, 595. (9) The giving of instruction number 2, defining what was meant by being open to

the public, was entirely proper; no error in using the words, "if permanent," in instruction number 3. *Taubman v. Lexington*, 25 Mo. App. 218, 224, 225. A variance between the pleadings and the evidence is no ground of error, unless the evidence was objected to on this ground at the time it was offered. 2 Thompson on Trials, sec. 2310, p. 1663. (10) But it was not necessary to have alleged that the injury was permanent. *Ohio v. Hecht*, 115 Ind. 443; 15 West. Rep. 122; 17 N. E. Rep. 297; *Dooly v. Railroad*, 36 Mo. App. 386; *State v. Blackman*, 51 Mo. 319; 1 Chitty's Pleading, 396; Bliss on Code Pleading, [2 Ed.] 297; 3 Sutherland on Damages, 426; 2 Sedgwick on Measure of Damages [7 Ed.] 606. (11) Loss of time and inability to earn a livelihood are the natural results of the injury, and need not have been specially pleaded. The evidence was not objected to nor asked to be excluded or limited in its application, and was properly submitted to the jury. *Brennan v. City of St. Louis*, 92 Mo. 482; McQuillin's Pleading and Practice, p. 304; also, *Railroad v. Hastings*, 26 Ill. N. E. 594, affirming 35 Ill. App. 434. (12) The use of the word *round* in instruction 3, no reversible error. *Loewer v. Sedalia*, 77 Mo. 439. And the court will not reverse where substantial justice has been done, even though misdirected as to damages. 2 Thompson on Trials, secs. 2401, 2402, 2403, pp. 1746-1749; Revised Statutes, 1889, sec. 2303, ch. 33, p. 580, and cases cited.

SMITH, P. J.—This is an action brought by the plaintiff against defendant, a city of the third class, to recover damages for personal injuries. The plaintiff had judgment and the defendant has brought the case here by writ of error.

I. The defendant city assails the plaintiff's petition on the ground that there is no allegation therein

either directly or by implication that it had ever opened or established Allen street, where the alleged injury occurred, by ordinance or otherwise. By reference to this pleading we find that it in terms charges that Allen street constituted a public highway of the defendant city at the time of the happening of the injury thereon of which plaintiff complains. This under numerous rulings of the appellate courts of this state was sufficient. To establish the character of the locality where the injury occurred as a part of a public street, nothing more was essential than to show that it was in the actual possession of the city and open and used by the public as a thoroughfare at the time. It was not necessary to allege that the street had been formally laid out by ordinance. In a case of this kind a street may be shown to be a public thoroughfare not only by evidence that it has been formally laid out by ordinance, but also by evidence of dedication, acceptance and user as a public highway. *Pierce v. Lutesville*, 25 Mo. App. 317; *Beaudean v. Cape Girardeau*, 71 Mo. 396; *Maus v. Springfield*, 101 Mo. 613; *Haniford v. Kansas City*, 103 Mo. 172.

It follows that the trial court did not err in overruling the defendant's objection to the introduction of any evidence in support of the petition.

II. The defendant contends that the trial court erred in refusing to give an instruction asked by it in the nature of a demurrer to the evidence, but we do not think this contention should be sustained. By an ordinance numbered 31, introduced in evidence, and against which there was no objection, or if so there was no exception saved to the action of the court in admitting the same, the defendant city expressly authorized the street railway company to construct the embankment in Allen street where the injury happened. This ordinance provided the manner in

which the embankment should be constructed. It specified that if the street railway company should find it necessary to construct or grade any street upon their route in the city limits that the grade should not be less than twenty-five feet wide, or wide enough to allow a wagon to pass on either side of the track. By a further amendatory ordinance, number 141, it was provided that said street railway should be constructed and maintained so as not to interfere with the ordinary public use of the streets any further or to any greater extent than would be incident and unavoidable to such tracks, etc. These ordinances name Allen street as one of the streets on which said street railway company was authorized to construct and maintain its railway. This was a legislative declaration of the fact that the city was in the actual possession of Allen street and that it was a public thoroughfare. In these ordinances we find a clear and explicit recognition of the fact that the streets over which the street railway company was licensed to construct and maintain its railway was then and thereafter to be open and used by the public as a thoroughfare. The evidence is quite convincing that the street railway company under the license conferred by said ordinances constructed the said embankment in Allen street at the place of the injury.

If the embankment was so constructed and maintained as to render travel on the street passing over it dangerous and hazardous and by reason thereof the plaintiff received her injuries, then the city is liable therefor if said embankment was placed there by the street railway company by the authority conferred upon it by the ordinances of the city. *Taubman v. Lexington*, 25 Mo. App. 218; *Russell v. Columbia*, 74 Mo. 480; *Swenson v. Lexington*, 69 Mo. 167; *Stephens v. Macon*, 83 Mo. 345. The city by ordinance having authorized the construction of said embankment not

only for the use of the street railway but as a public thoroughfare, it became the duty of the defendant city thereafter to keep the same in a reasonably safe and good traveling condition, and whether it neglected to perform the duty in consequence of which the plaintiff was hurt was a question of fact, which under the evidence adduced the court was warranted in submitting to the determination of the jury.

There was substantial evidence tending to prove that the embankment at the place of the injury was about twenty-four feet wide, and that on either side of the railway track the width of the street was about ten feet; that the declivity of the sides of the embankment was about forty-five degrees; that it was fifteen feet from the top of the embankment to its base, along which was extended a barbed-wire fence. The plaintiff's horse took fright at a passing car while on the embankment, and becoming unmanageable backed the buggy to which he was attached over the embankment, which resulted in a forcible collision of the plaintiff and her horse and buggy with the barbed-wire fence, by which the plaintiff claims she was injured. There was neither bar nor guard rail on the outer edges of the embankment. As the embankment was constructed by the defendant's authority, notice of its condition was unnecessary and especially so since there is no pretense that it did not conform in its construction to the requirements of the ordinance. The plaintiff's evidence clearly showed a *prima facie* right to recover.

III. It is next contended that the trial court erred in admitting in evidence several deeds to the defendant city which purported to convey to it the land over which Allen street was located, because it did not appear that the grantors in said deeds had title of any kind to the land conveyed, or that the defendant city accepted such grant. In order to make a city liable for

injuries for suffering a street to remain defective, there must be an acceptance of the grant or dedication. Such acceptance may be express and appear by the record, or it may be implied. It has been held that the digging of a well in a street by a town council was proof of the acceptance of the dedication of the street. *Aiken v. Lythgoe*, 7 Rich. (S. C.) Law, 435. So an acceptance of the public will be presumed when clearly beneficial, of which actual use is strong evidence. *Guthrie v. New Haven*, 31 Conn. 308; *Lake View v. LeBohn*, 120 Ill. 92. So, too, it has been held that acceptance will be presumed if the gift is beneficial, and user is evidence that it is beneficial. *Abbott v. Cottage City*, 143 Mass. 521; *Manderschild v. Dubuque*, 29 Iowa, 73. So, too, it has been declared in this state that all that is required to constitute a dedication is the assent of the owner of the land and the fact that it is being used for the public purposes intended by the appropriation. *Becker v. St. Charles*, 37 Mo. 14; *Rose v. St. Charles*, 49 Mo. 510.

In this case the evidence shows that the defendant city assumed jurisdiction of Allen street by authorizing the construction of a street railway thereon in such a manner as it could be used by the public as a thoroughfare of the city. There is also evidence tending to show the defendant city exercised supervision over it by working it. It was also shown to be a street that had been much used by the public since the construction of the railway embankment. The intent of the grantors in the deed to dedicate the land covered by Allen street for street purposes appears clearly from the deeds themselves. This is not an action of ejectment to try title to the street as in *McShane v. Moberly*, 79 Mo. 41, cited by the defendant. Our attention has been called to no case where it has been held, that in an action of this kind, where a city has accepted the dedi

cation of a street, that it has been permitted to interpose the defense that the person making the grant or dedication was not the owner of the land.

The law is settled by numerous adjudications to the effect that when a municipal corporation has treated a piece of land within its limits as a public street, taking charge of it as such, it is chargeable with the same duties as though it was legally laid out; and it is liable for damages by reason of neglect to keep the same in safe condition for travel. It is under such circumstances estopped to claim that it is not a legal highway. Dillon's Municipal Corporations, secs. 1009, 1012, and cases cited in note 2, p. 1267; Herman on Estoppel & Res Adjudicata, secs. 1222, 1223, 1226; *Mansfield v. Moore*, 124 Ill. 133; *Veal v. Boston*, 135 Mass. 187. The Moberly plat introduced in evidence seems to have been approved by an ordinance of the city and certified as required by the statute, and was properly admitted.

The evidence is not as full and satisfactory as it ought to have been that the deeds already referred to were accepted by the city, but it seems to us that whilst this is so there was some evidence from which their acceptance might reasonably be inferred. We think that under the authorities already cited the evidence of the dedication and acceptance was sufficent to carry the case to the jury.

The defendant is in error in supposing that by the provisions of section 1576 the defendant city had no authority to pass an ordinance granting the street railway company the right to construct its railway in Allen street until the majority of the resident owners of land abutting on said street first assented thereto in writing. It was competent for the city under the statute to pass the ordinance granting the right of way

at any time, but the right could not be exercised until the consent of the abutting property owners was obtained and the damages to such abutting property was ascertained and paid. As the ordinance was passed and the railway built in pursuance thereof, we have a right to presume that the abutting property owners not only consented thereto but that their damages have long since been ascertained and paid. We do not think the validity of the ordinance is therefore subject to the objection defendant makes to it.

IV. The defendant's further contention is that the court erred in refusing to allow it to show that the records of the city council had never passed an ordinance establishing, grading or defining Allen street or ordering it improved or worked. As has been indicated in a previous paragraph, streets are opened and established, not merely by ordinance, but likewise by use, dedication and acceptance, and the duty to repair or improve a street attaches whether it becomes a street by user or dedication, and the acceptance or dedication may be evidenced by express public act or resolve, or it may be implied from user or other significant facts. *Kemper v. Collins*, 97 Mo. 644. So that it will not do to say that the duty to improve or repair attaches only when the street has been formally opened and established by ordinance.

V. The defendant makes the further objection that the court erred in permitting the plaintiff to show by a witness that other and different accidents had previously occurred on said embankment. The character of the embankment was one of the subjects of inquiry in the case. Evidence of previous accidents at that particular place with the other evidence tended to show the dangerous character of the embankment in its unguarded condition. And for this purpose we think

the evidence was properly admitted. *District of Columbia v. Armes*, 107 U. S. 519.

Many authorities have been cited by counsel, some of which hold that such evidence is proper, while others equal in respectability hold it improper. A review of these authorities would subserve no useful purpose here. We have contented ourselves in following the ruling made by the supreme court of the United States in the case last cited, and hence uphold the ruling of the trial court. A great number of other points of objection to the action of the trial court in the admission and rejection of evidence have been urged by the defendant's counsel upon our attention and which we have given due consideration, but conclude they are not well taken.

VI. The defendant complains of the action of the trial court in giving for plaintiff an instruction which told the jury, "that it is the duty of the city of Clinton to keep its streets in a reasonably safe condition for persons traveling thereon with ordinary care and caution. And the city having by its ordinance assumed control over Allen street and authorized the Clinton Street Railway Company to lay its track on said street, is responsible for any unsafe condition of said street, occasioned by the company, if said street was, at the time of the accident to plaintiff, open to be used by the public. Now if the jury believe from the evidence that at the time of the accident Allen street was open for use and actually used by the public as a street, and that the embankment down which plaintiff fell was made by the Clinton Street Railway Company, and was, on account of the steepness of the sides thereof or the narrowness of its top or the absence of barriers or guards thereon, not reasonably safe for persons traveling thereon with ordinary care and caution, and that the plaintiff, while driving thereon with ordinary

care and caution, on account of such defects in the street, was thrown down said embankment by reason of her horse shying or backing on meeting the car, without fault or negligence on her part, you will find for the plaintiff," etc. It was not the duty of the defendant city to keep *all* of its streets in repair as stated in said instruction, *but only such of them as were necessary for the convenience of and use of the traveling public. Craig v. Sedalia*, 63 Mo. 417; *Bassett v. St. Joseph*, 53 Mo. 290; *Brown v. Glasgow*, 57 Mo. 156. But while the said instruction was too broad in its statement of the measure of the defendant city's obligation in the particular stated, yet as that part of the instruction which followed stated and applied the correct rule to the facts embraced in its hypothesis, we cannot perceive that the error was harmful. It was a mere abstraction needlessly prefacing the instruction on the facts of the case as they appeared in evidence.

There is no force perceived in the defendant's objection to said instruction that it declared as a matter of law that the defendant city by ordinance assumed control over Allen street. The granting by the defendant city of the franchise over Allen street was an undisputed fact; being such a solemn legislative act of the defendant city, affecting Allen street, it was the duty of the court to declare to the jury as to the effect of such legislative act, or as to the legal relation created by it between the city and the ground included within the limits of Allen street. The interpretation of the ordinance of a city like that of a statute is the function of the court and not of the jury. Thompson on Trials, 1056; *Slayback v. Gerhardt*, 1 Mo. App. 383; *Walker v. City of Kansas*, 99 Mo. 647; *Carroll v. Railroad*, 88 Mo. 239.

Nor is there any force in the objection to said instruction that it omits from its assumption of action-

able facts that of notice by defendant city of the dangerous and unsafe condition of Allen street at the time of the injury. As has already been stated in another place, when a defect in the street of a city has been occasioned by the act of a party authorized by the city to make use of such street, which results in producing the defect, the city will be liable, without notice, for an injury occasioned by such defect. *Taubman v. Lexington*, 25 Mo. App. 218; *Russell v. Columbia*, 74 Mo. 490; Lawson on Rights, Remedies & Practice, sec. 4018; 2 Dillon on Municipal Corporations [2 Ed.] sec. 790; *Hines v. City of Marshall*, 22 Mo. App. 214; *Swenson v. City of Lexington*, 69 Mo. 167; *Stephens v. City of Macon*, 83 Mo. 345; *Crane v. Railroad*, 87 Mo. 588, 594, 595.

Nor do we discover that it was error for the court, as it did by the plaintiff's second instruction, to tell the jury that a street could be opened to travel without an ordinance of any kind directing that it be so opened. In view of plaintiff's first instruction it was proper for the court to further direct the jury, that whether said Allen street was open for use by the public depended upon its physical condition at the time of the injury. The defendant is in error in supposing there was no evidence of the physical condition of the street at the place of the injury. The inference is plain enough that at this point the street was free from fences, houses and other obstructions preventing travel.

The defendant further complains of the action of the trial court in giving the plaintiff's third instruction as to the measure of damages. The jury were told by this instruction that in determining the measure of damages they might take into consideration the character and extent of plaintiff's injury, "its continuance, *if permanent*." The defendant contends that as the petition did not allege "a permanent injury" that

the instruction was erroneous. The law has long been settled that in actions for injuries to the person by the person injured, it is not essential that the petition should specially allege the injury is *permanent* in order to recover therefor. The gist of the action is the injury to the person, and the prospective damages are considered to be the immediate and natural consequences. *Cook v. Railroad*, 19 Mo. App. 324; *North Chicago v. Railroad*, 128, Ill. 603; Bliss on Code Pleading, sec. 297; Chitty on Pleading [14 Am. Ed.] pp. 395–396.

And a like answer may be made to the objection that said instruction authorized the jury to take into consideration the evidence of "loss of time and services and inability to earn a livelihood for herself and family when no such injuries are stated in the petition." But even if there was a variance between the pleadings and evidence, as there is not as we have seen, this would afford no ground of complaint, since it does not appear that the evidence was objected to on this ground at the time it was offered. Thompson on Trials, sec. 2310.

The term "round" is no doubt the equivalent of that of "large, great or considerable" and for that reason should not be employed in an instruction in a case like this, but in view of the fact that an instruction employing such a term has been passed by the supreme court without criticism *(Loewer v. Sedalia*, 77 Mo. 439) we do not feel at liberty to overturn a judgment for this reason alone. No material objection is seen either to the instruction or to the manner and time of giving the same.

It is but just to counsel for defendant to say that in the preparation of the bill of exceptions, the abstract of the record and points and authorities, they have evinced the most commendable care and painstaking.

It is seldom that we have been favored by counsel with a brief where every point relied on for reversal has been so ably and exhaustively treated. In fact the briefs of counsel on both sides for perspicuity, logical arrangement and artistic finish are most excellent models, and have been of much assistance to us in the consideration of the various grounds of complaint.

It results that the judgment will be affirmed. All concur.

WALLACE M. PRICE, Respondent, v. THE HOME INSURANCE COMPANY OF NEW YORK, Appellant.

Kansas City Court of Appeals, May 1, 1893.

1. **Principal and Agent:** DEPOSITORY OF ESCROW: INSURANCE: DELIVERY. If an agent is such an one as his acting as custodian of the paper is not antagonistic to his principal's interest and the paper is put in his hands, not as a delivery, but as a custodian, he can act as the depository of an escrow, as well as a stranger; and so a soliciting agent of an insurance company may hold an application and note to be delivered to his principal upon the happening of the contingency fixed by the maker, and if he delivers the same in violation of his instructions the delivery would be void.

2. **Insurance:** EVIDENCE: PROOFS OF LOSS: HARMLESS ERROR. Evidence of proofs of loss is not admitted for the purpose of establishing the value of the property but to show compliance with the terms of the policy; and the admission of affidavits of value making part of such proofs is harmless error when there is in fact no issue of value on the trial.

3. ———: ———: CONVERSATION WITH THIRD PERSON. Conversation with the agent of another insurance company as to the issue of a policy by his company on the insured property is admissible where the issuance of such policy is an issue in the case.

4. ———: INSTRUCTIONS. Instructions are held not subject to the criticisms made upon them.

Appeal from the Henry Circuit Court.—Hon. James H. Lay, Judge.

Affirmed.

Fyke & Hamilton, for appellant.

(1) The court erred in permitting plaintiff to prove that there was an understanding that the agent of the German of Freeport should procure the consent of the defendant to the insurance in the German of Freeport before the application should be sent in. Such understanding could not affect defendant; besides, Ross, by that arrangement, if it was made, became the agent of plaintiff to procure defendant's consent, and if he failed to do so and sent in the application, it was plaintiff's own act. Even if plaintiff thought at the time of the fire that he had no other insurance, still, if the German policy was valid, he cannot recover. *Zinck v. Ins. Co.*, 60 Iowa, 266; *Ins. Co. v. McCrea*, 8 La. 541. (2) The court erred in admitting conversation between plaintiff and Ross; the same was hearsay, and occurred before the application for the German policy was signed, and were certainly inadmissible. *Sarsfield v. Ins. Co.*, 42 How. Pr. 97. (3) The court erred in admitting the *ex parte* affidavit of Roher and Shoey. Such affidavit was not any part of the proofs of loss required by the policy. There is no conceivable theory upon which it was admissible. *Ins. Co. v. Sennett*, 41 Pa. St. 161; *Ins. Co. v. O'Neill*, 110 Pa. St. 548.

C. C. Dickinson and *Jas. Parks & Son*, for respondent.

(1) The instrument may be delivered in escrow to the agent of the party to whom such instrument is to

be finally delivered, and nothing passes if such agent delivers the instrument unless the condition is performed. *Railroad v. Iliff*, 13 Ohio St. 235; 2 Abbott's National Digest, sec. 11, p. 251, citing *Hammond v. Hunt*, 4 Bann A. Pat. Cas. 111, First Circuit (Mass.), 1879; *People v. Bostwick*, 32 N. Y. 445; *Railroad v. Atkisson*, 17 Mo. App. 484; *McCurtney v. Ins. Co.*, 45 Mo. App. 373; *Gilbert v. Ins. Co.*, 23 Wend. 43. (2) A written contract, not under seal, may be placed in the hands of the grantee or third party as an escrow, and a parol condition that its operation shall commence only on the transpiring of a future event will be good. If, in violation of the trust, the custodian delivers it without the fulfillment of the condition, it is void and passes nothing. Bishop on Contracts, secs. 356, 357, 358, and authorities cited; *Railroad v. Iliff*, 13 Ohio St. 235; *Gilbert v. Ins. Co.*, 23 Wend. 43; *Chipman v. Tucker*, 38 Wis. 43; Lawson on Rights, Remedies & Practice, secs. 2277, 2500, 2502, 2508, pp. 3817, 3818, 3819, 4144, 4145, 4152. (3) Proofs of loss are admissible in evidence for the purpose of showing compliance with the conditions of the policy. *Breckenridge v. Ins. Co.*, 87 Mo. 62; *Baile v. Ins. Co.*, 73 Mo. 371; *Browne v. Ins. Co.*, 68 Mo. 133; *Newmark v. Ins. Co.*, 30 Mo. 160; *Wagner v. Ins. Co.*, 143 Pa. St. 338. (4) Where there is other evidence in the cause showing plaintiff's loss and its extent, the admission of proofs of loss, while competent only to show compliance with terms of the policy and not to prove loss or its extent, is the admission of cumulative evidence as to the loss and damage, and does not constitute reversible error. *Baile v. Ins. Co., supra.*

ELLISON, J.—This action is based on a fire insurance policy issued by defendant to plaintiff, containing a clause against further or additional insurance without

the written consent of the defendant indorsed on the policy. Some time after the policy was delivered to plaintiff and shortly before the fire, the agent of another insurance company called on plaintiff, who resided in the country, and solicited him to take further insurance. Plaintiff refused to do so, stating as a reason that he had a policy issued by this defendant and that he could not take out more insurance without first getting the written consent of defendant. The agent then said he could so arrange the matter as to avoid a ride of twenty-five miles if plaintiff would make out an application and premium note to be held by him (the agent) until he (the agent) could get the written consent of this defendant. That when he obtained such consent he would forward the application. If he failed to get such consent he would return it to plaintiff. With that understanding the plaintiff signed an application and a note for the premium for further insurance. In violation of this agreement and without plaintiff's knowledge, the agent, who was only an agent for soliciting and taking applications, sent the application to his company. The company issued a policy and forwarded it by mail to plaintiff. The fire occurred at about three o'clock in the morning and that afternoon about four o'clock plaintiff's hired man brought him his mail from the postoffice in which was a letter inclosing the policy. Plaintiff started out next morning to find the agent, who resided in an adjoining county, to turn the policy over to him as he had not sent him the written assent of this defendant as agreed. Not finding the agent at home he returned, getting back after night. He then learned that the agent was in the house in bed. Next morning he gave the policy to the agent, stating that it amounted to nothing as there had been no consent obtained from this defendant, and that it was issued in violation of the agreement. This policy,

so given over to the agent, appears next in the hands of the adjuster who procured a release from plaintiff and returned him his note, the plaintiff however disclaiming any interest in the policy.

The important question presented by the foregoing facts, is whether the application was put into the possession of the agent as an escrow; or, rather, could it be delivered to the agent as an escrow; for the intent and aim of the plaintiff manifestly was to so deliver it. It is generally stated that a delivery of a deed to a grantee, or even to his agent, with conditions attached, amounts to a complete delivery, notwithstanding the conditions are not complied with. But in so far, at least, as this statement relates to an agent it will bear qualification. If the agent is such an one as that his acting as custodian of the deed or paper is not antagonistic to his principal's interests, and the paper is put in his hands, not as a delivery but as a custodian, there is no reason why he should not be permitted to so act for both parties, as well as a stranger. The duties owing by this agent to his insurance company were in no wise incompatible with the obligation he assumed for this plaintiff. When such is the case he may hold a deed or contract in escrow for both parties. Mr. Bishop, in his work on contracts, section 356, states that the attorney for the grantee in a deed may properly hold the deed in escrow. In *Railroad v. Iliff*, 13 Ohio St. 235, it is pointedly decided that the agent of one party is not incapacitated from becoming the depositary of an escrow. That the phrase "a stranger," or, "a third person," as used in defending the depositary of an escrow, may mean "a person so free from any personal or legal identity with the parties to the instrument, as to leave him free to discharge his duty as a depositary, to both parties without involving a breach of duty to either." The application having been delivered in vio-

lation of the trust reposed in the depositary, the delivery was void. Bishop on Contracts, sec. 358.

The trial court gave instructions for plaintiff in keeping with the foregoing views of the law, and since the verdict was for the plaintiff we will hold that no further insurance was taken by plaintiff and that the provision of the policy sued on was not, in this respect, violated.

Proofs of loss were introduced by plaintiff. A part of the proofs consisted of the affidavit of two neighbors of plaintiff who knew of the property and of the fire, the loss of the property and its value. They stated "that the date of the fire, the loss and damages and value therein (in plaintiff's affidavit of loss) set forth are true." Objection was made by defendant to reading these affidavits as a part of the proofs of loss. Evidence of the proofs of loss is not admitted for the purpose of establishing the value of the property. It is admitted in order to show a compliance with the terms of the policy. Such proofs contain a statement of the value of the property, and the plaintiff himself is required by this policy to state the value. If the policy did not require the statement of value by any other affiant than plaintiff, it may be that it was improper to admit the two affidavits of the neighbors referred to. But they stated only what had been already stated by plaintiff—they adopted plaintiff's statement—this, in connection with the fact that no *issue was made on the trial* as to the value of the property or the amount of the loss, makes the admission of the affidavits altogether harmless. Defendant's answer, being in part a general denial, made an issue as to the loss and the amount thereof, but on the trial such issue may be said to have been abandoned, since defendant not only failed to introduce evidence tending to contradict plaintiff's valuation, but failed to cross-examine plaintiff's witnesses

on the matter; in other words, failed to mention the matter of amount or value of property lost throughout the trial. No harm was done defendant and we rule the point against it.

The evidence of conversations after the fire with the agent of the other insurance company who had held plaintiff's application to that company, related to the question of how that application was obtained from plaintiff and for what purpose, and also to the question of his acceptance of the policy which came to him through the mail. It was properly admitted.

We cannot adopt the criticism which defendant makes of instruction number 1, given by the court of its own motion. It does not authorize a verdict for plaintiff notwithstanding he may have accepted the policy for additional insurance from the other company. The instruction especially refers to another instruction given in which such phase of the case is explained to the jury. The other instructions were unexceptionable.

A consideration of other objections made to the rulings of the trial court has satisfied us that no injury has resulted to defendant, and we affirm the judgment. All concur.

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DOGGETT, BASKETT & HILL COMPANY, Respondent, v. T. T. WIMER *et al.*, Appellants.

Kansas City Court of Appeals, May 1, 1893.

1. **Attachment**: PRIOR AND SUBSEQUENT: PAYMENT FOR JUDGMENT. A *bona fide* creditor's *bona fide* attachment for existing good cause is not destroyed or his right postponed to subsequent creditors for the reason that he pays the debtor defendant a money consideration to permit a judgment sustaining the well founded attachment and for the debt.

2. ———: ———: RELEASING PORTION OF ATTACHED GOODS. The fact that the prior attaching creditor releases a portion of the attached property does not have the effect to postpone his attachment on the balance of the goods to the claim of subsequent attaching creditors.

Appeal from the Barton Circuit Court..—HON. D. P. STRATTON, Judge.

AFFIRMED.

M. T. January, for appellant.

(1) A preference by an insolvent is lawful only when voluntary. A purchased preference is fraudulent and void. Bump on Fraudulent Conveyances [2 Ed.] pp. 191–2; *Kissom v. Edmonson*, 1 Ired. Eq. 180; *Pettibone v. Stevens*, 15 Conn. 19; *White v. Graves*, 8 J. J. Marshall (Ky.), 523. (2) The stipulation for reversal of the judgment of the circuit court in the case of Locke, Hulett & Co. filed in the court of appeals was an attempted fraud on the rights of the moving creditors whose attachments were subsequent in time. The agreement to file the stipulation and procure a reversal in the case of Locke, Hulett & Co., was a part of the same contract by which the plea in abatement in this case was withdrawn and judgment entered in favor of respondent, and if that part of the contract relating to the Locke, Hulett *case* was fraudulent it ought to vitiate the entire contract and postpone the lien of respondent to that of the moving creditors.

Scott & Hoss and *G. S. Hoss*, for respondents.

ELLISON J. —This case comes here on the appeal of Glaser Brothers and others, creditors of the defendant Wimer. They are styled, moving creditors, and filed their motion to postpone the lien of plaintiff's attachment to theirs which had been subsequently levied.

There was a demurrer to their motion sustained by the trial court.

It seems, from the allegation of the motion, that plaintiff and several others, including Locke, Hulett & Co., all creditors of defendant Wimer, instituted attachment suits against Wimer on December 10, 1889, the writs being levied on the same day, one day ahead of the attachment of these moving creditors. That thereafter Locke, Hulett & Co., were defeated in their attachment on trial of the plea in abatement, but that they duly appealed the cause to this court. That while this appeal was pending plaintiff's and the other prior attaching creditors entered into an alleged fraudulent agreement to have their attachments sustained, the effect of which will be to thereby absorb the fund in the sheriff's hands to the exclusion of these moving subsequent attaching creditors. That by said agreement the prior attaching creditors release certain notes, accounts and debts due defendant Wimer, and that they agreed to and did pay said Wimer $1,000 in money. And that afterwards judgments were rendered in favor of the prior attaching creditors, sustaining their attachments, as well as for their demands, including the attachment and demand of Locke, Hulett & Co.

It is not charged in the motion that the debts of the prior attaching creditors were not *bona fide*. It is not charged that the causes alleged for attachment in aid of their suits were not *just and true*. Nor is it alleged that any part of the attached property was taken or held by the prior attaching creditors for the use or benefit of the debtor defendant. The only specifications upon which the charge of fraud is founded consist in the charge that defendant was paid $1,000, and that certain notes and accounts were released from the prior attachment. The question then comes to this: *First*, whether a *bona fide* creditor's *bona fide*

attachment for existing good cause is destroyed or his rights postponed to subsequent creditors for the reason that he pays the debtor defendant a money consideration to permit a judgment sustaining the well founded attachment and for the debt. We answer the question in the negative. On such a state of facts the creditor is entitled to his debt and is entitled to have it made out of the property attached. By obtaining judgment, he only obtains his rights. The fact that he pays a consideration to the debtor defendant to permit him to have judgment rendered without contest, ought not to work to his detriment, since he could have obtained the same result at the end of a contest. He may conclude that expenses, time and trouble will be saved to him, and, as his position, fairly obtained, is already ahead of subsequent attaching creditors, it is not seen why such action should be annulled at the instance of the latter class of creditors.

Second. Does the fact that the prior attaching creditor releases a portion of the attached property have the effect to postpone his attachment on the balance of the goods to the claim of subsequent attaching creditors? We answer this also in the negative. We cannot understand what obligation the prior attachment creditor is under to the subsequent creditor. The subsequent attaching creditor ought to have levied this attachment on such goods before they were released. The release would then have operated to his benefit. There is no pretense that the prior creditor did any thing towards concealing or disposing of the effects released, or that they were in any way responsible for the subsequent creditors, not having included them in their attachment.

Appellants state that the trial court based its ruling on the demurrer on the authority of *Adler v. Anderson*, 42 Mo. App. 189, and then distinguish that

case from this. But whatever may have been the reason governing the circuit court, our opinion is it was right in the disposition made of the motion. The other authorities cited us by counsel are not thought to be applicable to the facts of this case. The judgment must be affirmed. All concur.

THE SOUTH MISSOURI LAND COMPANY, Appellant, v. C. B. RHODES, Respondent.

Kansas City Court of Appeals, May 1, 1893.

1. **Payment**: RULE AS TO. To constitute a payment, money or some other valuable thing must be delivered by the debtor to the creditor for the purpose of extinguishing the debt, and the creditor must receive it for that purpose.

2. ——: MARGINAL RELEASE OF MORTGAGE: ESTOPPEL. The marginal release of a mortgage reciting the payment of the debt operates as estoppel on the right of any owner of a note to have recourse against the land as security as to subsequent purchasers and incumbrancers thereof, but otherwise such release is but a receipt and is open to explanation like any other receipt, and the cancellation and destruction of a note does not necessarily have the effect to discharge the maker.

3. **Interest**: PRESUMPTIONS AS TO PLACE OF MAKING NOTE: KANSAS NOTE: MISSOURI MORTGAGE. In the absence of evidence to the contrary, a note is presumed to have been made in the state where dated, and a note dated in Kansas and bearing the Kansas rate of interest will not be usurious in Missouri, though secured by a mortgage on Missouri land.

Appeal from the Barton Circuit Court.—HON. D. P. STRATTON, Judge.

REVERSED AND REMANDED (*with directions*).

McClure & Bowling, for appellant.

(1) The entry of satisfaction is nothing but a receipt, is only *prima facie* and not conclusive evidence

of payment. *Joerdens v. Schrimpf*, 77 Mo. 383–387; *Knox Co. v. Goggin*, 105 Mo. 182–189; *Christy v. Scott*, 31 Mo. App. 337; *Chappel v. Allen*, 38 Mo. 223; *Valle v. Iron Mountain Co.*, 27 Mo. 455; *Crosby v. Chase*, 17 Me. 371; *Bean v. Boothly*, 57 Me. 303; *Homer v. Grasholz*, 33 Md. 525; *Peter's Appeal*, 2 Cent. Pa. 528; *Hughes v. Torrence*, 2 Cent. Pa. 334; *Ferguson v. Glassford*, 12 West. Rep. (Mich.) 436; *Ins. Trust & Safe Deposit Co. v. Railroad*, 9 S. E. Rep. (W. Va.) 180; *Seiberling v. Tipton*, 113 Mo. 373. (2) The note sued on in the absence of proof will be presumed to have been made where dated. Randolph on Commercial Paper, sec. 26. Hence this was a Kansas contract and the interest shown to be legal in that state can be collected here. 3 Randolph on Commercial Paper, sec. 1707, and cases cited. That the note was secured by deed of trust on land in this state does not make it a Missouri contract. *DeWolf v. Johnson*, 10 Wheat. 367; *Dolman v. Cook*, 1 McCart. 56–62; *Andrew v. Torrey*, 1 McCart. 357; *Cathial v. Blydenburgh*, Halst. Ch. 17.

Cole & Ditty, for respondent.

(1) When the note was canceled it was in effect destroyed. Its satisfaction utterly did away with its value. The validity and legal effect of the note were gone. *Greenabaum v. Elliott, Adm'r*, 60 Mo. 28–29; *Patrick v. Gas Light Co.*, 17 Mo. App. 466; *Burr v. Smith*, 21 Barb. 262; 3 Randolph on Commercial Paper, sec. 1841 (1888), p. 956. (2) The legislature in amending section 7094, Revised Statutes, 1889, intended to remove forever from the jurisprudence of this state any question as to whether notes secured by real estate had an end put to their vitality when releases were entered upon the margin of the record by an assignee.

SMITH, P. J.—Action on a promissory note. Defense was payment. The undisputed facts in the case are that defendant made his promissory note for $150 to the Van Fossen & Wilcox Investment Company to secure which he executed a deed of trust on one hundred and sixty acres of land in Barton county. Afterwards the said investment company was reorganized under the name of the Union Loan and Trust Company and succeeded to the ownership of said defendant's promissory note; that later on the defendant sold the land incumbered by said deed of trust lien, and after successive conveyances G. H. Nettleton became the owner thereof, as trustee for plaintiff; that, when said note of defendant became due, J. S. Ford, the comptroller of the plaintiff, purchased said note of the Union Loan and Trust Company, taking an assignment thereof to himself; that the said comptroller assigned the note to George E. Bowling for the purpose of having said land released from the lien of said deed of trust; that the said Bowling had said deed of trust lien released on the margin of the record. The marginal note on the record reads:

"The debt mentioned in the within deed of trust having been fully paid and discharged, I hereby acknowledge satisfaction in full and release the property therein conveyed from lien and incumbrance thereon. GEORGE E. BOWLING,

"Assignee of Beneficiary."

The testimony of the comptroller was that the word "paid" marked upon the face of the note was placed there by mistake while in plaintiff's possession, and that the note had never been paid. Upon this state of facts the court peremptorily directed the jury to return a verdict for defendant and entered judgment thereon accordingly.

The single question is: Do the foregoing facts show a payment of the note? It is conceded that the record marginal entry constitutes a valid release of the lien of the deed of trust on the land, but the question is what is the effect of this entry upon the defendant's obligation to pay the note. Are the recitals in this entry conclusive evidence of the payment? It has been decided that to constitute a payment, money or some other valuable thing must be delivered by the debtor to the creditor for the purpose of extinguishing the debt, and the creditor must receive it for that purpose. *Kingston Bank v. Gray*, 19 Barb. 459. There is not a semblance of evidence according to this rule that the defendant has ever paid the note. While the marginal record entry states the note has been paid, the evidence otherwise shows that in truth and in fact it has not been paid. As the only evidence of payment is the recital on the margin of the record, it remains to be determined whether this recital concludes the holder of the note. This recital as to subsequent purchasers and incumbrances of the land is conclusive evidence of the fact of the release of the land from the operation of the lien of the deed of trust. As to the land it no longer stood as a security for the payment of the debt. The record recital would operate as an estoppel on the right of any owner of the note to have recourse against the land as a security. The entry of satisfaction is nothing but a receipt, is only *prima facie*, and not conclusive, evidence of payment, and is open to explanation like any other receipt. *Joerdens v. Schrimpf*, 77 Mo. 383; *Knox Co. v. Goggin*, 105 Mo. 182; *Christy v. Scott*, 31 Mo. App. 337. It was therefore competent to prove that while the record entry showed that the debt had been discharged as to the land, that it was not so as to the defendant who owed the debt. A cancellation

and destruction of a note does not necessarily have the effect to discharge the maker's obligation to pay the debt which it evidences. The evidence *aliunde* the marginal record shows quite conclusively that it was the intention of the plaintiff to release the land from the lien of the deed of trust, but not to extinguish the debt. It is everyday experience that real property is released by appropriate instruments in writing from the liens of mortgages and deeds of trust without discharging the debt. Under the facts of this case we think it plain that the lien of the deed of trust was released, but that the debt remained unpaid.

The note is dated Fort Scott, Kansas, and bears interest at the rate of twelve per cent. per annum. There was no evidence adduced showing that it was made at a place other than where dated, and such being the case the legal presumption is that it was made in the state of Kansas where dated. 1 Randolph on Commercial Paper, 26; *Ins. Co. v. Simons*, 52 Mo. 357. And so it has been held that where a loan is secured by a mortgage on land lying in another state a note and mortgage at a rate of interest valid where they were given will not be rendered usurious by the law of the state where the land lies. 1 Randolph on Commercial Paper, sec. 27, and cases cited in note 1. Under the statute of Kansas (Statutes of Kansas, section 2, chapter 51) introduced in evidence, parties to any bill, bond or promissory note may stipulate therein for interest at a rate not exceeding twelve per cent. per annum. It results that the interest stipulated in this note was not usurious and can be enforced in this state.

It follows from these considerations that the plaintiff, and not the defendant, should have recovered in the court below, and for that reason the judgment will be reversed and the cause remanded with directions to

the circuit court to give judgment for plaintiff for the amount of the note and the interest that has accrued thereon at the rate of twelve per cent. per annum from the maturity thereof. All concur.

BARTON BROTHERS, Appellants, v. T. K. MARTIN *et al.*, Respondents.

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Kansas City Court of Appeals, May 1, 1893.

1. **Record:** PLEADING: DEMURRER. A demurrer is a plea to the action and is recognized and classed as a pleading in the code and is *held* to be a part of the record proper and will be considered on appeal without a bill of exceptions.

2. **Pleading:** THREE AMENDMENTS: VOLUNTARY. A party has a right to amend his pleading until the court has *adjudged* three pleadings insufficient; and a voluntary amended pleading should not be counted as one of the three.

3. **Guarantor:** SECURITY: ENUREMENT. When a guarantor takes security from the principal debtor, indemnifying him by reason of his being guarantor to the creditor, such security will enure to the benefit of the creditor.

Appeal from the Bates Circuit Court—HON. JAMES H. LAY, Judge.

REVERSED AND REMANDED.

Karnes, Holmes & Krauthoff, R. T. Railey and *Noah M. Givan*, for appellants.

(1) The petition of plaintiff, held to be insufficient upon the demurrer of defendant Glazebrook, was not the third petition adjudged insufficient by the court. Revised Statutes, secs. 2066, 2067, 2068; *Spurlock v. Railroad*, 93 Mo. 13, 530; *Corrigan v. Brady*, 38 Mo. App. 659. (2) Sheriff Glazebrook was a necessary and proper party at the beginning of the suit, and the cause was properly revived against his administratrix, who

held the trust fund in question after his death. Revised Statutes, sec. 1993; *Smith v. Sims*, 77 Mo. 269. (3) The petition stated a good cause of action against the Gregory Grocer Company, and it was error to enter judgment in its favor even if defendant Glazebrook was not a necessary party. *Lank v. Young*, 35 Mo. 371; *Ancell v. Cape Girardeau*, 48 Mo. 80; *Almutt v. Leper*, 48 Mo. 322; *Swan v. Thompson*, 73 Mo. App. 159. (4) The petition states a good cause of action. The property in the hands of J. K. Martin was trust property held for the payment of plaintiff's debt. The proceeds of its sale was a trust fund for the same purpose. The conveyance to plaintiff's guarantor was proper and enured to the benefit of plaintiffs. *Harrison v. Smith*, 83 Mo. 210; *Stoller v. Coats*, 88 Mo. 520; *Petring v. Chrisler*, 90 Mo. 649; *Kendall v. Baltis*, 26 Mo. App. 411; *Tolle v. Boeckler*, 12 Mo. App. 54, 63; *Haven v. Foley*, 18 Mo. 136; *Thornton v. Bank*, 71 Mo. 221, 232.

Thos. J. Smith and *P. H. Holcomb*, for respondents.

(1) "If a third petition, etc., be filed and adjudged insufficient as above" (that is in whole or in part, section 2066), judgment shall be rendered. Revised Statutes, 1889, sec. 2068; *Beardslee v. Morgner*, 73 Mo. 22. (2) Appellants according to their last amended petition show that at the institution of this action they had an adequate legal remedy; and, therefore, the interposition of a court of equity cannot be properly invoked. Having full knowledge of the time and place where they could assert their claim in a court of law and having had every opportunity to do so, plaintiffs cannot invoke the powers of the chancellor. *Janny v. Spedden*, 38 Mo. 395; *Maguire v. Tyler*, 47 Mo. 115; *Odle v. Odle*, 73 Mo. 289; *Holland v. Johnson*, 80 Mo. 39. (3) The objection that appellants' petition

does not state a cause of action may be first raised in this court. *Smith v. Burrus*, 106 Mo. 94, and cases cited; *Bassett v. Glover*, 31 Mo. App. 161.

ELLISON, J.—This action is based on a petition to recover the proceeds arising from a sale of certain merchandise. The sale was made by the sheriff under an attachment in favor of the Gregory Grocery Company, the said sheriff and grocery company being made defendants. Each of them filed an answer to the petition. On June 27, 1890, plaintiff, under leave asked and obtained, filed an amended petition. Afterwards on February 18, 1891, defendants withdrew their answers and filed a demurrer to this petition. Afterwards, on June 8, 1891, this demurrer was sustained and leave given plaintiffs to file an amended petition. This amended petition was filed, July 28, 1891. Afterwards, on February 10, 1892, plaintiffs obtained leave to file another amended petition, which they filed on April 12, 1892. Afterwards, on June 6, 1892, one of defendants filed a demurrer to this second amended petition, which was by the court sustained on June 22, the court entering the following judgment in sustaining this demurrer: "Now at this day, the demurrer of Gellia C. Glazebrook to plaintiffs' second amended petition is now by the court sustained, and plaintiffs having no further right to plead, it is therefore ordered and adjudged by the court that defendants go hence without day and recover of plaintiffs their costs and that execution issue therefor."

Plaintiff then filed an affidavit and bond for appeal, which was granted, and leave given plaintiff to file a bill of exceptions in vacation. There is some dispute or question raised as to whether the bill of exceptions was filed in the time and manner entitling it to be here considered. We are relieved of the necessity of determ-

ining this, since we can dispose of the case without the bill, and this leaves for our consideration only the record proper. A demurrer is a part of the record proper. What should be included in the record proper or judgment roll, in addition to what we now call the petition, summons, answer, reply, verdict and judgment, has frequently been discussed by the courts. A demurrer being regarded as not strictly a plea, "but rather as an excuse for not pleading," is sometimes omitted from a statement of what is included in the record proper. But, says Gould on Pleading, 35, as it was one of the modes of contesting a right of action it was properly considered "in connection with pleas to the action." So it is recognized and classed as a pleading in our code of civil procedure and is so named in Revised Statutes, 1889, section 2041. It is therefore held to be a part of the record proper. McQuillin's Pleading & Practice, sec. 942; *State to use v. Finn*, 19 Mo. App. 560; *State to use v. White*, 61 Mo. 441; *Spears v. Bond*, 79 Mo. 467. There is left, therefore, for the scope of our consideration the petitions, demurrers, with the action of the court thereon, and the judgment.

It will be noticed that there were but two petitions *adjudged* by the court to be insufficient. Under the provisions of sections 2066, 2067 and 2068, in order to deny the plaintiff the right or privilege of filing an amended petition the court must have *adjudged* three of their petitions insufficient. There were four petitions—the original and three amended petitions; but two of the amendments were not made as the result of having been adjudged insufficient. One of them was voluntary and the other was perhaps made necessary by death of one of the parties defendant. The court having adjudged the insufficiency of only two petitions committed error in concluding on the last demurrer that

plaintiff had no right to another amendment and in rendering judgment for defendant on demurrer.

In *Spurlock v. Railroad*, 93 Mo. 13 and 530, a question in many respects similar to this arose, and our determination here is in keeping with what was said there. In that case the petitions were adjudged insufficient on objections to testimony at the trial. But, for the reason that they were not so adjudged on demurrer, as specified in the foregoing statute, the court held the statute not applicable. It will be noticed that one member of the court dissents in that case, but he agrees that insufficiency of the petitions must be "*adjudged*" *by the court.* It seems clear, therefore, that the statute will not cover voluntary amendments to the pleadings referred to therein.

Since the cause is to be remanded it is proper to state that a consideration of the allegations of the petition satisfies us that it states a good cause of action against the Gregory Grocery Company. When the guarantor takes security from the principal debtor indemnifying him by reason of his being guarantor to the creditor, such security will enure to the benefit of the creditor. *Schell City Bank v. Reed*, *ante*, p. 94. A large number of authorities supporting this proposition will be found collected by counsel in their brief.

The judgment is reversed and the cause remanded with the concurrence of the other judges.

HEIDELBACK, FREIDLANDER & COMPANY, Appellants, v. COLE & FOX, Respondents.

Kansas City Court of Appeals, May 1, 1893.

1. **Novation:** ASSUMPTION OF PARTICULAR DEBTS. The assumption of certain listed debts of a debtor is not an assumption of all the debts of such debtor, and a mistake of a collecting bank in placing a payment as a credit on a note not listed will not raise a liability to pay such note.

2. **Practice, Appellate:** SUBMISSION WITHOUT INSTRUCTIONS. Where a cause is submitted to a court without instructions, its finding on the evidence is conclusive on appeal.

Appeal from the Barton Circuit Court.—HON. D. P. STRATTON, Judge.

AFFIRMED.

C. B. Adams, for appellants.

(1) Defendants are bound, notwithstanding the alleged oversight of said defendants in construing plaintiffs' letter. Where one of two innocent partiest must suffer, he who commits the error must bear the loss. *Rice v. Goffman*, 56 Mo. 434; *Mfg. Co. v. S. H. Henry* and *B. T. Henry*, 44 Mo. App. 263; *English v. Rice*, 20 Mo. 583; 2 Parsons on Contracts [15 Ed.] pp. 792 to 801; 3 Parsons on Contracts [15 Ed.] p. 398. (2) When the facts and evidence are such that the trial court should have found the issue for the plaintiff, the court of appeals will reverse the case and direct the entry of judgment accordingly. *Nicholson v. Walker*, 25 Mo. App. 368; *Friesz v. Fallon*, 24 Mo. App. 439.

Cole & Ditty, for respondents.

Plaintiffs having asked no declarations of law from the trial court on the question of novation, or on any other question, this court cannot review the finding of the circuit court. *Cunningham v. Snow*, 83 Mo. 587; *Lee v. Porter*, 18 Mo. App. 378; *Easley v. Elliott*, 43 Mo. 289; *Weilandy v. Lemuel*, 47 Mo. 322; *Miller v. Breneke*, 82 Mo. 163; *Taylor v. Cayce*, 97 Mo. 242; *Krieder v. Milner*, 99 Mo. 145.

SMITH, P. J.—This was an action brought to recover a balance on two promissory notes, one for $250 and the other for $325.35.

The petition alleged that Lewis & Co. sold their stock of merchandise to defendants and in consideration of such sale and as a part of the purchase price of said stock of merchandise the latter agreed to assume the indebtednes of Lewis & Co., and that this was communicated to plaintiffs by the defendants who consented thereto and thereupon discharged Lewis & Co. The evidence appearing in the abstract of the record does not sustain this allegation of the petition. It shows that the defendants did purchase Lewis & Co.'s stock of merchandise and agree in consideration of such purchase to assume a fixed amount of the latter's indebtedness. That a list of such debts were furnished the former by the latter including these notes of the plaintiff which defendants fully discharged.

There was a fourth note for $250, which was made to plaintiffs by Lewis & Co., but no mention was made of it by Lewis & Co. to defendants nor was it included in the fixed amount of the indebtedness of Lewis & Co. which defendants agreed to assume. It was in excess of the fixed amount of their assumption under the agreement. It is conceded that the amount which defendants paid plaintiff was equal to the amount of the three notes, principal and interest. It seems that through the mistake of the collecting bank that $100 which defendants paid on the $325.35 note was entered as a credit on the $250 note which defendants had not assumed to pay. There is nothing in the subsequent correspondence between plaintiffs and defendants which shows any liability of the defendants to plaintiff on the note they did not primarily assume to pay to plaintiffs. The defendants did not assume the payment of all the indebtedness of Lewis & Co., but only a specific sum to certain designated creditors which it appears they have paid.

There was no exception preserved to any ruling of the court in the admission or rejection of evidence, nor were there any instructions asked or refused. The cause was submitted to the court sitting as a jury. Such being the case the finding of the court upon the evidence which was for defendants is conclusive and binding upon us. *Cunningham v. Snow*, 83 Mo. 587; *Lee v. Porter*, 18 Mo. App. 378: *Easley v. Elliott*, 43 Mo. 289; *Wielandy v. Lemuel*, 47 Mo. 322; *Miller v. Breneke*, 82 Mo. 163; *Taylor v. Cayce*, 97 Mo. 242; *Kreider v. Milner*, 99 Mo. 145.

The judgment must be affirmed. All concur.

A. LEFKOW, Respondent, v. F. ALLRED, Appellant.

Kansas City Court of Appeals, May 1, 1893.

1. **Practice, Appellate:** EXCEPTIONS TO INSTRUCTIONS. Exceptions to instructions must be made at the time of giving in order to be reviewed on appeal.

2. ——: DISTURBING VERDICT. Where the record discloses ample testimony to warrant the finding it will not be disturbed on appeal.

Appeal from the Vernon Circuit Court.—HON. D. P. STRATTON, Judge.

AFFIRMED.

Stone, Hoss & King, J. T. James, for appellant.

Burton & Wight, for respondent.

(1) Defendant did not object to the giving of plaintiff's instructions at the trial. The first time he objected to them was in his motion for a new trial. Not having objected to them at the trial, he cannot be heard to complain of them either in his motion for a

new trial or in this court. *Randolph v. Alsey*, 8 Mo. 659-7; *Bompart v. Boyer*, 8 Mo. 234; *Dozier v. Jerman*, 30 Mo. 216; *Waller v. Railroad*, 83 Mo. 608; *Webb v. Allington & Anderson*, 27 Mo. App. 559. (2) This being a suit at law, this court will not weigh and pass upon the preponderance of the evidence. *Randolph v. Alsey*, 8 Mo. 656; *Honeycutt v. Railroad*, 40 Mo. App. 674; *Home Ins. Co. v. Shultz*, 30 Mo. App. 91; *Douglass v. Orr*, 58 Mo. 573; *McHugh v. Meyer*, 61 Mo. 384.

GILL, J.—This is a suit in replevin, and involves the right and title to a certain stock of goods. The goods were foremerly owned by a Mrs. Goodwin, who was sued in attachment by various creditors, and defendant Allred as constable levied said attachment on the goods as then belonging to said Mrs. Goodwin. At the date of the levy plaintiff Lefkow claimed to have been the owner and in possession of the goods by right of a prior purchase from Mrs. Goodwin.

The defense interposed by the attaching creditors, through the defendant constable, was that plaintiff Lefkow was not a purchaser in good faith, and that he did not before the levy of the attachments take such possession as would satisfy the statute of frauds.

The evidence for the plaintiff tended to show that the purchase was made in good faith, that practically the entire purchase price was applied to the payment of such of the debts of Mrs. Goodwin as plaintiff had knowledge of, and that he took open and unequivocal possession of the goods. The testimony for defendant tended to prove the contrary. Under instructions from the court the jury found for the plaintiff, and defendant appealed.

There is little here for review; indeed nothing except whether or not there was any evidence to

support the verdict and judgment. The motion for new trial, it is true, complains of the court's instructions, but the record fails to disclose any exceptions saved in that regard; and hence, since the defendant failed to object to the court's instructions at the time they were given, he cannot afterwards be heard to complain.

On the question whether or not we should disturb the judgment for want of evidence, it is sufficient to say that the record discloses ample testimony to warrant the jury's finding, and the judgment will therefore be affirmed. All concur.

CLARK NORRIS, Respondent, v. O. E. RUMSEY, Defendant; FRED RUMSEY, Interpleader and Appellant.

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Kansas City Court of Appeals, May 1, 1893.

1. **Partnership:** PARTNER'S LIEN: INDIVIDUAL CREDITORS: PRIORITY. A partnership creditor has a right derived through the partner's lien to have his claim paid out of partnership funds, but this right ceases with lien of the partner, as when he sells his interest to his partner, and a *bona fide* mortgage lien of an individual creditor of the purchasing partner taken after the sale, has the preference over a partnership debt; and the mere fact that the individual creditor knew that there was an agreement that the purchasing partner was to pay the partnership debts, will not of itself postpone his debt to the partnership debt. There must be want of good faith.

Appeal from the Nodaway Circuit Court.—HON. CYRUS A. ANTHONY, Judge.

REVERSED AND REMANDED.

W. W. Ramsay, for appellant.

(1) The interest here attached (should we admit it to have been partnership property) was clearly such

an interest as O. E. Rumsey could convey to an individual creditor. 1 Bates on Partnership, secs. 186, 291; 1 Jones on Mortgages, sec. 120; *Conant v. Fray*, 49 Ind. 530; *Reyburn v. Mitchell*, 16 S. W. Rep. 593. (2) The right of a firm creditor in equity to have the firm property applied in payment of firm debts is derived from similar rights existing in favor of each partner. It can only exist so long as the partnership continues. Creditors of the dissolved partnership cannot have a continuing lien upon property which the partnership once owned. *Huispamp v. Wagon Co.*, 121 U. S. 310; *Purple v. Farrington*, 119 Ind. 164; *Sexton v. Anderson*, 95 Mo. 381; *Reyburn v. Mitchell*, *supra; Tennant, Walker & Co. v. McKean*, 46 Mo. App. 486. Any act which will serve to transfer a chose in action is sufficient between partners to convert partnership property into separate property. 17 American & English Encyclopedia of Law, pp. 974, 975, and cases cited. How can respondent enforce an administrative right in the absence of administration, assignment, bankruptcy, insolvency or attachment for fraud? *Tennant, Walker & Co. v. McKean*, 46 Mo. App. 493.

Johnston & Wilfley, for respondent.

(1) It is too well settled in this state, that partnership property is liable to pay partnership debts in preference to the payment of creditors of individual partner, to require argument. *Bank v. Brenneison*, 97 Mo. 145; *Julian v. Wrightsman*, 73 Mo. 569; *Flannighan v. Alexander*, 50 Mo. 50; Parsons on Partnership [1 Ed.] 480, 481. (2) This right of the firm creditors to priority of payment of firm debts out of firm property continues after the dissolution of the firm; especially where one of the firm buys out his co-partner and agrees by the terms of such dissolution to pay the firm

debts. *Phelps v. McNeely*, 66 Mo. 554; *Conroy v. Wood*, 13 Cal. 631; *Tenny v. Johnson*, 43 N. H. 144. (3) Each partner has an equity to have the partnership property first applied to the payment of the firm debts, and such equity continues after the dissolution of the partnership in favor of one selling to his co-partner, where the purchasing partner by the terms of the dissolution agrees to pay the firm debts. *Phelps v. McNeely, supra; Caldwell v. Scott*, 54 N. H. 414; *Tenny v. Johnson*, 43 N. H. 144; *Rodgers v. Batchelor*, 12 Pet. U. S. 230; *Conroy v. Woods, supra; Bank v. Brenneison, supra.* (4) It makes no difference in the foregoing rule whether the action of the firm creditor is brought against all the members of the firm or against the individual partner who purchased the partnership property and agreed to pay the firm debts in the contract of dissolution. *Grant v. Holmes*, 75 Mo. 109; *Simpson v. Schulte*, 21 Mo. App. 639.

ELLISON, J.—The partnership of O. E. Rumsey & Co., composed of O. E. Rumsey and one Goodsill, was indebted to plaintiff, the indebtedness being evidenced by a promissory note signed by the firm. Upon this note plaintiff brought suit by attachment against O. E. Rumsey individually and attached (principally) the partnership property. Before the attachment, however, Goodsill sold his interest in the partnership to O. E. Rumsey. O. E. Rumsey thereafter, and also before the attachment, conveyed the property by chattel mortgage to this interpleader to secure an individual debt which he owed him. After the levy of the attachment this interpleader filed his interplea and lost his case in the trial court. He comes here for relief.

The question for decision is, which debt has the preference. Or, in other words, which takes prefer-

ence, the partnership creditors' right claimed by plaintiff, or the mortgage securing the individual debt to interpleader?

That a partnership creditor has a right (sometimes called a *quasi* lien), which he derives through the partner's lien, to have his partnership claim paid out of the partnership funds or property, is well settled. This right of the creditor, arising from or being derived through the partner, ceases with the lien of the partner. The creditor's right is derivative and has no independent or separate existence. If, therefore, one of two partners in good faith sells his interest to his remaining partner, no equity can attach to the partnership effects in favor of the partnership creditor, for the plain reason that the lien is the partner's lien which he may destroy or waive by a *bona fide* sale, and having done so there is nothing left to work the right of the creditor through. These principles are well established by the recent cases in this state. *Reyburn v. Mitchell*, 106 Mo. 365; *Sexton v. Anderson*, 95 Mo. 373; *Tennant, Walker & Co. v. McKean*, 46 Mo. App. 486. There was no fraud found in this case and we must hold, under the foregoing principles of law, that the mortgage securing interpleader's individual debt has the preference over plaintiff's partnership debt.

But it is asserted, and is true, that O. E. Rumsey and Goodsill, the retiring partner, had an agreement between themselves whereby Rumsey was to pay all the partnership debts. But it is not shown or at least was not found that interpleader knew of this, or that if he did know it, that there was not abundant partnership property with which to pay them. But if he had known it, such knowledge, standing alone, would not have affected the matter. *Howe v. Lawrence*, 9 Cush. 553; Story on Partnership, sec. 359. In the case of *Reyburn v. Mitchell, supra*, Robertson and Mitchell were partners.

Robertson sold out to Mitchell with the agreement that he, Mitchell, was to assume partnership debts. Mitchell then conveyed by quitclaim deed to Kilgour his individual creditor; the court held, at page 676, that, if this sale was *bona fide*, Kilgour could not be affected by the claims of partnership creditors, and proceeded to hold under the facts of that case that the transaction between Mitchell and Robertson was not in good faith.

We examined the principle which governs this case in the case of *Tennant, Walker & Co. v. McKean, supra;* and a reconsideration of all the cases cited therein as well as the opinion of McFARLANE, J. in *Reyburn v. Mitchell*, satisfies us that the court below has not determined the cause from the standpoint which should govern it, and we will therefore reverse the judgment and remand the cause. All concur.

THE WYETH HARDWARE AND MANUFACTURING COMPANY, Plaintiff in Error, v. H. F. LANG & COMPANY, Defendants in Error.

Kansas City Court of Appeals, May 1, 1893.

1. **Judgments:** FAITH AND CREDIT OF: JURISDICTION OPEN TO ATTACK. Under the United States Constitution the duly authenticated record of the judicial proceedings of a state have such faith and credit given them in the courts of every other state as they have by law or usage in the courts of such state; yet this does not preclude an inquiry into the jurisdiction of the court, nor into the right of the state to exercise authority over the parties or subject-matter, or whether the judgment is founded in fraud in its procurement.

2. **Injunction:** FOREIGN ATTACHMENT: EVASION OF LAW. A court of equity may at the suit of one citizen restrain another from prosecuting an attachment suit in a foreign state for the purpose of evading domiciliary laws; and this jurisdiction proceeds on the principle that the citizens of a state are bound by its laws, and cannot be permitted to evade them to the injury of other citizens.

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3. **Action**: MALICIOUS ATTACHMENT: COMMON LAW. The common law affords a citizen of this state an ample remedy against another citizen of the state for a malicious attachment brought in another state.

4. **Judgments**: VOID FOR WANT OF JURISDICTION. Where it appears from the whole record that the court had no jurisdiction over the person or subject-matter, the judgment is void and will be so treated in a collateral proceeding.

5. **Kansas**: COMMON LAW: ATTACHMENT: PRESUMPTION AS TO LAW OF. The common law has never prevailed in Kansas. Attachment is unknown to the common law; and the Missouri courts will presume the attachment law of Kansas is the same as in Missouri.

5. **Debts**: SITUS OF CONTRACT: ATTACHMENT. Contracts respecting personal property and debts have no *situs*, but follow the owner and are disposed of by law of his domicile wherever in point of fact they may be; but this fiction yields to laws for attaching the property of nonresidents which assume that the property has a *situs* distinct from the owner's domicile; and the fact that the debt is by contract payable in a state other than that of the debtor, does not change the *situs* so as to prevent its attachment in the state of the debtor, *conflicting with Keating v. Refrigerator Co.*, 32 Mo. App. 292, and other cases of the St. Louis court of appeals.

6. **Litigation in Foreign Courts**: PRESUMPTION. Courts of equity refuse to interfere with the actions of persons litigating in other states, if it is apparent that full and complete justice may be done in such litigation, and that such justice will be done in such litigation is to be presumed, and a petition for an injunction to restrain the parties from such litigation must rebut such presumption and show a case of oppression or fraud.

Error to the Jackson Circuit Court—HON. JOHN W. HENRY, Judge.

CERTIFIED TO THE SUPREME COURT.

Johnson & Wilson and *George N. Elliott*, for plaintiff in error.

Henry Wollman, *Alexander New*, for defendants in error.

SMITH, P. J.—The petition in this case, which is for an injunction, alleged that both plaintiff and

defendants were business corporations organized and existing under the statutes of this state.

It was further alleged that the defendant had sued the plaintiff by attachment in one of the courts of the state of Kansas, and had procured the process of garnishment in said suit to be served upon certain debtors of the plaintiff, who were its customers and had become indebted to it for merchandise sold by it to them in this state where such indebtedness by the terms of the sale of such merchandise, for which it was incurred, was made payable; that the plaintiff here, who was the defendant in the attachment suit, was notified thereof by publication, and that judgment had been severally pronounced against the defendant and the garnishees therein. The petition fails to disclose the nature of the claim upon which the attachment proceedings were grounded. It appears that the plaintiff is a solvent corporation and that the defendants are about to take steps to compel by execution the garnishees to satisfy the amount of the judgments against them; that the garnishees, who are plaintiff's customers, are in great danger of having to pay their indebtedness to plaintiff twice, which would frustrate the trade relations between the former and the latter to the great injury of the latter, etc. The prayer was that defendants be enjoined and restrained from enforcing and collecting the judgments against plaintiffs and the garnishees, etc.

The defendant interposed a demurrer to the petition on the ground that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and, the plaintiff electing to abide by its petition, judgment was given accordingly. The plaintiff brings the case here by writ of error.

While it is undeniably true that under the constitution of the United States and the act of congress passed in pursuance thereof (Constitution of United

States, art. 4, secs. 1 and 2; Revised Statutes of United States, sec. 905), that the record and judicial proceedings of a state duly authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said record shall be taken, this does not preclude an inquiry into the jurisdiction of the court in which the judgment is rendered to pronounce it, nor into the right of the state to exercise authority over the parties or the subject-matter, nor whether the judgment is founded in, and impeachable for fraud in its procurement. *Kincaid v. Storz*, 52 Mo. App. 564; *Cole v. Cunningham*, 133 U. S. 107; *Crone v. Dawson*, 19 Mo. App. 214; *Matson v. Field*, 10 Mo. 103; *Marks v. Fore*, 51 Mo. 74; *Eager v. Stover*, 59 Mo. 88; *Barlow v. Steel*, 65 Mo. 619; *Napton v. Leaton*, 71 Mo. 358; *Railroad v. Sharritt*, 43 Kan. 375; *Thorn v. Salmonson*, 37 Kan. 441.

The interposition of a court of equity of a state may be invoked by one of its citizens to restrain another of its citizens from prosecuting an attachment suit in a foreign state for the purpose of evading their domiciliary laws without violating any rule of comity existing between the states. *Cole v. Cunningham, supra.* Mr. Justice STORY (Story's Equity Jurisprudence, sections 899, 900) thus states the principle: "But although the courts of one country have no authority to stay proceedings in the courts of another, they have an undoubted authority to control all persons and things within their own territorial limits. When, therefore, both parties to a suit in a foreign country are resident within the territorial limits of another country, the courts of equity in the latter may act *in personam* upon those parties, and direct them by an injunction to proceed no further in such suit.

In such a case these courts act upon acknowledged principles of public law in regard to jurisdiction. They do not pretend to direct or control the foreign court, but, without regard to the situation of the subject-matter of the dispute, they consider the equities between the parties and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam*. * * * It is now held that, whenever the parties are resident within a country, the courts of that country have full authority to act upon them personally with respect to the subject of suits in a foreign country as the ends of justice may require, and with that view to order them to take or omit to take any steps and proceedings in any other court of justice, whether in the same country or in any foreign country." And a like principle was affirmed by the supreme court of the United States in *Phelps v. McDonald*, 99 U. S. 298. And this principle had been applied by the courts of the domicile against attempts of some of its citizens to defeat the operation of its laws to the wrong and injury of others. *Snook v. Snitzer*, 25 Ohio St. 516; *Keyser v. Rice*, 47 Md. 203; *Railroad v. Thompson*, 31 Kan. 180; *Zimmerman v. Franke*, 34 Kan. 650; *Wilson v. Joseph*, 107 Ind. 490; *Pickett v. Ferguson*, 45 Ark. 177; *Railroad v. Ramsey*, 45 N. Y. 637; *Kidder v. Tufts*, 48 N. H. 121; *Bank v. Lacombe*, 84 N. Y. 367; *Paine v. Lester*, 44 Conn. 196; *Sercomb v. Catlin*, 128 Ill. 556; *Dehon v. Foster*, 4 Allen, 545. The foregoing authorities plainly show that the ground or principle upon which courts of equity proceed in cases of this kind is that the citizens of a state are bound by its laws and cannot be permitted to do any acts to evade or counteract their operation, the effect of which would be to deprive other citizens of rights which those laws are intended to secure.

In looking at the plaintiff's petition it will be found that there is no act there alleged which brings its case within the principle just adverted to. If the Kansas attachment was wrongful and malicious and is likely to entail upon the plaintiff the injurious consequences he alleges, the common law prevailing in the state of his domicile will afford him ample remedy.

It is further contended by the plaintiff that the petition shows that the Kansas debts which were the subject of the garnishment were, by the terms of the agreement by which they were created, made payable at the place of the domicile of the plaintiff in this state, and that, therefore, the Kansas court was without jurisdiction to condemn the same. It is the well recognized rule of law that where it appears from the whole record of a court that it had no jurisdiction over the person or subject-matter, the judgment is void and will be so treated in a collateral proceeding. *Hope v. Blair*, 105 Mo. 35; *Adams v. Cowles*, 95 Mo. 507; *Carr v. Coal Co.*, 96 Mo. 155; *Brown v. Woody*, 64 Mo. 548; *Higgins v. Peltzer*, 49 Mo. 155; *Barlow v. Still*, 65 Mo. 619; *Napton v. Leaton*, 71 Mo. 366.

The common law has never prevailed in Kansas unless adopted there by statute (*Bain v. Arnold*, 33 Mo. App. 631). Besides this, the proceeding by foreign attachment was unknown to the common law. *Railroad v. Crane*, 102 Ill. 258. We are, therefore, justified in presuming that the attachment law of Kansas is the same as our own. *Bain v. Arnold*, *supra*; *White v. Charry*, 20 Mo. App. 389; *Hoffmeyer v. Losen*, 24 Mo. App. 652; *Flato v. Mulhall*, 72 Mo. 522; *Sloan v. Terry*, 78 Mo. 623. Under the statutes of this state suit by attachment may be begun and prosecuted against a non-resident defendant and his lands, chattels and credits made subject thereto. The process of garnishment in attachment cases may be employed to reach

the credits of the defendant. Revised Statutes, art. 1, ch. 10. And one non-resident may sue another non-resident by attachment under our statute. *Fielden v. Jessup*, 24 Mo. App. 91. The statute of this state just referred to also provides in attachment suits against non-resident defendants for service of summons upon them by publication and that the judgment and execution thereon, in case there is no appearance, shall run against the property attached.

The plaintiff's insistance is that the proceedings of the Kansas court are void for want of jurisdiction for the reason that the debts garnished had no *situs* in that state, and that consequently they were not liable to be attached there. Contracts respecting personal property and debts are now universally treated as having no *situs* or locality; and they follow the owner in point of right. They are deemed to be in the place and are disposed of by the law of the domicile of the owner wherever in point of fact they may be situate in accordance with the maxim *mobilia non habent situm* Story on Conflict of Laws, secs. 362, 399; State Tax on Foreign Bonds, 15 Wall. 320; *Renier v. Hurlbut*, 50 N. W. Rep. 783; *Wallace v. McConnell*, 13 Pet. 136; *Railroad v. Gomila*, 132 U. S. 485; *Bank v. Rollen*, 99 Mass. 313; *Trowbridge v. Means*, 5 Ark. 135. It has been ruled in effect that a debt without reference to where payable is deemed attached to the person of the owner so as to have its *situs* at his domicile, yet this fiction always yields to laws for attaching the property of a non-resident because such laws necessarily assume that the property has a *situs* distinct from the owner's domicile. Wherever the creditor might maintain a suit to recover the debt there it may be attached as his property, provided the laws of such place authorize it. *Harvey v. Railroad*, 52 N. W. Rep. (Minn.) 905; *Nichols v. Hooper*, 17 Atl. Rep. (Vt.) 134; *Railroad v.*

Crow, 102 Ill. 258; *Berry v. Davis*, 13 S. W. Rep. 979; *Railroad v. Dugan*, 31 N. W. Rep. 594; *Boyd v. Ins. Co.*, 16 S. W. Rep. 384; *Railroad v. Thompson*, 31 Kan. 180, and cases there cited; *Plimpton v. Bigelow*, 93 N. Y. 592.

According to the rulings in the cases just cited, it would seem quite obvious that the Kansas court had the requisite jurisdiction to impound the plaintiff's credits there by the attachment proceedings. And this doctrine seems just and reasonable, for, if the defendant cannot reach the plaintiff's credits by the attachment process in Kansas because they have a *situs* in this state, he cannot reach them in this state, because there can be no service of notice had on the garnishees in this state, so that it results that plaintiff's credits cannot be attached at all.

But we are confronted with contrary rulings of the St. Louis court of appeals to the effect that the *situs* of the debt is the place where the debtor resides, *unless the debt by the terms of the contract is made payable elsewhere, and in the latter event such situs is at the place where the debt is payable. Keeting v. Refrigerator Co.*, 32 Mo. App. 293; *Bank v. Wickham*, 23 Mo. App. 663; *Fielder v. Jessup*, 24 Mo. App. 91. And to the exception to the rule as indicated by the *italicized* words thereof, we cannot agree for the reasons already stated. We think the rule declared in *Harvey v. Railroad* and the other cases cited which are in accord with it will better subserve interstate trade and business relations than that embraced in the foregoing exception.

It does not appear that the plaintiff did not acquire knowledge of the pendency of the attachment suit in time to have made its proper defense in the courts of Kansas. Nor does it appear that full and complete justice would not have been done to all the parties in the Kansas courts had they appeared and litigated the

case there. The generally recognized doctrine is, that courts of equity may properly refuse to interfere with the action of persons litigating in other states if it is apparent that full and complete justice may be done to all parties in the litigation already pending in a sister state. There is nothing in the residence of the parties to this proceeding, nor in the circumstances alleged in the petition, that tends to rebut the presumption, which we must indulge, that in their Kansas litigation full and complete justice would have been done them by the courts of that state had they afforded them an opportunity to do so. The Kansas court in which the judgment was rendered against plaintiff upon publication of notice is still open to it. We will presume, as already stated, that the attachment laws of that state are like ours, and that as here the plaintiff may avoid a judgment of that sort within two years after its rendition if entitled thereto by a resort to the proceeding the statute prescribes for that purpose. Revised Statutes, secs. 580, 586. The case stated in the petition is not one calling for the interference of a court of equity to control the conduct of the defendants to prevent oppression or fraud, nor, indeed, is there any allegation of fact that would justify a court of equity in the use of its preventive injunctive process. But since the rulings which we have herein made are contrary to those of the St. Louis court of appeals in the cases cited it becomes our duty under the constitution to certify the case to the supreme court, which is accordingly done. All concur.

ELLISON, J. *(concurring)*.—In concurring in the foregoing opinion I have some fear that an interpretation too narrow may be given to the exception mentioned to the rule stated that a debt has no *situs*. There are other exceptions besides in attachment; as,

for instance, for the purposes of administration, the debt has a *situs* where the debtor resides. *Becraft v. Lewis*, 41 Mo. App. 546, and cases cited.

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WINTON & DEMING STATE BANK, Appellant, v. SIMON R. HARRIS, Respondent.

Kansas City Court of Appeals, January 16 and May 1, 1893.

1. **Pleading**: DEFECT OF PARTIES: WAIVER. The action was on a promissory note. The answer was a set-off for service as attorney. The reply was a general denial. The evidence tended to show the services were rendered by defendant and another as partners. *Held*, the trial court was right in instructing the jury that the fact of the partnership did not affect the set-off; it amounted only to a defect of parties, which was waived by a failure to set it up in the replication, and the same rule applies to the evidence tending to show an assignment of the set-off.

2. **Set-Off**: POSITION OF PARTIES AS TO: PLEADING. In respect to a set-off defendant occupies the position of a plaintiff, and a plaintiff's replication is an answer to the defendant's set-off as set up by him.

3. **Pleading**: DEFECT OF PARTIES: FATAL, WHEN. If on the state of pleading in this case defendant's own testimony had shown he had assigned his claim and thereby parted with all interest therein, he would have failed to make out his case.

4. **Evidence**: VALUE OF BUSINESS BOOKS. Defendant's books were not the best evidence of the value, extent and volume of his business so as to prevent his oral testimony on the subject.

5. **Practice, Appellate**: EVIDENCE: SPECIFIC OBJECTION. On appeal the objector to the evidence is held within the limits of the objection as made and specified below.

Appeal from the Gentry Circuit Court.—HON. C. H. S. GOODMAN, Judge.

AFFIRMED.

Ed. E. Aleshire, for appellant.

(1) The court erred in allowing defendant to testify as to the amount of law business done by him in

the state of Kansas. If admissible at all it should have been shown by the books of Harris & McCartney. The giving by the court, of its own motion, the instruction which is as follows was error: "The court instructs the jury that, under the pleadings in this case, it makes no difference whether the services were rendered by defendant or by himself and former partner, McCartney; if they were rendered by either, the plaintiff is liable for the services if they have not been paid for." That instructions not based upon pleadings are improper, I presume I might cite any number of cases as found in our reports, but I only note a few. *Gessley v. Railroad*, 26 Mo. App. 156; *Moffatt v. Conklin*, 35 Mo. 453; *Camp, Adm'r, v. Helan*, 43 Mo. 591; *Bank v. Murdock & Armstrong*, 62 Mo. 70; *Parker v. Marquis*, 64 Mo. 38; *Hassett v. Rust*, 64 Mo. 325; *Waddington v. Hulett*, 92 Mo. 528; *Merrett v. Poulter*, 96 Mo. 237; *Wilmott v. Railroad*, 106 Mo. 535.

McCullough, Peery & Witten, Sam H. Benson, for respondent.

(1) The only objection to the question asked of defendant as to the extent of his business was that the books (*i. e.*, defendant's books of account) were the best evidence of the amount of business done by him or his firm. This objection admitted the relevancy of the testimony, and only went to its competency. It is apparent that there was nothing in the objection made, and in this court the appellant will be limited to the objection made in the trial court. *Russell v. Glasser*, 93 Mo. 360. (2) The giving of instruction number 3 by the court of its own motion was not error because none of the matters attempted to be proven by plaintiff's evidence were pleaded in its reply. *Mfg. Co. v. Ball*, 43 Mo. App. 504; *Northup v.*

Ins. Co. 47 Mo. 435; ***Musser v. Adler,*** 86 Mo. 445; *Donovan v. Railroad*, 89 Mo. 147; *Rees v. Garth*, 36 Mo. App. 641; *Guinotte v. Ridge*, 46 Mo. App. 254; *Hyde v. Hazel*, 43 Mo. App. 668; *Kersey v. Garton*, 77 Mo. 647; *Cumisky v. Williams*, 20 Mo. App. 611; *Williams v. Mellon*, 56 Mo. 263; *Hudson v. Railroad*, 101 Mo. 29; *Smith Co. v. Rembaugh*, 21 Mo. App. 390; *Mize v. Glenn*, 38 Mo. App. 98; *Ehrlich v. Ins. Co.* 103 Mo. 240. "Where a party defendant pleads a set-off, he in effect brings an action for the amount of that set off." *Russell v. Owen*, 61 Mo. 186; *Brady v. Hill*, 1 Mo. 315; *Renger v. Lindenberger*, 53 Mo. 364; *Kellogg v. Malen*, 62 Mo. 429; *Rickey v. Ten Broek*, 63 Mo. 570; *Donan v. Intelligencer P. & R. Co.*, 70 Mo. 168; *Thompson v. Railroad*, 80 Mo. 521; *State ex rel. v. True*, 20 Mo. App. 176; *Turner v. Lords*, 92 Mo. 113; *Pike v. Martindale*, 91 Mo. 268; *Church v. Kellar*, 39 Mo. App. 441; *Butter v. Lawson*, 72 Mo. 247.

ELLISON, J.—Plaintiff sued defendant on a promissory note, he being surety for two others who were not sued. Judgment was given for defendant and plaintiff appeals. The controversy here is mainly over the pleadings. Defendant's answer pleaded a set-off exceeding plaintiff's demand, alleged to be due him as an attorney's fees. The reply was a general denial. There was evidence on plaintiff's part tending to show that the services for which arose the fee were rendered by defendant and one McCartney, who was his partner at the time the services were rendered. The trial court by its instruction refused to allow this to affect defendant's set-off, taking the view that such matter should have been pleaded in the reply. Was the court right? We think it was. Plaintiff owed for the services and owed defendant for them, but owed to defendant and another on account of the partnership. In other words

there was another person interested in the defendant's claim. This was a defect of parties which if it had appeared on the face of the answer would have been the subject of demurrer—not so appearing, it should have been taken advantage of by being set up in the replication.

In respect to this point, defendant occupies the position of a plaintiff, and plaintiff's replication is an answer to defendant's set-off as set up by him. In such case it seems clear that plaintiff's claim, that the subject-matter of the set-off was owned by another in conjunction with defendant, amounts only to a defect of parties, and should of course have been set up in the replication.

In *Rickey v. Ten Broek*, 63 Mo., 563, which was a suit for the purchase price of certain cattle, the evidence tended to show that other persons were part owners of the cattle with the plaintiff and the defendants sought to have that issue submitted to the jury, but the court said: "Instruction number 4, which asked the court to declare that if the jury believe the cattle were owned by others in conjunction with the plaintiffs they would find for the defendant, was properly refused. Our statute provides that when a party fails to take advantage of a defect of parties either by demurrer or answer he shall be deemed to have waived the same." By way of illustration of the rule of pleading we quote from *Musser v. Adler*, 86 Mo. 445, where it is said: "In view of this, and the state of the pleadings, we think the case should not be reversed. The character of the defense thus interposed at the close of the trial by prayers for instructions, was to admit that the services were rendered, but to avoid a recovery on the ground that they were illegal and contrary to public policy. Such a defense should be pleaded and an intelligent issue made thereon. Here it is very clear

that the question was raised incidentally, and, that too, at the close of the trial. It is not enough that evidence may appear tending to establish facts which if pleaded would defeat a recovery. The general denial puts in issue the facts pleaded in the petition, not the liability. The facts from which the law draws the conclusion of non-liability must be pleaded in the answer when they are not stated in the petition. This defense so far as pleading is concerned is not unlike that of champerty, gaming, usury and the like. It is an affirmative defense and should be clearly and distinctly stated. This was not done, not even attempted in this case."

Plaintiff's contention includes testimony tending to show that defendant had assigned the claim on which the set-off was founded to his partner; but we think the foregoing applies to this as well. When testimony has been introduced under such pleadings, it is allowable to withdraw it from the jury by an instruction. *Kersey v. Garton*, 77 Mo. 645; *Reynolds v. Reynolds*, 45 Mo. App. 622. We may remark, that we may not be misunderstood, that if defendant's own testimony had shown that he had assigned his claim and thereby parted with all interest therein, he would of course fail to make out his case—he would fail to sustain his own pleading. In this case the defendant denied plaintiff's contention, and for plaintiff to make an issue thereon he should have pleaded the facts.

The court permitted the defendant, for the purpose of showing the value of his services rendered to plaintiff, to state the value, extent and volume per year, of his law business at the time the services were rendered. This was objected to and the objection put upon the specific ground that such matter should be shown by the books, presumably defendant's account books, as being the best evidence. In this respect the objection was not tenable and was properly overruled. We will

only consider the point on the objection as made. The rule is on appeal to hold the objector within the limits of the objection as made and specified below. *Russell v. Glasser*, 93 Mo. 353.

We discover no error in the record and hence affirm the judgment. All concur.

ON MOTION FOR REHEARING.

ELLISON, J.—The case of *Sedgwick v. Evans*, 25 Mo. App. 388, is not opposed to what we have here said. The syllabus in that case is misleading. The evidence offered under the reply in that case was of a partnership transaction, but was a *separate* transaction. Evidence that it was another and different transaction would, of course, tend to show that it was not the transaction pleaded in the answer. *Blatz v. Lester*, *post* p. 283. Motion overruled.

ELIZABETH MCKENNA, Respondent, v. THE MISSOURI PACIFC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, May 1, 1893.

1. **Negligence**: STATUTE: INSTRUCTIONS. In an action under section 4425, Revised Statutes, 1889, the instructions should not contain words not found in the statute, such as "wanton," etc., and should be confined to the acts of the servants and the employes of the defendant, mentioned in the statute, whilst running, conducting or managing any locomotive, etc., and not permitted to include defects in the track.

2. **Master and Servant**: FELLOW-SERVANTS: STATUTE. A section man was walking along the track of the master's railway when a train was derailed and a car fell upon him and killed him. *Held*, he was not a fellow-servant of the engineer of the train, and the master's liability, if any, came under the first division of section 4425.

3. **Negligence**: DUTY OF ENGINEER. Although it is the duty of an engineer, after discovering the peril of even a trespasser on the track, to do everything consistent with safety to prevent an accident, yet such rule does not apply to the case when the engineer sees such person putting himself out of all apparent danger and had no reason to believe that his train might leave the track while passing such person and fall upon him.

4. ———: LIABILITY UNDER STATUTE: NON-PASSENGER. An action for death of a person not a passenger, brought under section 4425, Revised Statutes, 1889, must rest on some negligence, etc., of the engineer in running the locomotive, etc., and a recovery cannot be had on general negligence, such as defects in the track, etc. Such general negligence can only aid as it may serve to make out negligence in the engineer, who must be shown to have known of such general negligence and its effect in making his conduct dangerous.

5. ———: CONTRIBUTING AND CONCURRING. A section man walking along the track of his master's railway upon the approach of the train stepped from the track to the right of way and the train while passing him was derailed in consequence of a defective track and rapid running, and a car fell upon him and killed him. *Held*, if he knew of the defective track, as by reason of work thereon and also the speed of the train and made no further effort to avoid the danger than merely to step off the track on the right of way, he was equally negligent with the engineer, and there can be no recovery in case of concurring negligence.

Appeal from the Moniteau Circuit Court.—HON. E. L. EDWARDS, Judge.

REVERSED.

H. S. Priest and *William S. Shirk*, for appellant.

(1) The court should have sustained defendant's demurrer to the plaintiff's evidence. *Loeffler v. Railroad*, 96 Mo. 267; *Williams v. Railroad*, 96 Mo. 275; *Barker v. Railroad*, 98 Mo. 50; *McAlester v. Railroad*, 64 Iowa, 395; s. c., 19 American & English Railway Cases, 108, and note; *Scheffer v. Railroad*, 32 Minn. 518; *Conely v. Railroad*, 12 Atl. Rep. 496; *Railroad v. Shrœder*, 16 Atl. Rep. 212, par. on 214; *Blanchard v. Railroad*, 18 N. E. Rep. 799, and note. (2) It follows

that it was error to give plaintiff's first, second, third, fourth and fifth instructions.

Edmund Burke, for respondent.

(1) The plaintiff in this case bases her right to recover on the ground that she is the mother of Frank McKenna who was killed. Revised Statutes, 1879, sec. 2121; Session Acts, 1885, pp. 153–4. (2) The court committed no error in overruling defendant's demurrer to the plaintiff's evidence. There was ample evidence to show that the death of plaintiff's son was occasioned by the unsafe condition of the track in connection with the negligence of defendant's employes in running over it at an unusually rapid rate of speed. *Drain v. Railroad*, 86 Mo. 574; *Petty v. Railroad*, 88 Mo. 306; *Sullivan v. Railroad*, 107 Mo. 66; *Cox v. Granite Co.*, 39 Mo. App. 424; *McDermott v. Railroad*, 87 Mo. 285; *Dowling v. Allen & Co.*, 89 Mo. 299; *Moore v. Railroad*, 85 Mo. 588; *Stoher v. Railroad*, 91 Mo. 509; *Porter v. Railroad*, 75 Mo. 66; *Stoher v. Railroad*, 105 Mo. 192; *McPherson v. Railroad*, 97 Mo. 253; *Grayharsh v. Railroad*, 103 Mo. 570; *Wash v. Railroad*, 52 Mo. 434. (3) The instructions asked on behalf of the plaintiff are amply sustained by those given and approved in the case of *Rine v. Railroad*, 100 Mo. 228; s. c., 88 Mo. 392.

ELLISON, J.—The plaintiff, a widow, is the mother of one William McKenna, who was killed in 1888, while walking along defendant's right of way, by the cars of one of defendant's running trains leaving the track at the point of passing or meeting him, and falling upon him. Defendant demurred to the evidence. It was overruled and the judgment was for plaintiff.

The action was brought under section 2121, Revised Statutes, 1879 (Revised Statutes, 1889, sec.

4425). Deceased was a section laborer under the immediate direction of a section foreman. He had been engaged at work on the track of a branch of defendant's railway when the foreman and men were ordered by the roadmaster to go to a certain crossing about four miles north of Speed station and there take a train from Boonville and go to the town of California to perform certain other work. Instead of waiting for the train at the crossing the foreman and his men (including deceased) concluded they would walk to Speed station and board the train at that point. It does not appear that the foreman gave an order or command that the men should walk to Speed station, or that they should go by walking over the track or right of way. It seems that they concluded to go, and to go over the track. One witness stated that the foreman said that "we will go down to the station at Speed and wait till the train comes from Boonville." While on the way down to Speed they met the train coming towards them at a rapid rate of speed, estimated at from twenty-five to thirty-five miles an hour. The men left the track to avoid the train and went upon the right of way, some going upon one side and some upon the other. The train became derailed at the point of passing them and one of the cars fell over onto the deceased, killing him instantly.

The case as before stated is brought under section 2121, Revised Statutes, 1879, and as such the instructions given for the plaintiff cannot be upheld. The first instruction contains a number of words such as "wanton," "recklessness" and "willfulness," which are not only not a part of the statute upon which the action is based, but are scarcely justified by the evidence. This, however, in the absence of any other error might not work a reversal of the judgment. The instruction should also have been confined to the acts

of servants and employes of the defendant. It appears to distinguish between the acts of the defendant and that of its employes. The instruction could be improved by confining it to those persons mentioned by the statute. The statute is addressed to the personal conduct of the employe "whilst running, conducting or managing any locomotive, car or train of cars."

The second and third instructions are wholly unauthorized in cases of this kind. They place plaintiff's right to recover upon the defective and unsafe condition of the track. Deceased was not a passenger nor was he a fellow-servant with the engineer on the train. His case, therefore, falls under the first division of the section aforesaid, which reads that, "whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employe whilst running, conducting or managing any locomotive, car or train of cars; or of any master, pilot, engineer, agent or employe whilst running, conducting or managing any steamboat or any of the machinery thereof, or of any driver of any stage coach or other public conveyance whilst in charge of the same as driver." * * * Thus the negligence or unskillfulness from which must arise the liability of defendant is in *running, conducting or managing the train.* This statute has no reference to defective tracks or roadbeds, and yet the instructions referred to authorize the jury to find for plaintiff on account of unsafe track apart from any question of negligence of the engineer in *managing the train.* This we regard as clearly erroneous.

Coming to instruction number five our opinion is that it is not proper under facts shown. It omits matters essential to plaintiff's recovery. It directed

the jury, that, notwithstanding deceased may have been a trespasser upon defendant's right of way, yet, if he was discovered by the engineer in time to enable him to avert the accident, it became the duty of the engineer to do everything in his power consistent with the safety of his engine to prevent the accident, and that if he failed to do so defendant was liable. This is an instruction usually given when the engineer sees a person or an obstruction upon the track, and which he must know will result in a collision and accident unless he averts it by the manipulation of the machinery of the engine. But here when the engineer saw deceased he saw him putting himself out of all apparent danger by leaving the track and going upon the right of way. To make this instruction at all proper we must suppose that the engineer must reasonably have known that a part of his train might leave the track and turn over onto deceased at the point of passing him. This he could not be supposed to know unless he knew of the defective condition of the track, a matter wholly omitted from the instruction.

This brings us to the point of considering whether plaintiff has not altogether failed in making out a case against defendant. As before indicated the liability of defendant can only attach, under the statute quoted, by reason of some negligence, unskillfulness or criminal intent of the engineer in running and managing the locomotive and cars on this occasion. Whatever negligence there may have been on the part of defendant generally, as distinguished from and apart from the negligence of this engineer, has nothing whatever to do with the case. As for instance, if it be true that the defendant was negligent in the construction or maintenance of its track or roadbed at the place of the accident, and that deceased was killed in consequence of this; these facts alone would not sustain the

case. Negligence on the part of *defendant* as it affects a *passenger* is provided for in the second division of the section of the statute here being considered. If one (not a passenger) in bringing his action chooses to place it on that section, the negligence of the defendant *alone as such* will avail him nothing. It can only aid him in his effort to make out negligence in the engineer. So, conceding that it was negligence on the part of the defendant to permit its track or road-bed to be in the condition it was at the place of the accident, it must be further shown that the engineer knew of such defective and insecure condition, and that it would be unsafe to run cars over it at the speed at which he did run them. But plaintiff has made no effort whatever in this direction. The engineer was not the one who regularly run on this branch of defendant's road. He had only been over this branch perhaps four times. Whether the defects in the track, as it was before this accident, were of such character as to be observable to one in this engineer's position does not appear in the record, and, since it is a question for the jury's consideration, I favor remanding the cause; though if it had appeared that he did not know of such defect, or did not have good reason to believe it existed, I would deem it proper to simply reverse the judgment.

It is proper to make this further remark. It appears (though not definitely) that deceased knew of the condition of the track at the point of the accident, as he appears to have been one of the workmen who had been engaged in repairing it a few days before. If he was so engaged in repairing it, he of course knew its condition. If therefore he knew the speed at which the train was running (a matter not made clear to my mind) and made no further effort to avoid it than merely to step off the track onto the right of way, he

was equally as negligent as the engineer could be, since he knew all the engineer knew. That there can be no recovery in cases of concurring negligence is uniformly held. For the reasons foregoing I favor remanding the cause. My associates, however, are of the opinion that no case has been made against defendant, and that the judgment should be simply reversed. It is therefore so ordered.

JAMES T. KELLEY, Respondent, v. WILLIAM S. SITLINGTON, Appellant.

Kansas City Court of Appeals, May 1, 1893.

Chattel Mortgage: ATTACHMENT: SURETY ON FORTHCOMING BOND: PRIORITY. A surety on a forthcoming bond in an attachment proceeding may purchase the attached property at the foreclosure sale of a prior chattel mortgage and can replevy the same from the sheriff who seizes it under the attachment proceeding, and is not, by reason of his suretyship, estopped from setting up title in himself, as in cases where a forthcoming surety undertakes to set up title in himself as against his principal when the attachment was levied.

Appeal from the Jackson Circuit Court.—HON. R. H. FIELD, Judge.

AFFIRMED.

Thomas F. Gatts, for appellant.

Can it be said that this plaintiff, who by his own act caused the release of the property attached, by signing the forthcoming bond, without any claim to the property at the time or notice of claim, and by his silence cause a great injury to Nichol & Co., be allowed to set up at this late day an after acquired title to said

property or any claim to said property? The weight of authority and reason would say no. *Mfg. Co. v. Bean*, 20 Mo. App. 111; *Dickson v. Anderson*, 9 Mo. 156; *Page v. Butler*, 15 Mo. 76; *Burseley v. Hamilton*, 15 Pick. 40; *Haxton v. Sizer*, 23 Kan. 310; *Sparks v. Shropshire*, 4 Bush (Ky.), 550; *Hundley v. Felbut*, 73 Mo. 34; *Butts v. Collins*, 13 Wend. 138; *Debach v. Murries*, 45 Cal. 223; *Staples v. Fillmore*, 43 Conn. 510; *Wolf v. Hahn*, 28 Kan. 588; *Doggett v. O'Dell*, 3 Hill, N. Y. 215; *Billingsby v. Harris*, 79 Wis. 103; *Holcomb v. Nelson Lumber Co.*, 39 Minn. 342; *Bangs v. Beacham*, 68 Me. 425; *Holt v. Burbank*, 47 N. H. 164; *Smith v. Cudworth*, 24 Pick. 196.

Fyke & Hamilton, for respondent.

James T. Kelley acquired under the chattel mortgage sale of Daniel T. Kelley all the title which Hursig & Russell had at the time said mortgage was executed and delivered to Daniel T. Kelley, which was previous to the attachment in the suit of A. A. Nichol & Co. *v.* Hursig & Russell, and stands in the same position that any other purchaser could have stood at the sale; and said A. A. Nichol & Co. occupy no higher or better position than second mortgagees would have occupied. The fact that James T. Kelley was an obligor on the forthcoming bond of Hursig & Russell in the suit of A. A. Nichol & Co. *v.* Hursig & Russell could not change his position or affect his title to said property acquired under said sale. The bond was not forfeited, and could not be forfeited until James T. Kelley had been notified as provided in section 575 of Revised Statutes, and given a hearing.

GILL, J.—In July 1890, Nichol began a suit by attachment against Hursig & Russell, and the writ was

levied on certain machinery, tools, etc. The property thus seized was then subject to a prior chattel mortgage, duly recorded, held by Daniel Kelley. Hursig & Russell gave a forthcoming bond as provided for in the statute (section 544, Revised Statutes, 1869), with plaintiff J. T. Kelley as security. Said Hursig & Russell then retained possession of the attached property until the September following, when, on default in the payment of the mortgage debt, Daniel Kelley, the mortgagee, took possession of the property, advertised and sold the same at public sale, and plaintiff, J. T. Kelley, became the purchaser. Several months thereafter Nichol got judgment against Hursig & Russell, both for his debt and sustaining his attachment. In October, 1891, and more than a year after J. T. Kelley had purchased and taken possession under the sale enforcing the prior mortgage, Nichol caused an execution on his judgment to be levied on the property, and the defendant Sitlington, as sheriff, took the same from Kelley. Thereupon plaintiff instituted this suit in replevin. Trial was had before the court without a jury, resulting in a judgment for plaintiff, and defendant appealed.

The matter for determination is this: Did plaintiff, Kelley, under the facts above stated, acquire title to the property in dispute superior to and exclusive of the Nichol's attachment? The trial court held in the affirmative, and we are clearly of the opinion that such holding was correct. No question is made as to the priority, regularity and entire good faith of the mortgage under which Kelley purchased, and that he bought at a public sale conducted in the manner provided by the mortgage deed. Admit that the levy of the attachment created a lien; but yet that lien was subsequent in point of time, and therefore subject to the prior mortgage. The attachment then could only reach the

equity of redemption then resting in the mortgagors; but a sale under the mortgage extinguished such equity of redemption.

But it is insisted that plaintiff Kelley is estopped now from setting up title in himself by reason of becoming an obligor in the forthcoming bond for the return of the property, etc., entered into in July, 1890, when the attachment was levied.

This contention is grounded on that line of cases (cited in defendant's brief) which in effect hold, that where property is attached as belonging to A., and B. gives a forthcoming bond, admitting the property to belong to A. and agreeing to produce the same when and where the court may order, etc., then on a suit on such bond B. will not be heard to say in defense that when the attachment was levied *he* and not A. was the owner. But this is not that kind of case. Kelley's claim of title subsequently acquired under the foreclosure of a prior chattel mortgage is not inconsistent with the admission that the attached debtors owned the property when the attachment was made and the forthcoming bond executed. He does not now attempt to claim that *when the property was attached* that he and not the attachment debtors was the owner. But on the other hand he admits their ownership at that time, but asserts a right by him *subsequently acquired* under the foreclosure sale of a lien prior and therefore superior to the attachment lien. We know of no rule—in law or reason—that will deny the right in a surety on a forthcoming bond to subsequently purchase the attached property at a sale made under a prior mortgage.

Judgment affirmed. All concur.

THE BADGER LUMBER COMPANY, Respondent, v. BALLENTINE, FOSTER & CO. *et al.*, Appellants.

Kansas City Court of Appeals, May 1, 1893.

1. **Mechanics' Lien:** PARTIES. A mechanics' lien was filed against four contiguous lots for four buildings thereon. Each lot had a distinct mortgage on it. Three of the mortgagees and their trustee were made parties defendant in the suit to enforce the lien but the fourth mortgagee who had the same trustee was not made a party. Before the trial the trustee became the owner under foreclosure of all the mortgages. *Held*, there was no defect of parties, since the owner and the contractor, the only necessary parties, were made defendants; and besides at the time of the trial all the parties in interest were before the court, the mortgagees' interest having ceased by foreclosure.

2. ———: PRINCIPAL AND AGENT: AUTHORITY TO WAIVE LIEN. A general agent or manager in charge of a lumber yard and all the business connected therewith, selling for cash or long or short credit, as he deemed best, has authority to waive a mechanics' lien, and did in this case waive it. The doctrine of an agent's apparent authority discussed and applied.

Appeal from the Jackson Circuit Court.—HON. MATHEW FYKE, Special Judge.

REVERSED *(as to Mechanics' Lien)*.

Cook & Gossett, for appellants.

(1) A failure to include all such houses in the mechanic's lien statement required to be filed with the clerk renders the same invalid as to those which are included therein, because it fails to bind those which are omitted. *Rice v. Nautasket Co.*, 140 Mass. 256; *Foster v. Cox*, 123 Mass. 44; *Stevens v. Lincoln*, 114 Mass. 476; *Schulenburg v. Vrooman*, 7 Mo. App. 133; *McCauley v. Mildrum*, 1 Daly (N. Y.), 396. (2) The *cestui que trust* in a deed of trust is not bound unless

made a party to the suit in time, and a sale under the deed of trust will necessarily carry title clear of the lien; and this is so, although the trustee may be a party. *Coe v. Ritter*, 86 Mo. 277; *Crandall v. Cooper*, 62 Mo. 478; *Missouri Fire Clay Works v. Ellison*, 30 Mo. App. 67; *Bayard v. McGraw*, 1 Bradw. (Ill.) 134; *Clark v. Manning*, 4 Bradw. (Ill.) 649; *Phœnix Ins. Co. v. Batcher*, 6 Bradw. (Ill.) 621; Revised Statutes 1889, sec. 6713. (3) One man or one property cannot be compelled to give contribution unless respectively and equally bound for the common charge which another is compelled to pay. *Johnson v. Wild*, L. B. 44 Ch. Div. 146; *Foster v. Burton*, 62 Vt. 329; *Cochran v. Walker*, 82 Ky. 220; *Van Patton v. Richardson*, 68 Mo. 379. (4) The agent executing waiver was not a special agent but a "manager"—a general agent. Within the apparent scope of his authority such agent may waive the principal's rights although contrary to his special instructions. *Pitnowsky v. Beardsley*, 37 Iowa, 9; *Baum v. Aultman*, 80 Wis. 307; *McNicols v. Nelson*, 45 Mo. App. 445. Party right to rely on apparent authority of agent. *John Hutchison Mfg. Co. v. Henry*, 44 Mo. App. 263. Possession of goods—*indicia* of authority to receive pay therefor, etc. *Indianapolis Rolling Mill Co. v. Railroad*, 120 U. S. 256; *Pelkington v. Ins. Co.*, 55 Mo. 172; *Hamilton Ins. Co.*, 94 Mo. 368; *Jackson v. Ins. Co.*, 27 Mo. App. 62; *Heilman v. Dollarhide*, 32 Mo. App. 178; *Kinealy v. Burd*, 9 Mo. App. 359; *Curry v. Giles*, 10 Ga. 10; *White Lake Lumber Co. v. Stone*, 19 Neb. 403. Mechem on General Agency, secs. 278, 279 283, 284, 287; Wharton on General Agency, secs. 126, 22; Story on General Agency, 126, 127. See as to General Manager, *McKiernan v. Lenzie*, 56 Cal. 61, and *Farnum v. Ins. Co.*, 83 Cal. 246; Manager regarded as possessor of powers of owner, 17 Mo. 344; Mechem on Managers' Powers, 395; *Bailey v. Par-*

dridge, 134 Ill. 188. (5) As to this sale, particularly as it was incomplete at the time the waiver was executed, the agent White had authority to impress it at that time with any terms he saw fit. He could have rescinded the entire contract or agreed on a different price or arrangement. *Denman v. Bloomer*, 11 Ill. 177; *Bloomer v. Denman*, 12 Ill. 240; *Anderson v. Coonley*, 21 Wend. 279; *Scott v. Wells*, 6 Watts & S. 357; *Taylor v. Nussbaum*, 2 Duer. 302.

J. B. Hamner, *Kinley & Kinley*, for respondents.

(1) The statute requires as absolutely necessary parties the parties to the contract and the owner who contracted with the contractors for the erection of the houses; and all other parties may be made parties, but if not so made they shall not be bound by the proceedings. Revised Statutes, 1889, sec. 6713; *Steinman v. Strimple*, 29 Mo. App. 478; *Whitmeyer v. Dart*, 29 Mo. 565. (2) The alleged waiver was not made by authority, either general or special. White, who signed plaintiff's name to such instrument was plaintiff's salesman in charge of the Fifteenth street and Cleveland avenue yards, under the direct supervision of plaintiff whose general officers were in Kansas City. The cases cited by appellants to support the contention that plaintiff is bound by the act of White, whether in the regular course of business or not, do not sustain them on this question. *Flanagan v. Alexander*, 50 Mo. 50; *Fairbanks v. Long*, 91 Mo. 628; *Railroad v. Vivian*, 33 Mo. App. 583; *Wheeler v. Link*, 75 Mo. 100; *Atlee v. Fink*, 75 Mo. 100; *Buckwalter v. Craig*, 55 Mo. 71; *Gentry v. Ins. Co.*, 15 Mo. App. 215; *Winsor v. Bank*, 18 Mo. App. 665. (3) Persons dealing with one claiming to have authority to act for a corporation are held to learn the powers of

such agent. This is especially so, when the act done is outside of the regular course of business or scope of the employment of the agent. 1 Beach on Corporations, sec. 187; *Bocock v. Coal Co.*, 82 Va. 913; *Credit Co. v. Machine Co.*, 54 Conn. 357; *De Bost v. Albert Palmer Co.*, 35 Hun, 386; *Railroad v. McKinney*, 55 Tex. 176; *Hardin v. Railroad*, 78 Iowa, 726; s. c., 43 N. W. Rep., 543; *Deacon v. Greenfield*, 21 Atl. Rep. (Pa.) 650; 141 Pa. St. 475; *Carr v. Greenfield*, 19 Atl. Rep. (Pa.) 676; *Irish v. Pulliam*, 48 N. W. Rep. (Neb.) 963; *Lee v. Hassett*, 39 Mo. App. 67; *Jodd v. Duncan* 9 Mo. App. 417; *Ehrlich v. Ins. Co.*, 88 Mo. 249.

GILL, J.—This is an action to enforce a mechanics' lien. Defendant Young was the owner of certain contiguous lots in Kansas City having a frontage of one hundred and twenty feet, and he contracted with defendants, Ballentine, Foster & Co., for the erection of four houses thereon, each occupying thirty feet front. Said Ballentine, Foster & Co. purchased the necessary lumber from the plaintiff.

While the buildings were in course of construction Young borrowed certain sums of money from the defendant Alliance Trust Company and the Scottish-American Mortgage Company, and to secure same made four several deeds of trust, defendant Holmes being trustee, and each covering thirty feet front of said real estate. Three of these were made to secure the Alliance company and one, covering thirty feet of the ground, was made to secure the Scottish company.

The lumber company failing to get pay for the material furnished filed its lien against the four houses and lots and sought by this action to enforce same. On a trial below plaintiff recovered, and defendants, Holmes and Alliance Trust Company, appealed. The real contest, it seems, is between the plaintiff and defendant

Holmes, who since the institution of this suit has become the owner of the four houses and lots by reason of the foreclosure of the four deeds of trust above mentioned. Other facts will be mentioned in course of the opinion.

I. Defendant's first point of attack relates to the failure of the plaintiff to make the Scottish-American Mortgage Company (who was beneficiary in a deed of trust covering one of the houses) a party defendant to this action. It is claimed that by reason thereof the entire bill of lumber which went into the construction of all four houses is made a charge on *three* only of said buildings, in other words that the lien was released as to one fourth of the property and the other three fourths made to bear the entire burden, etc.

We fail to see in this the commission of any wrong, technical or otherwise, to these defendants. These four buildings were erected on contiguous lots and under one general contract, and it was therefore permitted plaintiff to file and enforce one lien against the entire property. Revised Statutes, 1889, sec. 6729. And this it sought to do. Then by section 6713 of the mechanics' lien statute it is provided, that, "in all suits under this article, the parties to the contract *shall*, and all other persons interested in the matter in controversy or in the property charged with the lien *may*, be made parties, but such as may not be made parties shall not be bound by any such proceedings." The plaintiff here complied literally with this statute. The owner Young was made a defendant along with Ballentine, Foster & Co., his contractors; the making the holders of incumbrances also parties was at the option of the lienor. The statute says they *may* be made parties, but if not made parties then they are not bound by the proceedings. It is true that when the suit to enforce the lien was instituted the Scottish-American company

was the holder of a mortgage lien on a portion of the property sought to be charged and it was not made a party defendant, yet the most that can be said of this omission is that it would not be bound by the proceedings, but the proceedings were valid nevertheless.

But there is another view to be taken of this matter which takes away from the defendants' contention all semblance of merit. While the Scottish-American company as mortgagee was not brought in when the action was begun, yet E. E. Holmes *was* made a defendant, and he continued such till the trial of the cause. Now after the suit was brought, and before the trial and judgment, the mortgage of the Scottish-American company was foreclosed and Holmes became a purchaser, and therefore subrogated to all the rights of the company. In other words, during the pendency of the suit the interest of the Scottish-American company ceased and defendant Holmes became substituted in its stead. The company was then no longer interested in the property charged with the lien, and was therefore *at the trial* wholly unconcerned as to the result of the case, but Holmes was a party in interest and was a party to the suit, and then and there defended his interest. So then it seems, that when this cause was tried *all* parties interested in the subject-matter "or in the property charged with the lien" were parties to the action.

We see nothing then in the first matter of complaint urged in brief of defendants' counsel.

II. But the second point made against the enforcement of plaintiff's alleged lien is of a more serious nature. This relates to the claim of waiver by the plaintiff Badger Lumber Company of its priority of lien over the four mortgages which were executed as above stated during the construction of the buildings.

On the face of things it must of course be conceded that plaintiff's lien for materials used in the buildings would be preferred to that of the four mortgages executed after the commencement of the work. Revised Statutes, 1889, sec. 6711. But it is claimed by the defendants that this priority was waived by the plaintiff—that is, in so far as concerns them and the mortgages under which they claim.

The history of the transaction in that regard is as follows: After the commencement of the buildings, and while the plaintiff lumber company was delivering the materials which it had agreed to furnish, Holmes, the agent for the Alliance Trust Company and Scottish-American Mortgage Company, was applied to for a loan on the property; and in behalf of these corporations he agreed to loan Young, the owner, the sum of $15,000, taking as security therefor four separate mortgages of $3,750 each on a house and lot of thirty feet front, *provided*, however, that Young should get from the Badger Lumber Company a waiver as to these loanors of any mechanic's lien it might have or acquire against the property; and said loanors refused to let the money to Young unless said waiver was secured.

Thereupon Young applied to White, the agent in charge of plaintiff's yards at Kansas City, and a written stipulation was signed by him as manager for the Badger Lumber Company, and which purported to waive its priority as demanded by said mortgagees, and substantially agreeing therein to look to the money that was to be raised by said loans. There was at that time a prior mortgage of $10,000 on the property, which was to be paid off and the balance of the $15,000 loan was to go towards paying for labor and materials used in constructing the four houses, and of this plaintiff subsequently received as part payment on its bill the sum of $500.

Replying to this claim of waiver the plaintiff denies the authority of White to make it, and upon this arises the main controversy in the case.

After a careful consideration of this entire record we think the evidence incontestably shows that as to the public generally, and the mortgagees aforesaid as well, said White had ample authority to enter into this agreement of waiver on behalf of the Badger Lumber Company.

The trial court on this point of its own motion gave the following instruction:

The court instructs the jury that if you believe from the evidence that F. A White was the manager of and in charge of plaintiff's lumber yard from which the lumber in question was sold, and that he was authorized to sell lumber upon general credit, with or without security therefor, to such persons as he might deem proper, and for such purposes and on such terms as he might deem proper, and had general management and charge of the business of plaintiff at said lumber yard, and that while so in charge thereof he executed the paper read in evidence, dated June 16, 1890, as manager for plaintiff, then you must find for defendants Holmes and the Alliance Trust Company."

We regard this instruction as correctly embodying the principles of law applicable to this case, *except* that the court should have declared peremptorily in favor of the waiver, since every fact upon which this instruction was predicated was indubitably and without question shown by the evidence.

The Badger Lumber Company was at that time conducting its business over a wide extent of territory, having thirty or forty distinct and separate yards in as many towns and cities in this western country. Its general office was kept in the business (office) portion of Kansas City, and the lumber yard here was at a

distance of quite three miles in the suburbs. Over each of these separate yards throughout the country there presided a local manager or general agent who had, apparently at least, full and complete power and authority to sell for cash or on credit and for a long or short time, to judge of the responsibility of parties, to sell lumber to be used in the erection of buildings where no lien could he had, or for making wagons or other personal property and to sell on personal credit without reference to buildings. He had, too, authority to file liens and make affidavits thereto (as he did in this case), and in short to do any and everything necessary to be done in the general conduct and management of a lumber yard. The only difference between this manager or general agent at Kansas City and at other yards of the plaintiff throughout the country was as Mr. Toll, the president of the company, testified, that he, White, being near to the main office, was supposed to consult with the officers there more frequently than others. As shown by all the evidence Mr. White was apparently in chief, unlimited control. The company seemingly trusted entirely to his judgment and discretion. He was the *alter ego*, so to speak, of the corporation plaintiff.

The law in such cases is well settled. Where the principal holds out one as his general agent, apparently in the entire management and control of a particular business, the principal will be bound by the acts of such agent within the scope of the apparent general authority, even though he may in fact violate the private instructions of such principal. Story on Agency, sec. 126. As said by another author: "The criterion in this case is the *character* bestowed by the principal. He may not hold the agent out in the character of one having a general power and bind third persons who have relied thereon in good faith by secret limitations

and restrictions upon the agent's authority which are inconsistent with the character bestowed. Although the agent violates his instructions or exceeds the limits set to his authority, he will yet bind his principal to such third persons, if his acts are within the scope of the authority which the principal has caused or permitted him to appear to possess." Mechem on Agency, sec. 279. So then it would be immaterial here if White was restricted by instructions from his principal, unless such were known by third persons dealing with him.

It cannot be seriously denied that this arrangement entered into by manager White was within the scope of his apparent authority to manage and conduct the entire business of this lumber yard. As already said he had full authority to sell and collect. And the means he adopted to collect this bill was, as he testifies, approved by his own judgment. By releasing his lien and thereby securing the loan, White thought the cash was procured for the ready payment of the bill of lumber he was selling to Young. He was mistaken, it is true, for he only got of the amount borrowed a payment of $500. But these defendants ought not to suffer because of White's poor judgment. In addition to this he knew he was providing for the payment of a prior lien (the $10,000 mortgage), which of course would strengthen his security.

We have examined all the cases referred to by counsel, but it will serve no good purpose to comment on them in detail. The supreme court of Nebraska in a case quite similar arrived at the same conclusion as that announced here. See *White Lake Lumber Co. v. Stone*, 19 Neb. 402.

Of the authorities cited by plaintiff's counsel, those from Pennsylvania (134 Pa. St. 503 and 141 Pa. St. 467) are more nearly related to the case in hand; but

the authority of the agents there named was of a more limited character than was that of White in this instance. The releases there were made by mere clerks or foreman in the yards during the temporary absence of the principals. Here White had complete control at all times. The principal was never present except in the person of White. He was designated, held out and published to the world as the *general agent* or *manager in charge* of all the business connected with the sale and delivery of the lumber, as well as the collection of bills therefor, at this particular yard. Under the circumstances it would be the greatest injustice to permit this plaintiff to deny White's authority to execute this waiver of lien. The defendants parted with their money on the faith of such waiver—relying on White's apparent authority. And as the plaintiff held White out as possessing such general authority it will not now be allowed to deny it.

The recital in the written waiver that plaintiff had sold the lumber to Young, whereas it was strictly a sale to Ballentine, Foster & Co., Young's contractors, is of no substantial importance. The character of the transaction was as to all the facts fully understood by all the parties. While Ballentine & Foster were the nominal contractors, the plaintiff was looking to Young for payment of the lumber that was to be put into his, Young's, house.

The judgment then of the lower court, in so far as it charges a mechanics' lien on the property in question, will be reversed. All concur.

ANNIE E. LEWIS, Respondent, v. THE CITY OF INDEPENDENCE, Appellant.

Kansas City Court of Appeals, May 1, 1893.

1. **Evidence:** PLEADING: DAMAGES: PERMANENT INJURY. Where a petition on its whole face shows that permanent injuries are covered by its allegations, evidence of such injuries is admissible; besides, it is not necessary to allege permanent injuries in order to allow such character of damages. There was sufficient evidence to sustain an instruction as to permanent injuries.

2. **Negligence:** EARTH ON CULVERT: INSTRUCTION: EVIDENCE. The evidence in this case justified an instruction submitting to the jury the question whether a culvert was out of repair on account of the earth having been washed off and on account of the character of the stone and the way in which it was placed over the culvert.

3. **Contributory Negligence:** INCREASED SUSCEPTIBILITY TO INJURY: PREGNANCY. The fact that plaintiff's condition — advanced pregnancy—rendered her more susceptible to injury will not relieve the defendant city from its obligation to keep its streets in such repair that they will be reasonably safe for women in her condition to travel over in a two-wheeled cart.

Appeal from the Jackson Circuit Court.—HON. J. H. SLOVER, Judge.

AFFIRMED.

Gates & Wallace and *Albert Ott*, for appellant.

(1) The court erred in submitting to the jury the question of a permanent injury. In the first place the petition does not allege that the injuries were permanent. In the second place there was no evidence that the plaintiff's injuries were permanent. *Crawford v. Railroad*, 55 N. Y. 255; *Mosher v. Russell*, 44 Hun, 12; *Strohm v. Railroad*, 96 N. Y. 305; *Miley v. Railroad*, 8 N. Y. 455; *Baily v. Wescott*, 14 Daly, 506;

4 N. Y. 482; *Dawson v. Troy*, 2 N. Y. 137; *White v. Railroad*, 61 Wis. 536; *Wilburn v. Railroad*, 36 Mo. App. 204. (2) The court erred in submitting to the jury the question of negligent construction of the culvert, that is, the character of the stones on said culvert and the manner in which they were placed on said culvert. There was no evidence that it was negligently or improperly constructed, either as to the manner in which it was built or the character of stone used. *Evans v. Railroad*, 106 Mo. 594; *Conway v. Railroad*, 24 Mo. App. 235; *Muirhead v. Railroad*, 24 Mo. App. 634; *Waddingham v. Hulett*, 92 Mo. 528. (3) The mere fact of the accident is not evidence that the culvert was not reasonably safe or of negligence on the part of the defendant. *Railroad v. Neal*, 65 Ind. 438; *Gamall v. Railroad*, 21 S. W. Rep. 1. (4) The plaintiff was guilty of contributory negligence. Being six months advanced in pregnancy, she was riding in a single seat two-wheeled cart, together with another woman and two children; also carrying a valise, and driving in a trot over this culvert. This was her own testimony. Dr. Bryant and Dr. Henry both testified that it was dangerous for a woman in her situation to ride in such a cart.

John N. Southern, *Flournoy & Flournoy*, for respondent.

(1) The petition alleges permanent injuries, but such allegation was not necessary. Chitty on Pleading [14 Am. Ed.] pp. 395, 396; Bliss on Code Pleading [2 Ed.] sec. 297a; 1 McQuillin's Pleading & Practice, sec. 304; 2 Thompson on Negligence, sec. 33, p. 1250; *Cook v. Railroad*, 19 Mo. App. 329; *Railroad v. Gastka*, 128 Ill. 613. (2) The evidence as to permanent injuries was sufficient. *Welch v. McAllister*, 15 Mo. App. 492; *Squires v. Chillicothe*,

89 Mo. 227, 231; *Stutz v. Railroad*, 73 Wis. 147; *Eddy v. Wallace*, 49 F. R. 801; *Kane v. Railroad*, 132 N. Y. 160. (3) The only question of negligence on the part of the city, submitted to the jury by plaintiff's instruction, was that of negligence in permitting the culvert to remain out of repair. (4) We do not think there was any question of contributory negligence in this case; if there was, it was for the jury and was properly submitted to them. *Wilkins v. Railroad*, 101 Mo. 94; *Kenny v. Railroad*, 105 Mo. 270; *Dickson v. Railroad*, 104 Mo. 491; *Duncan v. Railroad*, 48 Mo. App. 659; *Taylor v. Railroad*, 26 Mo. App. 336; *Holmes v. Railroad*, 48 Mo. App. 79.

ELLISON, J.—This action was instituted on account of personal injuries received by plaintiff upon one of defendant's streets while she was driving along said street in a one-horse cart. The negligence charged against defendant was in its permitting a certain stone culvert to become and remain out of repair. There was a verdict and judgment for plaintiff. The accident happened while plaintiff was driving or being driven over the culvert. One of the stones covering the culvert was broken, though remaining in position. Plaintiff did not know of the defect and it was not such as to necessarily attract her attention. One wheel of the cart dropped into the hole, precipitating plaintiff forward onto the shafts. There was ample evidence to sustain the verdict of the jury on all branches of the case, and, unless there was substantial error in the instructions given, the judgment must be affirmed.

The first objection goes to the alleged error of the court in permitting the jury to allow damages for permanent injuries when the petition fails to claim damages for such character of injuries. An examination of the petition discloses that it is not justly subject to

such criticism. It does not in specific terms allege permanent injuries, but the whole face of the petition, when fairly construed, shows with sufficient clearness that such injuries are covered by its allegations. Besides it has been held not to be necessary to allege that the injuries were permanent in order to allow such character of damages. *Cook v. Railroad*, 19 Mo. App. 329.

It is next asserted, in support of the objection to this instruction, that there was no evidence of permanent injuries. This objection is not well taken in point of fact and will therefore be ruled against defendant.

The next complaint is that the court erred in giving an instruction which authorized the jury to find the culvert was unsafe owing to the character of the stones upon the top of it and the manner in which such stones were placed upon it. The contention being that there was no evidence to support the instruction, we cannot sustain this contention. There was evidence to this effect, that when a culvert was built as this one was—in the manner it was and of the material of which it was constructed—that it should be kept covered with a certain thickness of earth so as to give strength and support to the otherwise insufficient stone.

The petition, in effect, charges that the stone with which the culvert was covered was not strong enough for the purposes of street travel unless covered with earth; and there was evidence tending to support this which is found in the testimony of Krump and Little. Krump says that, "In building culverts, ten or twelve inches of dirt should be placed on top to support the stone to keep heavy wagons from breaking them and also to hold the stone in place." He evidently referred to culverts constructed in the manner and of

the material this one was. The instruction might have been worded differently, but it does no more than submit to the jury the question whether the culvert was out of repair on account of the earth having washed off and on account of the character of the stone and the way in which it was placed over the top of the culvert.

It is urged that the case shows plaintiff was guilty of such contributory negligence as to prevent her recovery, in that, being six months advanced in pregnancy, she was riding in a two-wheeled cart with another woman and two children. We are not able to see what possible contribution this fact could have made to the accident. The evidence does not tend to show any connection between this fact and the accident. It may be that plaintiff's condition rendered her more susceptible to injury, but that will not relieve defendant of its duty to the public. We certainly are unwilling to say that defendant is under no obligation to keep its streets in such repair that they will be reasonably safe for a woman in plaintiff's condition to travel over in a two-wheeled cart. The testimony of the two physicians referred to in the brief has no tendency to show contributory negligence. They knew nothing of the accident or its cause. They stated that riding over rough roads in a cart might produce miscarriage, and they would undoubtedly have said further that an accident, such as this was described to be, might also produce it, but such evidence has no tendency to prove who was in fault. There was no miscarriage resulting here and we can see no relevancy in the testimony referred to.

A consideration of the record does not disclose that there was any error committed at the trial which can fairly be said to materially affect the merits of the case, and we therefore affirm the judgment. All concur.

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S. F. TRUNDLE, Respondent, v. THE PROVIDENCE-WASHINGTON INSURANCE COMPANY, Appellant.

Kansas City Court of Appeals, May 1, 1893.

1 **Practice, Trial:** PARTICIPATION IN SECOND TRIAL: FORMER APPEAL. When a party participates in a new trial awarded, he cannot afterward be heard to complain of errors committed in the first trial; and so after an appeal has been taken from an order sustaining a motion for a new trial and setting aside a finding for the appellant, if he participates in the second trial, he waives his appeal, though it is error to order a further trial until the appeal was disposed of.

2. **Insurance:** DELIVERY OF POLICY ON CONDITION: EVIDENCE. On the evidence in this case it is not perceived that the policy in suit was delivered on condition as claimed by defendant.

3. ———: PAYMENT OF PREMIUM: EVIDENCE. Though defendant's agent, in transmitting the policy in suit, notified plaintiff that there would be a small difference in the premium of this policy and the one for which it was substituted, yet, as he made no demand for its remission, plaintiff was justified in believing that there was no occasion for promptness in remitting, and the failure to remit did not vitiate the policy; though there had been a request to remit, a failure to comply would have avoided the policy.

4. ———: CANCELLATION: NOTICE: PRINCIPAL AND AGENT. Plaintiff took out a policy in L. Co. which afterwards ordered its agent to cancel said policy. The agent wrote plaintiff's husband, who had secured the policy and was in charge as manager for his wife, of the goods insured, of the cancellation and inclosed defendant's policy in lieu of the canceled policy. The husband accepted the substituted policy. *Held*, the plaintiff's husband was her general agent as to her mercantile business and giving such notice to him was sufficient.

5. ———: OWNER: EVIDENCE. The evidence in this case shows plaintiff was sole owner of the insured property.

6. ———: MORTGAGE: NOTICE: AGENT OF TWO: ESTOPPEL: DEFENSE. An agent of L. Co. issued plaintiff a policy in said company, knowing there was a mortgage on the insured property. This policy was soon canceled, and the same agent being also agent of defendant company issued its policy in lieu of the canceled policy. *Held*, that the facts of the case give rise to the inference that the knowledge of the mortgage obtained in the first transaction was present in the mind of the agent in the second one, and his knowledge is the knowledge of the defendant; and the defendant is estopped from setting up the want of indorsement of the incumbrance on the policy as a defense.

7. **Proofs of Loss:** WAIVER. In this case there is some evidence of the adjuster's denial of the liability, and it is sufficient to constitute a waiver.

8. **Practice, Trial and Appellate:** TRIAL BY COURT: CONFLICT OF INSTRUCTIONS. Where the trial is before the court without the aid of a jury, though the declarations of law cannot be harmonized in every particular, the judgment will not be reversed if the theory upon which the finding is made is justified by the evidence and is correct as a proposition of law.

Appeal from the Vernon Circuit Court.—HON. D. P. STRATTON, Judge.

AFFIRMED.

Fyke & Hamilton, for appellant.

(1) The evidence clearly shows that the policy was delivered upon condition that the Lancashire policy be surrendered, which was never done. (2) The evidence clearly shows that the premium for the policy had never been paid, nor was credit given therefor. *Union Bld'g Ass'n v. Ins. Co.*, 49 N. W. Rep. 1032. (3) The evidence clearly shows that the Lancashire policy was in full force at the time of the fire. No notice had been given to Mrs. Trundle of the company's desire to cancel, and notice to Mr. Trundle, although he was authorized generally to procure insurance for her, was no notice to her. There is no evidence to show that the Lancashire policy could be canceled without plaintiff's consent. *Rothschild v. Ins. Co.*, 74 Mo. 41; *Stockton v. Ins. Co.*, 33 La. Ann. 577; *Latoix v. Ins. Co.*, 27 Va. 113; *Zimmerman v. Ins. Co.*, 42 N. W. Rep. 462; *Body v. Ins. Co.*, 63 Wis. 157. (4) If the Lancashire policy was in force, there would be other insurance on the property, which is prohibited by the policy sued on. *Rothschild v. Ins. Co.*, *supra*. (5) The evidence shows that the plaintiff was not the sole owner of the property, so that under the conditions of

the policy it never attached. *Mers v. Ins. Co.*, 68 Mo. 127; *Reuhmuller v. Ins. Co.*, 20 Mo. App. 246. (6) Notice to Davis of the incumbrance at the time the Lancashire policy was transferred was not notice to him as agent for defendant that the mortgage was still in existence on February 24th. Besides, it appears that the fact that a mortgage existed was not indorsed on the policy, but was concealed from the company for fear it would not carry the insurance. *Fitchburg Savings Bank v. Ins. Co.*, 125 Mass. 431; *German-American Bank v. Ins. Co.*, 8 Mo. App. 401; *Fletcher v. Ins. Co.*, 117 U. S. 519. (7) No proofs of loss were made. Proofs of loss are a condition precedent to plaintiff's right to recover. *Leigh v. Ins. Co.*, 37 Mo. App. 542; *Sheehan v. Ins. Co.*, 53 Mo. 351.

Stone, Hoss & King, for respondent.

(1) Even though it was a condition of the policy that the insurance should not commence until all the premium was actually paid, this condition would be waived by the company signing and delivering the policy. *Thompson v. Ins. Co.*, 52 Mo. 469; *Baldwin v. Ins. Co.*, 56 Mo. 151. (2) When defendant's policy was received by Trundle he is conclusively deemed to have accepted it unless he at once returned it to the agent. The contract of insurance then being complete on the part of the defendant, and the policy having been accepted by plaintiff, her rights and defendant's liability become at once fixed, and the Lancashire policy ceased to exist, and upon its ceasing to exist the defendant's policy was the only insurance on the goods. *Keim v. Ins. Co.*, 42 Mo. 38. (3) The testimony does not warrant the assertion of defendant that the plaintiff was not the sole owner of the goods. (4) The testimony shows conclusively that the incumbrance on the

goods was known to the defendant's agent. And knowledge on the part of the agent estops defendant from insisting on a written indorsement on the policy. The law imputes to the principal and charges him with all knowledge relating to the subject-matter of the agency which the agent acquires while acting as such agent and within the scope of his authority. *Pilkington v. Ins. Co.*, 55 Mo. 172; *Franklin v. Ins. Co.*, 42 Mo. 459; Mechem on Agency, secs. 720–721. (5) Proofs of loss was waived by defendant. *Summers v. Ins. Co.*, 45 Mo App. 46. (6) The letter of the agent Davis to Trundle contains an admission on his part that he holds the $8.90 unearned premium paid on the Lancashire policy, as agent for this defendant, and this agreement upon his part is binding on the defendant. *Ins. Co. v. Miner*, 44 N. W. Rep. 97. (7) The defendant, under the testimony, is clearly liable, and the fact that the plaintiff still retains the Lancashire policy, and brought suit upon it, cannot be held to prejudice her right in recovering from this defendant. *Dibble v.* ———, 37 N. W. Rep. 704; *Bennett v. Ins. Co.*, 31 N. W. Rep. 948; 7 American & English Encyclopedia of Law, p. 1014. (8) The able and exhaustive opinion in 41 Mo. App. 53 *(Huggins Candy & Cracker Co. v. Ins. Co.)* is clear authority as to defendant's liability. (9) An agent is bound to insure the goods of his principal if it is the usage to have such goods insured. *Shirtliff v. Whitfield*, 3 Am. Dec. 701; Mechem on Agency, secs. 493, 510; Paley on Agency, p. 51.

SMITH, P. J.—This is an action on a policy of insurance. It appears that at the November term, 1891, of the court the cause was tried, which resulted in a verdict and judgment for defendant. The plaintiff thereupon filed a motion for a new trial, which went over to the next term, when it was sustained. The

defendant thereupon perfected an appeal to this court from the order granting the new trial.

At the last named term, after the appeal had been taken, the cause was called for trial; and, against the objections of the defendant that no further trial of the cause could be had until the defendant's appeal was disposed of, the court ordered the trial to proceed, which resulted in a judgment for plaintiff. It may be as well remarked here that the defendant also appealed here from the judgment which was rendered against it in the second trial. These two appeals are both before us and are so intimately blended and connected in the records, proceedings and briefs therein that one cannot well be considered independent of the other, so that we shall consider them together, and as practically but one appeal.

It appears by the record of the cause before us that, after the new trial was granted on the motion of the plaintiff, the defendant participated in the second trial of the cause. It introduced evidence to maintain the issue in its behalf and also requested the giving of instructions and generally appeared in the case. The law has been well settled in this state that when a party under such circumstances participates in the new trial awarded, he cannot afterwards be heard to complain of errors committed in the first trial. *Bank v. Armstrong*, 92 Mo. 265; *Hill v. Wilkins*, 4 Mo. 87; *Davis v. Davis*, 8 Mo. 56; *Martin v. Henley*, 13 Mo. 312; *Bowie v. Kansas City*, 51 Mo. 459; *Gilstrap v. Felts*, 50 Mo. 431. There is nothing in the act of 1891, (Session Acts, 1891, p. 70), which changes this rule. The defendant had under that act the right to take its appeal from the order granting the new trial, and had it not participated in the retrial the effect of that appeal would have necessarily been to suspend further proceedings in the case until the appeal was disposed of. It was pri-

marily error for the trial court to order a further trial of the cause until the appeal was disposed of, but that error was cured by the act of the defendant in participating in the new trial. Defendant could have stood on its appeal, refused to participate in the new trial awarded and thus arrested any further proceeding in the case until its appeal was heard and disposed of; but, instead of taking that course, it elected to participate in the new trial, and having done so it cannot now be heard to complain of the errors, if any, which occurred during the first trial. The defendant by its own motion killed and rendered inefficacious its appeal from the order granting the new trial.

This brings us to the consideration of the grounds of the appeal from the judgment which was recovered against it at the second trial. The defendant contends that the trial court erred in overruling the demurrer interposed by it to the evidence adduced by the plaintiff. The first specific ground of this contention is that the evidence shows that the policy sued on was delivered upon condition that the Lancashire policy be surrendered, which was not done.

It appears from the evidence that a policy for the same amount as the policy sued on had been issued by the Lancashire company to plaintiff covering the plaintiff's merchandise, and that during the life of this policy its agent at Nevada wrote the plainliff's husband, who it seems was managing her mercantile business, to return the policy, as that company refused to carry the risk, and also inclosed a policy in defendant's company for a like amount in lieu of the Lancashire policy. It appeared by the register kept by the agent of the Lancashire company that the policy held by plaintiff had been canceled the day before the letter was written to plaintiff's husband notifying him of the fact and

inclosing the policy sued on. It is not perceived that the defendant's policy was delivered to plaintiff's husband upon the condition for which defendant contends.

The next ground urged is that the evidence shows that the premium for the policy has never been paid nor has credit been given therefor, and that the policy is invalid for that reason. The annual premium for the policy sent by defendant's agent to plaintiff was $10. The letter inclosing the policy informed plaintiff that "there would be a small difference of $1.10, owing to the additional time this one has to run, it being one year from now," while the one in whose stead it was issued began to run January 15 preceding. The agent of the Lancashire company was also agent of defendant company, and so when he canceled the policy of plaintiff in the former company and issued one in its place in the latter he gave plaintiff credit on the new policy for the amount of unearned premium on the old one. The defendant's agent in his letter sending the policy did not so much as request a remittance of the $1.10 difference, but contented himself with giving information alone of the difference. The policy is not set out in the record and we cannot tell how essential to its operative effect the payment of the premium is made. We think the language employed by the defendant's agent in his letter transmitting the policy to plaintiff justified plaintiff in believing that there was no occasion for great promptness in remitting the small unpaid amount on the new policy, and that he could do so within a reasonable time. It was not a cash transaction. It was on credit to the extent of the small balance. Undoubtedly it was not in the mind of defendant's agent that the plaintiff would by return post remit that balance. Nothing of the kind was contemplated or intended.

If, as is not the case, the policy had been sent to plaintiff with the request to remit the balance of the unpaid premium thereon, then the rule declared in *Building Ass'n v. Ins. Co.* (supreme court of Iowa, 49 N. W. Rep. 1033) would be fairly applicable.

The defendant further contends that there is no evidence tending to show that the Lancashire policy could be canceled without the plaintiff's consent. Of course if this policy was still in force at the time of the fire, then that of the defendant, which plaintiff insists was accepted in lieu of the former, could not have been operative, since only one of these policies was then valid. It sufficiently appears that the plaintiff's husband was her general agent to transact all her mercantile business. He was the *alter ego* of the plaintiff as to that particular business, and as such by the nature of his relation to her and the business, the transaction of which he was intrusted, he must be held as the general agent of the plaintiff (Mechem on Agency, secs. 6, 7, 285, 493, 510), and presumed to possess those powers which are commensurate with his employment, and which are usually and properly exercised by other similar agents under like circumstances.

It would not do to say that a husband conducting a mercantile establishment for and in the name of the wife would not be implicitly authorized not only to insure the merchandise under his management, but to determine in what company or companies the risk should be placed. The power to receive notice of cancellation of an existing policy and to accept a new policy in another company in its place is necessarily implied. These powers are necessarily implied in the general agent. A case of this kind is distinguishable from one where an agent is simply authorized to procure for his principal insurance. Such an agency is special and does not include author-

ity to cancel the insurance so effected. The cases cited by defendant demonstrate this. *Rothschild v. Ins. Co.*, 74 Mo. 41. The deduction to be made from the evidence is that the husband of the plaintiff to whom the notice of cancellation of the Lancashire policy was given was the general agent of the wife in respect to her mercantile business, and, therefore, the giving such notice to him was sufficient.

We do not agree with defendant that the evidence fails to show that the plaintiff was not the sole owner of the property covered by the policy. It does not appear that the plaintiff's husband had contributed a single dollar of capital or credit to the business which he was managing for and in her name.

The defendant further insists that there was a mortgage on the merchandise of plaintiff at the time the policy was issued which was not indorsed on the policy, and of which defendant had no notice, and that this rendered the policy void. The undisputed evidence shows that Davis, who was the agent of the Lancashire company, was notified of the existence of the mortgage at the time he issued the policy to plaintiff in that company. Davis was also the agent of defendant, who issued the policy in suit. The knowledge of the existence of the mortgage obtained by Davis while agent of the Lancashire company was acquired under such conditions as necessarily gives rise to the inference that such knowledge remained fixed, and was present in his memory when subsequently acting as the agent of the defendant in the transaction of the issue of the policy in the defendant company to plaintiff, and that his knowledge must be deemed the knowledge of the defendant. *George v. Railroad*, 40 Mo. App. 446; *Chouteau v. Allen*, 70 Mo. 341; Wade on Notice, sec. 688.

Although it was provided in the policy that if there was any incumbrance on the property that it should be reported by the assured and indorsed on the policy, otherwise the policy would be void, yet if there was an incumbrance on the plaintiff's merchandise of which defendant's agent had notice at the time of the issue of the policy, the defendant is estopped from setting up the want of indorsement of the incumbrance on the policy as a defense. *Pelkington v. Ins. Co.*, 55 Mo. 172; *Franklin v. Ins. Co.* 42 Mo. 459.

There is no evidence that the plaintiff or her husband was present when a conversation took place between Davis while acting as agent for the Lancashire company and the holder of the mortgage on the plaintiff's merchandise; so that the plaintiff is in no way bound by anything that was then said or done. There is no evidence whatever that the plaintiff and the agent of the Lancashire company agreed to conceal the knowledge of the mortgage from the company. As to the defendant's further contention that there was no evidence that any proofs of loss were made, it is sufficient to say that there was some evidence adduced which tended to show that the defendant's adjuster denied to the plaintiff the defendant's liability on its policy. We think there was sufficient evidence of waiver to support the finding of the court. *Summers v. Ins. Co.*, 45 Mo. App. 46; *La Force v. Ins. Co.*, 43 Mo. App. 518.

The defendant finally contends that the finding of the court for plaintiff was at variance with the theory of the following declaration of law given by it at the request of the defendant: "The court finds that it is provided in and by the terms of the policy sued on that if the property described in the policy had a mortgage thereon at the time said policy was issued, it should be so represented to the company and expressed

in writing, otherwise the policy should be void. The court declares that said condition is a reasonable and valid condition, and finds from the evidence that at the time the policy was issued the property described therein was covered by a chattel mortgage and such fact was not represented to the defendant or expressed in the policy in writing, and such policy is void."

The court at the instance of the plaintiff declared the law to be, that if there existed, at the time of the issuance of the policy sued on, a chattel mortgage against the property insured, and that the defendant's agent, Davis, knew of such incumbrance at the time, and issued the policy with such knowledge, then his action in that respect is binding upon the defendant, and said agent's neglect or omission to state such fact in writing in the policy is no defense in this action, the defendant being bound by the knowledge of said agent in that respect.

This last instruction in view of the authorities already cited stated the rule of law correctly as applicable to the facts of the case. The defendant's declaration of law when read in connection with that given for plaintiff it seems to us was well enough. If the court found the state of facts assumed in that of defendant it would necessarily have found for the defendant, but if on the other hand it found the facts embraced in that of the plaintiff, then, of course the finding would have been for plaintiff. The court could adopt the theory of either declarations accordingly as the evidence warranted. The trial was by the court without the aid of a jury, and as the evidence justified the finding of the court the apparent or supposed want of harmony in the foregoing declarations of law is unimportant. The theory upon which the court found for plaintiff as appears by its declarations of law was unexceptionable. In such case we will not reverse a judgment because all

the court's declarations of law cannot be harmonized in every particular. If the theory upon which the finding is made is justified by the evidence and is correct as a proposition of law, that is all that is required to uphold the judgment.

It follows that the judgment in both appeals will be affirmed. All concur.

JONATHAN L. BEARDEN, Respondent, v. JOSIAH H. MILLER *et al.*, Defendants; JOSIAH H. MILLER and ALMA B. MILLER, Appellants.

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St. Louis Court of Appeals, May 2, 1893.

1. **Married Women**: VALIDITY OF PERSONAL JUDGMENT. Under our present statute a personal judgment against a married woman is valid, and one may therefore be rendered upon her admission of liability in an action against her.

2. ———: VALIDITY OF JUDGMENT OF MECHANICS' LIEN ENTERED BY CONSENT. But *semble* that she is not empowered to charge her real estate with a mechanic's lien by consenting to the entry of a judgment establishing the lien, and that such a judgment, entered by her consent and without proof of the existence of the lien, is therefore invalid.

Appeal from the Greene Circuit Court.—HON. W. D. HUBBARD, Judge.

AFFIRMED.

L. O. Neider and *Robert G. Campbell*, for appellants.

No brief filed for respondent.

BIGGS, J.—This cause must be reviewed on the record proper, there being no bill of exceptions. The appellants challenge the sufficiency of the petition and the validity of the judgment.

The petition, although inartifically drawn, states a cause of action. The suit is to enforce a mechanic's lien for labor performed and materials furnished by the plaintiff in the construction of certain buildings erected on contiguous lots. It was alleged in the petition that the appellants were husband and wife, and that they were the owners of the property; that the materials were furnished and the labor performed by the plaintiff under one contract with them, and that the buildings were erected on contiguous lots. Then follows the usual averments of the filing of the mechanic's lien and the balance due thereunder, to-wit, $791.55. It was also averred that the Continental Building & Loan Association held a mortgage on the same property, which had been executed subsequently to the filing of the plaintiff's lien.

We think that all the facts necessary to a recovery were either expressly or impliedly stated in the petition. The objection that two separate causes of action were stated, one against the appellants and the other against the building and loan association, is not tenable, even if such an objection could now be urged. It was alleged that the defendant association was a subsequent incumbrancer, and it was made a party in order that it might be bound by the proceedings brought to enforce the plaintiff's lien.

The judgment of the court begins: "Now on this day come the said parties, plaintiff and defendants, by their respective attorneys; whereupon it is agreed by and between the parties plaintiff and defendants, Josiah F. Miller and Alma D. Miller, his wife, here in open court that judgment shall be rendered herein against said defendants in favor of said plaintiff for the sum of $410.99 as debt and damages; and, it appearing to the court," etc. The decree, continuing, finds all the facts necessary to establish a mechanic's

lien against both buildings, and judgment was rendered accordingly. It is contended that this judgment as against Mrs. Miller is absolutely void.

A judgment creates a debt, and under the common law could not be taken against, nor be confessed by, one who was not *sui juris*. Hence a personal judgment against a married woman, however taken, was void by reason of her common-law disabilities. But in this state her disabilities have been swept away by an innovating statute, which permits her to sue and be sued, contract and be contracted with, as if she were a *feme sole*. Revised Statutes, 1889, sec. 6864. Under this statute the confession by Mrs. Miller of the money part of the judgment was clearly authorized. Whether the further judgment of the court enforcing the mechanic's lien against her real estate is valid, presents a more difficult question, for the reason that the law governing and limiting the right of a married woman to convey or charge her real estate is no way changed by the statute referred to. Therefore, if it appeared affirmatively that that portion of the judgment was rendered without evidence, we would be inclined to hold, under the authority of the case of *Coe* v. *Ritter*, 86 Mo. 277, that it was void as to the interest of Mrs. Miller in the property charged with the lien. But this is not so. It is fairly inferable from the wording of the decree that evidence was heard on this branch of the case. Besides all presumptions prevail in favor of the regularity and validity of the judgment. *Wetzell v. Waters*, 18 Mo. 396; *Johnson v. Godlove*, 71 Mo. 400; *Snider v. Railroad*, 73 Mo. 465; *Boswell v. Railroad*, 73 Mo. 470.

In conclusion it may be remarked that the confession of the judgment in this case must not be confounded with the statutory confession of a judgment

which is entered without action. The authorities cited by the appellants on this point are inapplicable.

With the concurrence of the other judges the judgment of the circuit court will be affirmed. It is so ordered.

THE STATE OF MISSOURI *ex rel.* ROBERT WHITE *et al.*, Directors of School District Number 7, Township 3, Range 10, West, Appellants, v. JAMES T. LOCKETT, Respondent.

St. Louis Court of Appeals, May 2, 1893.

1. **Pleading:** MANDAMUS. When, in a proceeding by *mandamus*, the pleading filed by the relator to the return of the defendant merely denies the allegations of the return and tenders no new issue, no further pleading on the part of the defendant is required.

2. **School District:** ANNEXATION OF ADJOINING DISTRICT: REQUISITE ACTION BY BOARD OF DIRECTORS. It is essential to the validity of proceedings, under section 8097 of the Revised Statutes for the annexation of a school district to an adjoining district, that the meeting held in the former district to vote upon the proposition of annexation shall be ordered by the board of directors of that district. And the corporate action of that board is necessary; assent given by the members of the board separately and individually will not suffice.

3. ———: ———: PROOF OF ACTION OF BOARD OF DIRECTORS. *Held*, in the course of discussion, that the action of the board of directors in calling such meeting can only be shown by the record which the statute requires the clerk of the board to make.

Appeal from the Knox Circuit Court.—HON. BEN E. TURNER, Judge.

AFFIRMED.

L. F. Cottey, for appellants.

O. D. Jones, for respondent.

BIGGS, J.—This is an appeal from the judgment of the circuit court denying a peremptory writ of *mandamus*. The relators are the directors of village school district number 7, of Knox City, Knox county, Missouri. The defendant is the county clerk of the county. Upon the petition of the relators an alternative writ of *mandamus* was issued, in which it was alleged in substance that sub-schooldistrict number 4 in said county adjoined said village district and that the inhabitants of the subdistrict, being desirous of having the territory composing their district annexed to the village district, ten qualified voters of such subdistrict signed and presented a petition to the board of directors thereof, asking that a special meeting be ordered for the purpose of voting on the proposition of annexation; that, upon the reception of the petition, the said board of directors ordered that the vote be taken at the annual school meeting to be held on April 5, 1892, and that notices to that effect were posted in five public places in the subdistrict at least fifteen days prior to the date of said meeting; that pursuant to said notices all of the qualified voters of the sub-schooldistrict assembled in the schoolhouse in the district on the fifth day of April, 1892, and organized by electing a chairman and secretary, when the proposition to annex the subdistrict to the village district was submitted by ballot to the qualified voters there assembled, which resulted in sixteen votes being cast for such annexation and fifteen votes against it; that thereupon the secretary of the meeting certified the proceedings thereof to the board of directors of the subdistrict and also to the board of the village district; that afterwards on the ninth day of April, 1892, at a meeting called for that purpose, the directors of the village district unanimously decided in favor of the proposition of annexa-

tion, and ordered the boundary lines of their village district to be changed so as to include the territory of the subdistrict, and that immediately thereafter the said board of directors notified the clerk of the subdistrict of its action in the premises.

It was then averred that on the fourteenth day of May, 1892, the relators made an estimate of the amount of levy necessary for the current and other necessary expenses of their school district for the year 1892, which, together with a copy of the record of the action of the relator's board in reference to the change of the boundary lines of the district, was forwarded to the defendant; that the defendant was requested to extend the levy upon the school tax books of Knox county on all the taxable property within the boundary lines of the village district as then constituted, which the defendant failed and refused to do.

In the return to the alternative writ the defendant admitted that the relator's board of directors had made and forwarded to him the levy as alleged, and that he had refused to extend the tax against the property within the limits of district number 4; but he denied that the board of directors of said subdistrict had received a petition asking for the annexation of the district to that of the relators as alleged in the alternative writ, or that the board of said district number 4 had ordered a special meeting for the purpose of voting on such a proposition, or that such board had notices to ordered be posted of such meeting as averred.

In further defense of his action in the premises, the defendant alleged that the acting board of directors of the subdistrict denied the legality of the alleged proceedings for annexation for the reasons heretofore stated; that they made and certified to him a levy for school purposes for their district for the year 1892; that he could not lawfully extend both levies; and

that, as the relators had failed to furnish to him satisfactory evidence of the alleged annexation, he extended the tax as certified by the acting directors of district number 4. The return contains other matters which we need not notice.

The relators filed a replication denying the affirmative matter set forth in the return, but it tendered no new issue of fact.

The first question presented is one of pleading. Our statute regulating proceedings by *mandamus* (Revised Statutes, 1889, chapter 105) provides: "Section 6812. When any writ of *mandamus* shall be issued, and return shall be made thereto, the person suing out or prosecuting such writ shall plead to or traverse all or any of the material facts contained in such return.

"Section 6813. The persons making such return shall reply, take issue or demur to the pleading of the party suing out or prosecuting such writ."

The argument of counsel for appellants is that, under a proper interpretation of the foregoing sections of the statute, common law and not code pleading must be applied in *mandamus* proceedings. The point is made that the circuit court committed error in overruling the motion of the relators for judgment under the pleadings, the defendant having failed to plead to what counsel denominates "the answer of the relators." If it be conceded that code pleading is inapplicable, the relators were not entitled to a judgment as asked, unless their last pleading tendered a new and controlling issue of fact. This it did not do. Under either system of pleading, the cause being at issue on the facts, no other pleadings by way of traverse could be made. We will, therefore, overrule this assignment of error.

The evidence adduced by the relators to prove that the board of directors of sub-schooldistrict number 4 ordered a special meeting for the purpose of voting on the question of annexation, and authorized notices to be posted to that effect, was entirely oral. It was to the effect that one of the directors circulated a petition for that purpose and secured thereon the signatures of at least ten qualified voters of the district; that he presented the petition to the other directors separately; that they each informed him that they were opposed to the scheme, but each signified a willingness for him to proceed; that thereupon he posted the notices in five different places in the district, and that pursuant to the notices the meeting was held and the vote taken. There is no pretense that the board met and took any action as a board. The circuit court held this evidence to be incompetent and insufficient, and the relators assign this ruling of the court for error.

Section 8097 of the Revised Statutes of 1889 reads: "Whenever an entire school district or a part of a district adjoining any city, town or village school district, desires to be attached thereto for school purposes, upon the reception of a petition setting forth such fact and signed by ten qualified voters of such district, the board of directors thereof *shall order* a special meeting for said purpose, by posting notices in five public places within the district, for fifteen days prior to the day of such meeting. Said meeting shall be held at two o'clock P. M. on the day specified in the notices, and when assembled the meeting shall be organized by the election of a chairman and a secretary, who shall keep a correct record of the transactions of said meeting, and, should a majority of the votes cast favor such annexation, the secretary shall certify the fact, with a copy of the record, to the board

of said district and to the board of said city, town or village school district; whereupon the board of such city, town or village district shall meet to consider the advisability of receiving such territory, and, should a majority of all the members of said board favor such annexation, the boundary lines of such city, town or village school district shall from that date be changed so as to include said territory, and said board shall immediately notify the clerk of said district which has been annexed, in whole or in part, of its action."

The statute relating to the organization of the boards of directors of the several school districts in the state (Revised Statutes, 1889, section 7990) provides: "The directors shall meet within four days after the annual meeting at some place within the district, and organize by electing one of their number president; and the board shall, on or before the fifteenth day of July, select a clerk who shall enter upon his duties on the fifteenth day of July; but no compensation shall be allowed such clerk until all reports required by law and by the board have been duly made and filed. A majority of the board shall constitute a *quorum* for the transaction of business: *Provided*, each member shall have due notice of the time, place and purpose of such meeting; and, in case of the absence of the clerk, one of the directors may act temporarily in his place. The clerk shall keep a correct record of the proceedings of all the meetings of the board. No member of the board shall receive any compensation for performing the duties of director."

We think that the action of the court in excluding the relator's evidence was right. The statute clearly provides that the directors of a school district in ordering a special meeting for the purposes herein stated must act as a board, and not as individuals. Corporate action is required; therefore, individual action is of

no avail. *Johnson v. School District*, 67 Mo. 319; *State ex rel. etc., v. Tiedemann*, 69 Mo. 515; *Kane v. School District*, 48 Mo. App. 408; *Finley Shoe Co. v. Kurts*, 34 Mich. 89; *Shackelford v. Railroad*, 37 Miss. 202.

Even though the proof offered had shown a meeting of the directors of the district for the purpose of taking action on the petition, the action of the board thereon could only have been shown by the record, which the statute required the clerk of the board to make. *City of Lowell v. Wheelock*, 11 Cush. 393; *Sheckert v. City of Saginaw*, 22 Mich. 104; *Morrison v. City of Lawrence*, 98 Mass. 219; *Bank of United States v. Dandridge*, 12 Wheat. 69; *Bank of United States v. Fillebrown*, 32 U. S. 28.

As the relators failed to show that the board of directors authorized the vote on the question of annexation on the day of the annual meeting, and that the notices were posted in obedience to the order of such board, it necessarily follows that the vote on the question was without authority and amounted to nothing. This is decisive of the case, and renders the discussion of other questions presented in the briefs unnecessary.

The judgment of the circuit court will be affirmed. All the judges concur.

THE STATE OF MISSOURI, Respondent, v. GEORGE R. CROW, Appellant.

St. Louis Court of Appeals, May 2, 1893.

Criminal Law: PETIT LARCENY: INSTRUCTIONS. To warrant a conviction for petit larceny, there must, under the statutory definition of that offense, be a finding that the property taken belonged to a third person. Accordingly, an instruction which authorizes a conviction without requiring such finding is erroneous.

Appeal from the Clark Circuit Court.—HON. BEN. E. TURNER, Judge.

REVERSED AND REMANDED.

J. W. Howard and *W. L. Berkheimer*, for appellant.

There is a fatal variance between the allegation of the ownership of the property in the information and the proof. The ownership must be proved as laid. *State v. Horn*, 93 Mo. 190; *State v. Fay*, 65 Mo. 490. The court failed to instruct on the whole case, which is fatal. *State v. Banks*, 73 Mo. 568; *State v. Palmer*, 88 Mo. 592; *State v. Riley*, 100 Mo. 494. There was a complete failure of proof. *State v. Ballard*, 104 Mo. 634. The court compelled the prosecutor to elect as to which of the logs alleged to have been stolen he would proceed, yet did not, by an instruction to the jury, confine them to the consideration of the logs which the state elected to rely upon after the jury had heard the evidence on the whole case. This was a fatal error.

J. A. Whiteside, Prosecuting Attorney, for respondent.

The ownership of the logs, for the stealing of which the defendant was convicted, was proven, and the fact of their ownership was not controverted. The failure of the instruction to require a finding on that subject was, therefore, not prejudicial and hence not reversible error. *State v. Bruder*, 35 Mo. App. 475; *State v. Jackson*, 105 Mo. 196; *McDermott v. Class*, 104 Mo. 14; *State v. Stockwell*, 106 Mo. 36; *State v. Hultz*, 106 Mo. 41; *State v. Zumbuson*, 86 Mo. 111; *State v. Brooks*, 92 Mo. 542. And, after the court required the prosecuting attorney to elect and confined the jury to the consider-

ation of the three burr-oak logs south of the creek, the defendant should have asked the special instruction taking away from the jury the other evidence, if he desired it done in more specific terms. Having neglected that, he cannot now complain. *State v. Brooks*, 92 Mo. 542; *State v. Elkins*, 101 Mo. 344; *State v. McDonald*, 85 Mo. 539; *State v. Marshall*, 36 Mo. 400; *State v. Ray*, 53 Mo. 345; *State v. Pints*, 64 Mo. 317; *State v. Viers*, 48 N. W. Rep. (Iowa) 732; *Winn v. State*, 52 N. W. Rep. (Wis.) 775; *People v. Ahern*, 29 Pac. Rep. (Cal.) 49; *Mead v. State*, 23 Atl. Rep. 264; *Small v. Williams*, 13 S. E. Rep. (Ga.) 589; *People v. McNutt*, 29 Pac. Rep. 243; *People v. Raher*, 52 N. W. Rep. (Mich.) 625; *Keyes v. State*, 23 N. E. Rep. (Ind.) 1097; *Sullivan v. State*, 44 N. W. Rep. (Wis.) 647; *State v. Pritchett*, 11 S. E. Rep. (N. C.) 357. The statutes in some of states quoted from above are very similar to the statutes of Missouri.

Biggs, J.—The defendant was prosecuted under an information before a justice of the peace charging him with petit larceny. The information was signed by the prosecuting attorney, who professed to act on affidavits made by John W. Harrison and Charles Davidson. The defendant was charged in the information with stealing one burr-oak log fifteen feet long, two burr-oak logs eight feet long, one red-elm log sixteen feet long, one burr-oak log fourteen feet long, and one burr-oak log twenty-six feet long; all of the value of $10, and the property of John W. Harrison and Charles Davidson.

The defendant was convicted before the justice and in the circuit court. He was convicted of stealing the burr-oak log fifteen feet long, and the two burr-oak logs, each eight feet long, the prosecuting attorney, at the close of the evidence for the state, having elected to hold the defendant on the charge of stealing those logs

only. The defendant has appealed, and claims that the judgment is erroneous for several reasons.

At the close of the evidence the defendant asked the court to direct an acquittal. The court very properly refused to do this, for the reason that there was evidence tending to prove that the defendant took the logs from the land of one Thompson with the unlawful purpose or intent to convert them to his own use; that he afterwards did so convert them; and that they were the property of John W. Harrison and Charles Davidson. The fact that the defendant's evidence tended to show that the logs were the property of Thompson, and that the defendant did not take them with a felonious intent, did not entitle him to a peremptory instruction of acquittal. The credibility of the evidence was for the jury.

At the instance of the prosecuting attorney the court gave the following instructions, of which the defendant complains:

"Defendant is charged in the information with stealing, taking and carrying away certain lumber, to-wit, one burr-oak log fifteen feet long, two burr-oak logs, each eight feet long, one red-elm log sixteen feet long, one burr-oak log fourteen feet long, and one burr-oak log twenty-six feet long, from the land of Thomas Thompson, at the county of Clark and state of Missouri, and being the property of John W. Harrison and Charles Davidson.

"Now, if the jury shall find from the evidence that the defendant, at the said county of Clark, at any time within one year prior to July 23, 1891, did steal, take and carry away three burr-oak logs, south of the creek, and that same was of less value than $30, then in such case the jury will find the defendant guilty of petit larceny, and assess his punishment at imprisonment in the county jail not exceeding one year, or at a

fine alone not exceeding $100, or at both such fine and imprisonment."

In the first instruction the jury should have been told directly that the state had dismissed the prosecution as to all property mentioned in the information, except the burr-oak log fifteen feet long and the two burr-oak logs eight feet long. It is true that the attention of the jury was inferentially directed in the second instruction to those logs only, as the evidence tended to show that they were the only burr-oak logs south of a certain branch; but it would have been better to have informed the jury explicitly that the state had elected to confine the charge of larceny to those particular logs, especially in view of the fact that the prosecuting attorney had attempted, by the introduction of evidence, to make out a case against the defendant for stealing *all* the logs.

The second instruction is fatally defective, because it did not require the jury to find that the logs were the property of some third person. Our statute, section 3547, Revised Statutes, 1889, defining petit larceny reads:

"Every person who shall steal, take and carry away any money or personal property or effects of another under the value of $30, not being the subject of grand larceny without regard to value, shall be deemed guilty of petit larceny and, on conviction, shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding $100, or by both such fine and imprisonment."

This statutory definition of the offense necessarily requires that the property should be found by the jury to belong to a third person, and the jury should have been so directed. As the indictment alleged that the logs belonged to Harrison and Davidson, under the rule of the common law it would have been incumbent on the state to strictly prove the alleged ownership as

laid (*State v. Nelson*, 101 Mo. 477; 1 Wharton on Criminal Law [9 Ed.] sec. 931), for the reason that the alleged ownership is considered as descriptive of the particular offense, and, if not proved as laid, the variance is fatal. But this rule had been changed in this state by statute. Revised Statutes, 1889, section 4114. That portion of the section which is pertinent reads: "Whenever on the trial of any felony or misdemeanor there shall appear to be any variance between the statement in the indictment or information and the evidence offered in proof thereof, * * * in the ownership of any property named or described therein, such variance shall not be deemed grounds for an acquittal of the defendant, unless the court before which the trial shall be had shall find that such variance is material to the merits of the case and prejudical to the defense of the defendant."

Now in the case at bar there was evidence tending to prove that the logs were the property of three different persons, viz., Harrison and Davidson, Thompson and Keets. While the defendant under the foregoing statute might have been convicted if the logs belonged to either of the parties named, it was the duty of the court to instruct the jury that, in order to convict, they must find that the logs alleged to have been stolen were the property of one or the other. This is technical, but it is in conformity with the statute.

We find no other error in the record. For the reasons stated the judgment of the circuit court will be reversed and the cause remanded. All the judges concur.

THE STATE OF MISSOURI *ex rel.* THE STATE SAVINGS, BUILDING & LOAN ASSOCIATION Number 1, Respondent, v. CHARLES H. R. DAVIS, Appellant.

St. Louis Court of Appeals, May 2, 1893.

Practice, Appellate: HEARING OF APPEAL TO THIS COURT. This court may in its discretion hear and determine an appeal at any time after the expiration of fifteen days from the filing of the transcript in the office of its clerk. *Held*, accordingly, that this court has the power to set a cause for hearing at the term during which the appeal therein was taken.

Appeal from the St. Louis City Circuit Court.—HON. LEROY B. VALLIANT, Judge.

MOTION OVERRULED.

Chester H. Krum, for appellant.

W. M. Kinsey and *Frank E. Richey*, for respondent.

ROMBAUER, P. J.—On the fourth day of March, 1893, the circuit court for the city of St. Louis awarded a writ of peremptory *mandamus* against the defendant, commanding him to deliver to the relator certain records and other property belonging to the relator, which he unlawfully detained. From this judgment the defendant, on March twenty-third, appealed to this court, giving a *supersedeas* bond on such appeal. A transcript of the record was filed in the office of the clerk of this court on April 15, 1893. On the eighteenth day of that month, the relator entered his appearance in this court and moved that the cause be set for hearing under the provisions of section 20,

article 6, of the constitution. As a ground for such motion, relator stated that the defendant was the former secretary of the corporation, had been ousted as such by a final judgment of the circuit court, and declined to turn the records and property of the corporation over to its successor, thereby rendering the corporation powerless to fulfill its duties. The relator further stated that, although there was a final judgment of ouster against the defendant, he prosecutes the appeal from the peremptory writ of *mandamus* for the apparent object of vexation and delay. We thereupon ordered the cause to be docketed at this term, and ordered the appellant to file his brief on or before the first day of May, 1893. The appellant now files his motion to vacate this order, claiming that it was improvidently made, and is contrary to the statute regulating appeals.

Section 20 of article 6 of the constitution provides that all cases coming to this court by appeal or writ of error shall be triable at the expiration of fifteen days from the filing of the transcript in the office of the clerk of this court. This provision is too plain to be misunderstood. It invests this court with power to hear any cause coming to it by appeal or writ of error after the expiration of fifteen days from the filing of the transcript in the clerk's office of this court. Whether this court will *exercise* such power in any given case, may depend on the nature of the action, the necessity for a speedy determination of the cause and the business of the court. That is to say, whether the cause shall be tried out of its statutory order rests in the judicial discretion of the court, which like all judicial discretion must not be oppressively exercised.

There is no conflict between this constitutional provision and the statutory provision on the subject of appeals, as was shown in the opinion of this court by

LEWIS, J. (*In re Drake's Estate*, 7 Mo. App. 512). And as GAMBLE, J., aptly remarks in *Hamilton v. St. Louis County Court*, 15 Mo. 20: "If there be in the constitution any language of doubtful import, we must, of course, look to the circumstances and condition of the people, and to the history of the instrument itself to find the meaning of the clause in question; but, where the language is plain and intelligible, and consistent with all other parts *of the instrument*, we cannot allow ourselves to find, in any reference to facts, *out of the instrument* any authority for interpolating either a grant of power *or a restriction upon power granted.*"

Under the settled rule in this state touching appellate procedure, an appeal taken from the circuit court, when perfected, at once deprives the circuit court of all jurisdiction over the cause, and vests it in the appellate court. *Ladd v. Couzins*, 35 Mo. 513; *Burgess v. O'Donoghue*, 90 Mo. 299.

The motion to vacate the order is overruled. As some time was necessarily consumed in the determination of this motion, the appellant's time for filing brief is extended to May 9, 1893, and the respondent's time to five days thereafter. All the judges concur.

THE CURRENT RIVER LUMBER COMPANY, Respondent, v. J. S. CRAVENS *et al.*, Appellants.

St. Louis Court of Appeals, May 2, 1893.

1. **Mechanics' Liens:** COMPETENCY OF ADMISSIONS OF FORMER OWNER. When materials are furnished for a building under contract with the owner, and such owner subsequently sells the premises, admissions made by him after he has parted with his title are not competent evidence in an action against the purchaser for the enforcement of a mechanics' lien for such materials.

2. ——: USE OF MATERIALS SUED FOR. A material-man is not entitled to a mechanics' lien against a building for materials furnished by him therefor, unless such materials were actually used in the construction of the building.

Appeal from the Greene Circuit Court.—HON. W. D. HUBBARD, Judge.

REVERSED AND REMANDED *(with directions).*

Heffernan & Buckley, for appellants.

The claimant of lien for material furnished must prove that the identical material charged went into construction of improvement sought to be charged in the lien. *Schulenburg v. Hawley*, 6 Mo. App. 34; *Schulenburg v. Vroman*, 7 Mo. App. 133; *Schulenburg v. Robison*, 5 Mo. App. 561; *Fitzgerald v. Thomas*, 61 Mo. 499; s. c., 76 Mo. 513; *Schulenburg v. Prairie Home Institute*, 65 Mo. 295. If such claimant so mix or mingle the material furnished for other buildings or purposes with that furnished for the one sought to be charged, the lien is gone. *Kirtley v. Morris*, 43 Mo. App. 144; *Fitzgerald v. Thomas*, 61 Mo. 499; s. c., 76 Mo. 513; *Schulenburg v. Robison*, 5 Mo. App. 561; Jones on Liens, sec. 1526. Where lumber is furnished a party on general account and a part is paid, then lien claimant cannot take the balance due, divide it up and apportion it to each house, the material for which remains unpaid. *Schulenburg v. Vroman, supra.* It is not sufficient to maintain a lien that material is furnished on a general or personal account, even though shown to have gone into the construction of the particular buiding sought to be charged with liens; but the material must be furnished for a particular building, with the intention of charging it with the lien. *Planing Mill Co. v. Ritter*, 33 Mo. 404.

Barbour & Stillwagen, for respondent.

ROMBAUER, P. J.—A preliminary question arises in this case on the respondent's motion to dismiss the

appeal, because the abstract fails to show that an appeal was granted by the trial court, or that the bill of exceptions was filed in time. This motion is not well taken and must be overruled. It appears by the abstract that the time allowed the defendants to file a bill of exceptions expired June 10, 1892, and that they filed their bill of exceptions on that day. The order granting an appeal need not be shown by the abstract, but, under section 2253 of the Revised Statutes of 1889, it must be shown by the clerk's certificate. The clerk's certificate in this case does show the granting of the appeal.

This brings us to the merits of the appeal. The action is one to enforce a mechanic's lien for materials against a house. The parties defendant are the owner with whom the contract was made, and the county of Greene which became a mortgagee of the premises on November 3, 1890, and John Endley, the owner of the premises at the date of the institution of the suit. The answer of defendants was a general denial. The trial of the cause by the court resulted in a judgment for plaintiff for the debt and a judgment establishing its lien. The main complaint made on this appeal is that the judgment, as far as the lien is concerned, is not supported by any substantial evidence.

The following facts are uncontroverted by the evidence: The defendant Cravens was engaged in building six or more houses in the city of Springfield, and in doing so he bought the necessary lumber from the plaintiff on general account. The account ran against him without anything to indicate therein for what purpose the lumber was bought. The lumber was not furnished for any particular house. He made payments on account from time to time, which were credited generally on his account. When he ceased to make payments, the plaintiff presented to him a gross bill for

the balance due, which he certified to as correct. The plaintiff, afterwards discovering that such evidence was unavailable for the purposes of a lien, caused three separate bills to be made out, dividing the balance left on general account between three of the houses ratably. The plaintiff's clerk, Hahn, took these three bills to Cravens, who marked each of the bills "O. K." Cravens, who was a witness for the plaintiff, testified that he could not tell whether the lumber contained in each bill went into each house, but as to some he could tell that it did not. There was absolutely no evidence whatever in the case that the indentical lumber charged for in this action went into the particular house in question. In fact there was no substantial evidence that any of it did, as some of the other houses were constructed later. The following extract from the testimony of Cravens will best illustrate the facts of the case:

"*Q.* Didn't you go to Mr. Hahn at his request and separate these bills for lumber used in the three different houses, numbers 33, 35, 36? *A.* No, sir; not in the way that he is trying to put it at me.

"*Q.* How did you do it? *A.* Mr. Hahn came to me when he came up from his mill, and came over to my place and says: 'I have come to see you.' Says I: 'What about?' He says: 'I have got to divide up that lumber bill in some kind of shape to make a lien.' Says I: 'Do you know how much?' He says: 'I don't know, unless I just divide them up into three sizes and put a lien onto them.' I says: 'Go ahead. I guess that is the best you could do.' And he went ahead and divided it up and asked me if I would O. K. it, and I told him I would as to amount, but I couldn't tell what. I says that boxing didn't go into the house, and I O. Kd. the bill simply because it was the amount I owed Mr. Milner.'"

Upon this evidence the court first declared the law thus: "Unless the court finds from the evidence in the case that the identical lumber and building material in plaintiff's lien account actually entered the construction of the house and improvements erected on lot 35, the plaintiff is not entitled to the enforcement of the lien against the property." It then entered a judgment of lien against the property.

It will be thus seen that the court's finding is opposed to its declaration of law. Even the attenuated evidence, which under other circumstances might have been furnished by the "O. Kd." bills, was rebutted by the testimony of Cravens upon the stand, from which it distinctly appeared that he did not know whether the lumber went into the building or not. Moreover, he was not in a position to make any admissions as far as they affected the question of lien, having parted with the title to the property anterior to such admissions. His so-called admissions were declarations against the interest of third persons, and not against his own, and as such inadmissible.

It only remains to be seen whether the declaration of law made by the court was correct. It was once held that, if materials are furnished for a certain house, the fact that they were not actually used in its construction did not defeat the lien. *Morrison v. Hancock*, 40 Mo. 561. This judicial aberration, which lost sight of the governing principle that the lien is one which attaches on account of the material, and not on account of the debt, was subsequently repudiated. *Simmons v. Carrier*, 60 Mo. 581; *Fitzpatrick v. Thomas*, 61 Mo. 516; *Schulenburg v. Prairie Home Institute*, 65 Mo. 295; *Deardorff v. Everhartt*, 74 Mo. 37. It is now well settled in this state that, in order to entitle a material-man to a lien, the material must be furnished for the house and be used in its construction. *Schulenburg Lumber Co. v.*

Johnson, 88 Mo. App. 404, 407, properly states the rule and its limitations.

It results from the foregoing that the judgment must be reversed, having no foundation in the evidence as far as the lien is concerned. The judgment is reversed, and the cause remanded with directions to enter a general judgment against defendant Cravens for the debt sued for, and a judgment in favor of the other defendants. All the judges concur.

MARSHALL WILSON, Respondent, v. NELSON VASS, Appellant.

St. Louis Court of Appeals, May 2, 1893.

Contracts: STATUTE OF FRAUD. A promise, whereby the promisor agrees for a valuable consideration to assume and pay the debt of a third person to the promisee, is valid though not in writing.

Appeal from the Lawrence Circuit Court.—HON. M. G. MCGREGOR, Judge.

AFFIRMED.

R. H. Landrum and *W. Cloud*, for appellant.

N. Gibbs and *William B. Skinner*, for respondent.

The statement of the cause of action, the sufficiency of which is controverted by appellant, is a perfect statement of a cause of action by novation. That statement alleges every fact essential to establish the liability of defendant by novation, and the right of plaintiff to sue and recover thereon. The promise of the defendant was a direct undertaking to pay his own debt, and need not to have been in writing. *Holt v. Dollarhide*, 61 Mo. 433; *Besshears v. Rowe*, 46 Mo. 501; *Flanagan v. Hutchinson*, 47 Mo. 237.

ROMBAUER, P. J.—This action was instituted before a justice of the peace on a statement containing two causes of action, one on an open account for labor and material, the other on an indebtedness evidenced by writing. Upon the trial of the cause in the circuit court, the plaintiff recovered a verdict on both causes of action. The defendant complains on this appeal that error has intervened in the trial of the second cause of action, and that the recovery thereon was unwarranted.

Before the final submission of the cause in this court, it was shown to us by affidavits filed by the respondent that the bill of exceptions embodied in the transcript was so embodied without legal warrant, as the bill originally filed was a mere skeleton, and did not have a report of the testimony attached to it when signed by the trial judge. We, thereupon, on the authority of *Crawford v. Spencer*, 92 Mo. 498, *Roberts v. Bartlett*, 26 Mo. App. 611, and *Tipton v. Renner*, 105 Mo. 5, ordered the bill of exceptions to be stricken from the files. The only question remaining for our consideration is, whether any errors are shown by the record proper which demand a reversal of the judgment. Touching the plaintiff's first cause of action, no errors of record are claimed; but it is claimed that the statement of his second cause of action is insufficent to support a recovery.

That statement is as follows: "And for another and different cause of action plaintiff states that, on the fifteenth day of March, 1887, one David Matthews was indebted to Marshall Wilson in the sum of $15.75, and defendant Nelson Vass was indebted to said Matthews in a like or greater sum, and, at the special instance and request of defendant Nelson Vass, plaintiff, Marshall Wilson, accepted from said David Matthews

an order on said Nelson Vass for said sum of $15.75. That said defendant wrote said order from Matthews to plaintiff on himself, and agree to pay it. That said order for $15.75 has been lost or mislaid, and for that reason is not filed herewith. That the same has never been paid, and said sum is now due and owing to plaintiff from defendant, for which he asks judgment."

This statement shows a complete contract of novation, and charges a direct promise by the defendant to pay his own debt. As such a promise need not be in writing (*Holt v. Dollarhide*, 61 Mo. 433), the objection that the statement is insufficient in not charging an acceptance in writing is untenable. We must presume in support of the judgment that the evidence was sufficient to support a recovery on that theory.

The judgment is affirmed. All concur.

JOHN SHANNON, Respondent, v. THE HANNIBAL & ST. JOSEPH RAILWAY COMPANY, Appellant.

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St. Louis Court of Appeals, May 9, 1893.

1. **Destruction of Fruit Trees and Hedges:** MEASURE OF DAMAGES. The measure of damages for the wrongful destruction of fruit trees—and so *held* also of hedges sued for herein—consists of the difference between the value of the land, on which they grow, before and after their destruction.

2. **Practice, Appellate:** PRESERVATION OF OBJECTIONS TO RULINGS ON INSTRUCTIONS. To entitle himself to the review of adverse instructions on appeal to this court, a party must preserve his exceptions to the giving of them.

Appeal from the Marion Circuit Court.—HON. THOMAS H. BACON, Judge.

REVERSED AND REMANDED.

Spencer Mosman and *W. M. Boulware*, for appellant.

The apple trees and hedge were part of the land; the injury was an injury to the inheritance, and the measure of plaintiff's damage is the difference in the value of the land before and after the injury. The distinction between fruit trees and ornamental or shade trees on the one hand and timber trees on the other is well marked. The timber tree has a value of itself as a convertible marketable commodity, independent of the land on which it stands. The former have no value except as connected with the land of which they form a part. The ornamental or shade trees have no value other than as, connected with the land, they add to its enjoyment; and fruit trees, drawing the elements from the soil on which they stand, have a producing capacity which may add to the value of the realty. As a general rule the measure of damage for cutting or destroying ordinary timber trees is the value of the trees as timber. No such measure of damages can be applied to fruit trees, for they have no such value. They are of value only as part of the land. *Dwight v. Railroad*, 34 Cent. Law Jour. 409; *Gates v. Railroad*, 44 Mo. App. 495; *Railroad v. Tubbs*, 28 Pac. Rep. 612; s. c., 47 Kan. 630; *Greenfield v. Railroad*, 49 N. W. Rep. (Iowa) 95; Sedgwick on Damages [8 Ed.] sec. 933.

W. R. and *T. L. Anderson* and *H. J. Drummond*, for respondent.

The evidence objected to was competent, as bearing upon the question of damages, to show the situation of the property and the use to which it was put. The distinction sought to be drawn by defendant between

fruit trees on the one hand and timber trees on the other is not only rather refined than otherwise, but has no application whatever to this class of cases. By section 2614, chapter 42, Revised Statutes of Missouri, 1889, it is made the duty of the railroad corporation to burn and clear off their right of way twice every year to prevent the destruction of property by fire, attaching a heavy penalty for failure to do so. The word property embraces fences, growing fruit trees and herbage. *Railroad v. Bohannon*, 7 S. E. Rep. (Va.) 236; *Grissell v. Railroad*, 9 Atl. Rep. (Conn.) 137. It is suggested that the fruit grown on apple trees have a value as a convertible marketable commodity.

BOND, J.—This action was brought for the negligent injury and destruction by fire of four hundred and sixty-two feet of hedge fence, and six apple trees standing on the lot of the respondent. The evidence tended to prove that five apple trees and about four hundred and sixty-two feet of Osage hedge were consumed by fire, negligently or willfully communicated by the act of defendant's servants, engaged in burning out its right of way as required by section 2614 of the Revised Statutes of 1889. There was a verdict and judgment for plaintiff, from which defendant took an appeal to this court, whereon the main error assigned is that incompetent evidence was received as to the market value of the trees and hedge destroyed.

In a well considered case (*Dwight v. Railroad*, 34 Cent. Law Jour. p. 409), the question was fully examined as to what is the proper measure of damages in an action for negligently destroying by fire apple trees, cherry trees and grass. The point of exception before the appellate court in that case was raised by the following question and answer: "*Q.* What were those

twenty-one trees worth at the time they were killed? *A.* I should say they were worth $50 apiece." The court held that the reception of this and like testimony was error, for which the case was reversed. In reaching its conclusion in that case the court held that fruit trees have no value susceptible of accurate measurement without reference to the soil on which they stand, and on this point overruled *Whitbeck v. Railroad*, 36 Barb. 644. The true rule, as deduced from the authorities, is, that in such actions the measure of damages depends upon the relation the trees or shrubs sued for bear to the soil. If their chief value exists when separated from the soil, then their value after removal may be shown as the measure of damages. If on the other hand their essential value arises from their connection with the soil, then the difference in value of the land before and after their removal is the measure of recovery of the owner. This is a sound principle supported by safe legal principles, and establishes a method of distinction which can be practically applied. 3 Sedgwick on Damages [8 Ed.] sec. 933.

In the case at bar the apple trees and hedge sued for had no appreciable value apart from the soil. The respondent and the other witnesses gave evidence as to the value of the five trees and the hedge injured by the fire communicated by the act of appellant's servants in burning off the grass and other accummulations on its right of way. To each question, when propounded, the appellant interposed apt and specific objections to the effect that such testimony did not constitute the true measure of damages. The evidence thus received was in substance all that tended to show the extent of the respondent's damage, and must have been the basis of the verdict of the jury. We are satisfied that this was misreception warranting the reversal of this case.

The appellant criticises instructions, numbers 1 and 4, given by the court "on general behalf." As the record does not disclose that it excepted to the giving of these instructions, we are warranted in declining to pass upon the validity of the objections now made. *Holliman v. Cabanne*, 43 Mo. 568; *State v. Elvins*, 101 Mo. 243.

The judgment herein is reversed, and the cause remanded to be tried in conformity with the views herein expressed. All concur.

LUCY A. ROLAND, Respondent, v. WILLIAM BESHEARS *et al.*, Executors of the Estate of ROBERT A. BESHEARS, Deceased, Appellants.

St. Louis Court of Appeals, May 9, 1893.

Practice, Trial: REOPENING CASE AFTER SUBMISSION. The right to permit a plaintiff, after the technical submission of a cause, to reopen it for the purpose of offering additional testimony rests in the sound discretion of the trial court; but care should be taken to prevent the order for the reopening of the case from operating unfairly towards the defendant.

Appeal from the Ralls Circuit Court.—HON. THOMAS H. BACON, Judge.

REVERSED AND REMANDED *(nisi)*.

Allison & Megown and *Harrison & Mahan*, for appellants.

James P. Wood, for respondent.

BOND, J.—This is an action for money had and received for $1,526, brought against the testator of appellants upon the following facts: The respondent, Lucy A. Roland, on January 14, 1891, had an estate in

a tract of land of one hundred and sixty acres situate in Ralls county, Missouri, which was subject to a mortgage securing about $2,574, due the appellants' testator for money borrowed by the respondent to buy said land. The respondent executed a deed to Silas H. Hornback for the land for the consideration therein expressed of $4,100. The notary who took her acknowledgment testifies that, the next day after the preparation of the deed, he went to the respondent's house to get her signature. "I went, and when I got there, Mrs. Roland did not want to sign it. She first said she would not sign the deed, unless I would agree to receive $1,500 and deposit it in the bank to her credit. I don't know what that amount represented. There was a mortgage on the place held by Beshears. I told her I was not a safe hand to handle money and would not do it, and that, if she could not risk Mr. Roland with the money, she could not risk me, and that she need not sign the deed. She decided to sign, if Mr. Roland would receive the money and put it into the bank to her credit, that is, receive the difference between what they owed on the farm and what they were to get for it. I suppose she knew what she was getting for the place, because Roland was there with her. I did not explain it. She may have wanted me to receive a little more than the $1,500. I took her acknowledgment and took the deed back to my store and put my seal on it. I think Mr. Beshears had some suspicion that she would not sign the deed. Once before they tried to make a deed and failed. I don't know that I told Mr. Beshears how she came to sign the deed, but did say she asked me to put the money in the bank. I told him she agreed to sign the deed, if Roland would put the money in bank. That was the evening the seal was put on and the contract completed. It was before I parted with the deed. I never saw the money pass. I had no special reason

for not receiving the money. I did not want to carry it around with me. I did not seek to know anything about the transaction. I knew there was some pulling around, but didn't understand the thing fully. I didn't try to understand it. I was there to make the deed or not, just as they wanted. I was under the impression that Mrs. Roland would not get $1,500, and I thought she was expecting it. She had declined to sign the deed, until she received assurances that the money would be deposited in the bank to her credit. I did not want to induce her to do anything that she did not want to. I did not want to be responsible for the money being put in the bank." He further states on cross-examination: "I told him (Beshears) that Mrs. Roland signed the deed with the understanding that Roland was to put $1,500 in bank."

Ben Roland testified as follows: "I am the son of plaintiff, Lucy Roland. I did not know anything about the sale of the farm and making the deed until next day. There was a deed of trust on the farm for $2,400 or $2,500. The difference between the amount of the deed of trust and the amount the farm sold for was never turned over to Mrs. Roland. Mr. Beshears never said anything to my mother about paying her off in notes, but my father has. Mr. Beshears sent the notes to my mother by me, and he told me to give them to her. I offered to do so, but she would not have them; then I gave them to my father and he brought them to New London. My mother declined to receive the notes. Some of them are secured by mortgage, and some are not. Mr. Osterhaut signed the notes over to me on the request of my father and Mr Beshears."

The evidence tended to show that, after the cancelation of his notes for which he held a mortgage on the land, Mr. Beshears procured other notes of various parties amounting to the difference between his notes

and $3,900, and caused these notes to be indorsed to the respondent's son, and delivered them and the canceled notes due him (Beshears) to this son of the respondent to be carried to her.

The purchaser of the farm testified as follows: "I am acquainted with the Lucy Roland farm in Ralls county, Missouri, and also with the plaintiff. I also knew R. A. Beshears in his lifetime. I am the one who purchased the Lucy Roland farm from her, and the one to whom Mr. Hulse referred yesterday. I paid $3,900 for the farm, but I did not pay the money to anyone. I settled with Mr. Beshears for the farm. I gave notes amounting to $3,500 secured by deed of trust on the farm, and a $400 note secured by personal property. Both notes were made to R. A. Beshears. I never paid any part of the $3,900 to Mrs. Roland. I did not know that she was principal in the deed. Mr. Roland and I agreed as to the price, and he told me to arrange with Mr. Beshears. I did not know that there was a mortgage on the farm, or what it was. I made terms with Mr. Beshears according to the direction of Mr. Roland. He and I had agreed on the price. I did not pay any money for the farm; only gave secured notes to Mr. Beshears. Mr. Roland told me to arrange so with Mr. Beshears. There was no cash paid at all. I paid for the farm entirely in secured notes. The notes are solvent, and none of them are yet due."

The court gave judgment for the respondent for $1,526, and interest from the day of the filing of the petition until the date of the decree, August 23, 1892.

On this appeal it is urged, *first*, that the court erred in admitting in evidence the notes, mortgages, etc., sent by the appellant's testator to the respondent. We do not think there was any error in the reception of this evidence. Mr. Beshears had actual knowledge that the land in question belonged to the respondent,

and that she had consented to the sale of it only on *condition* that the excess of the purchase money over what she owed him (the amount secured by mortgage) should be put in bank to her credit. It was, therefore, competent to show that he sent her these notes as an indication, that he considered himself accountable to her for the difference between his claim as mortgagee and the purchase money. His first step was to arrange with the purchaser of the respondent's land terms of payment in contradiction of the consideration expressed in the deed, *i. e.*, permitting the vendee to pay $3,900 instead of $4,100. He next took a mortgage to himself from the vendee for $3,500 of this sum, and a solvent note for the remaining $400. Lastly, instead of the $1,526, which he knew was due to the respondent, he sent her ten notes amounting to $1,131.69, of which only $160.88 was solvent, the rest being worthless. The evidence of these notes was, therefore, competent to show his accountability.

Nor do we think, under the circumstances of this case, that there was any error in the action of the court in permitting the respondent to reopen her case, after its technical submission, for the purpose of offering the testimony of the vendee of the land. Such a ruling rests within the sound discretion of the trial court, and, while it ought never to be made to the detriment of the adversary party as to the presentation of his proofs, it should never be refused when substantial justice requires it, and safeguards are taken against unfairness or injury.

In the case at bar the court, after permitting the vendee of the land to be called upon motion of the respondent after her case had closed, made the following order: "Plaintiff, having withdrawn her former rest, now announces rest. The court then offers to defendant a reasonable time in which to produce his witnesses.

The defendant elects not to produce any testimony, but continues for reasons mentioned to object and except to the action of the court in reopening the case after the demurrer had been overruled." That appellants were not prejudiced by this order is apparent from its terms.

The third point made on this appeal is that the respondent sues on one cause of action, and recovered on another. If this assignment were well taken, it would be fatal to the respondent's case. We are satisfied from the allegations of the petition that a cause of action is stated against the appellants' testator for money had and received to the plaintiff's use. There is much redundance and surplusage in the averments of the petition, but these imperfections do not destroy its sufficiency as a pleading, nor deprive the trial judge of the power of granting any and all relief within the scope of the petition. We, therefore, decide this point against appellants.

We are satisfied that a judgment in this case should not have been given in excess of the amount which Beshears received as purchase money for the land, to-wit, $3,900. The respondent is not precluded from enforcing her rights to so much of the purchase money, as the vendee did not pay Beshears, in a suit against the vendee therefor, provided the facts justify it. But she cannot hold the estate of Beshears for any more than he received. It follows, therefore, that the respondent's recovery is excessive in amount by $200. If this is remitted in this court within ten days, the judgment will be affirmed for the residue; otherwise it will be reversed, and the cause remanded. In case of such *remittitur* the costs of this appeal will be equally divided. It is so ordered. All concur.

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JOHN M. CRENSHAW, Respondent, v. THE ST. LOUIS, KEOKUK & NORTHWESTERN RAILWAY COMPANY, Appellant.

St. Louis Court of Appeals, May 9, 1893.

Railroads: OBLIGATION TO FENCE RIGHT OF WAY. A railway company is not required to fence such grounds, as the use of the public and the necessary transaction of business at its depot or station require to remain open.

Appeal from the Pike Circuit Court.—HON. E. M. HUGHES, Judge.

REVERSED.

Palmer Trimble and *Clark & Dempsey*, for appellant.

Charles Martin, for respondent.

The place where the steer entered upon the track, and where it was killed, was not a part of appellant's station grounds, nor was it necessary to leave it open for the benefit of the public or the transaction of the business of the company. The necessity for leaving this space open must be shown in order to avoid a liability. It was outside of the town of Foley and not within the station grounds. The evidence did not satisfy the jury that it was necessary. The jury passed upon the question, as it was instructed to do by instructions given for appellant. *Morris v. Railroad*, 58 Mo. 78; *Bean v. Railroad*, 20 Mo. App. 641; *Hamilton v. Railroad*, 87 Mo. 85.

BOND, J.—This action was begun before a justice of the peace of Lincoln county. Thereafter, upon

appeal to the circuit court, a change of venue was taken to Pike county. The cause of action set forth in the amendment there made was the killing of a steer, of the value of $12, on the appellant's railroad track in Burr Oak township, Lincoln county, at a point where the law required it to be fenced and where it was not inclosed by lawful fence and cattle-guard. The jury returned a verdict for the respondent, from which appeal is taken.

The only instruction offered by appellant was a demurrer to the evidence. This the court declined to give; to this ruling the appellant duly excepted, and it assigns the same as error. This necessitates an examination of the evidence. The proof was that the railroad of appellant ran through the town of Foley, Lincoln county, on a north and south line. The testimony of John Bricker was that there was a cattle-guard south of Mill street, and distant therefrom seven hundred and fourteen feet, and that it was between these points the steer was struck by the engine and knocked over the cattle-guard (south) into the appellant's right of way; that there was a spur-track running from a point on the appellant's main track (northeasterly) to a point seventy-five or a hundred feet north of the mill site.

McNutt testified that the steer was killed eight or ten feet north of the cattle-guard; that this cattle-guard was eighty-four feet south of the point where the main track branches off, and was seven hundred and fourteen feet south of Mill street.

There was evidence (Bricker recalled) tending to prove that the railroad built the fencing on the sides of its right of way north of the south cattle-guard on its main track; on the west line this fencing stopped at the mill. There was evidence tending to prove that north of the mill there was no fencing nor inclosure of

the right of way on the track of the railroad company. There was also testimony tending to show that from the mill site north (on the west line of this track) there was no inclosure nor fencing; that there was a public street, however, within this space (Mill street) and some distance north. The depot of appellant was located in the town of Foley, which town contained about three hundred inhabitants.

There was evidence from which it was inferable that the steer entered upon appellant's track at an unfenced point between the mill site and Mill street, or between the latter and the depot. The uncontradicted evidence was that this space between the mill and Mill street, and between the latter and the depot, was used for the business of the railroad and the accommodation of the public, and also that the space between the head of the switch and the cattle-guard could not be lessened without danger to employes.

The transcript in this case does not contain the map or drawing offered in evidence by the respondent, the statement therein being that it was "not furnished the clerk."

In order to maintain an action under section 2611 of the Revised Statutes, 1889, the plaintiff must adduce evidence showing actually or presumptively that the animal sued for entered upon the track of the defendant railroad company at a point where it was required by law to fence or protect the same. It is also the law that, when there is no other evidence to show the point of entrance except the location of the injury, then the point of injury, if unfenced, may be presumed to be the point of entrance on the track. *McGuire v. Railroad*, 23 Mo. App. 325; *Jantzen v. Railroad*, 83 Mo. 171.

A railroad company is not required to fence such grounds as are necessary to remain open for the use of the public and the necessary transaction of business at

the depot or station. *Morris v. Railroad*, 58 Mo. 78; *Bean v. Railroad*, 20 Mo. App. 641. Where exemption from liability is claimed on this ground, the burden of proving the necessity for leaving its tracks unfenced and unguarded is cast upon the railroad company, and the issue on this point, being a mixed question of law and fact, must be submitted in all cases of conflicting evidence to the jury. *Hamilton v. Railroad*, 87 Mo. 85; *Bean v. Railroad, supra; Straub v. Eddy*, 47 Mo. App. 189, 194; *Jennings v. Railroad*, 37 Mo. App. 651; *Pearson v. Railroad*, 33 Mo. App. 543.

It must be conceded that the evidence in this record, that the unfenced portions of the appellant's track were left open for the safe and necessary transaction of their business at the town of Foley, is not contradicted by any evidence contained in the transcript which we have carefully examined. The transcript, however, discloses the omission of a plat introduced in evidence by the respondent; it appears also from an affidavit filed in this record that this plat was *twice* requested for use in making up the transcript. I am satisfied from the statement in the respondent's brief that he did not receive the letters referred to in said affidavit.

The evidentiary force of this plat and the testimony explanatory thereof may be material to the rights of the respondent, as contradictory of the appellant's testimony as to the necessity of leaving the track unfenced. For this reason and in the absence of said plat, apparently without fault or purpose on either side, I think the cause should be remanded for new trial; but, as my associates are of opinion that under the uncontroverted facts of this case there can be no recovery for double damages, and, as we are all of opinion that the judgment is bound to be reversed, the judgment will be reversed without remanding the cause. So ordered.

JOHN KURZ, Respondent, v. LEONARD S. TURLEY *et al.*, Appellants.

St. Louis Court of Appeals, May 9, 1893.

1. **Practice, Appellate:** REVIEW OF RULING OF TRIAL COURT ON DEMURRER TO ANSWER. A defendant is not entitled to a review of the ruling of a trial court in sustaining a demurrer to his answer, if he has not filed a motion in arrest of judgment.
2. **Right of Road Overseer to Remove Fence Obstructing a Public Highway.** A road overseer has the right to remove a fence which obstructs a public highway in his district, after he has given the owner who has erected it the requisite statutory notice for its removal.

Appeal from the Pike Circuit Court.—HON. E. M. HUGHES, Judge.

AFFIRMED.

Joseph Tapley and *Clark & Dempsey*, for appellants.

J. D. Hostetter, for respondent.

BOND, J.—This action was a trespass by the defendants in removing the fencing inclosing a growing crop on the plaintiff's land, thereby causing damage to the crop. The defense was that the fence was removed by the road overseer and other defendants, because it obstructed a public road. There was a judgment for the respondent and an appeal taken.

The only error assigned is that the court instructed the jury on the theory that the road overseer under the statutes existing at the time this cause of action accrued (Revised Statutes, 1889, sections 7807 and 7827) had no power nor right as such overseer to remove the respondent's fence.

The instruction of the court was given in consequence of its ruling sustaining a demurrer to all of the

averments of the answer filed by the appellants, beyond a general denial. As the appellants filed no motion in arrest preserving their exceptions to such ruling, we would be warranted in disregarding it on appeal. *Dobyns v. Rice*, 22 Mo. App. 457; *Erdbruegger v. Meier*, 14 Mo. App. 258; *Warner v. Morin*, 13 Mo. 455; *Finney v. State*, 9 Mo. 632. But, waiving this technical rule, we will construe the statute relied upon in its support.

Section 7807, Revised Statutes, 1889, defines the qualifications and general duties of road overseers. Among other things it prescribes: "And it shall be his duty to keep the roads in his district in good repair, according to the provisions of this article."

Section 7827, Revised Statutes, 1889, same article, provides, to-wit: "If any person or persons shall willfully or knowingly obstruct any public road, * * * or by fencing across or upon the right of way of the same, * * * or shall obstruct said road or highways in any other manner whatsoever, he or they shall each pay a fine of not less than $5 nor more than $100, to be recovered by indictment or by information. Any person who shall obstruct any public road by any of the means in this section named or otherwise, and shall fail or refuse, within five days after being notified by the road overseer of the district in which the obstructed road lies, requiring him or them to remove such obstruction, to remove the same, shall pay the sum of $5 for each and every day he or they shall maintain such obstruction or permit the same to remain in such road, or fail to remove the same after being notified as aforesaid, to be recovered by indictment or by information before a justice of the peace."

We fail to see anything in the portions of the two sections above quoted, excluding the power of the road overseer to keep the public roads in his district in good

repair by using other means than those enumerated in the statutes.

It was directly held by the supreme court (*State ex rel. v. Buhler*, 90 Mo. 560, 568), in speaking of the provision herein quoted from Revised Statutes, 1889, section 7807 (Revised Statutes, 1879, section 6941), that under the general power thus conferred it was the duty of overseers to remove any and all fences and other obstructions from any of the public roads in use as such in their district.

At the time this ruling was made there was a provision (Revised Statutes, 1879, sec. 6964) providing for a substantially similar method of enforcing the removal of obstructions to public roads, as that now provided in Revised Statutes, 1889, sec. 7827.

Under these views we should hold the appellants were not precluded from defending the trespass charged as having been necessarily committed in the discharge of the duties of the road overseer, provided such defenses had sufficiently averred the facts as to the public character and use of the road, that the same was at the time in the custody of the road overseer, and that he had, under lawful authority as such overseer, given due notice to the owner of the land to remove the fence thereon obstructing its use. *State ex rel. v. Buhler, supra;* Revised Statutes, 1889, sec. 7827. But in these essential particulars the averments of the special defenses of the appellants were fatally defective, and the learned judge committed no error in adjudging their insufficiency on these grounds.

We have also examined the testimony in this case, and do not think there is any merit in the defense, if it had been well pleaded. We therefore affirm the judgment. All concur.

THE BECK & PAULI LITHOGRAPHING COMPANY, Appellant, v. LOUIS OBERT, Respondent.

St. Louis Court of Appeals, November 9, 1892; Motion for Rehearing Overruled May 9, 1893.

1. **Fraud in Procurement of Contract:** DEFENSE IN ACTION AT LAW. A person whose knowledge of the English language was limited, and who was ignorant of the meaning of the term "5 M.," was induced to contract for 5 M. lithographed cards under the representation by the agent of the other contracting party, that 5 M. ment five hundred. *Held*, that the misrepresentation could be shown as a defense to an action at law upon the contract.

3. ———: PLEADING: VERIFICATION OF DENIAL OF EXECUTION OF CONTRACT. Such defense must, under the requirements of section 2186 of the Revised Statutes, be verified by affidavit.

3. **Practice, Appellate:** FAILURE TO OBJECT IN TRIAL COURT. An objection to the sufficiency of such defense, on the ground that the answer whereby it is made was not verified by affidavit, cannot be raised for the first time in this court.

4. **Instruction:** ASSUMPTION OF FACTS. Instructions assuming contested facts essential to the right of recovery are properly refused.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL DILLON, Judge.

AFFIRMED.

J. Hugo Grimm, for appellant.

(1) Inasmuch as the answer does not show defendant was free from fault in signing the contract, it did not state any defense. *Clodfelter v. Hulett*, 72 Ind. 138. The answer did, however, show that the representation complained of was not calculated to impose upon a man of ordinary prudence, and that defendant did not use ordinary prudence to inform himself as to the meaning of the term in question. There existed no relation of trust or confidence between defendant and plaintiff's

agent. They were strangers dealing with each other at arm's length. Courts will not aid those who neglect the means of protection within their easy reach. *Railroad v. Cleary*, 77 Mo. 634; *Bell v. Byerson*, 11 Iowa, 233; *Dunn v. White*, 63 Mo. 186; *Robinson v. Glass*, 94 Ind. 212; 2 Parsons on Contracts [7 Ed.] * p. 774; *Moore v. Turbeville*, 2 Bibb, 602; *Saunders v. Hatterman*, 2 Ired. 32; *Bowers v. Thomas*, 62 Wis. 480; *Union Nat. Bank v. Hunt*, 7 Mo. App. 42; *Langdon v. Green*, 49 Mo. 364; *Hawkins v. Hawkins*, 50 Cal. 558; Cooley on Torts [2 Ed.] pp. 570. (2) The answer did not deny under oath the making of the contract; hence its execution was admitted. The defense *non est factum* was not sufficiently pleaded, and could not be made. *Smith Co. v. Rembaugh*, 21 Mo. App. 390–1; *Rothschild v. Frensdorf*, 21 Mo. App. 321; *Corrigan v. Brady*, 38 Mo. App. 649–656; *Merrill v. Trust Co.*, 46 Mo. App. 236–42.

Rassieur & Schnurmacher, for respondent.

(1) "As between original parties, if one has procured the signature of the other to a written instrument, whether by fraud or not, which does not contain the contract made by the parties but a different one, he cannot be permitted to avail himself of the writing, but must stand by the real contract." *Wright v. McPike*, 70 Mo. 175; *Cole Bros. v. Widmaier*, 19 Mo. App. 7. (2) Abbreviations in a writing may be explained by parol evidence. *First Nat. Bank v. Fricke*, 75 Mo. 178; *Heideman v. Wolfstein*, 12 Mo. App. 366. (3) The objection that the answer was not verified was not made in the trial court, but is advanced for the first time in this court. It will therefore not avail the appellant. Revised Statutes, 1889, sec. 2302; *Haniford v. Kansas City*, 103 Mo. 172; *McDonald v. Cash*, 45

Mo. App. 66. Section 2186, under which it is claimed the answer should have been verified, applies only to cases in which the "petition or other pleading shall be founded upon any instrument in writing." The petition in the case at bar did not come within the purview of this requirement for verification, because the writing sued upon was signed by both parties. Section 2088 of the Revised Statutes is a corollary to section 2186; the first clauses of both are almost identical. Yet section 2088 does not apply to a contract signed by both parties to it. *Campbell v. Wolff*, 36 Mo. 459; *Bowling v. Hax*, 55 Mo. 446; *Railroad v. Atkison*, 17 Mo. App. 484. The action in this case is really in *assumpsit* for the price of five thousand cards.

BIGGS, J.—The plaintiff sued the defendant for a violation of the following written contract:

"ST. LOUIS, October 14, 1890.

"*Louis Obert, Esq., St. Louis.*

"DEAR SIR: We will submit colored sketch to you of bock card on style of sketch shown you, furnishing you as soon as ready after February, 1, 1891, with 5 M cards lithographed in first class style at twenty-two cents apiece.

"Respectfully yours,

"THE BECK & PAULI LITH. CO.,

"Hildebrand.

"Accepted. Louis Obert."

Full performance of all the conditions of the contract on the part of plaintiff, and a refusal on the part of the defendant to receive and pay for the cards, were averred. Judgment was asked for the contract price of the cards, with interest on said amount from March 7, 1891.

The defendant's answer was as follows: "Now comes the defendant, and for answer to plaintiff's peti-

tion denies each and every allegation therein contained, except as hereinafter specifically admitted. And for a further and full and complete answer to plaintiff's petition defendant states that heretofore, to-wit, on or about the fourteenth day of October, 1890, the defendant was called upon by one of plaintiff's agents or solicitors, who offered to lithograph and furnish and deliver to defendant five hundred display cards for the price and sum of twenty-two cents each, and that defendant thereupon agreed with said agent or solicitor of plaintiff that he would receive from plaintiff five hundred such cards, and that he would pay therefor the sum of twenty-two cents for each and every one of said five hundred cards. That thereupon said agent or solicitor of the plaintiff wrote out what he asserted to defendant to be a memorandum of their said agreement, and requested this defendant to sign his name thereto in evidence of the said agreement so by them made. That defendant, not being entirely conversant with the English language in which the said memorandum was written, requested the said agent of plaintiff to read and explain the same to him, and that he particularly called the attention of said agent to the fact, when the said memorandum was read to him, that his agreement was to receive and pay for five hundred cards, whereas the said memorandum called for 5 M cards, and that he, this defendant, did not know the meaning of said expression, 5 M, and that thereupon plaintiff's said agent explained to this defendant that by the expression, 5 M, he, the said agent of plaintiff, meant five hundred, and that defendant, relying upon the said explanation and representation of plaintiff through its said agent as to the force and meaning of the said expression and term, did sign his name to said agreement, intending thereby to bind himself to the acceptance of five hundred show cards at the price and

sum of twenty-two cents each, and that plaintiff through its said agent and solicitor knew and so understood defendant's intentions at said time.

"And, further answering, defendant states that thereafter the plaintiff offered the defendant five thousand show cards, and demanded that he pay for that number, and that defendant, relying upon his said agreement to take five hundred show cards, refused to accept more than five hundred of said five thousand cards, but that plaintiff refused to deliver to him any less number than five thousand. Wherefore, having fully answered, defendant prays to be hence discharged."

The reply was a general denial of the new matter in the answer. With the issues thus framed the parties went to trial, which resulted in a verdict for the defendant. The plaintiff has appealed.

The plaintiff read the contract, and introduced other evidence tending to prove performance on its part of all matters not expressly admitted by the answer to have been performed. The defendant introduced evidence tending to prove that he agreed to buy only five hundred cards; that the plaintiff wrote the contract and represented to the defendant that "5 M" meant five hundred in the lithographing business; that the defendant is illiterate and has an imperfect knowledge of the English language; and that, having no knowledge himself of the true meaning of the form of expression used, and believing the representation to be true and that he was obligating himself to purchase only five hundred cards, he signed the contract.

The plaintiff objected to the whole evidence for the reason thus stated: That, if the contract failed to express the intention of the parties, the defendant's only remedy was to have it reformed or declared void; that the evidence tended to vary the written contract; that

the averments of the answer showed affirmatively gross neglect or carelessness by the defendant in reference to the alleged deception; and that the only fraud, which could be pleaded to avoid a written contract, was fraud in the execution of the instrument itself.

If the alleged statement made by the plaintiff's agent as to the meaning of the term "5 M" can, under the circumstances, be regarded in law as a fraudulent representation upon which the defendant had a right to rely, the admission of the evidence under the objections made was not error. With this exception, all other questions covered by the objections have been fully settled against the plaintiff's contention in the case of *Wright v. McPike*, 70 Mo. 175. It was there said: "As between the original parties, if one has procured the signature of the other to a written agreement, whether by fraud or not, which does not contain the contract made by the parties but a different one, he cannot be permitted to avail himself of that contract, but must stand by the one which was in fact entered into by both parties." The defendant's answer and evidence make such a case. We, therefore, conclude that, if the evidence was competent for the purpose for which it was offered, it could not have been properly rejected on any of the special grounds urged on the trial.

But it will be observed that the alleged fraud pertained to the execution of the contract, and not to its inducement. Hence the point is made for the first time in this court, that, as the answer was not sworn to, the execution of the contract was confessed, and that for this reason the evidence offered ought to have been rejected. If this specific objection had been made on the trial, and it had been disregarded by the court, we are of the opinion that the admission of the evidence

would have been error. Section 2186 of the Revised Statutes, 1889, reads:

"When any petition or other pleading shall be founded upon any instrument in writing, charged to have been executed by the other party and not alleged therein to be lost or destroyed, the execution of such instrument shall be adjudged confessed, unless the party charged to have executed the same deny the execution thereof by answer or replication verified by affidavit," etc. Prior to 1868 this section provided that such instrument "might be received in evidence without further proof," unless its execution was denied by answer or replication under oath. Under the statute as it then stood, if the answer was not sworn to, any defense was available which tended to show that the instrument sued on was void by reason of fraud or duress in its execution. But not so under the present statute, as has been decided by this court and also the Kansas City Court of Appeals. *Rothschild v. Frensdorf*, 21 Mo. App. 321; *Smith Middlings Purifier Company v. Rembaugh*, 21 Mo. App. 390. In each of the above cases it was held that, unless such an answer or replication was verified by affidavit, the party attacking the instrument would be precluded from introducing any proof tending to impeach the execution of the instrument. Now, in the present case, the defendant's evidence did tend to impeach the execution of the contract, but the objection to the testimony comes too late. Section 2302, Revised Statutes, 1889, reads: "No exceptions shall be taken in an appeal or writ of error to any proceedings in the circuit court except such as have been expressly decided by such court." This section has been held to apply to all matters of exception, unless a jurisdictional fact be presented. *Haniford v. Kansas City*, 103 Mo. 172; *McDonald v. Cash*, 45 Mo. App. 66. The section

enacts a just rule, and this case makes it clear. If the objection that the answer was not verified had been made on the trial, the defect could have been easily remedied. Having failed to make the objection, the plaintiff must be held to have waived it.

We now come to the important question, and that is whether the defendant had the right to rely on the statement made by the plaintiff's agent as to the meaning of the term "5 M." It is not every false affirmation, either in regard to the inducement or the execution of a contract, that will afford a ground for its rescission or justify a defense for its breach. For instance, there can be no relief against a fraudulent representation as to the legal effect of a written instrument. *Smither v. Calvert*, 44 Ind. 242; *Clem v. Railroad*, 9 Ind. 488; *Starr v. Burnett*, 5 Hill, 303. Neither would a false statement by the vendor concerning the value of the article sold ordinarily afford the vendee grounds for relief. Such statements must be taken as the mere expression of opinion, and made by way of commendation, and it would be folly for a purchaser to rely on them. Now, in the present case, if instead of the term "5 M" the words five thousand had been written, or if the figures representing five thousand had been inserted, that would have been plain English; and, as the defendant admitted that he could read English and that he did read the paper before signing it, he would not now be heard to say that plaintiff's agent represented to him that five thousand meant five hundred, and that he believed the representation to be true. If such a rule should be adopted, then written contracts would be worthless. If a proposition is made in plain English, it must be conclusively presumed that the party to whom it was made understood it. But we have a different case here. The plaintiff's agent wrote the contract, and instead of writing five

thousand or inserting the number in figures, he used the letter "M," a symbol used in Roman notation and also in modern commerce to denote one thousand. The term as used would doubtless have been understood by the most of business men, or by persons possessing an ordinary English education. But the defendant, who is evidently a German, testified that his knowledge of the English language was limited, and that he read it with difficulty; that he did not know what "5 M" meant; that he asked the defendant's agent, and he told him that it meant five hundred. This was a fraud on the part of the agent, whether he knew the meaning of the term used or not, and we are of the opinion that these facts bring the case within the principle laid down by Judge SPENCER in *Van Valkenburgh v. Rouk*, 12 Johns. 337, to the effect that, "if a deed be misread or misexpounded to an unlettered man, this may be shown on *non est factum*, because he has never assented to the contract." The contract was not misread but it was misconstrued to the defendant, which rendered it void as to him.

The instructions given by the court properly presented the law. Those asked by the plaintiff and refused by the court were properly refused for the reason, which is applicable to all of them, that they assume that the plaintiff was entitled to a verdict, unless the defendant made good his defense of fraud. The answer contained a general denial, which required affirmative proof of all averments not expressly admitted in the answer to be true. For instance, the contract required the plaintiff to submit to the defendant a colored sketch of the cards before they were printed. This was one of the conditions of the contract which the petition charged was performed, but the performance of which was denied by the answer. For the same

reason the court very properly overruled the plaintiff's motion for judgment notwithstanding the verdict.

There was no error in admitting the testimony of Kuhs under the circumstances surrounding this transaction.

Finding no errror in the record, the judgment of the circuit court will be affirmed. All the judges concur.

WILLIAM M. HOBART *et al.*, Respondents, v. A. H. MURRAY, Appellant.

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St. Louis Court of Appeals, May 9, 1893.

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1. **Statute of Frauds**: MANNER OF INVOKING ITS PROVISIONS. A defense based upon the statute of frauds cannot be invoked, when it has been neither pleaded nor raised by objection to the introduction of evidence at the trial.

2. **Conveyance for Mining Purposes**: REQUISITES OF LEASE. An agreement in writing purported in consideration of stipulated royalties to lease lands for mining purposes only, and, subject to the limitation that the grantee's rights should not be interfered with, reserved the right of occupation for the purposes of cultivation to the grantor. It provided that it should remain in force until the mineral should be exhausted, but otherwise had no fixed term. *Held*, that this agreement was not a lease, since it had no determinate period.

3. ———: GRANT OF MINERAL IN LAND. But, *held*, further, that this agreement was more than a mere license to mine, and that, while in force, it operated as a transfer of all mineral within the land, and as an exclusive grant of the right to mine therefor.

Appeal from the Greene Circuit Court.—HON. W. D. HUBBARD, Judge.

AFFIRMED.

Wm. O. Mead and *T. T. Loy*, for appellant.

The petition alleges the existence of a lease. The one offered in evidence is not a valid lease, nor is it a

lease or license for a longer period than five years, which had expired long before the cause of action here is alleged to have accrued. 2 Greenleaf's Cruise on Real Property, sec. 15, top p. 378; 1 Washburn on Real Property [5 Ed.] sec. 6, p. 470; Martindale on the Law of Conveyancing [1 Ed.] sec. 322, p. 271; Taylor's Landlord & Tenant [5 Ed.] secs. 74, 75, 76 and 77, p. 53; *Austin v. Mining Co.*, 72 Mo. 535. The paper offered in evidence is more in the nature of a license than a lease. It does not purport to be a conveyance of an interest in the land, nor does it give a right of possession. It is a mere license to dig and take mineral, on which the licensee is to pay a stipulated royalty per ton. The right to mine is not exclusive to the licensee. The licensor may go upon the land and mine on his own account, or he may license others to do so; hence, the plaintiffs here have no cause of complaint. 1 Washburn on Real Property [5 Ed.] pp. 661, 668 and 669; Washburn's Easements & Servitudes [3 Ed.] sec. 15, p. 15; *Nega v. Paving Co.*, 17 Mo. App. 294; *Austin v. Mining Co.*, 72 Mo. 535.

Goode & Cravens, for respondents.

Biggs, J.—It is alleged by the plaintiffs in their petition that they appointed the defendant their agent to manage certain mining interests, and that as such agent he collected from parties working the mines the sum of $1,000, which sum he has neglected and refused to pay. The defendant's answer is a general denial. A trial before a jury resulted in a verdict for the plaintiffs for $249, upon which the court entered a judgment. The defendant has appealed. His assignments of error pertain to the instructions and to the admission and exclusion of evidence.

A brief statement of the facts is necessary to a proper understanding of the questions presented by the record for our decision. It appears from the evidence that on the tenth day of January, 1880, John C. Hutchins, who was at that time the owner of eighty acres of mining land, entered into the following written agreement in reference thereto with one John G. Perryman:

"This indenture made and entered into this tenth day of January, A. D. 1880, by and between John C. Hutchins of the county of Greene in the state of Missouri, as party of the first part, and John G. Perryman of the county of Greene and state of Missouri, party of the second part, witnesseth: That the said party of the first part for and in consideration of the sum of $1 to him in hand paid by the said party of the second part (the receipt of which is hereby acknowledged), and in further consideration of the rent or royalty to be paid as hereafter provided, does by these presents demise and lease to the said party of the second part, his heirs, executors, administrators and assigns, the following described tracts or parcels of land, situate, lying and being in the county of Greene in the state of Missouri, to-wit, the southeast quarter of the northeast quarter, and the northeast quarter of the southeast quarter, section 32, township 30, range 24, and containing eighty acres, more or less, for mining and manufacturing purposes only, and for the term of five years at least from the date hereof, and until the mines opened and hereafter opened on any of said lands shall be worked out, but to continue during the existence of mineral on said land for said purposes. The said party of the second part, executors, administrators and assigns, their agents and workmen, shall have the right at all times to enter upon said lands to mine the same, to dig, to explore and bore for coal,

iron, lead, silver, tin, zinc, blackjack minerals, and all other precious metals on or in said lands to be found, and for that purpose to dig, sink, drive, make and use all pits, shafts, pumps, water courses and other works which may be necessary for mining and obtaining the same; to remove the said minerals therefrom, to erect buildings, sheds, hovels, machinery and other works, which may be such as smelting and manufacturing works, and to operate the same; except second party shall have no right to erect any buildings on the northeast five acres of said tract of land for any purpose. The said party of the first part shall have the right to cultivate the said lands, but not to interfere with or impair the rights of the party of the second part. The said party of the second part shall pay the said party of the first part, his heirs or assigns, on the first day of each and every week, rents or royalties on all mineral or ores mined and delivered during the preceding week as follows: On lead ore, of not less than sixty-six and two thirds per cent. of pure lead, $3 per thousand pounds; on zinc ore, $1 per ton; on all other grades of lead ore a portionably high royalty; on all other ores or minerals or fossil substances the usual proportionate rent or royalty. All property placed by said party of the second part, his heirs and assigns, on said premises may be removed by him therefrom at any time, provided that all rents and royalties which may be due shall have been paid as aforesaid. It is further agreed that the party of the second part, his executors, administrators or assigns, or any of them, may at any time or times hereafter during the time hereby granted lease, let or demise, all or any part of said land or premises hereby demised, or may assign, transfer or make on the same, or the present lease, or any of their term or time thereon, to any person or persons whomsoever.

"It is hereby expressly understood that this lease is intended to alter, change, amend a certain lease heretofore executed by said first party to said second party, of July 5, 1879, and recorded in book number 37, pages 641, 642, 643, in the recorder's office of said county.

"In witness whereof the parties have hereto set their hands and seal the day and year first above written.

"[SEAL.] JOHN G. PERRYMAN,
"[SEAL.] JOHN C. HUTCHINS,
"[SEAL.] MARY A. HUTCHINS."

This instrument was acknowledged in due form. Perryman assigned his interest to Ralph Walker; Walker assigned to E. A. Hurt; and on the fourteenth day of August, 1888, Hurt assigned to the plaintiffs. At the time the plaintiffs acquired their interest, the defendant had become the owner of the interest of Hutchins in the land, subject to the agreement.

The evidence of the plaintiffs tended to prove that, at the time the contract of agency was entered into, the mining on the land was done by tenants of the plaintiffs, and that a certain per cent. of the value of the mineral taken out was paid by them as royalties or rent, a portion of which under the written agreement went to the owner of the land, and the remainder was retained by the plaintiffs; that prior to the first day of April, 1889, E. A. Hurt had acted as agent of the plaintiffs in the management of the mines and in the collection of the royalty; that on that day the defendant, in consideration of the discharge of Hurt and the employment of himself as such agent and manager, agreed to reduce the amount of the royalty due to him under the agreement, so that the total amount to be paid thereafter by the miners would not exceed twenty per cent. of the value of the ore, ten per cent. of which he was to collect and pay to the plaintiffs; that pursuant to this agreement the defendant did act as such

agent or manager until June 10, 1890, and that during that time he collected the royalty. The defendant did not deny that he had collected the money, but he did deny the alleged contract *in toto*, and he also denied that the plaintiffs acquired any rights under the agreement.

It is urged by counsel that the judgment must be vacated because the alleged parol modification of the written agreement, upon which the plaintiff's right of action is based, is void under the statute of frauds. This objection is not available to the defendant. The statute of frauds was not pleaded; neither was the oral evidence, which was offered in support of the modified agreement, objected to on the trial.

Whether the statute of frauds should in all cases be pleaded is a question about which the decisions of the supreme court do not seem to be in accord. Some of them seem to hold that in *all* cases the defense must be treated as new matter, and, unless specially pleaded, will be regarded as having been waived (*Gardner v. Armstrong*, 31 Mo. 535; *Sherwood v. Saxton*, 63 Mo. 78); while others seem to hold that, when the contract is denied, the party relying on the statute may raise the defense by objection to the admission of proof. (*Allen v. Richard*, 83 Mo. 55; *Springer v. Kleinsorge*, 83 Mo. 152.)

In the case of *Sharff v. Klein*, 29 Mo. App. 549, this court decided that the defense must either be made by the pleadings or be raised by timely objection to the evidence, and that, if the party relying on it did neither, it could not be raised by instructions. Under the authority of that case we will have to rule this assignment against the defendant.

The point is made that the written agreement is not a lease but a mere license to dig and prospect for mineral, and that such license is not, under the terms

of the instrument, exclusive. Therefore, counsel argue that the court committed error in refusing to give an instruction asked by defendant, to the effect that his liability, if he could be held at all, was limited to ten per cent. of the value of the mineral which was shown to have been taken out by the plaintiff's tenants. If this is the interpretation of the writing, there is something in the point; because, if the plaintiffs were mere licensees, their right to take mineral from the land was not exclusive, and their right to claim royalty would be confined to the mineral taken out by their tenants or by persons working under their authority. It was said by Lord ELLENBOROUGH in the case of *Chetham v. Williamson*, 4 East, 469: "No case can be named where one who has only a liberty of digging for coals in another's soil had an exclusive right to the coals, so as to enable him to maintain trover against the owner of the estate for coals raised by him."

We are inclined to agree with the defendant's counsel that the agreement can not be construed to be a lease, for it has no "determinate period." (*Austin v. Mining Co.*, 72 Mo. 535.) The right to take mineral is indefinite, as it is to continue until the mineral is exhausted. Mr. Washburn in his treatise on the law of real property says: "It seems to be regarded as essential to a good lease for years that it should be either for a certain period, measured by years, months or the like, or for a period uncertain only from the circumstance that it may be determined before its natural expiration by the happening of some event, or that it be for a purpose which, of itself, serves to ascertain the length of time for which the premises are to be held." 1 Washburn on Real Property [5 Ed.] sec. 6, p. 470.

But is the instrument a mere license to dig and prospect for mineral, accompanied with the grant of

a beneficial privilege in the land, but no estate or interest therein? We think not. Subject to the payment of a stipulated royalty, the instrument transfers all mineral within the land, with the exclusive right by the grantee to occupy the premises for mining purposes. The effect of this transfer was to clothe Perryman with a beneficial interest in the land itself, as the mineral is a part of the land.

In the case of *Caldwell v. Fulton*, 31 Pa. St. 475, the court held that "an exclusive right to all the coal to be taken without limitation, except as to point of ingress and egress, is the sale of the coal itself." The court also held that the surface might belong to one person and the coal to another. The same court in the case of *Caldwell v. Copeland*, 37 Pa. St. 427, held: "That mines may form a distinct possession, and a different inheritance from the surface land, has been settled in England, as may be seen by reference to the cases cited in the two opinions heretofore delivered in this case, and reported in 7 Casey, 476, 482. See also *Barnes v. Mawson*, 1 Maule & Sel. 84. It is a common occurrence in mining districts there, not only that the ownership of the soil is vested in one person, and that of the mines in another, but there are frequently distinct ownerships of the minerals in the same land. Thus, one person may be entitled to the iron ore, another to the limestone, a third to one seam or stratum of coal, and a fourth to a distinct stratum. Title to any of these minerals, quite distinct from the title to the surface may be shown by documentary evidence, or in the absence of such evidence or in opposition to it title to them may be made out by proof of possession and acts of ownership under the statute of limitations."

Chief Justice Abbott in the case of *Doe v. Wood*, 2 B. & Ald. 736, draws the distinction between a min-

ing license and a grant of all minerals or ores. The court was dealing with a mining license granted by deed. Concerning this deed it was said: "Instead, therefore, of parting with or granting or demising all the ores, metals or minerals that were then existing within the land, its words import a grant of such parts thereof only as should, upon the license and power given to search and get, be found within the described limits, which is nothing more than the grant of a license to search and get (irrevocable, indeed, on account of its carrying an interest), with a grant of such of the ore only as should be found and got, the grantor parting with no estate or interest in the rest. If so, the grantee had no estate or property in the land itself or any particular portion thereof, or in any part of the ore, metals or minerals ungot therein; but he had a right of property only as to such part thereof as upon the liberties granted to him should be dug and got. That is no more than a mere right to a personal chattel, when obtained in pursuance of incorporeal privileges granted for the purpose of obtaining it, being very different from a grant or demise of the mines or metals or minerals in the land, and is such a right only as, under the circumstances stated in the case, is not sufficient to support the present action of ejectment."

Our conclusion is that the title to all minerals within the land was transferred to Perryman, subject to the claim of the primary owner of the land for royalties, and subject also to his right to have the transfer canceled in case of abandonment by Perryman or his assigns, or other course of conduct by them calculated to defeat the object of the grant. It therefore follows that the court did right in refusing the defendant's instruction, for the reason that he must

account to the plaintiffs for their share of all royalties collected, and it made no difference by whom the mineral was taken out. What we have said also disposes of the objection to other instructions.

During the time the defendant was acting as the agent of the plaintiffs, Hobart secured an option on defendant's interest in the land with a view of disposing it to other parties in the state of Pennsylvania. Hobart and the defendant had considerable correspondence about that part of their business. The court declined to permit the defendant to read the letters. We have read them, and there is nothing in them, as claimed by the defendant, which has any tendency to disprove the alleged contract of agency. Therefore, the court did right in excluding them.

Objections were made to the admission of evidence offered by the plaintiffs, but we do not deem it necessary to discuss them. They are without merit.

With the concurrence of the other judges the judgment of the circuit court will be affirmed. It is so ordered.

ISAAC T. WISE, Respondent, v. JAMES M. LORING, Administrator of WILLIAM H. COZENS, Deceased, Appellant.

St. Louis Court of Appeals, May 9, 1893.

1. **Pleading**: ALLEGATION OF NONPAYMENT OF CLAIM SUED UPON. An allegation in a suit upon a judgment, that the judgment remains valid and in full force, is equivalent to an allegation that the judgment is unpaid.

2. **Judgments**: ASSIGNMENT OF. The statutory mode of assigning judgments is not exclusive; an assignment by a writing not attached to the judgment is valid.

3. **Justices' Courts:** JUDGMENT IN PROCEEDING ON LANDLORD'S SUMMONS: RECITAL OF SERVICE ON DEFENDANT. It is not necessary that the judgment of a justice of the peace in the city of St. Louis in a proceeding upon a landlord's summons should recite that service was had upon the defendant in the ward in which the property sued for is situated, or in an adjoining ward.

4. ———: JUDGMENT BY DEFAULT. The fact, that a judgment by default against a defendant was rendered by a justice of the peace in less than three hours after the time at which the summons was returnable, will not invalidate the judgment.

5. ———: JUDGMENT: JURISDICTIONAL FACTS. When a court of inferior or limited jurisdiction exercises special statutory powers, as where there is a proceeding upon a landlord's summons before a justice of the peace, its jurisdiction must appear from the face of the proceeding.

6. ———: ———: ———. And *held*, BOND, J. not concurring, that, in a suit upon a money judgment rendered by a justice of the peace against the defendant upon five days service in a proceeding upon a landlord's summons, it must affirmatively appear that the verified statement required by the statute was filed by the plaintiff.

Appeal from the St. Louis City Circuit Court.—HON. W. W. EDWARDS, Special Judge.

REVERSED AND REMANDED.

C. A. Schnacke, for appellant.

Isaac T. Wise, for respondent.

BOND, J.—This suit was begun by the assignee of a justice's judgment rendered against Wm. H. Cozens during his life, he having died at the time of suit. The action now is brought against his administrator, appellant.

The case was tried by the court without a jury. No declarations of law were asked or given, and judgment was rendered against the administrator of W. H. Cozens, deceased, who appealed therefrom.

The transcript introduced in evidence by appellant was as follows:

"NUMBER 208, JANUARY ISSUES, 1873.

"L. M. Kennett, Plaintiff,
v.
"Wm. H. Cozens, Defendant. } Before Justice John C. H. Cunningham.

"Landlord's summons for $207 issued January 30, 1873, to Constable Kinsella, returnable February 5, 1873; returned executed. On the return day the plaintiff appeared; the defendant being called came not but made default. The justice, after hearing the evidence on the part of the plaintiff, adjudged that the plaintiff have judgment against the defendant for $200 with costs of suit and restitution of premises. *Fi fa* issued February 6, 1873, to Constable Kinsella.

Debt	$200 00
Justice Cunningham	350 00
Constable Kinsella	175 00
This transcript paid by plaintiff's attorney Wise	100 00

"STATE OF MISSOURI, } ss.
"City of St. Louis. }

"I, Patrick Kane, a justice of the peace within and for the city of St. Louis and State of Missouri, and successor to Justice John C. H. Cunningham, do certify the foregoing to be a full, true and complete transcript of the entries and proceedings in the case of *L. M. Kennett v. W. H. Cozens*, as the same are of record on the docket of Justice Cunningham.

"Given under my hand this third day of September, 1891, PATRICK KANE,

"Justice of the peace, fifth district, city of St. Louis, State of Missouri, and successor to Justice J. C. H. Cunningham."

There was evidence tending to show that the judgment recited in the above transcript was transferred to the respondent.

The appellant assigns for error on this appeal: *First.* That the petition is defective in not alleging

that the judgment sued on was *unpaid*. *Second*. That the judgment sued on is void. *Third*. That the assignments of the judgment whereunder respondent claims are not in accord with section 6043 of the Revised Statutes, 1889.

The first assignment as to the failure of the petition to allege that the judgment is *unpaid*, is frivolous. The petition, after stating the name of the court rendering the judgment, the names of the parties, the date and amount of the judgment and its successive assignments to the respondent, and the appointment of the appellant as administrator of the defendant in said judgment, concludes as follows, to-wit: "That said judgment shall remain valid and *in full force*. Therefore plaintiff prays judgment against said defendant aforesaid, administrator, for said sum of $200, interest and costs." This averment is clearly equivalent to an allegation that the judgment was *unpaid*.

Nor is there any merit in appellant's third assignment, that the transfers to the respondent should have been excluded, because not made in writing and *attached to the judgment* as prescribed in section 6043 of the Revised Statutes, 1889. This identical section was construed in *Burgess v. Cave*, 52 Mo. 43, 44, where it was said: "The statutory mode of assigning judgments is cumulative and does not prevent a party from making an equitable assignment in any other lawful way."

The second assignment of error made by the appellant, to-wit, that the judgment sued on is void, presents the question as to the sufficiency of the transcript of the justice's docket offered in evidence, and the rules governing such transcripts when made the basis of a new suit grounded on a former judgment between the parties.

It is the law of this state that in a suit upon a *foreign* judgment the defendant may show, notwithstanding the recitals therein of jurisdiction, that he was not a party to such judgment, or that the court had no jurisdiction of the subject-matter. *Bradley v. Welch*, 100 Mo. 258, 268; *Eager v. Stover*, 59 Mo. 88, 89.

A domestic judgment of a court of general jurisdiction cannot be collaterally impeached by the parties to it merely because the record is silent as to the acquisition of jurisdiction. In such cases, unless the record affirmatively shows a want of jurisdiction, it will presumed. *Huxley v. Harrold*, 62 Mo. 516, 523; *Cloud v. Inhabitants of Pierce City*, 86 Mo. 366, 367; *McClanahan v. West*, 100 Mo. 309, 320. A domestic judgment of an inferior court (justice of the peace) is not obnoxious to collateral attack, when the facts necessary to confer jurisdiction appear affirmatively upon the face of the proceedings in question. *Karnes v. Alexander*, 92 Mo. 660, 671; *Jeffries v. Wright*, 51 Mo. 215, 221; *Fulkerson v. Davenport*, 70 Mo. 541; *Baker v. Baker*, 70 Mo. 136; Freeman on Judgments, sec. 524.

Defenses to a judgment sued on are collateral, not direct attacks, and are therefore governed by the principles applicable to such methods of impeachment. In the case at bar the appellants objected to the introduction in evidence of the justice's transcript. Such transcripts, when properly certified, are competent evidence of the entries required by law to be made on the docket of the justice. The one offered in this case contained a fuller recital of the essentials of a valid judgment than the one held in *Baker v. Baker*, *supra*, to have "shown on its face jurisdiction not only of the person but of the subject-matter." In the case last cited the entry was as follows: "Now comes the plaintiff, but defendant, although being three times called, comes not but makes default; it is therefore considered and adjudged by the

justice that plaintiff have judgment for the sum of $90, for his debt, with six per cent. interest from date of judgment, and also the sum of $1.55 for his costs herein expended." In the case at bar there is a full statement in the transcript of the time, place, parties, matter in dispute and the result, with relief granted. Nothing further is required in a judgment entry. Black on Judgments, sec. 114. It may be admitted that on appeals or other proceedings directly attacking the judgment of a justice, it would be necessary, to maintain the jurisdiction of the justice, either that the transcript of his docket or some other part of the record should show the lodging with him of the paper or statement sued on. *Olin v. Zeigler*, 46 Mo. App. 193. But my own view is, that, in cases where the judgment can only be collaterally assailed, it is not indispensible to its enforcement that anything should appear on judgment entry except the jurisdiction of the action, the parties and the finding of the court. In the case at bar the judgment was for restitution of the premises in an action for the recovery of possession of real estate and unpaid rent, commonly called a landlord summons. The justice had direct statutory jurisdiction of such causes of action. The docket entry showed that this was the cause of action tried by him; it also shows service of process on the defendant, and the hearing of evidence before rendering judgment, and the nature, date and amount thereof. I think this transcript is sufficient to sustain the judgment of the trial court. My associates do not concur in this conclusion, but hold that there should be some evidence, independent of the above transcript, showing the filing of a statement of a cause of action with the justice. We are agreed that it is sufficient, if such showing is made to appear from any part of the record before the justice (*Ewing v. Donnelly*, 20 Mo. App. 6), and upon

retrial the respondent may show this by producing original files.

There is no merit in the contention of the appellant, that the transcript should show that the service was had in the ward or adjoining ward wherein the property was situated. It was directly held in *Fulkerson v. Davenport*, *supra*, where a similar point was raised, that the recital of service in the transcript will be presumed to be correct, and cannot be denied in a collateral proceeding. In the case at bar the transcript affirmatively shows service and return of process executed against the defendant in the judgment.

It has been held in *Klein v. Wielandy*, 15 Mo. App. 581, that the rendering of a judgment by a justice on default before expiration of three hours does not render the judgment void, and is not available collaterally. This disposes of the remaining point urged by the appellant, and leads to a reversal of the judgment of the trial court and remanding the cause for a new trial. It is so ordered. All concur.

CONCURRING OPINION.

ROMBAUER, P. J.—Where a court of inferior and limited jurisdiction exercises special statutory powers, its jurisdiction must appear by the face of the proceedings; otherwise its judgment is void. *Cunningham v. Railroad*, 61 Mo. 33; *Fletcher v. Keyte*, 66 Mo. 285; *Ewing v. Donnelly*, 20 Mo. App. 6. It makes no difference in such a case whether the judgment is attacked directly or collaterally; hence it is needless to discuss the character of the attack made in this case. In *Zimmermann v. Snowden*, 88 Mo. 218; *Dougherty v. Brown*, 91 Mo. 26; *State v. Farrelly*, 36 Mo. App. 282; the attack on the judgment was made in collateral proceedings, yet the rule above stated was emphatically announced.

A justice of the peace has no power to render a money judgment by default upon five days' service, unless it be in a proceeding upon a landlord's summons. Hence this judgment cannot be sustained as a money judgment alone, unless the justice had jurisdiction to issue a landlord's summons. His jurisdiction to issue such a summons depended upon the anterior filing of a verified statement. *Fletcher v. Keyte, supra; Ewing v. Donnelly, supra.* That this was done, should appear by the papers in the cause which constitute the judgment roll in this particular case. No presumptions can be indulged in to uphold the jurisdiction of the justice in such a case. To *that extent* the case of *Allen v. Scharringhausen*, 8 Mo. App. 229, states the unquestioned law.

In these views Judge BIGGS concurs.

THOMAS SWEANEY, Appellant, v. THE KANSAS CITY RAILWAY COMPANY, Respondent.

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Kansas City Court of Appeals, May 12, 1893.

1. **Special Tax Bills:** RAILROADS NOT CHARGEABLE WITH LIEN OF: K. C. CHARTER. A railroad right of way cannot be charged with the lien of a special tax bill for street improvement done under the charter of Kansas City of 1875.

2. ———: LIABILITY OF PROPERTY OWNER. There is not in Missouri, as in many other states, any personal liability of the abutting property owner for street improvement, and special taxes therefor are alone a charge against the property.

Appeal from the Jackson Circuit Court.—HON. JOHN W. HENRY, Judge.

AFFIRMED.

Gates & Wallace, for appellant.

(1) The railroad of the defendant is benefitted by the improvement of Summit street. The court found as a fact that this railroad is used as a switching road, having factories, warehouses, lumber yards, etc., along its line from which it receives a share of its business. The auditor admitted in his testimony that streets were a necessity to their road, and without such means of access it would be of no use except for through business. The company has six tracks located on their right of way at this point. (2) But the question of benefit is not an open question. The act of the legislature provides, in substance, that the cost of the grading of the sidewalks shall be taxed against the "land adjoining" the street in proportion to the frontage, etc. While these assessments are based upon the idea of benefit to the property assessed, this is a legislative declaration that all the lands abutting on the street are benefitted, and it is not open to any property owner to say that his property is not benefitted. City Charter, 1875, art. 8, secs. 1, 2, 3; Dillon on Municipal Corporations [3 Ed.] sec. 752; *Keith v. Bingham*, 100 Mo. 300; *City of St. Louis v. Rankin*, 96 Mo. 505; *City of Ludlow v. Railroad*, 78 Ky. 357; *Railroad v. Connelly*, 10 Ohio St. 159; *Davis v. City of Saginaw*, 87 Mich. 439; *White v. People*, 94 Ill. 604. (3) The statute includes all lands or property fronting upon the street. This includes the lands of a railroad company. The statute makes no exception and no exception can be made contrary to the statute. *City of Atlanta v. The Church*, 86 Ga. 730. (4) That railroad property of the character of that here in question is liable for special assessments for street improvements, we cite the following cases: *City of Ludlow v. Rail-*

road, 78 Ky. 357; *Railroad v. Connelly*, 10 Ohio St. 159; *Railroad v. Hanna*, 68 Ind. 562; *Railroad v. Kane*, 9 Hun, 506; *City of Chicago v. Baer*, 41 Ill. 306; *Railroad v. People*, 120 Ill. 104; *Railroad v. Decatur*, 126 Ill. 92; *Railroad v. Spearman*, 12 Iowa, 117; *Appeal of North Beach Ry. Co.*, 32 Cal. 499; *Emery v. San Francisco*, 28 Cal. 345; *In re County Commissioners*, 143 Mass. 424; *Railroad v. North Britain*, 49 Conn. 40; *State v. City of Passaic*, 23 Atl. Rep. (N. J.) 945. (5) In our own state recovery has been sustained against the property of a railroad company for street improvements, though the question was not specially raised. *Adkins v. Railroad*, 36 Mo. App. 652; *State ex rel. v. City of Kansas*, 89 Mo. 34. (6) In Missouri and some other states property belonging to the state, school boards and other municipal corporations is not exempt from taxation of this character. *Public Schools v. St. Louis*, 26 Mo. 468; *Sioux City v. School District*, 55 Iowa, 150; *County of McLean v. Bloomington*, 106 Ill. 209; *Adams Co. v. Quincy*, 130 Ill. 566; *Hasson v. Rochester*, 67 N. Y. 528.

Pratt, Ferry & Hagerman, for respondent.

(1) The tax bills in controversy have no life except as liens on the specific property therein described, and can only be enforced by a sale of that specific property. In no other respect is there liability at law or in equity. Since the liens, if good, are to be enforced against detached portions of a railroad right of way which cannot be sold, the bills sued on are nullities, and the portions of the defendant's right of way described in the bills ought not to be considered as adjoining property subject to assessment within the meaning of the charter any more than cross streets and alleys would be so considered. (2) No lien can exist or be enforced

against a portion of the right of way of a railroad. *Dunn v. Railroad*, 24 Mo. 493; *McPheeter v. Bridge Co.*, 28 Mo. 467; *Schulenburg v. Railroad*, 67 Mo. 442; *Knapp v. Railroad*, 74 Mo. 374; *Cranston v. Trust Co.*, 75 Mo. 29; *Ireland v. Railroad*, 79 Mo. 572; *Skrainka v. Rohan*, 18 Mo. App. 340, 345.

GILL, J.—This is a suit to enforce certain tax bills issued for the grading of Summit street in Kansas City. The street runs north and south, crossing the right of way of the defendant railway company nearly at right angles; and these special tax bills attempt to charge the strip of land about fifty feet wide and one hundred and fifty feet deep abutting on each side of the street, and which said strip of land composes a part of the continuous right of way for the main line of defendant's railroad. There was a judgment below in defendant's favor, and plaintiff appealed.

The sole question is this: Does the law authorize the enforcement of a special tax bill for a street improvement against a detached portion of a railroad right of way? The case is governed by the Kansas City charter of 1875. By that statute (Laws 1875, p. 250), the cost of grading a street is charged as a lien on the land adjoining or abutting on the highway, running back to the alley, or one hundred and fifty feet, etc., as the case may be.

The tax bills in suit were issued on the theory that the land along the line of the graded street, and used by a railroad as its right of way, is chargeable with such local improvements just as other adjacent property. This too is the position taken and so forcibly urged on us by plaintiff's counsel. But however cogent the argument, and however reasonable and just may be the position contended for, yet under the repeated decisions of our supreme court, in cases which we deem analo-

gous, we must hold that plaintiff cannot maintain this suit—which has for its aim and purpose the carving out, sale and conveyance of a *portion* only of defendant's right of way. Admitting the terms, "adjoining lands," "all the property on both sides," etc., appearing in the Kansas City charter to be sufficiently general to embrace the railroad right of way, but even then we are met with the doctrine of our adjudicated cases that a lien will not be enforced against a mere fractional part of a railroad right of way, except it be specially authorized by the legislature in language not to be doubted. *Dunn v. Railroad*, 24 Mo. 493; *Abercrombie v. Ely*, 60 Mo. 23; *Schulenburg v. Railroad*, 67 Mo. 442; *Knapp v. Railroad*, 74 Mo. 378; *Skrainka v. Rohan*, 18 Mo. App. 344.

These were cases mainly for the enforcement of mechanics' liens against railroad bridges, depot buildings and the like, based on the general provisions of the mechanics' lien law allowing such liens for labor and materials furnished for all *buildings*, *erections improvements*, etc. It was admitted that the erections of the railroad might come under the terms, buildings or improvements of the mechanics' lien law, but yet it was said to be against the policy of the law to permit the enforcement of a lien against a detached portion of a railroad. The railroad is declared public in its nature; that if a portion of its right of way was thus allowed to be taken its capacity for serving the public would be destroyed; hence it was said, "that it is better to suffer a mischief which is peculiar to one than an inconvenience which may prejudice many." *Dunn v. Railroad*, 24 Mo. 495.

It seems that the argument thus used to deny the enforcement of a mechanics' lien against a detached portion of a railroad applies with equal force in cases of this kind. The description of the property to be

charged in the former case is as general and comprehensive as in the latter. Before the act of 1873 (which for the first time provided for enforcement of liens against railroads) it was not permitted to enforce mechanics' liens against bridges, depots and the like, for it would result in selling detached portions of its right of way. And this was declared the law although the mechanics' lien statute made no specific exceptions in favor of railroads, but declared in general terms the laborer and material-man entitled to a lien against *all buildings or improvements* into which were put such labor or materials. The same rule must apply here and for like reasons. Although the charter declares no exemption in favor of the railroad right of way, and uses words of general description which might include the lands over which the road is built, yet the same policy that will deny a mechanics' lien in the one case must in the other refuse a lien for street improvements. This same policy which disapproved the enforcement of special liens against separate and distinct parcels of a railroad, manifested itself in the subsequent act of the legislature in 1873. Revised Statutes, 1879, sec. 3200, *et seq.* Although by that act liens in favor of material-men and laborers were provided for as against railroads, yet the lien was made to apply to the *whole line* of railroad, and the lienor was not permitted to proceed and charge a fractional part. *Knapp v. Railroad*, 74 Mo. 374.

Following then the spirit and evident trend of these decisions, the enforcement of these tax bills cannot be permitted, as, in order to make the judgment available, some three hundred feet of this railroad highway must be segregated from the continuous whole, and sold and conveyed to a third party. Indeed if this lien should be allowed there is but one judgment that could be rendered, and that is that the land sought

to be charged be sold under a special *fieri facias*. There could be no personal judgment against the defendant. This has been so often decided that citations of authorities are unnecessary. And, since this detached part of the right of way cannot be taken and sold on execution, it is clear that there is no valid lien. *Dugan Stone Co. v. Gray*, 43 Mo. App. 675.

Plaintiff's counsel, with laudable industry, have collated numerous decisions from other states, which tend in a great measure to sustain their contention here. But it will serve no useful purpose to go over these cases. Some are in point; but, as in our estimation these stand opposed to the well established law in Missouri, we must decline to follow them. The want of harmony between the courts of some of the states and Missouri, on the right to charge the right of way of the railroad for street improvements, may be in part accounted for on the difference of opinion as to the *personal* liability of the property owner. The courts of Missouri in later years—contrary to the earlier decisions—uniformly hold that such special taxes are alone a charge against the *property*, and can form no basis whatever for a personal judgment against the owner (defendant's counsel in their brief have cited some of the leading cases); while in some of the states the personal liability of the owner seems conceded. For example, in a late case from the supreme court of Kansas (and which plaintiff's counsel have furnished us since the argument in open court) an assessment for paving a street was sustained against a courthouse square. And yet in this case the court, in effect, declares that no lien can be enforced against the land; for the court says, "a courthouse cannot be sold or disposed of under tax proceedings or at forced sale for special assessments or taxes levied upon the ground thereof." The assessment was allowed, however, as a

charge against the county—to be collected as any other judgment against the county. *Board of Commissioners v. Ottowa*, 31 Pac. Rep. 788.

This clearly could not be allowed in this state; for, as already said, such charges for local improvements are liens or charges against the property and nothing more. There is no such thing in this state as a personal obligation on the owner to pay the assessment. If it can't be collected by the enforcement of a specific lien against the adjacent property it can't be collected at all.

The judgment of the circuit court must be affirmed. All concur.

CLARENCE A. BURLEY, Assignee, Respondent, v. S. M. HITT *et al.*, Appellants.

Kansas City Court of Appeals, May 15, 1893.

1. **Principal and Surety**: CHANGE OF CONTRACT WITH AGENT: SUBROGATION: INJURY. Defendant Hitt entered into a contract of agency with plaintiff's assignor and the other defendants became his sureties for the faithful performance of the contract. Subsequently the assignor authorized Hitt to retain money (he might need) which the contract provided he should remit. *Held*:

   (1) The sureties were discharged.

   (2) *Arguendo*, that the provisions of a contract having a tendency to secure the creditor are such securities as by the doctrine of subrogation enure to the surety, and release of such provision discharges the surety.

   (3) If the creditor's interference authorizes the performance in some other way than the contract provides, the sureties are discharged without regard to whether they are injured thereby or not.

2. **Principal and Agent**: GENERAL MANAGER. The fact that one is general manager of a company implies power and authority to manage its business, and the power and authority to make a contract authorizes him to release, waive or vary it.

Appeal from the Jackson Circuit Court.—HON. C. O. TICHENOR, Special Judge.

REVERSED.

Lipscomb & Rust, for appellants.

If Briscoe had the authority to make the contract allowing Hitt to retain $100 of the company's money, he had the right to modify it so as to allow him to retain more. "The same power which enabled him to make it was sufficient to enable him to release it." *Indianapolis Rolling Mill Co. v. Railroad*, 120 U. S. 256; *Sparks v. Transfer Co.*, 104 Mo. 539; 17 American & English Encyclopedia of Law, pp. 130, 135.

Ashley & Gilbert, for respondent.

In consideration of the bond, the company conferred the office and its emoluments, and it neither directly nor indirectly guarantees to the sureties that which they guarantee to it, that their principal shall perform the duties of his office. Brandt on Suretyship & Guaranty [Ed. '78] secs. 369, 474, pp. 496, 614; *Watertown Fire Ins. Co. v. Simmons*, 131 Mass. 85; *Railroad v. Shaeffer*, 59 Pa. St. 350; *State v. Atherton*, 40 Mo. 209; Murfree on Official Bonds, sec. 415, p. 294; *Taylor v. Bank of Kentucky*, 211 Marshall (Ky.), 565; *Creighton v. Rankin*, 7 Clark & Finnelly 325, 346.

ELLISON, J.—The defendants, Evans and Orr, are sureties of defendant Hitt. Plaintiff is the assignee of the Chicago Safe and Lock Company. Judgment was rendered against the defendants and the sureties appealed.

The Chicago Safe and Lock Company employed defendant Hitt as the general manager of its "Kansas

City office, to manage the Kansas City branch of their business for the sale of all goods and wares manufactured by them." His employment was by written contract wherein it was provided, among other things, that he should make reports to the company daily of all sales made; and that on the last day of each month he should furnish to the company a full and correct account of all goods sold and in stock, "together with all surplus cash on hand over and above $100, after paying all expenses." He gave a bond for the faithful performance of this contract and all its duties and obligations, and providing that he should "promptly pay all liabilities arising under and growing out of said contract." The provisions of the contract and bond were determined and agreed upon by Hitt and one Briscoe, the latter being the general manager of the Chicago Safe and Lock Company. After the first month Hitt failed to remit the surplus cash on hand over and above $100 and expenses, as the contract provided he should do. The first "balance sheet" sent in by Hitt showed him to be overdrawn in the sum of $17 or $18 Briscoe then came out to Kansas City and directed him not to allow his statements to disclose that he had "overdrawn;" but authorized him to hold back money that he might need over and above that which it was provided in the contract he might retain; that he could make a ticket of the amount, which he could put in his safe and carry as cash. In other words, Briscoe, as general manager, authorized Hitt to retain the money (he might need) which the contract provided he should remit. The question for decision is whether this discharges the defendant sureties? We answer the question in the affirmative. We must assume that the nature and provisions of the contract were considered by the sureties when they entered into their engagement, and that such provisions governed

them in their conclusion to become sureties. Among the provisions of the contract the sureties saw that their principal was required to make monthly statements and remittances of money which he should collect for the company. This provision was a cautionary safety clause not only for the company, but in its operations would amount to a security for the sureties. It is a familiar principle of equity, now frequently applied in law, that the surety is entitled to all securities which the creditor has from the principal debtor. *Schell City Bank v. Reed, ante*, p. 94. Such securities may consist not alone in mortgages or credits, but may be the provisions of a contract, the tendency of which is to secure the creditor. For instance, in *Taylor v. Jeter*, 23 Mo. 244, a builder by the terms of his contract was to furnish the material and build a house for the owner. The contract provided that the owner should make certain payments to the builder at certain times as the work progressed, and retain a certain sum for sixty days after the work was finished. The owner, however, paid the builder before the building was completed, and mechanics' liens were afterwards put upon the building which he was compelled to discharge. He sued the builder's surety who had engaged for the builder's faithful performance of the contract, and it was held that the provisions of the contract enabling the owner to retain the money was a security for the performance of the work and that in parting with it he discharged the surety. So a like holding was had and a like view taken in the case of *Calvert v. London Dock Co.*, 2 Keen, 639.

2 Brandt on Suretyship, sec. 397, stated that: "A surety for the completion of work to be performed by the principal, whereby the terms of the contract the principal is to be paid by installments, is discharged if the principal is paid faster than the contract provides."

"The surety," says the author, "is thereby deprived of the inducement which the principal would have to perform the contract in due time." To the same effect are the cases of *Bragg v. Shain*, 49 Cal. 131; *Truckee Lodge v. Wood*, 14 Neb. 293; *Carson Opera House v. Miller*, 16 Nev. 327; and *Simonson v. Grant*, 36 Minn. 439.

Now to apply the reasoning and the principle of these cases to the case at bar. In employments of service there are at least two inducements and incentives to faithful service in accordance with the agreement for such service. These are the desire a man has in a moral point of view to perform his obligation and the fear he has of loss of employment if he fails to do so. Both these inducements to perform the contract in this cause were brought to naught by the act of plaintiff. Instead of saying to Hitt, you will break your contract and promise; you will be guilty of a breach of faith, and we will discharge you if you retain our money, the company says to him, that it will be no breach of faith, and that he may set aside the terms of the contract and retain the money. The company had no right to withdraw these inducements by expressly authorizing Hitt not to perform his agreement, by releasing him from his undertaking.

It is, however, said that the company did not release Hitt from paying the money, but only from the mode and time of payment. But it was from this cause, the sureties can well say, that the defalcation has occurred. But the inforcement of the rule governing the contracts of sureties does not require that the surety shall be injured by the act of the creditor. If the creditor interferes with the performance of the contract and by such act authorizes or directs the principal to perform in some other way, the sureties are discharged without

regard to whether they were in fact injured by the interference.

We are aware of that class of cases where indulgence, forbearance, passiveness on the part of the creditor will not release the surety. Such is the case of *Railroad v. Shaeffer*, 59 Pa. St. 350, on which plaintiff largely relies. That case is totally different from this. In that case the railroad officers knew that the cashier was not making monthly reports as required by the rules of the company and referred to in his official bond. The company, after repeated failures of the cashier to make reports, dismissed him, but neglected to notify his sureties of its action or of the cashier's defalcation. This was held to be mere forbearance and not to discharge the sureties, and with such conclusion we find no fault; but we are unable to see where it applies to the facts before us. Neither do we consider the case of *Chew v. Ellengood*, 86 Mo. 260, applicable to the facts of this case.

II. We have assumed Brisco to be the company in the foregoing, and the remaining question is whether he was such an agent as possessed the power or authority to bind the company in waiving the provisions of the contract as set forth herein. He was shown to be the general manager of the company's business, and that he was managing its affairs, and that he entered into the contract as it was originally made, and that he did actively supervise this office at Kansas City. The evidence as to Briscoe's agency is quite short, but also quite comprehensive in its effect and bearing. He is stated to be the general manager of the company. This certainly implies power and authority to manage the company's business. But he is also stated to have entered into this contract for the company, and the case concedes that he had authority so to do. The

same power and authority which enabled him to make the contract, if not withdrawn, authorizes him to release or waive or vary it. *Rolling Mill v. Railroad*, 120 U. S. 256.

We are thus led to the conclusion that the sureties were discharged and the judgment should be reversed. All concur.

JOHN T. SEARS *et al.*, Respondent, v. J. V. PATTERSON, Appellant.

Kansas City Court of Appeals, May 15, 1893.

Subrogation: PAYMENT OF PRIOR LIEN. Under the equitable principle of subrogation one who pays a mortgage under an agreement for an assignment or for a new mortgage, as in this case, for his own benefit, acquires a right to the security held by the owner; and so, where the mortgagor attempts to secure the payor of the prior lien by a new mortgage on the premises, which is ineffectual by reason of a mutual mistake of the parties, the payor will be subrogated to the rights of the original mortgagee, notwithstanding a subsequent mortgage taken with notice of the intention that the said payor had a prior lien to such subsequent mortgagor.

Appeal from the Jackson Circuit Court.—HON. JOHN W. HENRY, Judge.

AFFIRMED.

Palmer & Parker, for appellants.

(1) The deed of trust to Chamberlain, as trustee for Sears, was absolutely void. *Stevens v. Hampton*, 46 Mo. 404; *Bartlett v. O'Donoghue*, 72 Mo. 563; *Dail v. Moore*, 51 Mo. 589; *Hoskinson v. Adkins*, 77 Mo. 537; *Shaffer v. Kugler*, 107 Mo. 62; *Rush v. Brown*, 101 Mo. 586. (2) The deed of trust to Swinney, as trustee, took effect only from the time of its execution. There

can be no ratification of a void instrument. Tiedeman on Real Property, sec. 794; 1 Devlin on Deeds, sec. 17; 3 Washburn on Real Property [5 Ed.] 329; 14 American & English Encyclopedia of Law, 631; *Jackson v. Stevens*, 16 Johns. 110. (3) The plaintiff acquired no right by subrogation. *Banta v. Garmo*, 1 Sandf. Ch. 383; *Neidig v. Whiteford*, 29 Md. 178; *Woolen v. Hillen*, 9 Gill (Md.), 185; *Stearns v. Godfrey*, 16 Me. 158; *Wormer & Son v. Agr. Works*, 62 Iowa, 699; *Bunn v. Lindsley*, 95 Mo. 250; *Price v. Courtney*, 87 Mo. 387. (4) There is no estoppel against the defendants. 7 American & English Encyclopedia of Law, p. 12; 1 Herman on Estoppel & Res Judicata, 5; *Brooks v. Owen*, 19 S. W. Rep. (Mo.) 723; *Sewing Machine Co. v. Emerson*, 115 Mass. 554; *Farmers & Mechanics' Bank v. Burchard*, 49 N. W. Rep. (Neb.) 762; *Thompson v. Morgan*, 6 Minn. 292.

McDougal & Sebree, for respondents.

SMITH, P. J.—The undisputed facts of the case are that the defendant, Anna Musick, who is the wife of defendant, J. W. Musick, was the owner of lot 171, of Altamont, an addition to Kansas City, which was subject to a deed of trust executed by Caldwell, at a time when he was the owner of said lot, to Calvin, trustee, to secure the payment of a debt to Arnold for $689; that about the thirtieth of July, 1889, the Caldwell debt became due and the owner thereof was about to foreclese the deed of trust and sell said lot when the Musicks, in order to prevent such sale, requested plaintiff Sears to pay off the Caldwell debt, and promised him if he would do so that he should have a first lien on said lot for the amount so paid out; that plaintiff thereupon paid the Caldwell debt to the owner thereof, the principal and interest of which amounted to $800; that, on the same day the Musicks undertook to incum-

ber said lot with a deed of trust to Chamberlain as trustee to secure their note to plaintiff for $800, the amount he had advanced for them to pay off the Caldwell debt, but by mistake the said deed of trust was acknowledged before Chamberlain the trustee, who was a notary public; that afterwards on the eleventh day of September, 1890, the mistake in respect to said acknowledgment having been discovered, the Musicks executed another deed of trust on said lot to secure their indebtedness to plaintiff; that between the dates of the execution of the two deeds of trust for the benefit of plaintiff, the Musicks executed another deed of trust on said lot to secure an antecedent indebtedness of theirs to the Pattersons; that it appears to have been expressly understood and agreed between the Musicks and Pattersons at the time of the execution of the deed of trust that the lien thereof should be junior to that of the plaintiff.

Upon these facts the trial court decreed a foreclosure of the interest and lien of defendant in the lot and that the indebtedness of the plaintiff be declared a first lien charge thereon, etc. The defendants who have appealed seek a reversal on the ground that the finding and judgment is contrary to law.

If it be conceded that the plaintiff's first deed of trust was void on account of the acknowledgment, and that his second only took effect from the time of its execution, still may not the decree of the court be sustained upon the equitable principle of subrogation? We are of the opinion that it can. The doctrine of subrogation rests on the basis of mere equity and is resorted to for the purpose of doing justice between the parties. We cannot well conceive of a case where the application of this doctrine could be more appropriately invoked than in this. When plaintiff took up the Caldwell debt and secured a release of the lien therefor on the lot at the request of the Musicks and

upon their assurance that they would execute to him a deed of trust giving him a like lien on the lot to secure the same debt, they were the owners of the equity of redemption and therefore interested in the lot. They occupied practically the position of the original mortgagors as to the lot and the lien debt. Upon this state of facts under the authorities the plaintiff became entitled in equity to the benefit of the mortgage. In such case a court of equity will subrogate him to the rights of the creditor whose debt he has paid. *Moore v. Lindsey*, 52 Mo. App. 474; *Wolf v. Walter*, 56 Mo. 292; *Williams v. Perkins*, 83 Mo. 376; *Norton v. Highleyman*, 88 Mo. 621; Sheldon on Subrogation, sec. 8; *Wilson v. Brown*, 13 N. J. Eq. 277; *Richmond v. Morrison*, 15 Ind. 134; *Hugh v. Ins. Co.*, 57 Ill. 319; *Sanford v. McLow*, 3 Paige, 117; *Hoy v. Barnhal*, 4 C. E. Green (N. J.), 565; *Pilson v. Anderson*, 4 Edwards Ch. 17; *Carter v. Taylor*, 3 Head. 30; *Pelz v. Clark*, 5 Pet. (U. S.) 482.

So under the equitable principle of subrogation one who pays a mortgage under an agreement for an assignment or for a new mortgage, as here, for his own benefit acquires a right to the security held by the owner. Jones on Mortgages, sec. 874; Leading Cases in Equity, 154; *Home Ins. Co. v. Marshall*, 32 N. J. Eq. 103; *Denton v. Col.*, 30 N. J. Eq. 244; *Saylin v. Knox*, 41 Mich. 40; *Levy v. Martin*, 48 Wis. 198; *Barnes v. Mott*, 64 N. Y. 397.

The defendant contends that the facts of this case are analogous to those in *Bunn v. Lindsey*, 95 Mo. 250, where the claim to the right of subrogation was denied. The report of the case shows that there one Lindsey, in September, 1873, executed a mortgage to a building company to secure a debt. In December, 1874, a judgment was recovered against Lindsey which became a junior lien on his land. In January, 1875, under a

previous arrangement made between Lindsey and Bunn, the latter paid off the building company's debt and took from Lindsey a deed of trust to secure his debt. In December, 1877, an execution was issued on the judgment and the land sold thereunder. Bunn then brought suit whereby he sought to be subrogated to the rights of the building company in its deed of trust.

That case is easily distinguished from this. There the mortgage debt was not paid off until *after* the rendition of the judgment. Here the mortgage debt was paid off by plaintiff *before* the defendants' deed of trust lien attached. In that case there was not, and could not have been, an effective agreement by which Bunn was to have a lien equal in priority to that which the building company held, because there was then in the way a valid junior judgment lien attaching to the land. Here there was no lien on the land other than that which plaintiff procured to be released under his agreement with the Musicks.

Dunn v. Railroad, 45 Mo. App. 29, is not like the case at bar, for there the railway company being the debtor of an employe voluntarily paid a debt of the latter without the semblance of a request to do so, and in such case of course the railway company was not entitled to be subrogated to the rights of the employe whose debt it had voluntarily paid. Nor is this case similar to that of *Kleinmann v. Geiselmann*, 45 Mo. App. 497, for there the debt was not discharged at the request of the party who owed it, or who owned the security subject to the lien.

The Musicks intended and undertook to give the plaintiff a first mortgage lien on the lot to secure the amount which he had advanced for them at their request to discharge the Caldwell mortgage debt; by mistake of the notary who took the acknowledgment

of that instrument it did not in law become operative. The mistake was mutual and unmixed with negligence.

To execute the intention of all the parties, as is the effect of the decree, and thus afford plaintiff a prior lien, seems to us to be highly equitable. This would not be unjust to the defendants because they would be left in identically the situation the Musicks intended to place them and which they understood themselves to be in at the time they accepted their lien. They simply sought to secure an existing debt by taking a lien, junior to that of the plaintiff. Surely a court of equity would not permit them to profit by the mistake of the other parties. The defendants have not been misled or induced by the act of the parties to part with anything. They present no equities superior to those of the plaintiff.

We think the decree is for the right party and should be affirmed. All concur.

VALENTINE BLATZ, Appellant, v. FRANK LESTER, Respondent.

Kansas City Court of Appeals, May 15, 1893.

1. **Evidence:** SALE: GIFT. Action was for the purchase price of certain chattels; the answer was a general denial. Evidence that the chattels were a gift was properly admitted as proof of a gift disproved the allegation of sale. 54 283 54 161

2. **Inducement:** GIFTS: DONEE'S CONDUCT: LEGAL EXPLANATION. If the gift is complete the fact that the donee fails in what the donor hoped and expected to induce him to do by the gift, cannot alter the gift. This case did not require the court to explain the legal nature of a gift.

Appeal from the Jackson Circuit Court.—HON. JOHN W. HENRY, Judge.

AFFIRMED.

F. V. Kander and *J. W. Gillespie*, for appellant.

(1) The court should have sustained the objection of plaintiff to the introduction of any evidence of a gift by plaintiff to defendant of the fixtures, for the reason that defendant had answered only by general denial and this being an affirmative defense and a plea of new matter should have been specially pleaded and could not be shown under a general denial. *Muelrath v. Roemheld*, 3 Mo. App. 563; *Kersey v. Gorton*, 77 Mo. 645; *Northrup v. Ins. Co.*, 47 Mo. 435; Bliss on Code Pleading, sec. 352; *Hudson v. Railroad*, 101 Mo. 13; *Nelson v. Wallace*, 48 Mo. App. 193; Revised Statutes, 1889, sec. 2049.

Jones & Jones, for respondent.

We denied the sale of the fixtures by general denial. Incidentally to prove that Lester never bought them, we showed the gift, corroborative merely of the general denial.

ELLISON, J.—This is an action on an account for the purchase price of certain chattels alleged to have been sold and delivered to defendant. Defendant's answer was a general denial. At the trial he was permitted, over plaintiff's objection, to give evidence showing that the chattels were a gift from plaintiff to him. This ruling was right. The answer need only set up new matter; and an allegation of the gift of chattels which are charged in the petition to have been sold is not new matter. Proof of a gift is one mode, and a legitimate mode, of disproving the allegation of a sale. It does not confess a sale and avoid it by some supervening fact, but its effect is to deny the sale. Such proof supports a general denial. Judge BLACK says in

State ex rel. v. Rau, 93 Mo. 130, that, if the facts stated in the answer show a non-liability, though the facts stated in the petition are true, then they are new matter. But if the facts stated in the answer simply show that the facts stated in the petition are not true, then they are not new matter, though stated in an affirmative form, and need not have been specially set out; as a general denial would have sufficed to let them in evidence.

In this case, if the defendant had set out in his answer that the chattels were a gift to him he would have been simply stating facts in detail which showed the allegations of the petition were not true. He could do the same thing as well, if not better, by a simple denial.

The court's instructions were proper and were based upon sufficient evidence to authorize them. The first is elementary law. The second was justified by all the evidence in the cause on the subject of the instruction. The same can be said of other instructions which are attacked as not having evidence to sustain them. The fourth instruction states in substance that if the fixtures were given to defendant as an inducement for him to purchase beer of plaintiff, then the gift was good though in fact defendant afterwards failed to so purchase his beer. This was correct. If the gift was complete, the fact that defendant failed in what plaintiff hoped and expected of him, could not alter the gift.

There was no such case presented by the evidence here as required the court to explain to the jury the legal nature or definition of a gift. After a consideration of all the points made by appellant, we have concluded that no error has been committed materially affecting the merits of the cause (Revised Statutes, 1889, sec. 2303), and we therefore affirm the judgment. All concur.

THE STATE OF MISSOURI *ex rel.* T. C. HEY, Public Administrator, Respondent, v. JAMES P. HARPER *et al.*, Appellants.

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Kansas City Court of Appeals, May 15, 1893.

1. **Partition:** PROCEEDS OF SALE: DESCENT OF. Where real estate is sold for partition, the proceeds of the sale do not remain real estato and descend to the heir, but pass to the administrator.

2. ———: ———: DAMAGES FOR DETENTION OF. A special commissioner appointed to make sale of real estate in partition must pay five per cent. per month for detention of the proceeds of sale after demand therefor.

Appeal from the Jackson Circuit Court.—HON. R. H. FIELD, Judge.

AFFIRMED.

K. M. DeWeese and *Karnes, Holmes & Krauthoff*, for appellants.

(1) The relator, Fred C. Hey, is not the proper party to maintain this action. The partition suit was brought for the purpose of dividing the land, and the sale which was ordered in the circuit court was a conversion of the land only for the purposes of division and the money; the proceeds of that sale remained real estate and descended to the heir, and did not pass to the administrator. 2 Story's Equity Jurisprudence [13 Ed.] sec. 1214*a; Durando v. Durando*, 23 N. Y. 331, 335; *Nortin v. Bradham*, 21 S. C. 375, 384. It is true that the contrary rule seems to have been made in the case of *State ex rel. Hounsom v. Moore*, 18 Mo. App. 406. But in that case the question was not argued, and we submit the case is not well considered, and is not supported by the cases to which it refers, and ought to be overruled as

being contrary to principle. (2) There is no law authorizing interest in a case like this at the rate of five per cent. per month. We understand the plaintiff to rely in this regard upon Revised Statutes, 1889, sections 4965 and 7188. It is not pretended that any other authority existed for calculating interest at any such rate and we respectfully submit that no authority for the same can be found in the sections quoted.

Adams & Windiate, for respondent.

(1) This action was properly brought. The administrator, and not the heirs of E. C. Peppard, is entitled to the proceeds of the sale in partition. *State ex rel. v. Moore*, 18 Mo. App. 406, and cases cited; *Jacobus v. Jacobus*, 37 N. J. Eq. 17. (2) The court below properly rendered judgment for interest at the rate of five per cent. per month from its date. Revised Statutes, 1889, sec. 4965, 7171, 7188; *The State ex rel. v. Cayce*, 85 Mo. 456.

SMITH, P. J.—One E. C. Peppard, a non-resident of Missouri, was the owner of an undivided one fourth of a certain tract of land in Kansas City, Missouri. In 1882 a partition suit was begun in the circuit court of Jackson county, Missouri, by W. L. Reid and Albert M. Winner, the owner of the other three fourths, against said E. C. Peppard, who was brought into the case as a non-resident by order of publication. The land was not susceptible of division and a sale of the same was ordered for the purpose of partition. The defendant, James P. Harper, was by the circuit court appointed a special commissioner under the statute for the purpose of making such sale, which he did. The distributive share of said E. C. Peppard from the proceeds of said sale amounted to $322.22. Defendant Harper, as such

commissioner, executed a bond with the defendants, D. Ellison, W. L. Reid and Albert M. Winner, as sureties. E. C. Peppard never called for his money. For the period of seven years he was never heard from, and the presumption of his death obtained. The relator, Fred C. Hey, as public administrator of Jackson county, Missouri, took charge of the estate of said Peppard and proceeded to administer the same. The present suit is an action on said bond at the relation of said administrator. The defendants assail the judgment on the grounds that upon the record the judgment which was for relator is erroneous, and that the petition fails to state facts sufficient to constitute a cause of action.

The principal contention of the defendant is that the relator Hey is not a proper party to maintain the action. In support of this it is argued that the partition suit was brought for the purpose of dividing the land, and the sale which was ordered in the circuit court was a conversion of the land only for the purposes of division, and the money, the proceeds of the sale, remained real estate and descended to the heir, and did not pass to the administrator.

The question thus presented is decided in the negative by the case of *State ex rel. v. Moore*, 18 Mo. App. 406, and to the ruling there made we feel constrained to adhere notwithstanding the plausible grounds upon which its soundness is called in question by the learned counsel for defendants. It has now been about eight years since that decision was announced, and its soundness so far as we know has never before been questioned in this state, and, since it has practically become a rule of property, we can discover no sufficient reason why it should be overthrown and another rule, the soundness of which is not entirely free from doubt, substituted in its stead.

Construing sections 4965 and 7188, Revised Statutes in the light of the decision of the supreme court in *State ex rel. v. Cayce*, 85 Mo. 456, and it seems to us plain enough that the relator is entitled to recover interest at the rate of five per cent. per month after demand.

It follows that the judgment will be affirmed. All concur.

J. A. Cox, Respondent, v. GEORGE E. BOWLING, Appellant.

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Kansas City Court of Appeals, May 15, 1893.

Principal and Agent: REAL ESTATE AGENT'S COMMISSIONS. A real estate agent undertook for a certain commission to sell a house and lot for a certain sum; but after repeated negotiations between himself, the owner and the contemplated purchaser, no sale was effected. Then the house burned down. Soon after the fire the owner and the contemplated purchaser met and traded at a lower price. *Held:*

(1) The agent was not entitled to his commission since he did not find an able and willing purchaser at the stipulated price.

(2) So material a change in the subject-matter of the agency as the burning of the house amounted to a rovocation of the agent's authority.

Appeal from the Barton Circuit Court.—HON. D. P. STRATTON, Judge.

REVERSED.

McCluer & Bowling, for appellant.

Before the plaintiff was entitled to recover he should have shown that he had complied with his part of the contract. *Blackwell v. Adams*, 28 Mo. App. 63; *Reiger v. Bigger*, 29 Mo. App. 421, cited and approved in *Harkness & Russel v. Briscoe*, 47 Mo. App. 202; *Gaty v. Foster*, 18 Mo. App. 643; *Sibald v. Iron Co.*, 83 N.

Y. 378, cited and approved in *Gaty v. Foster, supra; Wyle v. Marine Nat. Bank*, 61 N. Y. 416; *Beauchamp v. Higgins*, 20 Mo. App. 517; 1 Ewell's Evans on Agency, ch. 8, p. 132-133; Mechem on Agency, par. 238, ch. 7.

Cole & Ditty, for respondent.

(1) The demurrer to the testimony was properly overruled. The plaintiff under the evidence was entitled to recover for the reasonable value of services rendered, even upon proof of an express contract fixing the value of the services, such recovery would be limited to the contract value. *Crump v. Rebstock*, 20 Mo. App. 37; *Suits v. Taylor*, 20 Mo. App. 166; *Floerke v. Distilling Co.*, 20 Mo. App. 76; *Mansur v. Botts*, 80 Mo. 651; *Plummer v. Trost*, 81 Mo. 425. Plaintiff was the procuring cause, and by his exertion brought about the sale and is entitled to recover his commission. He introduced the purchaser and gave his name to defendant. Defendant perfected the sale and varied the terms from those given his agent, the plaintiff herein. *Timberman v. Craddock*, 70 Mo. 638; *Beauchamp v. Higgins*, 20 Mo. App. 514; *Ramsey v. West*, 31 Mo. App. 676; *Jones v. Berry*, 37 Mo. App. 125; *Wetzell & Griffith v. Waggoner*, 41 Mo. App. 509; *Russell v. Railroad*, 26 Mo. App. 368; *Nicholson v. Golden*, 27 Mo. App. 132; *Jones v. Berry*, 37 Mo. App. 125; *Desberger v. Harrington*, 28 Mo. App. 632. (2) In the instruction given by the court on its own motion the question of the revocation of the agency of the plaintiff was presented to the jury. Besides, reference being had to one of the instructions given at the request of defendant, it will be seen that defendant's theory of the revocation of the agency is therein embodied and explicitly set forth. The uncontradicted testimony is to the effect that the fire which destroyed defendant's building instead of terminating the agency, only facili-

tated the consummation of the sale of defendant's property to the purchaser procured through the exertion of plaintiff in the course of his employment. Defendant's testimony is that upon the destruction of the building by fire, he immediately took advantage of the purchaser's offer made through plaintiff. There was nothing in the evidence to warrant the inference or justify the court in making the assumption that the fire terminated plaintiff's agency. *Tetherow v. Railroad*, 98 Mo. 74; *Zwisler v. Storts*, 30 Mo. App. 163.

GILL, J.—This is a suit for commissions for sale of real estate. Plaintiff had judgment below, and defendant appealed. The material facts are about as follows: Bowling owned a house and lot in Lamar, Missouri, which he desired to sell. He agreed with Cox, an agent, that if he, Cox, would find a purchaser for the house and lot at the price of $2,500 he would allow him $100 as commissions. Cox entered into negotiations with one Snyder, a resident of Lamar, and made an effort to sell the property to Snyder at the fixed price of $2,500. Snyder refused to give that sum and offered to purchase at a less amount, which Bowling then declined. Cox made repeated efforts to get the parties together, but to no purpose, and the negotiations then ceased. A short time thereafter the building on the lot was destroyed by fire. A few days after the fire Bowling and Snyder met on the street, and after a brief interview Bowling sold the lot (then vacant) to Snyder for $2,000.

Plaintiff originally brought his action before the justice of the peace on the special contract which, as already stated, was that defendant was to pay plaintiff the agreed price of $100 if he sold the property for $2,500; but since plaintiff was unable to prove that the lot was sold for $2,500 the complaint was amended in

the circuit court, over defendant's objection, so as to sue in *quantum meruit*, and it was upon this amended petition plaintiff was allowed to recover.

We find it unnecessary to pass on the question last above suggested, that is, the right of the plaintiff to file the amended complaint in the circuit court, since in our opinion the evidence made no case for the plaintiff, and the trial court should have given a peremptory instruction for the defendant.

Even if there had been no change in the nature and condition of the property subsequent to plaintiff's employment, the right to commissions in this case may well be questioned, since according to the testimony of both parties the nature of plaintiff's engagement was, it seems, that he was to be paid $100 *if he found a purchaser able and willing to give $2,500 for the house and lot*, and otherwise no compensation was to be paid. Nor is there any evidence tending to show that this original contract was ever changed or modified.

But, however this may be, plaintiff did not secure a purchaser for the house and lot he engaged to sell. Snyder and Bowling were never able to agree on a price for the property as it stood when Cox conducted the negotiations. Bowling's price—and that, too, at which Cox undertook to sell—was $2,500, but Snyder was not willing to pay that for the property. Subsequently, however, when the building was destroyed and the property became materially changed (so that indeed it was not the same as when Cox was employed to sell it), Bowling and Snyder came together and a sale of the vacant lot was effected. But this was not the property that Cox was empowered to sell. There was nothing said between Bowling and Cox after the destruction of the building. So material a change in the subject-matter of the agency amount to a revocation of Cox's authority as agent. It is well settled that

the authority of the agent is determined by the destruction of the subject-matter of the agency. Story on Agency, sec. 499; Ewell's Evans on Agency, sec. 132; Mechem on Agency, sec. 238.

The judgment of the circuit court must be reversed. All concur.

ABIEL LEONARD, Appellant, v. THE CHICAGO & ALTON RAILWAY COMPANY, Respondent.

Kansas City Court of Appeals, May 15, 1893.

1. **Carriers**: PAROL OR WRITTEN: CONSIDERATION. Plaintiff made a parol contract with defendant to furnish a special live-stock train to ship his cattle to the Chicago market within a certain time. The train was furnished and the cattle loaded as agreed, and just as the train was about to move off defendant's agent presented him a contract which defendant signed. *Held*, the written contract was substituted for the original verbal one and the cancellation thereby of old oral contract is a sufficient consideration for the substituted written one.

2. ———: CONTRACTING AGAINST NEGLIGENCE. A common carrier is not allowed the benefit of a stipulation in a contract of affreightment protecting it from its own negligence.

3. ———: CONTRACT OF AFFREIGHTMENT: INTERPRETATION. In the interpretation of contracts of affreightment courts adopt the rule ordinarily applied to the interpretation of contracts, that is, to look into the circumstances surrounding the transaction and connected with its making, including the object in view and the nature of the performance required.

4. ———: ———: ———: PUBLIC POLICY. A carrier cannot be permitted negligently to delay a shipment of cattle beyond the time it could well make and does customarily make, and then excuse itself by showing that it still made the trip within the period agreed upon as a reasonable time, as such interpretation would make the stipulation against public policy which does not permit a carrier to be negligent with impunity. Such stipulation means the cattle were to be taken with all reasonable dispatch, and was a protection against a failure so to dispatch them.

5. ———: SHIPMENT OF LIVE STOCK TO MARKET: DILIGENCE. When a common carrier undertakes to transport fat cattle to market in a live-stock train it must be held to have undertaken a business which calls for diligence and dispatch commensurate with the trust it has accepted.

6. ———: CONTRACTS: INTERPRETATION: NOTICE OF DAMAGE. The provision of a shipping contract that the shipper shall give notice of his damages within five days after the train's arrival at its destination, relates to damage to the cattle themselves and not to damage suffered by a change in the market, nor does a provision relieving the carrier from liability for or damage after delivering upon stock yards tract refer to loss by fall in market.

Appeal from the Saline Circuit Court.—HON. RICHARD FIELD, Judge.

REVERSED AND REMANDED.

Leslie Orear and *A. F. Rector*, for appellant.

(1) The parol contract was when entered into a perfect and complete contract in all its details, and after plaintiff loaded his cattle into the defendant's special train it was fully executed on his part. The written contract signed by plaintiff after the transportation had begun, if it was to have any effect as a substituted contract for the parol contract, must be supported by a fresh consideration; the plaintiff contends that such substituted contract to have any effect on the subject-matter must have been made while the old contract was executory on both sides. In this case the parol contract was not abrogated but acted on by both parties; the defendant relinquished no rights acquired by it to make a consideration supporting the substituted contract. Bishop on Contracts, secs. 68, 174, 768; *Roberts v. Wilkinson*, 34 Mich. 129; *Church v. Irons Works*, 15 Vroom, 129; *Cutter v. Cochran*, 116 Mass. 408. (2) The rule that all prior negotiations are merged in a subsequent written contract, does not

apply to a case like this, because the rights of the parties and their liabilities are fixed by having acted under the verbal agreement. *Bostwick v. Railroad*, 45 N. Y. 716; *Shelton v. Merchant's Disp. Co.*, 36 N. Y. Sup. Ct. 527; *Coffin v. Railroad*, 64 Barb. 379; *Railroad v. Boyd*, 91 Ill. 268; *Co. v. Cornforth*, 3 Col. 280; s. c., 25 Am. Rep. 757; *Mason v. Railroad*, 25 Mo. App. 473; Hutchinson on Carriers, sec. 89. (3) The plaintiff having paid the full rate for shipping his cattle to Chicago, such rate was the consideration for the full performance of the duty imposed by law upon defendant as a common carrier without any other contract than the law imposes. *McFadden v. Railroad*, 92 Mo. 343; Lawson on Contracts of Carriers, sec. 212 *Bissell v. Railroad*, 25 N. Y. 442; s. c., 82 Am. Dec. 369; *Seybolt v. Railroad*, 95 N. Y. 562; *Wallace v. Matthews*, 99 Am. Dec. 473; *Express Co. v. Nock*, 2 Duvall, 562; s. c., 87 Am. Dec. 510. (4) Having established the negligent delay of defendant and the other points admitted by defendant, the question arises, can the plaintiff recover damages consequent upon negligent delay, notwithstanding the terms of the written contract releasing the carrier from answering for damages for a delay of twelve hours beyond the time necessary to complete the transportation? Can the carrier be safely negligent for twelve hours under such a contract? We answer, no. 2 Kent's Commentaries, 607; *Boscowitz v. Express Co.*, 93 Ill. 523; *Railroad v. Lockwood*, 17 Wall. 357. The law does not allow a common carrier to be safely negligent for any time or to any degree; he cannot contract so as to shield himself from the result of slight negligence no more than he can for gross negligence. Lawson on Contracts of Carriers, sec. 31, *et seq.; Rosenfield v. Railroad*, 103 Ind. 121; s. c., 53 Am. Rep. 500; *Railroad v. Heaton*, 37 Ind. 448; *Railroad v. Selby*, 47 Ind. 471.

The stipulations in this contract cannot be held to apply to a case involving as a cause of action the negligence of the carrier, without making such stipulation, in effect to be an agreement for absolute exemption. *Moulton v. Railroad*, 31 Minn. 85; *Railroad v. Simpson*, 30 Kan. 645. (5) The rule is different if negligence is the cause of the delay; to illustrate: the stipulation referred to would excuse the defendant, if delay was caused by a strike, or a mob should tear up the track, or an incendiary fire should destroy a bridge, or any other cause not the fault of the carrier, and, if the stock had been delivered in a reasonable time under these circumstances, the delay would have been excusable. The carrier must however exercise due care to guard against delay. *Railroad v. Chapman*, 133 Ill. 96. It has been so held in Missouri. *Dawson v. Railroad*, 79 Mo. 300. (6) The loss or damages referred to in the fifth clause of the special contract relied on by respondent are such as accrue to the shipper by reason of injuries to the stock itself caused by such delay, and has no reference to other loss which the delay may cause the shipper, as for loss of market. A similar contract has been so construed by Judge Cooley. *Sisson v. Railroad*, 90 Am. Dec. 252.

Boyd & Murrell, for respondent.

(1) The written contract read in evidence was the only evidence as to what the contract for shipment was in this case, and parol evidence was inadmissible to contradict or vary it, or even to show that the train on which shipment was made was either a special train or a wild train. *Railroad v. Cleary*, 77 Mo. 637–8; *O'Brien v. Kenney*, 74 Mo. 125, and, cases cited; *Snider v. Adams*, 63 Mo. 376; *Brown v. Railroad*, 18 Mo. App. 568; Hutchinson on Carriers [Last Ed.] secs.

126–128. (2) The defendant had the right to limit its liability by special contract, and while it could not stipulate against liability for damages arising from its own negligence, it had the right to agree with plaintiff as to what would be a reasonable time in which the shipment should be made, and such agreement should be upheld unless the time agreed upon was actually an unreasonable time. *Dawson v. Railroad*, 79 Mo. 300; *McFadden v. Railroad*, 92 Mo. 348. (3) The evidence offered fails to show that plaintiff gave the notice required by the ninth clause of the written cantract. Such contracts in regard to notice of loss are valid and binding on the shipper, and proof of a compliance with this contract was essential to a recovery in this case. *Dawson v. Ralroad*, 76 Mo. 515; *Rice v. Railroad*, 63 Mo. 314; *Brown v. Railroad*, 18 Mo. App. 568–577; *McBeath v. Railroad*, 20 Mo. App. 445; *Thompson v. Railroad*, 22 Mo. App. 326.

ELLISON, J.—Plaintiff shipped from Saline county, Missouri, to Chicago, Illinois, ninety-six head of fat cattle over defendant's road for the purpose of selling on the market there. The cattle were negligently delayed, as is charged, so that instead of arriving at Chicago on the morning following the shipment in time for that day's market they did not arrive till late in the afternoon, too late for that day's market, in consequence of which plaintiff was compelled to place the cattle on the market of the next day, on which they were fifty cents per hundredweight lower in price than on the previous day, thereby entailing a loss to plaintiff. He brought this suit for the difference between what he could have sold his cattle for and what he did sell them for on the day following the day he expected to sell them. Plaintiff was forced to a non-suit on account of the ruling of the trial court on the admissi-

bility of testimony and failing to have the non-suit set aside has brought the case here.

I. Plaintiff contends that the contract of shipment which he made with defendant was verbal. Defendant claims that it was written. Plaintiff then says that though written, defendant is liable to the action brought. Plaintiff claims that, some days before the seventeenth day of November, 1891, he entered into parol contract with the defendant through its proper agents and officials, whereby it was mutually agreed that the defendant would send a special stock train to Mt. Leonard, a station on defendant's line of road, and take plaintiff's stock for shipment by special train from that point to Chicago, Illinois, in time for the market of November 18, 1891, said stock consisting of ninety-six head of fat cattle. Plaintiff under the terms of said agreement was to deliver said cattle for shipment on the morning of the seventeenth, and load them into said special train ready for shipment under said agreement. That in performance of said contract the defendant did, on the morning of the seventeenth day of November, 1891, send a special train to Mt. Leonard for the purpose of taking plaintiff's cattle under the contract to Chicago, Illinois, and plaintiff loaded the cattle into the special train for shipment and fully performed all the terms of the parol contract as far as he had agreed to do. That after the cattle had been received for transportation under said contract and the transportation had begun, and after the cattle had entirely passed out of the control of plaintiff, and just before the train containing the cattle had started on its way to Chicago, the station agent of the defendant at Mt. Leonard handed the plaintiff the special written contract spoken of to sign, and he signed it; that he did so without any new consideration moving to him in any way whatever.

Plaintiff offered evidence tending to show that defendant's servants negligently and without any necessity delayed the train at several intermediate points whereby it was delayed for ten hours. That the train which defendant was to furnish was to be a special through stock train to arrive at Chicago next day after shipment, in the morning, in time for that day's market. That instead of taking the train through defendant's servants made of it a local freight train receiving and transacting miscellaneous local business. That it had been and was at the time of his contract with defendant the custom of defendant to make up special stock trains such as this was and run through from stations in Saline and Lafayette counties to Chicago in twenty-one hours, which would be in time for the market of the day following shipment. That defendant undertook to carry plaintiff's cattle on this occasion through to Chicago in time for the market of the following day. Plaintiff offered also some additional matter of like character as well as the damage he sustained, all of which was excluded by the court.

Defendant pleaded in defense the terms and provisions of the written contract of shipment whereby it was agreed and stipulated that the reasonable time in which to transport said cattle was and should be the schedule time of freight trains on the time card of the defendant in force at said date of shipment, with twelve hours added thereto, not including time lost by stops for feed, water, rest or for proper and humane care of said cattle, and that if said stock should be transported within said time the plaintiff should not have any claim for damages for delay in transit, and that defendant should not be liable therefor, and that the time should be estimated from the time the train should start from Mt. Leonard. That said contract further specified that: "As to stock consigned to stock

yards the tracks of which connect with those of the first party or to any person at such yards, the second party agrees that all liability shall end when it delivers the cars containing the stock upon the tracks of said stock yards company; and the first party shall not be liable for any loss or damage that may thereafter arise to said stock from any cause." And that it was further specified in said contract, that: "It is further mutually agreed, that should loss or damage of any kind occur to the property specified in this contract, while such property is in the possession of said first party, the second party shall in five days after such loss or damage has accrued give notice in writing of his claim to the first party."

In our opinion when plaintiff accepted and signed the written contract under the circumstances shown before the train started without protest and without any other apparent reason than as a substitute for the original verbal contract at a time when he might have refused to sign or have withdrawn his cattle, he must be assumed to have agreed to the cancellation or anulling of the oral contract. A cancellation of an oral contract is a good consideration for the substituted contract. Bishop on Contracts, secs. 68, 768; *O'Bryan v. Kinney*, 74 Mo. 125.

II. The case then stands upon the written contract with its provisions of exemptions of liability on the part of defendant. Among those provisions as before stated is one stating that the parties agreed that schedule time and twelve hours additional should be considered reasonable time. If for any reason other than negligence defendant's train failed to arrive at Chicago within the time it customarily did with live stock trains from the same points, this provision would relieve the defendant. It is a provision relieving it from the strictness of the rule with which the common

law binds a carrier, but it will not relieve defendant of any act of negligence. The defendant is not to be allowed the benefit of a stipulation protecting it from its own negligence. This latter proposition in its general application will not be disputed. But defendant says that it is only required as a carrier to take the stock through in a reasonable time and that this provision is an agreement as to what shall be considered a reasonable time, discharging defendant if the transportation is made within such time. We are not inclined to adopt this view. The contract is not to deliver the cattle at Chicago in a time specified. We agree that the parties could make such a contract. But the contract was for a reasonable time. Now for an interpretation of this contract we must adopt the rule we ordinarily apply to the interpretation of contracts, that is, to look into the circumstance surrounding the transaction and connected with its making, including the object in view and the nature of the performance required. Plaintiff had a large lot of fat cattle for market at Chicago. He asked and obtained a special live-stock train for the purpose of transportation. It is known to all, and to none better than a carrier, that quick transportation of live stock to market is one of the chief considerations that enters into its shipment. It must be assumed that defendant in undertaking to convey fat cattle to the chief market of the country undertook to do so in the absence of a specified time, in as quick a time as could reasonably be made with such trains by the use of diligence and care. The provision in the contract that a certain time was a reasonable time, was not a provision to carry the cattle on that time. A fair interpretation of the contract, in view of the surrounding circumstances and the situation of the parties, is that the cattle were to be taken with all reasonable dispatch, and the

provision naming what should be a reasonable time was for protection against a failure to transport with all reasonable dispatch. And any failure short of the negligence of defendant would be covered by this provision. But defendant cannot be permitted to negligently delay plaintiff's cattle beyond the time it could well make, and did customarily make, and then excuse itself by showing that it still made the trip within the period agreed upon as a reasonable time. The effect of such excuse, if allowed, would be to permit such provision of the agreement to shelter and protect negligence in a common carrier, a thing which public policy forbids. A carrier ought not to be allowed under any circumstances to be negligent with impunity. Or, as it is expressed in *Rosenfeld v. Railroad*, 103 Ind. 123, "The law will not allow a common carrier to contract to be safely negligent."

When a common carrier, under the circumstances here offered to be shown, undertakes to transport fat cattle to market in a live-stock train, it must be held to have undertaken a business which calls for diligence and dispatch exactly commensurate with the trust it has accepted. It ought not to require any argument to show that a delay of such cattle destined for such purpose with the resulting shrinkage of weight, as well as from value arising from the fluctuations and uncertainty of the market, will result in great damage, and should not occur if it could reasonably be avoided by an exercise of care and diligence.

III. But defendant says that there was no offer of evidence to show that plaintiff had given notice of his damage within five days after arrival at Chicago, as the contract provides in the words hertofore set forth. In our opinion that clause of the contract relates to injury or damage to the cattle themselves while in the possession of the defendant, and would therefore cover the

shrinkage of the cattle. But such provision will not cover a damage which the shipper may suffer by a change in the market or the like. A change in the market has no reference to an injury to the cattle and cannot be included within the terms of the provision of the contract.

The further provision of the contract that the defendant should not be liable for "loss or damage which may arise to the stock from any cause," after it is delivered upon the tracks of the Stock Yards Company, can have no application to loss and damages of the character here sued for.

As a result of the foregoing we must reverse the judgment and remand the cause. All concur.

JOHN H. ALFTER, Respondent, v. HAMMITT & MORRISON, Appellants.

Kansas City Court of Appeals, May 15, 1893.

1. **Practice, Appellate:** ABSTRACT: PREMATURE ACTION. Where the original petition nor the date of its filing is not in the abstract, the appellate court cannot tell what facts were relied on as a cause of action, nor determine that the action was prematurely brought; and the fact that an amended and supplemental petition was filed rather justifies the inference that the original petition did state a cause of action, as the amended and supplemental petition could only state such facts as had transpired after the commencement of the suit and reinforced the original cause of action.

2. **Practice, Trial:** CONTINUING DAMAGES: RECOVERY: SUPPLEMENTAL PETITION. The cause of action being complete when suit is brought, continuing damages may be recovered in the one suit, and the additional actionable facts may be brought upon the record by an amended and supplemental petition.

3. ———: EVIDENCE TO SUPPORT VERDICT. *Held*, the evidence in this case was sufficient to enable the jury to make an intelligent and probable estimate of the amount of the timber left on plaintiff's land by the defendant.

4. ———: EVIDENCE: FRAUD. *Held*, on the evidence there was no element of fraud or misrepresentation as to the situation and condition of plaintiff's land.

5. ———: PRIMA FACIE CASE: MEASURE OF DAMAGES: HARMLESS ERROR. By evidence tending to show a certain quantity of timber left on plaintiff's land which defendants had bound themselves to make into ties and to pay a certain price per tie therefor, the plaintiff had made a *prima facie* case. From the damages thus calculated should be subtracted the value, if any, of the timber left; and the burden was on the defendants to show such value and they were not harmed by an instruction directing such subtraction, and harmless error will not reverse.

Appeal from the Morgan Circuit Court.—HON. J. R. EDWARDS, Judge.

AFFIRMED.

Christian & Wind, for appellants.

(1) As the term during which Hammitt & Morrison had a right to make ties out of the oak timber on the land had not expired at the time of the institution of the suit, no cause of action for failure to make ties out of the timber could have accrued. *Collins v. Monterney*, 3 Ill. App. 182. The filing of an amended petition after expiration of contract period could not operate to include a cause of action which did not exist at institution of suit. *Davis v. Clark*, 40 Mo. App. 515; *Cook v. Redman*, 45 Mo. App. 397–402. (2) The evidence of the quantity of tie timber left on the land was not sufficient to base a verdict on. It was a mere guess and the verdict should not be sustained. *Wilson v. Railroad*, 32 Mo. App. 685. The admission of the witnesses' opinions without requiring them to state a basis for it, is error. *Fitzgerald v. Hayward*, 50 Mo. 521; *Eyerman v. Sheehan*, 52 Mo. 223; *Murphy v. Murphy*, 22 Mo. App. 24–25; *Belch v. Railroad*, 18 Mo. App. 85. (3) The contract required Alfter to furnish Hammitt

& Morrison a site adjoining the Osage river on his land for the establishment of a mill and a banking ground, and as it is conceded the land did not adjoin the Osage river plaintiff cannot recover and is liable for any damages caused by the misrepresentation and consequent breach. (4) There was no evidence of the value of the timber left standing and that left lying, and as that had to be shown before it could be ascertained whether plaintiff was damaged he could under no circumstances recover more than nominal damages. *Kingsland & Ferguson Co. v. St. Louis Iron Co.*, 29 Mo. App. 539, 540, 541. It was therefore error to instruct the jury, if they found for plaintiff, to return a verdict for the difference between the contract price and the value of the timber. *Harty v. Railroad*, 95 Mo. 372; *State v. Parker* 106 Mo. 225; *Martin v. Railroad*, 105 Mo. 353; *State v. Hope*, 102 Mo. 410; *State v. McKenzie*, 102 Mo. 620; *Brown v. Railroad*, 101 Mo. 497. It was error for the court to leave the jury to infer that the timber was of no value.

B. R. Richardson and *Draffen & Williams*, for respondent.

(1) It was competent for the plaintiff, by his amended and supplemental petition, to state facts showing a continuation of the wrongs complained of down to the filing of said amendment, and to recover damages for the injuries sustained to the time of filing said supplemental petition. This rule applies in legal as well as in equitable actions. *Childs v. Railroad*, 17 S. W. Rep. 954–958; *Nave v. Adams*, 17 S. W. Rep. 958. (2) The original petition is not set out. The action was predicated upon the contract sued upon in the second amended and supplemental petition. The amended petition alleged that the defendants continued

in possession of the land after the bringing of the suit, and down to the filing of the first amended petition, and set out various breaches that occurred before the filing of the supplemental petition. No objection was taken to this pleading by the defendants. There was no motion to strike it out. It is too late now to raise the objection, that the amendment was brought in a cause of action not in the original petition and was really the beginning of a new suit. *Scoville v. Glassner*, 79 Mo. 449; *Campbell v. Seeley*, 43 Mo. App. 23; *Hubbard v. Quisenberry*, 32 Mo. App. 459. (3) Witnesses who had made a careful examination of the timber and had inspected it with a view of ascertaining the number of ties that could have been made, and who were judges of the character of timber fit for ties, were properly permitted to give to the jury their estimate of the quantity of ties that could have been made from the timber left on the ground. In no other way could this be arrived at. It certainly was not necessary for plaintiff to have the timber cut down and made into ties in order to establish the amount of his loss. 1 Sedgwick on Damages [8 Ed.] sec. 170, p. 245; *Eyerman v. Sheehan*, 52 Mo. 221. (4) The land was fully described in the contract. There is no claim that the plaintiff fraudulently pointed out the wrong lines. *Dunn v. White*, 63 Mo. 181. (5) The court laid down the correct rule as to the damages. All the facts were laid before the jury. The evidence disclosed the quantity of timber on the ground, its situation and condition. It was not necessary to call a witness to express an opinion as to its value although the plaintiff offered to do so, and the defendent objected, and on account of this objection, the offer was withdrawn. *Gibbons v. Railroad*, 40 Mo. App. 146–152; *City of St. Louis v. Rankin*, 95 Mo. 189; *City of Kansas v. Streit*, 36 Mo. 666; *Bowen v. Railroad*, 95 Mo. 268–275. "A party cannot assign for

error that which he himself has invited the court to commit." *Waddingham v. Waddingham*, 27 Mo. App. 596; *Atkisson v. Taylor*, 34 Mo. App. 442. If the defendants, however, wished to exempt themselves from part of the damages, for the reason that plaintiff had the benefit of the timber left on the ground, and that it was of any special value, they ought to have shown it. *Pond v. Wyman*, 15 Mo. 175.

SMITH, P. J.—This was a suit to recover damages for the breach of a contract for the sale of railway tie timber. The plaintiff had judgment and the defendants have appealed.

The first ground upon which the appealing defendants assail the judgment is that as the time allowed by the contract in which defendants had the right to make ties out of the timber on plaintiff's land, had not expired at the time of the commencement of the suit, therefore no cause of action for non-performance had then accrued. The original petition is not contained in the defendant's abstract, so that it is impossible for us to tell what facts were therein stated and relied on as constituting a cause of action on the contract, nor does it anywhere appear at what particular date the suit was commenced. We cannot say from an examination of the plaintiff's amended and supplemental petition which is contained in the defendant's abstract of the record that it states a cause of action which did not exist at the commencement of the suit; for as we have already stated we have no means of ascertaining when that was. For aught that appears by the record the suit may not have been commenced until after the expiration of the timber contract. But if the suit was brought before the expiration of the contract as contended by defendants we cannot infer that it stated no breach of the contract for which dam-

ages were recoverable, but the fact that plaintiff filed an amended and supplemental petition rather justifies the inference that it did state facts constituting a cause of action on the contract, because such amended and supplemental petition could only state such facts as had transpired after the commencement of the suit as strengthened or reinforced the original cause of action. *Nave v. Adams*, 107 Mo. 421.

We must assume that the plaintiff's original petition stated a cause of action on the contract for which damages were recoverable and that the cause of action was complete when the suit was brought. The amended and supplemental petition doubtless stated no more than such additional acts of nonperformance of the conditions of the contract, which increased the damages as had transpired between the commencement of the suit and the filing of such amended and supplemental petition.

The cause of action being complete when the suit was brought and the continuing damages flowing from the one cause of action, according to our ruling in *Cook v. Redman*, 45 Mo. App. 397, could be recovered in one suit only. The meaning of this is as we think that when other and additional actionable facts of the same kind and belonging to the same group and cognate to those constituting the cause of action stated in the original petition have come into existence since the commencement of the suit they may be brought on the record by an amended and supplemented petition, and we may infer that nothing more than this was accomplished by the amended and supplemental petition in this case.

We cannot say as defendants insist we shall that there was no evidence of the quantity of timber left on the ground by defendants sufficient to support the verdict. The evidence of no less than three witnesses

tended to show that they went upon the land after the expiration of the defendant's contract and made a careful estimate of the number of ties that could have been made out of the timber left by the defendants. The evidence placed before the jury facts and circumstances which had an inevitable tendency to show damages and which was sufficient we think to enable them to make an intelligent and probable estimate of the amount of the same. This was all that is required by the law. 1 Sedgwick on Damages, sec. 170; *Eyerman v. Sheehan*, 52 Mo. 221.

The land was fully described in the contract and the plaintiff furnished defendants all that they required. The boundary lines of the land were shown the defendants before the contract was entered into, so that there was no element of fraud or misrepresentation in the transaction. In the light of the circumstances under which the contract was made as shown by the evidence, the slough running up to the land from the river was regarded as the river or a branch or arm of it. The defendants were fully advised of the situation of the land as respected the river at the time they made the contract and so have nothing to complain of on that account.

The defendants finally contend that there was no evidence introduced which tended to prove the value of the timber left on the land, and therefore it was error for the court to instruct the jury as it did, that the measure of damages was the difference between the contract price and the value of the timber so left. When the plaintiff adduced evidence tending to show that the defendants had left a certain quantity of the timber on the land which they had bound themselves under the contract to make into ties and to pay a certain price per tie therefor, the plaintiff had made out his *prima facie* case. From the damages which the plaintiff would

thus be entitled should be subtracted the value, if any, of the timber left on the land. The burden of showing this was properly on the defendants. *Pond v. Wyman*, 15 Mo. 175. If neither the evidence of the plaintiff nor that of the defendants showed that the timber was of any value the defendants were not hurt by the instruction. It might have been harmful to plaintiff but he is not complaining.

It seems there was no evidence introduced to justify the giving of that part of the instruction in respect to the reduction of the plaintiff's damages, yet this error was harmless and for which we cannot disturb the judgment.

With the concurrence of the other judges the judgment will be affirmed.

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The State of Missouri, Respondent, v. Ed Wellott, Appellant.

Kansas City Court of Appeals, May 15, 1893.

1. **Sunday Law**: DEFINITION: NECESSARY WORK: CONVENIENCE: UNFORESEEN: SHAVING. A definition of necessary work meeting the requirements of different cases is hardly possible, but it is not enough that it should be more convenient to do the work on Sunday than other days; it should be unforeseen, or, if foreseen, such as could not be provided against, and the necessity must not be of the party's own creation. A party may, however, shave himself as he would take a bath or wash his face.

2. ———: EXCEPTION: BURDEN OF PROOF. The state makes a *prima facie* case by proof that the defendant was prosecuting his work, not apparently a work of necessity; if it was work of necessity such as comes within the exception to the statute, the burden to show it is cast upon the defendant.

3. ———: BARBER'S WORK. The usual employment of a barber followed on Sunday as during other days of the week is the performance of work prohibited by the Sunday statute of Missouri.

4. **Court's Duty**: POLICY OF LAW. Courts do not sit to say what the law ought to be, but it is their duty to declare the law as they find it, leaving its wisdom and policy to the legislature.

Appeal from the Randolph Circuit Court.—HON. JOHN A. HOCKADAY, Judge.

AFFIRMED.

A. H. Waller and *Will A. Rothwell*, for appellant.

It is not disputed that appellant shaved witnesses Smith and Fox on Sunday. The question is whether or not under the facts and circumstances of this case the work done is within the exception provided in the statute. 1 Revised Statutes, 1889, sec. 3852, p. 919. (2) Said section 3852 unlike similar statutes in many other states, and the English statute of 26 Car. c. 7, sec. 1 p. 2, simply prohibits persons from performing labor on Sunday other than works of necessity or charity, and is not directed in terms against the prosecution of one's special avocation on Sunday. Therefore the averment of the fact in the indictment that appellant labored "at his trade as a barber" is surplusage. The pleader seems to have followed a precedent applicable to the English and similar statutes. *Commonwealth v. Dextra*, 143 Mass. 28; 8 N. E. Rep. 756. (3) The work done by appellant under the circumstances of this case was a work of necessity. Witnesses Smith and Fox could have legally shaved themselves, and being unable to do so another could legally perform this labor for them. It is the character of the work under our statute that renders the act criminal. *Stone v. Graves, Adm'r.*, 145 Mass. 353; 13 N. E. Rep. 906; *Commonwealth v. Waldman*, 21 Atl. Rep. 248; Law Rep. Ann. 563. The court erred in refusing the instruction asked by appellant. *Ungericht v. State*, 119 Ind.

379; *Edgerton v. State*, 67 Ind. 588; *Spaith v. State*, 22 Weekly Law Bulletin (Ohio), 323; 2 Bishop's New Criminal Law [8 Ed.] sec. 958, p. 557.

Frank F. Wiley and *Wm. Palmer*, for respondent.

(1) Indictment is drawn under section 3852, Revised Statutes, 1889, p. 919, and charges the offense in the language of the statute and according to approved forms and is sufficient. Kelly's Criminal Law; *State v. Fissing*, 74 Mo. 72; *State v. Anderson*, 81 Mo. 78; *State v. Miller*, 93 Mo. 263; *State v. West*, 21 Mo. App. 309. (2) State made a *prima facie* case by proving that defendant performed labor on Sunday not apparently a work of necessity or charity, and the burden was then upon defendant to show that the labor done was within the exception of the statute. *State v. O'Brien*, 74 Mo. 549, and authorities cited; *State v. Elam*, 21 Mo. App. 290; *State v. Taylor*, 73 Mo. 53. (3) Shaving customers on Sunday by a barber is not a "work of necessity or charity" and not within the exceptions of the statute prohibiting labor on Sunday. *Commonwealth v. Waldman*, 21 Atl. Rep. 248; 8 Pa. Co. Ct. Rep. 449; *Cleary v. State*, 19 S. W. Rep. 313; *State v. Frederick*, 45 Ark. 348; *State v. Schuler*, 23 Weekly Law Bulletin, 450; *Ungericht v. State*, 21 N. E. Rep. 1082; 119 Ind. 379; *Commonwealth v. Jacobus*, 1 Pa. Leg. Gaz. Rep. 491; *Commonwealth v. Williams*, 15 Cent. Law Jour. 145; *Norris v. State*, 31 Ind. 189; *Phillips v. Innes*, 4 Clark & Fin. 234; Bishop on Statutory Crimes, 245.

GILL, J.—Defendant was indicted, tried and found guilty of working at his trade as barber on Sunday contrary to the statute; and from a judgment thereon he has appealed to this court.

I. The section of the statute under which the defendant is prosecuted reads as follows: "Every person who shall either labor himself or compel or permit his apprentice or servant or any other person under his charge or control to labor or perform any work other than the household offices of daily necessity or other works of necessity or charity * * * on the first day of the week, commonly called Sunday, shall be deemed guilty of a misdemeanor and fined not exceeding $50." 1 Revised Statutes, 1889, sec. 3852.

The evidence unquestionably shows that on the Sunday in question the defendant was engaged in running his barber shop at Moberly in the ordinary manner; was himself working at his trade shaving customers as they came in. There were but two witnesses on the stand and they agree that the defendant was engaged at his labors as usual, and that they noticed no difference in the customary appearance of things, except that perhaps the blinds were down. These two parties were shaved, and others were served by the defendant before and after such witnesses were. Clearly then defendant was engaged in work or labor on the statutory Sabbath day. Was such work within the exception, was it a work of *necessity* such as the law permits? Defendant's counsel insists that it was, and herein rests the sole defense. The judge below trying the case without a jury held that the work so done by defendant did not come within the exception, was not a necessity. We think the decision was correct under the law.

It is hardly possible to give such a definition of *necessary* work as will meet the requirements of different cases. The futility of the effort to gather this from adjudicated cases will be readily seen by a reference to the decisions. Ringgold's Law of Sunday, pp. 230, *et seq.*, and cases cited. It is not enough that it shall

be more *convenient* to do the work on Sunday than on other days of the week. *Phillips v. Innes*, 4 Cl. & F. (Eng. H. L.) 244. Generally speaking it ought to be an unforeseen necessity, or if foreseen such as could not reasonably have been provided against. *State v. Ohmer*, 34 Mo. App. 115; *Ungericht v. State*, 119 Ind. 381. Neither must the necessity be of the party's own creation. *Bucher v. Railroad*, 131 Mass. 156. Now as to the act of shaving the two witnesses, Smith and Cox, the defendant was little more than serving the mere convenience of his customers; it would seem to have been a necessity of their own creation. But, however this may be, the evidence shows that the defendant on the Sunday in question was engaged in barber's work for various other people. Indeed defendant was prosecuting his trade and performing his customary work for all who applied at his place of business. The test of *necessity* in individual cases was not considered. The state's case was made *prima facie* by proof that defendant was then and there prosecuting his work, not apparently a work of necessity; if it was work of necessity, such as comes within the exception to the statute, the burden to show it was cast on the defendant. *Troewert v. Decker*, 51 Wis. 46; *Fleming v. People*, 27 N. Y. 329; *Bosworth v. Swansey*, 10 Met. 363; *State v. Frederick*, 45 Ark. 347; *Cleary v. State*, 19 S. W. Rep. 313; *State v. Elam*, 21 Mo. App. 290; *State v. O'Brien*, 74 Mo. 549.

The argument of defendant's counsel, to the effect that as one might shave himself on the Sabbath day without infringing the law the same party might lawfully secure the services of another for the like purpose, is more specious than sound. A party may shave himself as he would take a bath or wash his face and it would not be understood as labor or work, but when the barber opens up his shop and there follows his

usual worldly employment it is quite a different matter, he is engaged in *work* as ordinarily understood. *Commonwealth v. Waldman*, 140 Pa. St. at p. 98; *Phillips v. Innes*, 4 Cl. & F. 244.

From what is here said it will be seen that we approve the court's action in refusing the declaration of law offered by defendant.

Our conclusion then is, that the usual employment of a barber followed on Sunday as during other days of the week is the performance of work prohibited by the statutes of this state, and that defendant under the circumstances of the case was clearly guilty, as was declared by the lower court.

It is entirely improper for us to animadvert on the propriety of this statute. We are not here to say what the law ought to be or to assert that barber work *ought* to come within the exceptions to the law for the observance of the Sabbath. It is our duty to declare the law as we find it, and leave the wisdom or policy of the statutes to the legislative branch of government.

The judgment will be affirmed. All concur.

THE CITY OF ST. JOSEPH to the Use of THE SAXTON NATIONAL BANK, Appellant, v. ISRAEL LANDIS, Appellant.

Kansas City Court of Appeals, May 15, 1893.

1. **Construction:** MUNICIPAL IMPROVEMENT: RULES: INSTRUCTION: ABSURD LAW. The authority to charge private property with the costs of municipal improvement must be confined within the limits prescribed by charter and ordinances passed in conformity therewith. Such proceedings are *in invitum*, purely statutory and to be strictly pursued; but a construction will not be adopted which will defeat the act in whole or in part if it will admit of a construction which will sustain it. And, if the intent can be gathered from the whole act, it must be carried out though a literal interpretation must be rejected, and the legislature will never be presumed to have intended to enact an absurd law.

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2. ———: REPETITION OF DESCRIPTIVE WORDS. An ordinance provided for the building of six sewers, and the first three were specified to be made of vitrified clay pipe; the fourth to be "a sewer made of pipe," and the fifth and sixth to be "a pipe sewer." *Held*, it was the intention that all the sewer pipes should be made of the same material, vitrified clay, since there was no negative exception in the ordinance.

3. ———: TIME OF PUBLICATION OF NOTICE TO LET CONTRACT: SUNDAY. An ordinanee required an advertisement for ten days for proposals for doing work. It appeared in the issue of September nineteenth and continued daily until the issue of the twenty-eighth from which it was omitted, but appeared on the twenty-ninth and also thirtieth, the day on which the contract was let. *Held*, the publication was for the required time, and in counting statute time Sunday is not excluded.

4. **Practice, Appellate**: OBJECTIONS ABOVE BUT NOT BELOW. Objections to an ordinance for the construction of a sewer which does not appear in either the pleadings, evidence or instructions, will not be considered on appeal.

5. **Municipal Improvements**: ORDINANCE: SPECIFICATION: PERFORMANCE. An ordinance for municipal improvement is not bad because it does not refer to any plan or specification when the general ordinances provide for all the details including the preparation of plans, specifications and contract by the city engineer, which are to be by him referred to the council for its approval. The courts do not require a literal compliance with ordinances for local improvements. Following *Gibson v. Owen*, 110 Mo. 445.

6. ———: CONNECTIONS OF SEWER. *Held*, the evidence and finding establish a sufficient connection of the sewer in question.

7. ———: SEWER ON PRIVATE PROPERTY. It is no defense to a tax bill for the construction of a sewer that it was built on private property where it was so built with owner's approval and consent, as he would be estopped to object or oust the city.

Appeal from the Buchanan Circuit Court.—HON. HENRY M. RAMEY, Judge.

REVERSED AND REMANDED *(with directions)*.

Porter & Woodson, for appellant.

(1) The entire ordinance should be considered to ascertain the legislative intention. Being ascertained,

the intention will control the interpretation of all the parts. Sutherland on Statutory Construction, sec. 218, 241. (2) The specifications are so full as to leave absolutely no doubt as to the most minute details for the construction of pipe sewers. The sufficiency of the same form of specifications was considered by this court in the case of *Brick & Terra Cotta Co. v. Hull*, 49 Mo. App. 433, and held sufficient. *Morley v. Weakley*, 86 Mo. 151. (3) The publication of notice to bidders was sufficient. In computing statute time Sunday is not to be excluded. *Bank v. Stumpf*, 73 Mo. 315; *State v. Green*, 66 Mo. 645; *Ex Parte Dodge*, 7 Cowan, 147; *Andersen v. Baughman*, 6 Mich. 298; *Franklin v. Holden*, 7 R. I. 215. If we concede that the public sewer with which the district sewers for the construction of which these tax bills were issued was not completed at the date of the ordinance authorizing the district sewers, the tax bills are not invalidated for that reason. *St. Joseph ex rel. v. Wilshire*, 47 Mo. App. 130. Defendant's third point is not sustained by the evidence. There was no evidence nor any pretense that any of the sewers were constructed over private property except that of Doctor Schwab, and he not only consented but solicited it. *McClelland v. Railroad*, 103 Mo. 310, 311, and authorities there cited. If the trial court is sustained in his ruling we will remit any excess which may be found by a computation.

James W. Boyd and *Benj. Phillips*, for respondent.

(1) It must be conceded that the tax bills are void if the contract authorizing the work for which they were issued is a void contract. *Keating v. City of Kansas*, 84 Mo. 419; *Cole v. Strainka*, 37 Mo. App. 427; *Construction Co. v. Geiss*, 37 Mo. App. 509.

The contract in this case is void for several reasons: "It is a well settled principle that authority to charge private property with the cost of municipal improvements is confined within the limits prescribed by the charter and ordinances passed in conformity therewith; that proceedings to this end are *in invitum* purely statutory, and therefore to be strictly pursued." *Cole v. Strainka*, 37 Mo. App. 427; *Kiley v. Oppenheimer*, 55 Mo. 374; *Leach v. Cargill*, 60 Mo. 316; *Construction Co. v. Geiss*, 37 Mo. App. 509. The ordidances pertaining to the letting of the contract required a notice to bidders to be published for ten days prior to the awarding of the contract. The publication of this notice, in strict accordance with the terms of said ordinances, was a condition precedent to the right of the city to make the contract. *Kiley v. Oppenheimer*, 55 Mo. 374; *Brady v. New York City*, 20 N. Y. 312; Elliott on Roads & Streets, p. 425, and cases cited in notes. The notice in this case was not published for the length of time required by the ordinances. It was published only nine times in all. The publication on the two Sundays cannot be counted. *Scammon v. Chicago*, 40 Ill. 146; Revised Statutes, 1889, secs. 3852, 3853, 3854, 3855. Neither was the notice published in consecutive issues of the official paper. Under the terms of the ordinances referred to and the construction put upon them by the city itself, it was absolutely essential that the publication should be made on ten consecutive secular days. *McCurdy v. Baker*, 11 Kan. 111; *Whitaker v. Beach*, 12 Kan. 492; *Rounsville v. Hazen*, 33 Kan. 71. The contract was never legally awarded. Ordinances of City of St. Joseph, *supra; Saxton v. Beach*, 50 Mo. 488; *Saxton v. St. Joseph*, 60 Mo. 153; *Irwin v. Devors*, 65 Mo. 625; *Cape Girardeau v. Fougen*, 30 Mo. App. 551; *Worthington v. Covington*, 82 Ky. 265; *Leach v. Cargill, supra; State v. Bank*, 45

Mo. 528; *Dubuque v. Wooton*, 28 Iowa 571; *Lowell v. Wentworth*, 6 Cush. 221. The material to be used in the construction of three of the sewers of this system was not provided for in the ordinance. This renders the ordinance and contract void, said sewers being a material and substantial part of the entire work. *St. Joseph ex rel. v. Wilshire*, 47 Mo. App. 125; *Smith v. Duncan*, 77 Ind. 92, and cases cited; *Kankakee v. Potter*, 119 Ill. 324; *Sterling v. Galt*, 117 Ill. 11; *Wells v. Burnham*, 20 Wis. 119; *Kneeland v. Milwaukee*, 18 Wis. 411; *Ogden v. Town of Lake View*, 13 N. E. Rep. 159; *People v. Maher*, 9 N. Y. Sup. 94. The ordinance and contract are void for the further reason that the ordinance did not specify or show the grade of the proposed sewers, nor the depth of the excavations of the trench, nor any other matter connected with the construction of the sewers except the dimensions. Nor does the ordinance refer to any plan or specifications; nor is the paper claimed to be the specifications complete or even definite as to these matters. All these matters require the exercise of legislative powers, and cannot be delegated to the city engineer. *City of St. Joseph ex rel. v. Wilshire, supra; Wells v. Burnham*, 20 Wis. 119; *Kneeland v. Milwaukee*, 18 Wis. 411, star page, and cases cited in subdivision (g) *supra*. The plaintiff's evidence shows that there were no plans and specifications on file in the city engineer's office. Even if it could be said that the blank form of contract was specifications, still there were no plans. This renders the bills void. *Kneeland v. Milwaukee, supra*. The district sewers following the terms of the ordinance do not connect with a public sewer or other district sewer or with the natural course of drainage. Revised Statutes, 1889, sec. 1429. The tax bills showed on their face that they were for sewers to be constructed, and that they were made out prior

to the completion of the work. They are therefore void. Revised Statutes, 1889, sec. 1429.

SMITH, P. J.—In this case both plaintiff and defendant have appealed from the judgment of the circuit court. We will first notice the grounds of the plaintiff's appeal. It is conceded that the plaintiff is a city of the second class, under the statute.

The plaintiff city by an ordinance under the authority conferred upon it by statute (section 1429, Revised Statutes) established sewer district number 27. And by a subsequent ordinance it was provided in section 1 that: "The city engineer is hereby directed to cause district sewers to be constructed within a portion of sewer district number 27, with all the lateral sewers, inlets, manholes, junction pieces and other appurtenances necessary to render such sewers complete and efficient, said sewers being by the common council deemed necessary for sanitary and draining purposes. Said sewers shall be located as follows, viz: A sewer commencing at the manhole on Nineteenth and Mulberry streets, thence east on Mulberry street to Twentieth street, thence south on Twentieth street to the alley north of Faraon street, to be made of vitrified clay pipe, eighteen inches in diameter on Mulberry street and twelve inches in diameter on Twentieth street. Also a sewer commencing at same manhole as above, thence south on Nineteenth street to the south line of lot 7, block 9, Harris's addition, to be made of vitrified clay pipe, twenty-one inches in diameter from Mulberry street to Faraon street, fifteen inches in diameter from Faraon street to Jule street, and twelve inches in diameter south of Jule street; also a sewer made of vitrified clay pipe, commencing on Eighteenth or Kemper street at the alley between Clay and Mulberry streets, thence east on said alley to Twentieth street, to be eighteen inches in

diameter from point of beginning to Nineteenth street and fifteen inches in diameter from Nineteenth to Twentieth street; also a sewer made of pipe twelve inches in diameter, commencing on Twentieth street, at alley in block 7, Kemper's addition, thence north on Twentieth street to north alley in Hedenberg's first addition, thence east on said alley to the line between lots 4 and 5 in said addition; also a twelve-inch *pipe* sewer commencing at same place as last named sewer, thence south on Twentieth street to south alley in Hedenberg's first addition, thence east on said alley to the line between lots 17 and 18 in said addition. Also a *pipe sewer* fifteen inches in diameter, commencing at Nineteenth and Faraon streets, thence east on Faraon street to alley in block 7, Harris's addition; thence south on said alley to south line of Jule street."

The contract for building these sewers was awarded to Owen Danaher, who constructed the same, and for which the tax bills sued on were issued to him. The bank holds the tax bills under an assignment from Danaher. The sewers were all made of vitrified clay pipe. The total cost of all the sewers under the contract was shown to be $4,440.60, and that three of them, the materials for which it is contended is not specified in the ordinance authorizing their construction was $865.22. The court at the trial instructed the jury on its own motion to find for the plaintiff on each count of the petition the amount of the tax bills less the proportionate cost of the three sewers mentioned in the evidence for the construction of which no material was specified in the ordinance.

The plaintiff contends that the court erred in thus instructing the jury. Whether the court erred or not in its direction to the jury depends upon the construction to be given to the ordinance providing for the construction of the sewers. The plaintiff contends that

the context of the ordinance shows that it was the intention of the law-making power of the plaintiff city that all the sewers therein required to be constructed should be of "vitrified clay pipe." It is as the defendants suggest the well settled law of this state that authority to charge private property with the cost of municipal improvements must be confined within the limits prescribed by the charter and ordinances passed in conformity therewith; that proceedings to this end are *in invitum*, purely statutory and, therefore, to be strictly pursued. It is equally settled that a rule of construction will not be adopted which will defeat the act in whole or in part if it will admit of a construction which will sustain it. Sutherland on Statutory Construction, 332. The object of judicial tribunals is to carry out the intent of the law, and if such intent can be gathered from the whole act it must be carried out though a literal interpretation must be rejected. The presumption to be indulged in cases of this kind is, that the legislature never intended to enact an absurd law incapable of being intelligently enforced. *Bermingham v. Bermingham*, 103 Mo. 345; *Railroad v. Brick Co.*, 85 Mo. 329; *Ex Parte Marmaduke*, 91 Mo. 254; *State v. Hays*, 81 Mo. 585.

The ordinance in question plainly shows upon its face that it was the intention of the common council by its passage to provide for six pipe sewers in said district number 27. Of what material were they to be made? It is specified in the ordinance that the first three sewers shall "be made of vitrified clay pipe," and the fourth is required by the specifications of the ordinance to be a "sewer made of pipe," and the fifth and sixth to be "a pipe sewer" of certain dimensions. Now if the words, "vitrified clay," had preceded that of "pipe" in describing the material of which the first of the sewers mentioned in the ordinance were to be

made, and had not been repeated in the specifications of the other sewer pipes which followed, it would hardly be doubted that the descriptive words "vitrified clay" was intended to be implied as preceding the word "pipe" or "sewer pipe" wherever it occurred in the specifications for the other sewers. We think that the repetition of the words describing the material of which the first three pipe sewers were to be made is not different than if they had not been repeated at all, and that it was the intention of the common council that all of the sewer pipes should be made of the same material, and especially so since there is no negative exception contained anywhere in the ordinance.

If we adopt a construction which presumes that the common council never intended to pass an ordinance incapable of a sensible and practical operation, it will be in furtherance of such construction if we presume that the descriptive words "vitrified clay" are to be implied wherever needed in said ordinance to give effect to what we think was the intent of the common council, that is to say, that all of said sewer pipes should be made of the material said words describe.

This construction will harmonize all the provisions of said ordinance and render the same operative, which otherwise would not be the case. The exercise of this judicial license we think is allowable under the authorities we have cited. The construction of the officers of the city whose duty it was to execute said ordinance was the same as we have concluded it should be, as shown by the contract and specifications for doing the work. Taking this construction as correct, it necessarily follows that the instruction of the court to the jury was error. It should have declared that the plaintiff was entitled to recover on each count the whole amount of the warrant upon which it was based with the interest that had accrued thereon.

We will now turn our attention to the grounds of the defendant's appeal. The first of these is that the ordinance of the city providing for the construction of sewers for which the tax bills in suit were issued required the city engineer "to advertise for ten days for proposals for doing the work." It is conceded that the city engineer published the notice in the official paper of the city, and that the first publication thereof was made in the issue of September the 19th, and continued until the issue of the 28th, from which it was omitted, but was renewed in the issues of the 29th and 30th of the month, the day the contract was let. The question thus presented is, was the notice published for the time required by the ordinance? A like question arose in *Clopton v. Taylor*, 49 Mo. App. 117, where upon the authority of *German Bank v. Stumpf*, 73 Mo. 315, it was ruled in the affirmative.

Clopton v. Taylor also answers the defendants' further objection that in counting the time of the publication that the two Sundays included therein should have been excluded. It was held long ago in this state, that in counting statute time Sunday was not to be excluded. *State v. Green*, 66 Mo. 631. We think so far as any objection is raised in the record before us the contract was legally awarded.

The defendant next insists that said ordinance is void for the reason that it did not specify the grade of the proposed sewers nor the depth of the excavations nor to any plan or specification. It will be observed by reference to the record that there was no issue as to the grade of the sewers, nor as to the depth of the excavations to be made therefor. It does not appear that this objection was interposed either in the pleadings, evidence or instructions.

As to the other objection that the ordinance does not refer to any plan or specification, it is sufficient to

say that the general ordinances of the city provide that whenever any sewer is authorized by ordinance it shall be the duty of the city engineer to advertise for bids and let out the contract for the work of construction in the same manner as other city work is let out, and prepare the plans, specifications and contract for the same which shall be reported by him to the city council for approval. The duty thus enjoined seems to have been fully performed by that officer.

The specifications, a copy of which was incorporated in the contract for doing the work, were quite elaborate and minute in every particular. It is difficult to see how it could have been more so. Besides this the supreme court of this state in the recent case of *Gibson v. Owen*, 110 Mo. 445, which was in many essential particulars very like the case at bar, declared that this "court has never required a literal compliance with ordinances providing for such local improvements. "The principle thus announced affords a complete answer to most of the objections which the defendant has interposed in this case. Nothing more need be said.

The evidence tended to show, and the jury must have found, that the sewers connected with the main sewer of the city and that the latter ran to the Missouri river, which was the natural course of drainage. This was all that was required by the statute. Sec. 1429.

The objection that the tax bills show upon their face that they were issued for sewers to be constructed and were made out prior to the completion of the work was not taken at the trial, or if so no exceptions were preserved to the action of the court in overruling the same, so that we cannot now notice that matter here.

The defendant further challenges the judgment on the ground that one of said sewers was built over private property. The court by an instruction directed

the jury, in effect, that if they found from the evidence that said sewers or any part of them were constructed on private property without the authority or consent of the owner thereof that the plaintiff was not entitled to recover. The undisputed evidence showed that one of the sewers was built across the private lot of Dr. Schwab with his previous approval and consent. He would now be estopped to question the plaintiff's right to occupy his lot with its sewer under the facts and circumstances detailed in the evidence. As owner of the property he not only consented to the use of it by the city, but stood by and acquiescingly saw an expensive sewer constructed through his lot which became a part of the public sewer system of the city. He testified at the trial that he consented to the location of the sewer and that he had not nor would not object to the use of his lot for that purpose. Under the well settled law of this state he would be estopped after this from treating his consent as a nullity or maintaining ejectment against the city for the recovery of the property. *Village v. Borden*, 94 Ill. 26-34; *Provott v. Railroad*, 57 Mo. 256; *Baker v. Railroad*, 57 Mo. 265; *Gravel Road v. Renfroe*, 58 Mo. 265; *Bradley v. Railroad*, 91 Mo. 499; *Kanaga v. Railroad*, 76 Mo. 213-214; *Hubbard v. Railroad*, 63 Mo. 68; 2 American Leading Cases [5 Ed.] 568; 2 Smith's Leading Cases [6 Am. Ed.] 761.

No error is perceived in the action of the court in the giving or refusing of instructions. We therefore are of the opinion that said tax bills are valid.

The judgment of the circuit court will be reversed and the cause remanded to that court with directions to enter judgment on each count of the petition for the plaintiff for the amount of the several tax bills with proper interest thereon. All concur.

THE FIRST NATIONAL BANK OF TRENTON, Appellant, v. THE BADGER LUMBER COMPANY, Respondent.

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Kansas City Court of Appeals, May 15, 1893.

Principal and Agent: RATIFICATION OF UNAUTHORIZED TRANSACTION: RETENTION OF FRUITS OF. The duties of defendant's agent at Trenton was to sell lumber, make collections, pay expenses, make daily reports and deposit money collected in the local banks and check the same out in defendant's name. He made it seems, without the defendant's knowledge, two notes in its name which he paid. He got behind with defendant and in its name made a note to plaintiff, which defendant refused to pay, denying the agent's authority, of which want of authority plaintiff appears to have had no knowledge. Plaintiff however tendered the note, and sued for money had and received. The agent sent the money secured on the note to defendant. *Held:*

(1) Per SMITH, P. J., finding the facts as above, that defendant was liable as on discovering the facts, it should have returned the money, since a principal cannot repudiate the unfavorable part of an unauthorized transaction of the agent and adopt the favorable part.

(2) Per GILL, J., *concurring*, and finding further that the agent in four years time had kept an active bank account with other banks and borrowed in the name and behalf of defendant various sums by overdraft, of which the evidence tended to show defendant had knowledge that it was error to take the case from the jury by peremptory instruction, and that defend ant cannot deny the agent's authority and at the same time hold on to the proceeds of his borrowing.

(3) Per ELLISON, J., *dissenting*, and finding that the note transaction was an isolated one with this plaintiff, that the case as made concedes there was no authority to make the note or borrow the money, and rests solely on ratification and should not be placed with the class of cases declaring that if the principal retain the fruits of a transaction done by his agent after he becomes aware of how such fruits were obtained he will be held to have ratified the act, since the money sued for was not paid as defendant's money, or as money which had arisen on any of defendant's transactions, but as the agent's money in discharge of his debt, and defendant's subsequent knowledge of the unauthorized note did not affect its right to retain the money and its retention did not ratify the unauthorized transaction.

Appeal from the Grundy Circuit Court.—Hon. G. D. Burgess, Judge.

Reversed and remanded.

Stephen Peery and *McDougal & Sebree*, for appellant.

Under the proofs, it is clear that Hershe was defendant's agent, and that his authority was plenary. The defendant, knowing the facts, received and retained the money. Even if the act of Hershe were unauthorized, yet there is no exception to the rule that "a principal by keeping the fruits of the unauthorized act of his agent, after knowledge of the fact, ratifies the act and makes it his own," and judgment should have gone, and should in this court go, for the plaintiff. *Davis v. Krum*, 12 Mo. App. 279, 287, and cases cited; *Watson v. Bigelow*, 47 Mo. 413.

Harber & Knight, for respondent.

(1) The acts of Hershe in obtaining the draft from appellant being as they were unauthorized by respondent in order to become binding on respondent must have been ratified by it with a full knowledge of all the material facts and "the receipt, even from an agent, of money paid him on a contract does not bind the principal to the contract unless he knows on what account the money was received and the terms of the contract." *Penn Co. v. Dandridge*, 8 Gill & J. 323; *Baldwin et al. v. Burrows*, 47 N. Y. 212; *Winsor v. Bank*, 18 Mo. App. 665-675. When considered with reference to the facts appearing in each announce a different doctrine. (2) There was no evidence in this case tending to prove the allegations of

appellant's petition, *i. e.*, "That the money was had by respondent without consideration, or that respondent being fully advised and well knowing all the facts in relation to the manner the same was obtained withheld and withholds same." And "it is among the fundamentals of the law that the *onus probandi* lies on him who asserts the affirmative of the issue" * * * "and as a matter of course if he puts his case on the theory of ratification he must show that the confirmatory act took place with full knowledge of all material facts on the part of him sought to be charged." *Cravens v. Gillilan*, 63 Mo. 28; *Nixon v. Palmer*, 8 N. Y. 398; *Reese v. Medlock*, 27 Tex. 120; *Clark v. Lyon Co.*, 7 Nev. 75; *Fletcher v. Dysart*, 8 B. Mon. 413. (3) It is clear from the testimony that the draft was received and the money had by respondent without any knowledge of the transaction between Hershe and appellant, and not as fruits of a contract made for them or in their behalf, but upon an independent liability of Hershe to respondent, and the acceptance of said draft; and the receiving and keeping of the money therefrom, under these circumstances, did not amount to a ratification of Hershe's authorized act, or render respondent liable in this action. So say all the authorities. Cases cited above, and *Bohart v. O'Berne*, 36 Kan. 284; *Gulick v. Grover*, 33 N. J. Law, 463; *Fuller v. Ellis*, 39 Vt. 345; *Reese v. Medlock*, 27 Tex. 120; *Bell v. Cunningham*, 3 Pet. 69; *Owings v. Hull*, 9 Pet. 607; *Nickson v. Palmer*, 8 N. Y. 398; *Suit v. Tracy*, 36 N. Y. 79; *Manning v. Gasharie*, 27 Ind. 309, 413; *Bohart v. O'Bern*, 36 Kan. 284; *Lathon v. Bank*, 18 P. 824; *Reynolds v. Ferney*, 86 Ill. 570; *Clark v. Lyon Co.*, 7 Nev. 76; *Fletcher v. Dysart*, 9 B. Mon. 413; 1 American Leading Cases, 573; Story on Agency, sec. 239; *Eggleston v. Mason*, 51 N. W. Rep. (Iowa) 1; *Hyde v. Larkin*, 35 Mo. App. 365; *Carson v. Cummings*,

69 Mo. 328; *Cravens v. Gillilan*, 63 Mo. 28; *Ruggles v. Washington Co.*, 3 Mo. 497; *Watson v. Bigelow*, 47 Mo. 413; *Davis v. Crum*, 12 Mo. App. 279.

SMITH, P. J.—The plaintiff is a national bank and the defendant a business corporation. The general business office of the latter is at Kansas City, though it has a lumber yard at Trenton which at the time the transaction took place out of which this action arose was under the management of one Hershe whose duties it seems were to use his best endeavors to make sales of lumber furnished by defendant, make collections, pay the necessary expenses of the business there, make daily reports of the business to the general office, make deposits of money collected in the local banks and check out the same in the name of the defendant.

Hershe made two notes in the name of the defendant which he paid before he made the one of which we shall have occasion to presently speak, but whether the defendant knew of these transactions is not shown by the evidence. Hershe fell behind with the defendant in respect to the faithfully accounting for all moneys received by him in his capacity as agent for the defendant. To cover up his defalcations he made in the name of the defendant a note to the plaintiff bank in which he had been depositing the moneys of the defendant for the sum of $500, which the defendant refused to pay at maturity, or at all, on the ground that Hershe had no authority to make and sign the same for it. It does not appear that the plaintiff had knowledge of Hershe's want of authority to do this. It seems to have loaned the money on the credit of the defendant. Indeed there is much evidence adduced from which this might possibly have been inferred; but however this may be the plaintiff seems to have conceded after the defendant's refusal to pay the note that Hershe had not

the requisite authority to make the note, and so sued the defendant for the return of the money borrowed on its note. It appears further that Hershe received for the note so made to plaintiff a draft for $500 on the Bank of Commerce of Kansas City which he sent to the defendant who collected the same.

The defendant not only refused to pay the note but to return the amount thereof which it received after becoming acquainted with all the facts. The trial court in effect declared that the defendant incurred no liability to plaintiff in consequence of these facts. It repudiated the unauthorized act of its agent in signing the note but ratified the transaction to the extent of retaining the proceeds of the discount after becoming aware of all the facts. This of course the law does not tolerate. A party under such circumstances cannot repudiate that part of an unauthorized transaction of an agent which is unfavorable to him and adopt that part which is favorable. *Nichols v. Kern*, 32 Mo. App. 1; *Ruggles v. County*, 3 Mo. 497; *State ex rel. v. Harrington*, 100 Mo. 170; Mechem on Agency, sec. 148, and authorities cited in note 1. He must approve and ratify it entirely or not at all.

Although the defendant did not authorize its agent to borrow of the plaintiff said sum of money and was ignorant of the fact that he had done so when the said sum was paid over to it, yet if after defendant ascertained the fact that its agent had borrowed said sum on its credit and that he had paid over the same to it, then upon every principle of right doing and justice the debt became its own as much so as if it had in the first instance authorized its agent to procure the loan of the plaintiff. Under all the circumstances it would be more reasonable and equitable to hold the defendant to an agreement which it ignorantly ratified than that the plaintiff who was acting in good faith should be sub-

jected to loss. *Ruggles v. County*, 3 Mo. 497; *Norton v. Bull*, 43 Mo. 113; *Watson v. Bigelow*, 47 Mo. 413; *Carson v. Cummings*, 69 Mo. 325; *Fowler v. Bank*, 22 N. Y. (Sickels) 138; *Davis v. Krum*, 12 Mo. App. 279; Mechem on Ageney, sec. 113-116-148; Herman on Estoppel & Res Adjudicata, sec. 1073-1074.

The defendant should upon repudiating the unauthorized act of its dishonest agent have returned the fruits of the latter's crime which had come into the possession of the former, though innocently so. When defendant was advised of the fact that it had money in its possession which it had received from its agent and which had been obtained by him in its name and upon its credit by fraud, the least that it could have done would have been to make restitution to the rightful owner. The defendant by retaining the fruits of Hirshe's crime after acquiring full knowledge of the unauthorized transaction made that transaction its own. *Davis v. Krum*, 12 Mo. App. 279; Mechem on Agency, *supra*. The court erred in directing the jury that under the evidence the plaintiff could not recover.

The judgment of the circuit court will be reversed and cause remanded to be proceeded with in accordance with the views we have herein expressed. GILL, J., concurs in separate opinion, ELLISON, J. dissents.

GILL, J. *(concurring.)* The case as gathered from the record is simply this: Hershe was from October, 1887, to August, 1891, the agent or manager in charge of defendant's lumber yard at Trenton. During that time Hershe in the name of his principal kept an active bank account, *first*, with Shanklin & Austin, and then with the Grundy county National Bank, and frequently during all that time borrowed on account of said principal various sums of money from said banks by overdrafts. In July, 1891, Hershe, in the name and behalf

of the said Badger Lumber Company, borrowed $500 from plaintiff and gave the note of his principal therefor. This money was at once turned over to said lumber company and they used it as their own. Subsequently Hershe was discharged, defendant refused to pay the note on the ground that Hershe had no authority to execute it, and the plaintiff brought this action tendering the note in court and asking judgment for the said $500 which Hershe had procured from it and given over to defendant.

In my opinion the trial court erred in giving a peremptory instruction for the defendant. In the first place I think there was evidence tending to prove that Hershe was authorized to borrow the money in controversy. The testimony shows that for more than two years prior to this transaction he had on divers occasions secured in the name of the defendant advancements from the banks at Trenton, and the evidence tends to show that of this defendant had full knowledge. And in the second place whether Hershe had such authority or not there is conclusive proof that this money so borrowed from the plaintiff was turned over to the defendant and they have used it as their own, and refused to return the money after being advised of the fact. They cannot deny Hershe's authority to borrow and at the same time hold on and appropriate the proceeds of such borrowing. The case of *Watson v. Bigelow*, 47 Mo. 413, settles this feature of the controversy against the claim of the defendant.

ELLISON, J.—This action is for money had and received of plaintiff by defendant. The statement of the petition and the case as made is a concession that the agent had no authority to execute the note. I think the petition and the testimony refute the idea that *defendant* borrowed any money of plaintiff. To

borrow is to contract. There is no attempt to show any dealing with this plaintiff by defendant's agent except in the single instance over which this controversy has arisen, and in this instance the agent falsely represented or assumed authority to borrow for defendant and to execute defendant's note. There is but the isolated transaction. The case then has nothing to support it unless it be ratification and I think has not even this to rest upon. Keeping in mind that this action is not based on a contract of any sort, but is for a sum "had and received of plaintiff's money without any consideration therefor;" and that the case as made concedes there was no authority to make the note or to borrow the money at all, the act claimed to be ratified is necessarily only the act of the agent in receiving of plaintiff the money or the draft for the money. But there is no evidence whatever that defendant knew that the money came from this plaintiff. Defendant must have known this in order to be bound by ratification. Ratification presupposes a knowledge of the act ratified. *Winsor v. Bank*, 18 Mo. App. 665, 675. But defendant retained the money after knowledge. Still this case should not be placed with that class of cases declaring that if the principal retain the fruits of a transaction done by his agent after he becomes aware of how such fruits were obtained he will be held to have ratified the act. This case belongs entirely to another class. The money which is here sued for was not paid or turned in to defendant as *defendant's money* or as money which had *arisen on any of defendant's transactions*. It was paid by the agent and received by *defendant as the agent's money in discharge of his debt.* The money was received in payment of what was due to defendant from its agent, for collections made or to cover his defalcation—I assume this to be practically conceded. Defendant knew nothing of what was after-

wards disclosed at the trial and only received from the agent a debt he owed it. In such case defendant may retain the money without thereby ratifying the conduct of the agent. This has been expressly so ruled. *Bohart v. Oberne*, 36 Kan. 284; *Baldwin v. Burrows*, 47 N. Y. 211, 212; *The Penn, etc., Co. v. Dandridge*, 8 Gill & J. 324. Indeed, the case is no more than this, that defendant's agent owed it money. He obtained the sum necessary to pay it by the fraudulent use of its name, without its knowledge or consent. Defendant received the money as was its right. Money is current and passes from hand to hand without the necessity of inquiry or responsibility upon the receiver to the source from whence it comes. Defendant is no more liable to this action for the money received than if it had been obtained of plaintiff by the fraudulent use of any other name.

But aside from this consideration as before intimated the case as presented, in my opinion, rebuts all idea of *contract* between the parties by ratification or otherwise. I think the action of the trial court should be affirmed.

A. H. HALSEY, Plaintiff in Error, v. ARIEL MEINRATH, Defendant in Error.

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Kansas City Court of Appeals, May 15, 1893.

1. **Practice, Trial and Appellate:** SETTING ASIDE JUDGMENT AT SUBSEQUENT TERM: FINAL JUDGMENT: EXCEPTIONS: APPEAL. A motion under section 2235, Revised Statutes, 1889, to vacate a judgment at a term subsequent to the term of its rendition for irregularity appearing on the face of the record is not an independent proceeding in the nature of a writ of error *coram nobis* but is motion in the original suit from which an appeal will not lie, and the loser should take his bill of exceptions, proceed no further in the cause, suffer a final judgment to go against him and then prosecute his appeal, and neither the statute nor common law requires a motion for a new trial or in arrest to warrant an appeal in such case.

2. **Master and Servant:** DISCHARGE: ACTION. A servant wrongfully discharged may treat the contract of service as continuing and bring a special action for its breach, and this, whether his wages are paid up to the period of his discharge or not.

3. ———: ———: MEASURE OF DAMAGES: OTHER EMPLOYMENT: JURY QUESTION. The measure of damages for the wrongful discharge of the servant cannot exceed the contract price, nor is it necessarily the full contract price, as the servant may secure other employment and in some instance even at better wages, and the amount of damages is a question for the jury.

4. ———: ———: ———. A servant's damages for wrongful discharge are *prima facie* the contract price.

5. ———: ———: ———: CONTINUING DAMAGES. The servant in case of continuing damages is entitled to recover such damages as accrued to the expiration of his term of service.

6. **Practice, Appellate:** PRESUMPTION: EVIDENCE. Every presumption must be indulged in support of the judgment below, as that all evidence admissible under the pleadings and necessary to support the judgment was before the court, and matters tending to reduce damages if alleged will make no difference.

ON REHEARING.

7. **Judgments:** ANSWER: DEFAULT. It is error to render judgment upon default when an undisposed of answer is on file, though the defendant makes no appearance at the trial, but there are other defaults besides defaults in appearance.

8. ———: ———: ———: PRACTICE. Where there is an answer in and the defendant defaults at the trial, the trial should proceed exactly as it would have done had defendant taken part in the trial and failed in his defense.

9. **Master and Servant:** MEASURE OF DAMAGES: PLEADING: PRESUMPTION. The complaint against the judgment in this case that it is for more than is covered by the allegations of the petition is not well taken, since no objection was taken to the petition, and it did allege the servant was to have a certain compensation and his expenses for a year, and that he entered upon the discharge of his duties, etc., and was wrongfully discharged, as every intendment is to be presumed in favor of the judgment.

Appeal from the Jackson Circuit Court.—HON. J. H. SLOVER, Judge.

REVERSED AND REMANDED.

John W. Snyder, for plaintiff in error.

(1) "Nothing is better settled than that, after the term at which a final judgment is rendered, the court cannot interfere with it. *Brewer v. Dinwiddie*, 25 Mo. 351; *Harbar v. Railroad*, 32 Mo. 426; *Mann v. Warner*, 22 Mo. App. 581; *Blanchard v. Wolff*, 6 Mo. App. 204. (2) Even if the plaintiff was only entitled to his salary and expenses for living during a period of two months and twenty-three days, it cannot be said that the petition under no conceivable circumstances would support the judgment, and that the judgment was therefore irregular. The procedure was regular, the petition called for $1,000 damages, the evidence of the case could not be subsequently examined. *Brackett v. Brackett*, 61 Mo. 223; *Phillips v. Evans*, 64 Mo. 22; *Showler v. Freeman*, 81 Mo. 544. (3) Plaintiff is entitled to his salary and expenses of living for a period of six months (from the day of discharge to end of term, as the same expired long before the day of trial). This would make less than $2 a day for plaintiff's expenses. The day of trial is the day of reckoning. *Gordon v. Brewster*, 7 Wis. 355; *Ream v. Watkins*, 27 Mo. 518; *Lambert v. Hartshorne*, 65 Mo. 551; *Miller v. Boot & Shoe Co.*, 26 Mo. App. 61; *Koenigkraemer v. Glass Co.*, 24 Mo. App. 128; *Lally v. Cantwell*, 40 Mo. App. 50. (4) Plaintiff pursued the remedy marked out in *State ex rel. Merrill v. Burns*, 66 Mo. 227; *Blanchard v. Wolff, supra; Imp. Co. v. Wheeler*, 27 Mo. App. 16; *Edmonds v. Albrecht*, 42 Mo. App. 497; *Hirsh v. Weisberger*, 44 Mo. App. 506. (5) The judgment rendered December 24, 1889, should be reinstated and bear interest from its date, to-wit, December 24, 1889; *Hill v. City of St. Louis*, 20 Mo. 588.

Henry Wollman, for defendant in error.

(1) There was an irregularity in the entering up of the judgment that justified the court in setting it aside and it was this, that an answer was on file, and yet judgment by default was rendered. *Ruch v. Jones*, 33 Mo. 393; *Norman v. Hooker*, 35 Mo. 366; *Louthen v. Caldwell*, 52 Mo. 121; Black on Judgments, sec. 86; *Parrott v. Goss*, 17 Ill. App. 111; *Fish v. Wheeler*, 31 Ill. App. 596; *Mason v. Abbott*, 83 Ill. 445; *Elliott v. Leak*, 4 Mo. 543; *Maxwell v. Jarvis*, 14 Wis. 552; *Beard v. Shoe Co.*, Sup. Ct. Miss. 8 South. Rep. 512. (2) The object of a pleading is to make a party show on the face of it what his case is, and as plaintiff did not show in his petition that he ever had any expenses the court cannot assume that he did. (3) The plaintiff maintains that the circuit court at any time within three years can set aside a judgment for a trifling irregularity in practice, but not for something that goes to the very merits of the judgment, or to the correctness of the judgment itself, although such blunder appears right on the very face of the record itself and can be discovered without resorting to any matter *dehors* the record. The statute itself clearly recognizes that at common law a judgment could be set aside after the term, but in the case of an irregularity it was deemed best to confine the time within which it could be done to three years. Black on Judgments, sec. 326: *Warren v. Lusk*, 16 Mo. 102, at p. 114; *Downing v. Still*, 43 Mo. 309; *Critchfield v. Porter*, 3 Ohio, 518; *Hunt v. Yeatman*, 3 Ohio, 16; *Delancy v. Brownell*, 4 Johns. 136; *Darling Barns v. Branch*, 3 McCord, 21; *Vilas v. Plattsburg & M. R. Co., supra;* 25 N. E. Rep. 497. (4) Plaintiff contends that everything should be presumed in favor of the correctness of the original

judgment of the lower court. This presumption does not apply to a judgment by default when the attack on it is not collateral, because it is only fair to assume in case of a judgment by default that if the other party were in court it is probable he would establish a defense. *Hudson v. Breeding*, 2 Ark. 445.

SMITH, P. J.—This is an action wherein the plaintiff in his petition stated that he was employed by defendant as a traveling salesman in his business for the period of one year from the first day of January, 1888, at a salary of $90 per month and expenses; that on said first day of January, 1888, in pursuance of said employment, plaintiff entered upon his duties as such traveling salesman for defendant, and continued to perform his duties, and served defendant as such salesman till the thirtieth day of June, 1888, when defendant, without any just and reasonable cause, and not on account of any fault of plaintiff, discharged plaintiff from said employment and has ever since refused, and still refuses, to reinstate plaintiff in said employment, or to pay him any part of plaintiff's monthly salary and expenses since the first day of July, 1888, whereby he was damaged in the sum of $1,000.

The defendant by his answer interposed a general denial. When the case was reached for trial, he made no appearance, so that a judgment of *nil dicit* was entered against him for $860. At a subsequent term the defendant appeared again and filed a motion to set aside the judgment on the ground that it was irregular on the face of the record, in that the petition showed that the plaintiff was not entitled to recover any sum exceeding $263, whereas the judgment was rendered for $860, and in that under the petition the plaintiff was only entitled to recover the salary for the months of

July, August and twenty-two days in the month of September at the rate of $90 per month with interest, etc. This motion was sustained, to which action of the court plaintiff took exception, preserving the same by proper bill of exception duly allowed and filed in the case. The plaintiff making no further appearance, the court at the second term thereafter dismissed the cause for want of prosecution. To reverse this judgment the plaintiff sued out his writ of error and brings the cause here for revision.

This is not an independent proceeding in the nature of a writ of error *coram nobis*, but a proceeding under the statute (Revised Statutes, sec. 2235) to vacate a judgment at a term subsequent to the term of its rendition for an irregularity appearing on the face of the record. It is a motion in the original suit and for this reason an appeal or writ of error does not lie from an order sustaining the motion to set aside the judgment and reinstating the cause on the docket, but the remedy of the other party is, as in this case, to take a bill of exceptions, proceed no further in the cause, suffer a final judgment to go against him and then prosecute his appeal or writ of error. *State ex rel. v. Burns*, 66 Mo. 227; *Hirsch v. Weisberger*, 44 Mo. App. 506; *Edwards v. Albrecht*, 42 Mo. App. 497; *Blanchard v. Wolf*, 6 Mo. App. 200.

There is no rule of practice under the statute or at common law which required the plaintiff to file a motion for a new trial or in arrest of the judgment against him to entitle him to prosecute his appeal or writ of error. When the judgment dismissing the cause was entered, the plaintiff's right of appeal or to a writ of error accrued. *Implement Co. v. Wheeler*, 27 Mo. App. 16; *Hirsch v. Weisberger*, 44 Mo. App. 506; *State ex rel. v. Burns, supra; Gilstrap v. Felts*, 50 Mo. 431; *Bower v. City of Kansas*, 51 Mo. 459. It follows

from these considerations that the record in the cause is properly before us for examination.

The action of the trial court in setting aside the judgment for alleged irregularity in rendering the same constitutes the plaintiff's principal ground of complaint. The suit was brought before the expiration of the term of the contract for which plaintiff alleges he was employed. A servant wrongfully discharged may treat the contract of hiring and service as continuing and bring a special action against the master for breaking it by discharging him, and this remedy he may pursue whether his wages are paid up to the period of his discharge or not. *Ream v. Watkins*, 27 Mo. 516. And the general rule in cases of this kind is, that the measure of damages cannot exceed the contract price, neither is it necessarily the full contract price, for it may be that the plaintiff may after his dismissal sue and recover a judgment and then obtain employment elsewhere and receive for the residue of the term much more than by the contract he would have been entitled to if he had served out his term. The damages must depend on the kind of service to be performed and the wages to be paid, and allowance should be made for the time that would probably be lost before similar employment could be obtained. In some pursuits it may be almost certain that the dismissal of a person at a particular season will throw him entirely out of employment for the residue of the year, whilst in other pursuits similar employment could readily be obtained elsewhere on better terms, and therefore the amount of the damages is a question for the jury under all the circumstances. *Lambert v. Hartshorne*, 65 Mo. 551.

This case was not tried until after the expiration of the term of plaintiff's employment. The plaintiff's damages for breach of the alleged contract of employment are *prima facie* the contract price agreed upon

for such service. And in addition to this the plaintiff under the contract is entitled to his reasonable expenses. This of course would have to be established by extrinsic evidence.

But it is suggested that the plaintiff could only recover such damages as had resulted at the time of the commencement of the suit. This is an error. The plaintiff was entitled to such damages as accrued up to the expiration of his term of service in a case like this where the damages were of a continuing character. *Lally v. Cantwell*, 40 Mo. App. 50; *Miller v. Boot & Shoe Co.*, 26 Mo. App. 61; *Ream v. Watkins*, *supra*; *Lambert v. Hartshorn*, *supra*. We must indulge every presumption in support of the judgment.

Under these rules in respect to the admeasurement of the plaintiff's damages, it may have well been that the court under the evidence adduced before it felt constrained to allow the plaintiff the amount of his salary for the whole unexpired term of his employment, and not only that, but the evidence may have been such as to justify the augmentation of the damages just mentioned by the amount of the plaintiff's expenses. A showing of this sort was allowable under the pleadings and the rules for the measure of damages already referred to, and we must presume that there was such evidence and so conclude that the amount of the damages adjudged is not in excess of what was authorized under the petition and the contract pleaded.

No recoupment of damages was claimed in the answer, or if there had been we do not think the case would have been different since the presumption in favor of the correctness of the finding and judgment of the trial court would still have been indulged.

No irregularity is perceived in the record before us. It follows that the judgment appealed from be reversed

and the cause remanded with directions to the circuit court to reinstate the first judgment in behalf of the plaintiff. All concur.

ON REHEARING.

PER CURIAM.—Defendant contends that the judgment rendered in the cause was a judgment by default and that since there was an answer on file consisting of a general denial such judgment was erroneous. The facts were that an answer was filed by defendant, but when the case was called for trial he failed to appear. The court thereupon heard the petition and the evidence and rendered the following judgment: "Now at this day, this cause coming on to be heard, comes plaintiff in person and by attorney, and defendant, who has been lawfully summoned, comes not, but makes default; thereupon the cause is submitted upon the petition and evidence, and the court being fully advised in the premises finds that defendant is endebted to plaintiff in the sum of $878. It is therefore ordered and adjudged by the court that plaintiff have and recover of defendant the sum of eight hundred and seventy-eight ($878) dollars with interest thereon from this day, and all costs, and have hereof execution."

We concede that it is error to render judgment by default when an answer is on file undisposed of, defendant not appearing at the trial. This is well established by authority elsewhere. It has been stated in this state as well. *Ruch v. Jones*, 33 Mo. 393. The judgment here spoken of is of course that technical judgment by default known to the law which adjudges the cause of action to be confessed. Was the judgment here questioned such a judgment? We think not. There are defaults recognized under our practice on the part of a defendant which may figure in the judgment other than a default of appearance to the action.

The defendant here had appeared to the writ and had answered but he defaulted in appearance to the trial. No more than a recital of this was entered in the judgment here. The court does not adjudge the petition to be confessed, and with the exception of the word "default," which may have more than a single application, there are none of the distinguishing marks of a judgment by default appearing in this judgment. The court gave full effect to the issue made by the answer. It took nothing as confessed, and proceeded to hear the evidence in the cause. It proceeded exactly as it would have done had defendant taken part in the trial and failed in his defense. In other words, he has had the full benefit of the issue he presented. When a defendant answers the petition and then defaults or fails to appear to the trial, the proper proceeding to a legal determination of the case is to go on with the trial by hearing the evidence the same as if the defendant was present. *Covell v. Marks*, 1 Scammon, 391; *Manlove v. Gallipot*, *Ib.* 390; *Terrill v. State*, 68 Ind. 155; *Maddox v. Pulliam*, 5 Blackf. 205; *Patton v. Hazewell*, 34 Barb. 421.

It is next insisted that the judgment is for more than is covered by the allegations of the petition. This contention is based upon the assumption that the petition altogether fails to allege that plaintiff incurred any expenses. Since the defendant failed to make any objection to the petition, and since a finding and judgment has now been had upon it, we must give the plaintiff the benefit of every intendment in its favor. The petition does not charge in terms that he was put to any expense, but it does allege that he was employed as a *traveling salesman* for a year at certain compensation and his expenses. It also charges that he entered upon the duties of such traveling salesman, in pursuance of the employment, and performed such duties

until a certain date when he was wrongfully discharged. Now we cannot say what the facts may have shown as to the expenses, or what kind or extent of expenses were included in the contract. We cannot say that such expenses did not include his board, etc., in which event the amount of the judgment could be easily accounted for. The judgment will be entered as directed in the foregoing opinion.

N. B. FROST, Appellant, v. A. J. REDFORD, Respondent.

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Kansas City Court of Appeals, May 15, 1893.

1. **Insane Persons:** GUARDIANS: TRUSTEE: EFFECTS: DEBTS. The guardian of an insane person occupies the position of trustee for him as well also as for his creditors and family, and should take possession of his affects and should adjust, settle and pay his debts as far as his effects extend, having regard to priorities, and if the estate is insufficient then *pari passu*.

2. ———: PRESENTATION OF DEBTS: NOTICE: STATUTE. The statute contemplates a presentation of claims to the guardian, and when necessary it is the probable duty of the guardian to give notice to creditors to present their demands for adjustment and payment.

3. ———: PREFERENCE AMONG CREDITORS: PAYMENT: MEASURE OF DAMAGES. The guardian of an insane person cannot prefer the creditors of his wards as his ward could; and his payment of a per cent. on all demands excepts that of plaintiff of which he had notice was a breach of his duty; and the measure of his liability is the per cent. he should have paid plaintiff nad he paid all equally and equitably. GILL, J., *dissenting*.

4. ———: REMEDY OF PRETERMITTED CREDITOR AGAINST GUARDIAN: MONEY HAD AND RECEIVED: ACCOUNTING. An action against a trustee for money had and received will lie if the trust is closed, but it is otherwise if there has been no final accounting. But where the estate is exhausted,—practically closed,—equity has a general jurisdiction of the guardian of an insane person whose position and obligation are wholly fiduciary and will direct an accounting and final settlement to determine the amount of his liability.

5. ———: COMMON LAW: STATUTE: ALLOWANCE FOR SUPPORT: EQUITY: PREFERENCE: EXECUTION: SETTLEMENT: RES ADJUDICATA.

Per Ellison, J., Concurring.

(1) At common law the king as *parens patriæ* had the protection in a peculiar manner of all those who by reason of their inability and want of understanding are incapable of taking care of themselves, and this protection was administered through the chancellor and a committee of the person and estate of the insane person. The first and paramount duty of this protection was to provide for the personal ease and comfort of the lunatic to the exclusion of the payment of his debts.

(2) Under the Missouri statute the guardian can use his ward's estate for the payment of his debts to the exhaustion of the estate except as it is protected by homestead and exemption laws, and the ultimate maintenance of the ward may fall upon the county.

(3) An allowance cannot, if timely objection be made, be regularly set apart for the support of the lunatic, but if said allowance is made it will protect the guardian.

(4) Such guardian in paying the debts and administering the estate of a lunatic is governed by principles of equity and cannot prefer a creditor, since equity means equality.

(5) The real and personal property of a lunatic is not subject to an execution at the suit of a creditor who has obtained his judgment in an independent jurisdiction as it would amount to a preference and interfere with the jurisdiction of the probate court.

(6) A settlement made by the guardian in the probate court, wherein plaintiff's claim is not mentioned, does not affect plaintiff's claim.

(7) The fact that plaintiff brought suit against the lunatic naming defendant as his guardian and recovering the judgment he sues on in this action, does not make the subject-matter *res adjudicata* in this action.

Appeal from the Johnson Circuit Court.—HON. C. W. SLOAN, Judge.

REVERSED AND REMANDED.

J. W. Suddath and *Samuel P. Sparks*, for appellant.

(1) Guardians of insane persons are trustees and are governed by the law pertaining to trustees. *Michael v. Locke*, 80 Mo. 551; *State to use v. Jones*, 89 Mo. 478. (2) Trust funds in the hands of trustees are to be managed and disposed of by them for the equal benefit of all creditors. *State ex rel v. Brockman*, 39 Mo. App. 131, and cases cited. (3) A power given to a trustee to pay such creditors and prefer such claims as he pleased would render the trust void. 2 Perry on Trusts [2 Ed.] sec. 600. (4) The statute makes it the duty of the guardian of an insane person to pay all debts due from his ward so far as his estate and effects will extend. Revised Statutes, 1889, sec. 5530; *Conant v. Kendal*, 21 Pick. (Mass.) 36-41.

O. L. Houts, for respondent.

(1) Guardian of insane person chargeable as trustee at suit of creditor of the ward until there has been an accounting and a balance found in the guardian's hands. *Davis v. Drew*, 6 N. H. 399; s. c., 25 Am. Dec. 467. And certainly when as in the case at bar there has been an accounting and a balance found due respondent from the estate of his ward respondent is not liable to appellant, a creditor of the ward. (3) The statutes of this state do not authorize a recovery in this suit, nor do they require the guardian of an insane person to pay the debts of his ward *pro rata*, or provide for the probate classification or priority of the debts of an insane person. Revised Statutes, 1879, ch. 86; *State to use v. Jones*, 89 Mo. 470 (overruling *Michael v. Locke*, 80 Mo. 548.) Statute specifically provides that no process shall go against a guardian for the debt of his ward, but against the property of the insane per-

son only. Revised Statutes, sec. 5544; *Crow v. Weidner*, 36 Mo. 412; *Collier v. Cairns*, 6 Mo. App. 188; Revised Statutes, 1889, secs. 64, 67, and note; Revised Statutes, 1879, sec. 65. (3) If appellant has a right of action he has mistaken his remedy. He should have issued execution on his judgment and levied on the property of E. D. Frost, the insane person, if he had any, or garnisheed respondent. Revised Statutes, sec. 5544. Action on respondent's bond is the only action at law that appellant could probably maintain. The only duty respondent could in any way owe appellant grows out of the obligation of the bond. (4) Respondent does not, in his conception, need the benefit of the proposition, but he insists that the case of *N. B. Frost v. E. D. Frost and A. J. Redford*, this respondent is *res adjudicata* as to every issue in this case. In that case appellant sued respondent and asked judgment against him, and was defeated on the original and same cause of action he now sues on, the note on which the judgment was founded. If appellant was entitled to recover against respondent, he could have recovered as well on his note as on his judgment.

SMITH, P. J.—This was an action at law based upon a judgment recovered by the plaintiff against Ebenezer D. Frost, who had previously been adjudged insane. The petition alleged, amongst other things, that the defendant had been appointed guardian of the person and curator of the estate of said Frost, and had duly qualified as such; that there came into the hands of said defendant, as such curator, the sum of $10,000 in cash and personal property, and that the plaintiff at the time of the defendant's appointment gave the latter notice of his claim and demanded payment thereof. The answer admitted the defendant's appointment and qualification as guardian and the recovery of said

judgment, but denied the other allegations of the petition.

There was a submission of the case to the court and a separate finding of facts and conclusions of law by it, which (omitting the facts admitted by the pleadings) was as follows: "That there came into his hands as such guardian and curator prior to the commencement of this suit in cash and other personal property the sum of $4,216.25. That this suit is based on a debt exisiting due and owing by said E. D. Frost to plaintiff N. B. Frost at the time he was so adjudged insane, which was reduced to judgment in this court on the seventeenth day of February, 1891, in a suit thereon against Ebenezer D. Frost, to which action said defendant herein (Redford) appeared and defended as guardian, and the amount of said judgment was $2,353.75, bearing interest at the rate of six per cent. per annum.

The court further finds that in December, 1888, or at least prior to January 29, 1889, date of sale, plaintiff N. B. Frost gave the said defendant Redford notice of the said demand so due and owing by said E. D. Frost and demanded payment thereof, which demand was refused by said Redford; that, at the time said E. D. Frost was adjudged insane, he was indebted and owing to divers parties, including this plaintiff, in the aggregate, the sum of $12,069.05. It does not affirmatively appear whether there were any other debts or not, that after notice of plaintiff's demand, to-wit, between February 16, 1889, and June 5, 1886, defendant paid out on a portion of said indebtedness to some of the creditors the sum of $1,639.87, but paid plaintiff nothing whatever on his demand; that the suit culminating in this judgment of the seventeenth day of February, 1891, herein before referred to was commenced May 25, 1889. The court further finds that the said Redford as guardian distributed and disposed of said

assets so received by him belonging to his said ward in the manner, to the persons, in the amounts and at the time as stated in defendant's answer. The court further finds that on March 30, 1891, the said defendant Redford as such guardian and curator, made report of his said receipts and distributions to the probate court, except as to the last ten items above named, which said report was by said court approved, but that no notice of any sort to any person whatever was given of said settlement. The court further finds that the probate court did on February 18, 1889, make an order: "That said guardian keep and set aside $1,000 for the care and keeping of said insane patient, support of family and education of children."

That the defendant, Redford, has never paid anything to this plaintiff on said demand, nor on the judgment aforesaid; that the same and every part thereof is still due and owing.

On the foregoing facts found and the pleadings in the case, the court declares the law to be, that this is an action at law against defendant Redford as a trustee in charge of a trust fund liable to be applied in payment of plaintiff's demand, and not against him as guardian. That the report of the probate court of his said disbursement and the approval of the same by the court precludes plaintiff from recovering in this action, although plaintiff was denied any participation in said dividends or disbursements. The court is of the opinion and holds and decides a matter of law, that a guardian and curator of an insane ward's estate in managing the estate of such ward especially when authorized or permitted by the probate court might preserve, manage and disburse his personal estate about the same as his ward could, if sane and in control thereof. It follows, that in the absence of fraud the finding and judgment must be again at the plaintiff."

The plaintiff has appealed. With the finding of facts there can be found no just ground of complaint.

The only question in the case is, whether the conclusion of law is correct. The defendant being the guardian of said insane person occupied the position of trustee for him, as well also, as for his creditors and family. *Michael v. Locke*, 80 Mo. 551; Perry on Trusts, sec. 1097. And so being it was his duty, under the statute (secs. 5526, 5530) to take into his possession the goods, chattels, moneys and effects of the ward, and to collect the debts due him and to *adjust, settle and pay off all demands due or becoming due from his ward, as far as his estate* and effects would extend. Undoubtedly if this language of the statute has any signification whatever, it is that the duty of the guardian is to pay all the demands against his ward, having regard to priorities, in full, or if the estate is insufficient for that purpose then to pay them *pari passu*. Of course this would be of difficult accomplishment in every case, in view of section 5544, which provides that judgments may be recovered and executions issued thereon against an insane person. It is plain when we look at the provisions of chapter 86, that the intention of the legislature by the enactment of this statute was to provide an elaborate scheme for the administration of the estates of insane persons. It is true the analogy of this statute to that in respect to administration of the estates of deceased persons in many essentials is lacking. The generel purpose of the latter statute is to wind up the estate, pay off the debts and turn over the remainder of the property to those entitled to the succession. To that end creditors are required to prove up their demands within a specified time or be forever barred.

In the case of insane persons the ward continues to be the owner of the property. The statute as to his

debts makes no provision for their presentation, classification or allowance. But while this is true there ought ordinarily to be no difficulty in ascertaining the demands due by the ward. The notice the guardian is obliged to give of his appointment and the other steps required by the statute to be taken by him would no doubt enable him to discover the creditors of his ward. The creditors of such persons are usually quite swift in making their demands known. There is always that degree of insecurity and uncertainty felt by creditors of such persons that would prompt them to present their demands to the guardian to be "adjusted, settled and paid."

The very language of the statute just quoted shows that it contemplates a presentation of the claims of creditors to the guardian or else how could the same be "adjusted, settled and paid." It is probably the duty of the guardian to give notice when necessary to the creditors to present their demands to him for this purpose. When the amount of the claims due and to become due by the ward are ascertained by the guardian, he having charge of the ward's estate can experience very little trouble in determining under the supervision and orders of the probate court whether the estate is sufficient to pay the claims of all the creditors in full or only a per cent. thereon. In making payment he might exercise the precaution to take a refunding bond in case he should be uncertain as to whether there were other unpresented claims or whether the estate will finally be sufficient to pay each creditor the per cent. which it then seems he can pay.

A prudent and careful business man in charge of the estate of an insane person ought not to have any serious difficulty in administering such an estate under the statute. Ordinarily he could provide and protect an estate against sacrifice by a creditor having an exe-

cution. Such an execution creditor might by its levy secure a priority, and in that case the adjustment and payment of the claims of the other creditors having no priority would have to be made with reference to the existing conditions. It follows therefore that the payment by the guardian in this case of a per cent. on all the demands against his ward, except on that of the plaintiff, was a breach of his duty. The measure of his liability undoubtedly is the per cent. that he should have paid plaintiff had he paid all equally and equitably.

I do not think, in view of section 5530 and the other sections of chapter 86, that a guardian can prefer the creditors of his ward as the ward could have done himself had he not been insane. I think the scope and language of the statute discountenances this idea. In this case the guardian has exhausted the ward's estate and has paid the plaintiff no part of his demand, though he could have paid a part of it had he wished to do so. The question now is what is the plaintiff's remedy. If it is a fact, appearing from the guardian's settlement or otherwise, that the estate was able to pay any given per cent. on all of its debts and that he had exhausted the estate without doing so, or that any specified sum was in the hands of the guardian held by him for the plaintiff's use, it could be recovered in an appropriate action at law, or at any rate in an action for money had and received. An action against a trustee for money had and received will lie if the trust is closed, but otherwise if there has been no final accounting. Perry on Trusts, sec. 843; Hill on Trustees, *518–847.

In this case the guardian shows the estate exhausted—nothing in his hands. It is practically closed so far as creditors are concerned. Guardians of

persons *non compos mentis* stand in the relation of *quasi* trustee to their ward or principals. They do not hold the title to the property which is the subject of the relation, but their position and obligations are wholly fiduciary. Equity has therefore a general jurisdiction at the suit of the ward or other beneficiaries to compel a performance of the trust duties to relieve against violations of the trust obligations to direct an accounting and final settlement of the *quasi* trust and to grant other special relief made requisite by the circumstances. Perry on Trusts, sec. 1097; *Moody v. Bibb*, 50 Ala. 245; *Stephens v. Marshall*, 23 Hun, 641; *Strumph v. Guardian of Pfeiffer*, 58 Ind. 472; *Coles, Com'r, v. Coles, Adm'r*, 8 Gratt. 365.

It would be impossible to determine the per cent. to which plaintiff is entitled to recover on his claim until there shall be an account taken of the administration of said ward's estate and the amount thus ascertained.

To the end that such an account be taken the judgment will be reversed and the cause remanded with leave to plaintiff to amend his petition if he so elects to do. ELLISON, J., concurs and GILL, J., dissents in separate opinions.

ELLISON, J. *(concurring)*.—The defendant's ward was adjudged insane and defendant appointed his guardian on the fifth of July, 1888. When defendant took charge of the estate he found that the ward was indebted to various parties, among others to this plaintiff. Plaintiff obtained a judgment on his claim after the ward was adjudged insane, the defendant herein defending as guardian. There were not sufficient assets of all kinds belonging to the ward's estate to pay all his debts in full. Defendant paid a portion of several debts to other creditors but refused to pay

any portion of plaintiff's judgment debt notwithstanding he had notice of it. Plaintiff has brought this suit against defendant individually on the foregoing state of facts. The court below found against him and he comes here for relief.

The trial court declared the law to be that the guardian could prefer a creditor to the entire defeat of the claim of another creditor of equal dignity. The trial court further declared that the approval of the annual settlement of the guardian by the probate court wherein the disbursements to the preferred creditors were shown, protected the guardian notwithstanding the guardian made no mention of plaintiff's claim in such settlement. The case requires the consideration of several questions in relation to the duties and liabilities of guardians of insane persons. That defendant was a trustee and that he held the ward's estate in the nature of a fund for the benefit of the ward and his creditors I have no doubt. Nor have I any doubt that he would be liable for an inexcusable breach of that trust.

In all civilized countries care of the insane has been an object of much solicitude. The pity and sympathy which finds a response in the breasts of all from the first civilization has manifested itself in the promulgation of rules of law or equity devised for the protection and care of these most unfortunate of human beings. "It seems to be agreed at this day that the King as *parens patriæ* hath the protection of all his subjects, and that in a more peculiar manner he is to take care of those who by reason of their inability and want of understanding are incapable of taking care of themselves"—Idiots and Lunatics, Bacon's Abridgements. The same eminent author also said that, "The first paramount rule in lunacy is to provide for the personal ease and comfort of the

lunatic." From the inability of the King to give attention to these unfortunates it was deputed to the chancellor, who in practice referred the case to a master to approve of a proper person to act as a committee of the person and estate of the insane person. In this country the states have laws for the protection of the insane; and while the detail of such matters is not uniform in regulation, yet all the states, so far as my observation goes, have evidenced the same anxious care for such persons which is found to exist in other civilized communities. In Missouri the constitution places the jurisdiction over these people primarily in the probate court. That court appoints the guardian who fills the place of him who in England and many of our states is called the committee. The primary duty of the guardian (unless otherwise controlled by the statute) is to protect and maintain his unfortunate ward with the estate which may come into his hands, even to the exclusion of the claims of creditors, if this should be necessary for the ward's maintenance. This is the effect of the observations of Bacon above quoted and it is supported by the cases of *Eckstien's Estate;* 1 Parsons Equity Cases, 59, 63; *In the Matter of Latham*, 4 Ired. 234; 6 Ired. 406; *Adams v. Thomas*, 81 N. C. 296; *Smith v. Pitkin*, 79 N. C. 567; *Ex Parte Hastings*, 14 Vesey, 182. In the latter case Lord ELDON said, "I have no authority to pay the debts of the lunatic unless I see it is for the accommodation of the estate. I cannot pay his debts and leave him destitute of any provision. * * * There is no instance of paying the debts of a lunatic without reserving a sufficient maintenance for him. * * * These orders are made for the accommodation not of the creditor but of the lunatic." In 4 Ired. *supra*, the North Carolina court said that: "All the lunatic's estate has been converted into money, and only the sum of

$942.14, is now within reach of this court. We think that this fund must be retained by the committee, not to pay his balance or the debts of any creditors, but for the purpose of maintaining the lunatic and his wife and (tender) infant children. That the court must reserve a sufficient maintenance for the lunatic before making an order for the payment of debts or allowing to the committee sums already applied by him to that purpose is clear from the nature of the jurisdiction in lunacy, as well as from the decisions." It is evident that the insane person must be maintained or he will perish. If not maintained by his own estate he will become a public charge. If his own estate is taken up by creditors he becomes a public charge. I take it that no creditor has the right to strip the insane of their effects beyond the point of maintenance and the probate court's allowance for the support of the ward was proper unless the creditor's right is conferred by statute.

In this state, the statute for the protection of insane persons provides, Revised Statutes, 1889, section 5545: "If the estate of any such insane person shall be insufficient to pay his debts, to maintain himself and family or educate his children, his guardian may apply to the county court of the proper county by petition setting forth the particulars and praying for an appropriation from the county treasurer for the support of his ward. Sec. 5546. The petition shall be accompanied by a true and perfect account of the guardianship, an inventory of the estate and effects, and a list of the debts due from such insane person, and it shall be verified by the affidavit of the petitioner. Sec. 5547. If the county court shall be satisfied that such estate and effects are insufficient for the purposes above specified, such court may order such sum to be paid to the guardian out of the county

treasury as to them shall appear reasonable, and cause a warrant to be issued accordingly."

From the terms of these sections, construing them with our homestead and exemption laws, my opinion is that the guardian, in so far as his ward's estate is concerned, can use such estate for the payment of the ward's debts down to the exhaustion of the estate, except as it would be protected by homestead or exemption laws, if it should be of that character. The ultimate maintenance of the ward would, therefore, under this statute fall upon the county. *German National Bank v. Engeln*, 14 Bush. 708. So if a lunatic was the owner of a thousand acres of wild land as his entire estate, creditors could practically exhaust the whole of it and thus throw the lunatic upon the county. Under the statute cited, the reason for the rule excluding creditors as stated in the foregoing authorities does not exist, since the care and protection of the ward is plainly provided for at public expense. The legislature has deemed it expedient to put the burden of the ward's support upon the county rather than to disable the creditor from collecting his demand.

It follows then under this construction of the statute that if the estate was insolvent and the proper showing was made at the proper time the probate court should not have made the allowance of $1,000 for the support of the ward. But I am of the further opinion that since the allowance was made (the probate court having jurisdiction of the matter) it is merely erroneous action and will protect the guardian in the use of that amount of the estate for that purpose.

It is next contended by the defendant guardian that he is not required by the just terms of his trust to pay to creditors *pro rata*, but that he may prefer them as the ward might have done when sane. I do not think such contention is sound. In my opinion it is

contrary to the spirit of the original rule governing the care of the insane and the management of their estates as well as inconsistent with the statutory scheme which we have in this state. The guardian is a trustee. *State to use v. Jones*, 89 Mo. 478. And under our statute he is a trustee for the creditors. Under a statute of New York similar as respects the payment of debts he was held to be clothed with a trust for the benefit of creditors and an agency for the payment of debts and the administration of the estate. *Beecher v. Van Gortland*, 2 Johns. Ch. 246. He is governed by the principles of equity and cannot favor or prefer a creditor unless there be something in the nature of the debt requiring it. Equity in governing the conduct of a trustee clothed with the trust of paying debts from a trust fund means equality. *State ex rel. v. Brockman*, 39 Mo. App. 131. It has therefore been held that the creditors are to be paid *pro rata* and not by preference, unless the nature of the debt is such as to require it, as if it be a mortgage or other lien debt made before lunacy. *Wright's Appeal*, 8 Barr. 57; *Eckstien's Estate*, 1 Parson's Equity Cases, 59; *Ex Parte Latham*, 6 Ired. 406; and this is equally true where the debt is represented by a judgment obtained after lunacy as in the case at bar. Authorities *supra*.

It is true that it is held that suits may be brought against insane persons and the judgments thereon will not be void (*Heard v. Sack*, 81 Mo. 610) and that an execution sale to a party not advised of the insanity will pass title in the property; yet I judge these rulings to refer to that class of insane persons not under guardianship and who have not been formally adjudged to be insane. It is likewise true that the statute, sec. 5544, contemplates that there may be judgments and executions against an insane person or his guardian as such; and from this it may be suggested that it is

allowable for a creditor to be swift by obtaining a judgment and executing property. And that since he is thus permitted to force a preference he could be allowed a preference by the voluntary act of the guardian in preferring him. Such position is not tenable; the section of the statute referred to does not justify such course or result. There is an elaborate mode laid down by statute for the sale of the ward's real estate under the supervision of the probate court, and this mode is exclusive. *Rannels v. Gerner*, 80 Mo. 474. An execution on a judgment against a party who has been adjudged insane before judgment cannot be utilized for the sale of the ward's real estate.

As to personal property, while I will not say that a guardian cannot dispose of it for the purposes of the trust without an order of probate court, yet I do maintain that such personal estate is not subject to an execution at the suit of a creditor who has obtained his judgment in some independent jurisdiction. If he could it would amount to permitting a preference of creditors, and the unseemly spectacle of a race between creditors, each urged by the fear of success in the other, so forcibly deprecated in *Eckstien's Estate*, *supra*, would inevitably follow. The result would be that the management and administration of the ward's estate would be taken from the hands of the guardian and out of the forum of the probate court where the constitution has placed it. It will be observed from the authorities herein before cited that where in other states the ward's property has been disturbed or threatened by execution that the creditor has been restrained, to the end that the court and guardian designated by law might administer the estate. The right to sue the guardian which seems to be contemplated by the statute now under consideration is yet a valuable right notwithstanding the views here expressed. The cred-

itor may establish his demand by such suit. He may have the verdict of a jury thereon and thereby establish the legality of his claim over the head of the guardian. A broader statute in favor of the creditor in this respect than ours in other states has received this construction. *Wright's Appeal* and *Eckstien's Estate, supra.*

In this case the trial court held as stated at the outset that since defendant reported to the probate court at his annual settlement the disbursements of the estate to creditors, in which plaintiff's name or claim did not appear, and that these disbursements were approved by the probate court plaintiff could not recover. This I think was erroneous. It was a mere annual settlement and defendant made no mention therein of plaintiff's claim, notwithstanding he had notice of it. The probate court made no adjudication thereon. There has been no final settlement and the annual exhibit of the guardian here shown to have been approved by the probate court by no means amounts to an adjudication of plaintiff's claim; nor does it amount (as against plaintiff) to an approval of the payment of all the funds to other creditors. The case therefore stands upon the action of the guardian alone, and that action was a refusal to allow plaintiff a *pro rata* with the other creditors. The defendant, as we have hereinbefore stated, is a trustee for the creditors, handling a trust fund for their benefit. He has violated or abused that trust by an unequal and partial division of the fund, resulting in plaintiff's losing all of his claim. I think that for this he is liable and liable to an action at law. There are frequent cases of close analogy to this where an action at law is sustained, though in such action a *defense* might be made whereby the equitable jurisdiction of the court might be invoked in order to arrive at a proper adjustment of the guardian's accounts.

I ought to further remark that notwithstanding it appears to be the policy of the statute to charge the public with the maintenance of the lunatic rather than defeat creditors, yet there may be many cases where the guardian must necessarily maintain the ward out of the estate before its condition is known.

I attach no importance to defendant's plea of *res adjudicata*. It seems that plaintiff brought the suit which resulted in the judgment for his claim against the ward by name and defendant as his guardian, and that the judgment was rendered against the ward only. This was certainly not an adjudication that the plaintiff had no claim against the ward's estate. The foregoing considerations lead me to favor a reversal of the judgment and remanding the cause.

GILL, J. *(dissenting)*.—I understand Judge SMITH in the foreoing opinion to announce the doctrine that a guardian of an insane person cannot be allowed to prefer any creditor of his ward; but in case the estate should prove insufficient to pay the debts in full then the guardian must pay *pro rata;* and failing in this then the guardian can be held at the suit of a neglected creditor for the proportion that would be coming to him on a *pro rota* distribution.

I must dissent from that position. The statute on insane persons relating to appointment, etc., of guardians by the probate court makes no such provisions (Revised Statutes, 1889, ch. 86), and I cannot understand why the courts should so declare. Unrestricted by statute, the right of an insolvent debtor to prefer one creditor over another—that is, to use his assets to satisfy one or more and altogether to deny others—is everywhere admitted. If then the preference here in dispute had been given by the ward in person (before adjudged insane or after his restoration) then there could be no

question of its legality, and the paid creditor or creditors could hold on to all they had received, even though the entire property of the debtor had been exhausted.

Now the guardian of an insane person, appointed under our statute, stands in the place of the lunatic. He is placed in charge of the estate to manage and conduct its affairs subject of course to the orders of the probate court, but not to *wind it up* as in cases of administration of deceased persons. *State to use v. Jones*, 89 Mo. 470. There is a marked distinction between the duties of an executor or administrator and the guardian of one of unsound mind. In the former the object is to marshal the assets of the deceased—to close up finally his business and pay his debts, whilst in the latter the purpose is to hold and protect the business affairs of the insane person till restoration or death may come to his relief. In many cases the duty of the guardian is imperative to continue the business of the ward. This as already said is subject to the supervisory care of the probate court. *Jones Case, supra.* The statute law, too, has made a corresponding distinction between the manner of administering the two estates. In closing up and settling the estate of a *deceased* person provision is made for the allowance and classification of demands and for their *pro rata* payment if the estate proves insufficient to a full satisfaction; on the other hand the statute prescribing the management of the affairs of an insane person makes no provision for the presentment, allowance or classification of claims against it, but leaves this, with other matters concerning the interests of the lunatic, to the management of the guardian, who is subject to the superintending control of the court. If it was intended that the guardian should proceed to gather in the assets and pay the claims *pro rata*, it seems the like provisions that appear in the administration law would be found

inserted in the statute for the administration of the estate of insane persons. At common law the executor or administrator, it seems, might prefer one or more creditors over others of equal rank or degree (Woerner on Administration, sec. 376); and it is therefore only because of the statute that such is not still the rule. If then such was allowed in ordinary administrations on the estates of deceased persons, it ought very clearly to be permitted in the matter of conducting the affairs of an insane person's estate.

Again, a creditor of the ward may bring suit, and have judgment with right of levy and satisfaction out of the property of the insane person. Revised Statutes, 1889, sec. 5544. This is quite contrary to the idea that the assets shall be distributed *pro rata*. For it may be that the judgment thus enforced by execution may absorb the entire property and this would result of course in a preference. And if a preference can thus indirectly be accomplished, why not directly, through and by means of the voluntary act of the guardian?

And again, under the statute as it existed prior to 1883, for the settling of insolvent partnership estates, the surviving partner was not required to pay claims *pro rata*, but was permitted to pay in full such as he saw fit. *Crow v. Weidner*, 36 Mo. 412; *Collier v. Cairns*, 6 Mo. App. 190. In order to so provide for payment *pro rata*, the statute has since been amended. Revised Statutes, 1889, sec. 64. If now the surviving partner, administering the co-partnership estate, was thus, in the absence of a prohibiting statute, permitted to give preferences, on what theory can it be denied a guardian in charge of the affairs of one insane? In my opinion then, since the statute has failed to declare against preferences in the conduct or settlement of the affairs of an insane person, the guardian is not bound to pay *pro rata*, but may prefer one or more claims over others.

PRESTON ROBERTS, Plaintiff in Error, v. J. W. HERRYFORD, Defendant in Error.

Kansas City Court of Appeals, May 15, 1893.

1. **Partnership:** ACCOUNTING: UNNECESSARY SERVICES. In determining the questions of partnership profits gratuitous payments for non-beneficial, unnecessary or unjustifiable services are not to be allowed, but in this case, the disputed services are *held*, on the evidence, alike beneficial and necessary.

2. **Practice, Appellate:** DEFERRING TO TRIAL COURT IN EQUITY CASES. Where there is so much conflict and disagreement in the evidence as in this case the appellate court is authorized to defer to the finding of the trial court.

Appeal from the Howard Circuit Court.—HON. JOHN A. HOCKADAY, Judge.

AFFIRMED.

Draffen & Williams, for plaintiff in error.

(1) It was error to permit $3,600 to be deducted from the receipts of the Mexican eating-houses for wages to plaintiff's son. *First.* The evidence shows that this was an unnecessary and useless expense. Defendant protested against the employment of plaintiff's son, as it entailed unnecessary cost. "An expenditure which is both unauthorized and unnecessary cannot be charged to the firm." Bates on Partnership, sec. 767; *Marsh v. Mastersen*, 2 Cent. Rep. 435; 2 Lindley on Partnership, sec. 789. *Second.* The claim, that the plaintiff had made an arrangement with his son before he entered into the contract with defendant, and that the son's contract was one of those referred to in the articles of co-partnership to which

defendant was to be subject, is untenable. It is an afterthought. *Dobbins v. Edmonds*, 18 Mo. App. 307; *Goldman v. Wolf*, 6 Mo. App. 490; *Matthews v. Danahy*, 26 Mo. App. 660. (2) This is a proceeding in equity, and this court will examine the evidence in the case (*McElroy v. Maxwell*, 101 Mo. 294), and will enter such decree here as the court below should have given. *Baldwin v. Dawson*, 39 Mo. App. 527.

Flournoy & Flournóy, for defendant in error.

The appellate court will not reverse the finding of the trial court in equity cases, unless it appears that the preponderance of the evidence is against such finding. *Rawlins v. Rawlins*, 102 Mo. 563. The appellate court will defer to the finding of the trial court in equity cases. *King v. King*, 42 Mo. App. 454; *Mathias v. O'Neill*, 94 Mo. 520; *Erskine v. Lowenstein*, 82 Mo. 301.

SMITH, P. J.—This is a suit in equity to settle a partnership account. The questions which are presented for our decision arise upon exceptions to the report of the referee to whom the case had been referred. The trial court confirmed that part of the report of the referee which allowed a charge of $3,600 made by the plaintiff for the services of his son in managing his railway eating-houses for the two years covered by the partnership between plaintiff and defendant. The defendant's contention is that this item should have been disallowed plaintiff as a credit, and charged up on the debit side of the account, which would result in showing a profit on the eating-house business of that amount, the one half of which amount the defendant would be entitled under the terms of the partnership agreement.

The evidence tends to prove that plaintiff in June 1885, was the owner of a stock of groceries in El Paso, Texas, and had been carrying on business there in the name of "P. Roberts & Co." His two sons, Ed Roberts and Ben Roberts, were conducting the business. He also had a contract with the Mexican Central Railroad Company, by which he had leased for a term of years the eating-houses along the line of its road. The privilege of furnishing meals at these eating stations was sub-let by the plaintiff to other parties. He did not supply the meals himself, but rented the houses to others. It was necessary, under his contract, for him to see that proper service was rendered and to collect the rents. The plaintiff and defendant then entered into a contract, dated June 10, 1885, by which it was agreed that the business should be conducted for two years from July 1, 1885, under the firm name of Roberts & Herryford; that the defendant should have charge and control of it, and should devote his entire time and attention to said business, and, at the expiration of the two years, the capital of the plaintiff should be returned to him, and the profits, if any, should be equally divided between the plaintiff and defendant, and the losses should be borne equally by them. The contract contained this clause as to the Mexican eating-houses: "It is understood that said Herryford is to share with P. Roberts in the profits and losses during his partnership in the eating-houses on the Mexican Central railway, and shall be subject to all contracts and agreements made by and between said Roberts and the Mexican Central Railway Company, or said Roberts and other parties."

From these provisions of the partnership agreement it does not appear either expressly or by necessary implication that the defendant was to have charge of the plaintiff's eating-houses on the Mexican Central

railway. It seems that defendant was to have full charge and management of the partnership business only at El Paso. There were, no doubt, good reasons why the plaintiff would not care to place his eating-house business under the control of the defendant. He did not bind himself to do more than share the profit and loss therein with defendant. The testimony of the plaintiff and his son Ed was to the effect that the latter had been employed by the former to take charge of the eating-house business before the partnership agreement was entered into.

It further appears from the evidence that at the date of the partnership agreement and for some time thereafter one Bunell was acting as manager for plaintiff of his eating-houses; that on July 5th, after the partnership agreement was entered into, the plaintiff wrote to the defendant a letter, in which he mentions some complication in respect to one of his eating-house contracts and refers to Bunell's knowledge of the matter. In this letter he tells the defendant to "please explain this matter to Ed, as I presume he will take charge of that business," refering evidently to the railway eating-house business. If the plaintiff had employed his son to take charge of his eating-house business prior to the entering into the partnership with the defendant, it is easy enough to see why he wrote to the defenndant that he "presumed that Ed would take charge of the eating-house business." And this is perfectly consistent with the provisions of the partnership agreement. If plaintiff did not under the partnership agreement give defendant control of the railway eating-house business, then it would appear that the partnership agreement, the letter and the testimony of the plaintiff and his son are entirely consistent and harmonious. And even if the partnership agreement as first written was modified

before it was signed, which may well be doubted, so as to omit the clause that provided that plaintiff's son Ed should have charge of the eating-house business, this does not conclusively prove that the plaintiff had not before the date of the formation of the partnership employed his said son to take charge of that business. Nor did the plaintiff by the terms of the co-partnership agreement as modified surrender to defendant the control of the eating-house business. If the plaintiff had made an agreement with his son to take charge of his eating-house business before the date of the co-partnership agreement, then by the very terms of the instrument the plaintiff was authorized to pay his son the amount of wages stipulated in the agreement of employment, or if no amount was so stipulated, then whatever the services were reasonably worth.

The contract of co-partnership was entered into in this state where both parties then resided. The plaintiff's sons were then in charge of his grocery business at El Paso, and under the co-partnership agreement the defendant was to displace them. The co-partnership agreement was dated June 10th, though not signed till later on. On June 12th the plaintiff in answer to a letter of defendant dated June 11th states that: "I don't see it as you do in regard to Ed and Ben. Of course I do not mean that we are compelled to employ them whether they work or not. I don't want them employed unless agreeable to both you and them. I merely named it in the agreement so the boys would see that I had not forgotten them with you."

We think the inference deducible from this correspondence is that the plaintiff, who it appears wrote the partnership agreement, desired to make provision therein for the employment of his two sons by the partnership, and it was to this the defendant objected.

This provision does not seem to have made any reference to the plaintiff's eating-house business. On the other hand it would seem quite strange that if the plaintiff had previously employed his son Ed to take charge of his eating-house business, then why did he desire to provide employment for him by the partnership during the same time? Why he did this surpasses all understanding, unless it be untrue that he had such previous agreement with his son to take charge of the eating-houses.

What is stated by the plaintiff in his letter just referred to is fatal to the plaintiff's claim that he had employed his son to take charge of his eating-house business before the entering into the partnership agreement. But if the plaintiff retained under the contract of partnership, as we think was the case, the control of his eating-house business, then he had the undoubted right at any time to employ his son or any other person to manage the same for him. There is nothing in the partnership agreement requiring plaintiff to give his personal attention to his eating-house business, nor that he should furnish his son or any one else to take charge of the same and manage it without cost to the partnership. It is an elementary principle of the law of partnership that when the question of profit is required to be determined that gratuitous payments to third persons which do not appear to have been beneficial to the business nor necessary or justifiable upon business principles will not be allowed as credits. 2 Lindly on Partnership, sec. 789; Bates on Partnership, sec. 767. It is quite conclusively shown by the evidence that the plaintiff's eating-house business from its very nature and extent required frequent attention.

But as to the value of the service of one so attending it the testimony sharply conflicts. There is no evidence that the services of plaintiff's son were without

value. The defendant testified that the service could have been performed by the partnership bookkeeper, and for that reason the services of plaintiff's son were unnecessary. There was other testimony showing that it was impossible for the bookkeeper to have performed the double duty of attending to the partnership books and the plaintiff's eating-house business. The services of the plaintiff's son were alike beneficial and necessary, and the charge made therefor does not appear obnoxious to the rule of law just stated.

As to the value of the services of the plaintiff's son there is so much conflict and disagreement in the evidence that we feel authorized to defer to the finding of the trial court. *Nelson v. Nelson*, 41 Mo. App. 130; *King v. King*, 42 Mo. App. 454. And this last remark applies as well to every other issue of fact in the case which we have been called upon to decide.

We do not therefore feel warranted in interfering with the decree of the trial court, which will be affirmed. All concur.

James Halpin Manufacturing Company, Appellant, v. The School District of the City of California, Respondent.

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Kansas City Court of Appeals, March 6 and May 22, 1893.

1. **Evidence:** PLEADING: VARIANCE. The plea was that the balance sued for arose under a contract whereby plaintiff agreed to furnish two number 71 hot-air furnaces, etc., for $850. The contract offered in evidence called for two number 61 furnaces, etc., for $440. *Held*, a fatal variance and not admissible.

2. **Pleading:** CONTRACT: MODIFICATION BY PAROL. Parties by a parol agreement upon sufficient consideration may modify a written contract, and then they should declare on the agreement as modified by setting out the original agreement and the modification, as every substantive fact which must be proved must be alleged so that an issue can be made thereon. Adhered to on rehearing and the cases are discussed and distinguished.

3. ———: INSTRUCTION: ASSUMING FACTS. An instruction should not assume a theory as admitted by the pleadings unless it is so admitted, and its hypothesis should be within the limits of the pleadings.

4. **Evidence**: PLEADING: INSTRUCTION. A party is precluded from making proof of matter not pleaded, and from having an instruction thereon.

5. **Instructions**: ACCEPTANCE: TACITLY: JURY. An instruction in relation to acceptance of certain labor and material otherwise correct should not be refused simply because of the unnecessary use of the word "tacitly" as juries are presumed to understand the meaning and import of common English words.

6. **Building Contracts**: QUANTUM MERUIT: APPLICATION OF RULE. If one party without the fault of the other fails to perform his part of the contract so as to sue on it, still, if the other has derived benefit from the part performed, the law implies a promise to pay such remuneration as the benefit is reasonably worth, and this doctrine applies to contracts for sales, work, labor and material.

Appeal from the Cole Circuit Court.—HON. E. L. EDWARDS, Judge.

REVERSED AND REMANDED.

Joseph W. Hunter and *James E. Hazell*, for plaintiff.

(1) The proposition to put in the number 71 furnace for $850 when accepted by defendant constituted a new contract and a rejection of the old one for the number 61 furnace. Hence instructions based on the old contract and guaranty were improper; and numbers 1, 2 and 3 given for defendant should have been refused. *Shickles v. Chouteau, Harrison, Valle I. Co.*, 10 Mo. App. 241. (2) If the furnaces were used and possessed by defendant and were of value to defendant in heating said Aurora school building, then the plaintiff was entitled to recover their worth, not exceeding the contract price, deducting any damage to defendant by reason of plaintiff's failure to comply with its contract; and instructions numbers 1, 2, 3 and

4 asked on behalf of plaintiff should have been given, and instructions numbers 1, 2 and 3 given on behalf of the defendant should have been refused. *Tower v. Pauly*, 51 Mo. App. 75; 2 Missouri Legal News, number 2, p. 46; *Yeates v. Ballentine*, 56 Mo. 530, 538–9; *Fleischman v. Miller*, 38 Mo. App. 177, 180. (3) This being in the nature of a bulding contract and not a contract for the sale of chattels and it being impossible upon the rescission of the contract, to put the plaintiff in *statu quo*, the plaintiff was entitled to recover on a *quantum meruit* on its account and the defendant could recover on its counter-claim only such damage as it proved to the jury that it has sustained by failure of the plaintiff to comply with its contract and the instructions numbers 4 and 6 given on behalf of the defendant directing the jury to assess the amount of damages to defendant on its counter-claim at $500 the amount paid on said finances should have been refused by the court. *Yeates v. Ballentine, supra; Gregg v. Dunn*, 38 Mo. App. 283, 288; *Tower v. Pauly*, Missouri Legal News, *supra.*

Moore & Williams, for respondent.

(1) There was no error on the trial in favor of the defendant in the admission or rejection of evidence. (2) The issues raised by the first count in the defendant's answer are properly submitted in defendant's instructions 1 and 2, and upon the second count or counter-claim, in instructions 3 to 5. Instructions 6 and 7 are founded on the pleadings. And the instructions given on the part of plaintiff cover every issue made both in the pleadings and evidence. If any error was committed it was in plaintiff's favor, and is not reversible error. The defense and counter-claims were based upon a special warranty upon which

defendant relies. *Branson v. Turner*, 77 Mo. 489; *Fox v. Palace Car Co.*, 16 Mo. App. 122; 2 Benjamin on Sales [4 Am. Ed.] secs. 1348, 1354. (3) This is not a suit upon a "*quantum meruit*," and hence the doctrine for which plaintiff contends in its brief, points 3 and 5, is untenable. *Eyerman v. Cemetery Ass'n*, 61 Mo. 489. In the case of *Yeates v. Ballentine*, 56 Mo. 530, the action was upon "*quantum valebat*" not on a contract for goods and chattels sold, as in the case at bar. The case of *Gregg v. Owen*, 38 Mo. App. 283 was an action upon a "*quantum meruit*. (4) This is not a suit upon a building contract; it is a suit for goods, wares and merchandise. Plaintiff elected this form of action; the case was tried upon issues made on plaintiff's petition, and it is too late to come into this court and contend that plaintiff made a mistake in choosing its form of action, if such mistake was made. Such a practice would be subversive of all legal rules and a parody on justice. *Tower v. Pauly*, 2 Missouri Legal News, number 2, p. 46, cited by plaintiff, does not sustain such a doctrine. "He is not to be heard who alleges things contradictory to each other." Brown's Legal Maxims, side pp. 168–70. The case of *Mfg. Co. v. Mfg. Co.*, 42 Mo. App. 307 is rather in point, and the rules therein laid down govern this case. *Reed v. Bott*, 100 Mo. 62; *Nanson v. Jacob*, 93 Mo. 332; *Wilson v. Albert*, 89 Mo. 538; *Bank v. Armstrong*, 62 Mo. 59; *Weil v. Posten*, 77 Mo. 284–287; *Clemens v. Yeates*, 69 Mo. 623; *Ensworth v. Barton*, 60 Mo. 511; *Gruetzner v. Furniture* Co., 28 Mo. App. 263; *Electric Co. v. Drue Co.*, 42 Mo. App. 280.

SMITH, P. J.—This is an action to recover a balance of $350 for goods, wares and merchandise sold and delivered to defendant. The answer pleaded in bar a special contract. It was therein alleged and admitted

by the replication, that, in the month of September, 1890, the plaintiff contracted with defendant to furnish and place in the school building of the latter two number 71 hot-air furnaces which should be of sufficient capacity to heat said building to seventy degrees Fahrenheit when the temperature outside was zero. The answer further alleged, and the replication denied, that the plaintiff guaranteed that said furnaces should be complete with all necessary connections to heat said building, and that they should be free from emitting gas and smoke into said building, for which the defendant was to pay $850. The answer set forth in minute detail wherein the furnaces failed to come up to the requirements of the contract it alleged. The replication on the other hand charged that the reason why the furnaces did not heat the building was on account of the neglect and fault of the defendant, which was quite elaborately therein specified. The defendant had judgment and the plaintiff appealed.

At the very threshold of the trial the court committed an error, afterwards repeated and emphasized in the giving of an instruction for the plaintiff, which we think is fatal to the judgment. The court over the objections of the plaintiff permitted the defendant, upon whom under the issue made by the pleadings the burden of proof was primarily cast, to introduce in evidence a written proposition made by plaintiff to the defendant and by the latter accepted, to the effect: *First.* That it would place in defendant's school building two number 61 furnaces complete, set in brick with all proper connections necessary to heat said building for the sum of $440. *Second.* That it would guarantee that said furnaces should be free from emitting gas or smoke into the building; and *third,* that said furnaces would heat said building to seventy degrees Fahrenheit when the temperature would be zero. The introduction

of this contract in evidence did not tend to prove that alleged in the answer. Evidence showing a contract to deliver two number 61 furnaces for $440 with the specific guarantees therein enumerated to be free from emitting gas and smoke, and of a certain heating capacity, would not in the least tend to prove the contract alleged in the answer for the delivery of two number 71 furnaces for $850 with guarantees therein specified. There is a wide variation between the two.

It is insisted that the parol contract for the delivery of the two number 71 furnaces for $850 was made after that in writing which was admitted in evidence, and that the former is but a modification of the latter. No doubt this is a correct view of the matter, but the difficulty is that the answer pleads no such written contract and parol modification thereof. It is the law of this state that parties by a parol agreement upon sufficient consideration may modify or change the terms of a written contract. *Bunce v. Beck*, 43 Mo. 266; *Henning v. Ins. Co.*, 47 Mo. 425. But when they do so they must declare on the agreement as it stands modified. This is usually done by setting out the original agreement and the modification of it. Every substantive fact which the plaintiff must prove to maintain his action should under the practice act be alleged so that an issue can be made thereon. *Harrison v. Railroad*, 50 Mo. App. 332; *Lanitz v. King*, 93 Mo. 513. Here the *allegata* and *probata* do not correspond. It is necessary to allege the original contract and the modification thereof, for otherwise it would be impossible in any case to determine just what the contractual obligations of the parties really are. The original contract not having been alleged it could not be proved. If the original written contract and the subsequent modifications of it had been alleged as it should have been, then the con-

tract introduced in evidence would not have been subject to objection.

The defendant's first instruction told the jury that it is admitted by both plaintiff and defendant in this case that the original contract as to the furnishing and putting in the furnaces in controversy was in writing, and the jury are further instructed by such written contract the plaintiff agreed and guaranteed that it would put in defendant's school building two number 61 hot-air furnaces, and that such furnaces should heat the building to a temperature of seventy degrees Fahrenheit when the thermometer should be at zero as shown by the temperature outside; also that said furnaces should not emit smoke or gas into the building; and if you further believe and find from the evidence, that after making the aforesaid written contract the plaintiff's agent, James Halpin, inspected and examined the school building and thereupon concluded that furnaces of larger capacity were required for heating the building, and proposed a modification of said original contract, and that said proposed modification was only as to the size and heating capacity of the furnaces, which were to be number 71 instead of number 61, and as to the price of such larger furnaces, which were to be $850 instead of $440; and if you further believe that such proposed modifications were accepted by defendant, and that the terms of the original written contract as to furnaces as to heating the building and as to not emitting gas and smoke still remained a part of the modified contract, then you are instructed that if the furnaces put in by plaintiff did not comply with the agreement and guaranty as to heating the building and as to emitting gas and smoke, your findings will be for defendant.

The assumption by this instruction that it is admitted by the pleadings by both plaintiff and defendant

that the original contract for putting in the furnaces was in writing, we do not find sustained by an inspection of the pleadings. This instruction submits to the jury the proper theory of the case, if such had been the structure of the pleadings. It presents a very plain exposition of the provisions of the written contract and then leaves it to the triers of the fact to determine whether plaintiff and defendant entered into a subsequent parol modification thereof as to the size, heating capacity and price, etc., of said furnaces. It is quite clear that the essential facts embraced in its hypothesis are not within the limits of the pleadings, and for this fault it must be condemned. *Aultman-Taylor Co. v. Smith*, 52 Mo. App. 351; *Wright v. Fonda*, 44 Mo. App. 634; *George v. Railroad*, 40 Mo. App. 433; *Moffatt v. Conklin*, 35 Mo. 455; *Bank v. Murdock*, 62 Mo. 73; *Crews v. Lackland*, 67 Mo. 621; *Leonx v. Harrison*, 88 Mo. 495; *Merrett v. Poulter*, 96 Mo. 240; *Noll v. Railroad*, 97 Mo. 74; *Bender v. Dungan*, 99 Mo. 130. And the defendant's other instructions, except the sixth and seventh, are subject to a like infirmity.

No error is perceived in the action of the cour int refusing plaintiff permission to prove an agreement entered into between plaintiff and defendant whereby the latter promised to repair the said building and the flues therein. The replication alleged no such agreement. If this was one of the modifications of the original written contract and the plaintiff desired to invoke its provisions he should have pleaded it, and not having done so he is precluded from making the proof he offered. And for similar reasons the rulings of the court in rejecting other offers of proof by the plaintiff were properly rejected. In this connection it is not out of place to state that the plaintiff's seventh instruction in respect to the agreement to repair was outside of the limits of the pleadings and should not have been given

for that reason. But of this plaintiff can have no advantage, and we call attention to it in view of a probable further trial of the cause.

We can discover no error in the action of the court in refusing certain instructions asked by plaintiff, except as to the third, which informed the jury that, although they may believe and find from the evidence that the plaintiff failed to heat said building to 70 degrees, the temperature outside being zero, without the escape of smoke and gas, yet if the jury further find from the evidence that plaintiff erected and placed in said school building two number 71 hot-air furnaces in good and workmanlike manner, and that they were tacitly accepted by the defendant, and were used and possessed by defendant, and were of value to said defendant in warming and heating said building, then the jury will find for the plaintiff the actual value of said furnaces not exceeding the contract price.

The plaintiff's third instruction we think should have been given. It is true that the word "tacitly" should have been omitted; still we cannot think in view of the evidence that the meaning of this term could have been misunderstood. Juries are presumed to understand the meaning and import of common English words of which this is one. The evidence tended to show that the defendant retained the furnaces in their building and paid part of the purchase price, and while there was no formal acceptance of the furnaces under the contract it was not improper to have, as the instruction did, left it to the jury to determine whether or not under the circumstances in evidence there was not a tacit or implied acceptance of it.

Defendant's case seems to place the sale and putting in of the furnaces as an ordinary sale of a chattel, as distinguished from what is known as a builder's contract. Defendant's instructions were upon the theory

that plaintiff should remove the furnace on being notified of their failure to fill the contract. If the contract was a builder's contract, then the instructions should have been further qualified by allowing defendant the damage sustained, if any. *The Globe L. & H. Co. v. Doud*, 47 Mo. App. 439; *Mohney v. Reed*, 40 Mo. App. 112. The well established rule in this state now is, that if one party without fault of the other fails to perform his part of the contract in such a manner as to sue on it, still, if the other party has derived benefit from the part performed, it would be unjust to allow him to retain that without paying anything. The law, therefore, generally implies a promise on his part to pay such remuneration as the benefit conferred is reasonably worth and to recover that *quantum* in an action of *indebitatus assumpsit*, and this doctrine applies to cases arising on contracts for sales and on contracts for work and labor and materials. There is no longer any distinction as to the application of this doctrine to any of these cases. It is equally applicable to all alike. Nothing more need be said in respect to the propriety of the action of the trial court in refusing this instruction than to refer to the case of *Smith v. Keith & Perry*, decided by us and reported in 36 Mo. App. 567, where the principles of the rule embodied in this instruction were considered and discussed in the light of the authorities there collated.

We have not overlooked the question as to whether or not the plaintiff has not by its own instructions adopted the very errors of which it complains in respect to the admission of evidence and the giving of instructions for defendant. While some of the plaintiff's instructions approach in that direction within "a hair breadth" of the forbidden line, they do not transcend it. We do not think they should be considered as inviting or adopting the errors to which we have adverted

in noticing the evidence and instructions of defendant. The instructions given for both sides are in other respects, we think, unexceptionable.

Entertaining these convictions it follows that the judgment must be reversed and the cause remanded. All concur.

ON MOTION FOR REHEARING.

SMITH, P. J.—The defendant is in error in supposing that the rule of pleading announced in *Henning v. Ins. Co.*, 47 Mo. 425 and *Lanitz v. King*, 93 Mo. 513, is applicable alone to cases where the contract is required by the statute of frauds to be in writing.

In the first of these cases the suit was on a contract of insurance. The plaintiffs offered in evidence at the trial an open policy of insurance in many essential particulars different from the contract declared on. To avoid a variance and to bring the contract within the operation of the policy, plaintiff sought to introduce parol evidence to show that the written policy was modified by the agreement of the parties. This evidence was excluded by the trial court. The supreme court declared that, "Parties may by a subsequent parol agreement upon sufficient consideration change or modify their written contract," citing *Bunch v. Beck*, 43 Mo. 266. "But," says the court, "in the present case the written contract is not declared on *nor is suit instituted upon it in any modified form*," and therefore there was "*no error in the action of the court in excluding the evidence.*" After thus disposing of the question of pleading and evidence the court proceeded to declare that the *contract sued on, being merely verbal*, was invalid.

In *Baile v. Ins. Co.*, 73 Mo. 371, it was held that an insurance company could make a binding contract

of insurance without writing. In the second of these cases—*Lanitz v. King*—the learned judge who wrote the opinion must be presumed to have been aware of what was ruled in *Baile v. Ins. Co.*, yet he cites with approval and applies the rule of pleading stated in *Henning v. Ins. Co.* This goes to show that the rule there declared was a general rule of pleading and not limited in its application to contracts which are required by the law to be in writing. And this becomes more apparent when the opinion in *Lanitz v. King* is fully scrutinized, for it is there to be seen that the contract was one in writing for the sale of real estate where the purchaser was accorded two weeks time in which to arrange for the payment of the purchase price of the land. The purchaser did not offer to pay the purchase price of the land at the stipulated time, but twenty-one months afterwards he tendered the same and demanded a deed of the seller, which was refused. The purchaser brought suit for damages for the breach of the contract, declaring on the contract as written. At the trial the purchaser undertook to show a modificatian, or rather facts which amounted to a waiver of the stipulation in the contract as to the time of payment of the purchase price of the land which had not been pleaded. This the trial court refused to permit him to do.

The supreme court solved the question of the propriety of the action of the trial court in excluding this evidence by reiterating and applying the rule of *Henning v. Ins. Co.* And to prevent any misconception of the ruling, it was said in the concluding paragraph of the opinion that, "We do not consider the question whether such subsequent parol modification of the written contract would be within the statute of frauds." So that the court considered the rule in its application to pleadings on contracts in general unaffected by the statute of frauds, or in other words the idea that the

rule was to be applied only in those cases where there is a subsequent parol modification of such contracts as are required by the statute of frauds to be in writing, is expressly negatived. A parol modification of a contract required by the statute of frauds to be in writing can have no existence except perhaps in respect to the consideration in contracts for sale of real estate. *Rucker v. Harrington*, 52 Mo. App. 481; *Smith v. Shell*, 82 Mo. 215. It is thus seen that according to defendant's contention this rule of pleading would have a very limited application indeed, but in this we think it is in error and that the rule applies in every case where the modification of the contract sought to be established is a legal and valid modification of the original contract.

The defendants have misconceived what is declared in *Brown v. Brown*, 90 Mo. 184. The question there was whether certain oral testimony was admitted which it was contended contradicted or varied a written receipt given for the negotiation of a note and the payment of the proceeds thereof. In deciding this in the negative it is declared by the court, that the "Rule which prohibits the introduction of parol contemporaneous evidence does not apply when the original contract was verbal and entire and part only reduced to writing. * * * Nor does the prohibitory rule apply when a complete contract in writing is entered into which is subsequently varied by a parol agreement." From this it is plain that the court was dealing with a rule of *evidence* and not of *pleading*. The case is not in conflict with the two first cases cited, but if it was it would have to yield to the latter ruling made in *Lanitz v. King*.

We can discover no reason for receding from the opinion we have already expressed in the case.

CLARK WRIGHT, Appellant, v. JOHN VETTER *et al.*, Respondents.

Kansas City Court of Appeals, May 22, 1893.

Consideration: BILLS AND NOTES: SURETY: RESCISSION: FRAUD. The defendant gave the note in suit in settlement of another note on which he believed he was surety and soon thereafter received such other note and retained it, but offered it back in his answer. *Held:*

(1) As there was nothing in the transaction in the nature of a contract requiring a rescission, the doctrine of *statu quo* did not apply.

(2) There was no consideration for the note in suit and plaintiff could not recover.

(3) And though the answer raised the question of false and fraudulent representation plaintiff is not harmed by the omission of that question in the instruction.

Appeal from the Vernon Circuit Court.—HON. D. P. STRATTON, Judge.

AFFIRMED.

Stone, Hoss & King, for appellant.

(1) The rule is without exception, that, when there is an attempt to rescind a contract on account of fraud, the party offering to rescind must, as soon as the fraud is discovered, return or offer to return the property received by him in the transaction, and if he does not do this promptly upon discovery of the fraud he cannot take advantage of it afterwards. *Crumb v. Wright*, 97 Mo. 13; *Girard v. Car Wheel Co.*, 46 Mo. App. 79; *Cahn v. Reid & Bungardt*, 18 Mo. App 116; *Hoyt v. Green*, 33 Mo. App. 205. (2) The instructions given by the court were not based upon the pleadings, and

were therefore erroneous. The court ignored entirely the question of fraud, the only issue raised by the pleadings. *Glass v. Geloin*, 80 Mo. 297.

Horace H. Blanton and *Burton & Wight*, for respondents.

(1) No tender was necessary. It was only given in payment of the note John Vetter was made to believe by appellant he had executed to Henry Wright as security for his son Joe. The respondents were occupying no position of advantage. In short, the note in suit was not executed in consideration for the Joe Vetter note, but for the supposed note of defendant, John Vetter. There was no claim that Joe Vetter had become insolvent since the execution of defendant's note to the plaintiff, or that it was not as collectible at the time of the trial as it ever had been.

ELLISON, J.—This action is on a promissory note. Judgment of the trial court was for defendant. The defense presented by defendant was that he gave the note with two others in settlement of a certain other note on which it was represented to him he was surety. He was not in fact a surety on the other note. Therefore the consideration failed and defendant is not liable.

But shortly after defendant executed the note in suit, the note on which he supposed he was surety and which was to be surrendered to him was sent to him and has remained in his possession. From the fact that he did not return the note, or offer to return it, immediately after he discovered he had not signed it, it is urged that he cannot maintain this defense, notwithstanding he offered or tendered it back in his answer, the argument being that before he can be

permitted to urge his defense he must place the other party in *statu quo* by returning the other note. *Cahn v. Reid*, 18 Mo. App. 116, and other cases are cited in support of this contention. Our opinion is that these cases are not applicable. There was nothing in the nature of a contract in this case requiring rescission and return of property obtained under a contract. The note was neither sold nor pledged to defendant. There was no property right bestowed upon him at his election. The sole question made was as to the consideration of the note. If the defendant executed the note in suit under the belief that he was liable as surety on the other note, and for that reason there was no consideration for his act, and it can make no difference in the result whether he came to believe he was surety by reason of fraudulent representations or otherwise, there would still be no consideration.

The answer set up that defendant was led to believe he was surety on the other note by reason of the false and fraudulent representations of plaintiff's agent. But the court substantially instructed the jury, omitting the question of fraud, that if the note in suit was given by defendant under the belief that he was surety when he was not, and that it was given for the sole purpose of taking up the note upon which he thought he was surety, plaintiff could not recover. The complaint made is that this instruction omitted the question of fraud alleged in the answer. We cannot see how plaintiff is harmed by this. If defendant executed the note only for the reason that he believed he was surety on the original note, when in truth he was not, it is no consequence whether the belief was caused by fraudulent or innocent representations or no representations at all. In our opinion plaintiff's appeal is based upon a theory not applicable to the facts of the case.

The judgment will be affirmed. All concur.

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CAHILL, COLLINS & CO., Appellants, v. EVERETT ELLIOTT *et al.*, Respondents.

Kansas City Court of Appeals, May 22, 1893.

1. **Mechanics' Lien:** WITNESSES: DEATH OF CONTRACTOR. The plaintiff sub-contractor is not a competent witness in his suit against the contractor's administrator and the owner to enforce a mechanics' lien, even though the administrator's answer admits the allegations of the petition.

2. ———: CREDIT OF THE BUILDING: INSTRUCTION: HARMLESS ERROR. Whether an instruction requiring plaintiff to show the materials were furnished for the building and upon its credit is error or not, it was harmless in this case, where the trial was before the court and there was a failure of evidence that the material was furnished for the building.

Appeal from the Jackson Circuit Court.—HON. C. O. TICHENOR, Special Judge.

AFFIRMED.

H. D. Wood and *George N. Elliott*, for appellants.

(1) The rejection of the testimony of the plaintiff Cahill by the court, based upon the ground that the contractor to whom the materials were furnished was dead, was erroneous. The statute is an enabling, not a disabling, one. *Bates v. Forchet*, 89 Mo. 128. (2) Where at common law a party could testify, he can still do so notwithstanding the death of the party to the contract or cause of action. *Angell v. Hester*, 64 Mo. 144; 1 Greenleaf on Evidence [12 Ed.] par. 350; *United States v. Murphy*, 16 Pet. Rep. 203; *De Witt v. Smith*, 63 Mo. 266; *Henry v. Evans*, 97 Mo. 52. (3) The testimony of Cahill ought not to have been excluded. It was competent to the issue between Miller, the owner,

and plaintiffs, as to plaintiffs' right to a lien, an issue exclusively between them, and "the cause of action in issue and on trial," with which the representative of the deceased contractor had nothing to do. Neither of the parties to this issue was dead. *Nugent v. Curran*, 77 Mo. 325; *Poe v. Domine*, 54 Mo. 124; *Martin v. Jones*, 59 Mo. 186; *Williams v. Perkins*, 83 Mo. 385; *Wallace v. Jacko*, 25 Mo. App. 313; *Fulkerson v. Thornton*, 68 Mo. 468; *Wiley v. Morse*, 30 Mo. App. 269. (4) The contractor being incompetent as a witness to these facts in issue between the material-man and the owner, his death cannot affect the competency of the material-man as a witness to any one or all of such facts, the purpose of the statute being to close the mouth of one party by law only where the mouth of the other party is closed by death. *Coughlin v. Haeussler, Ex'r*, 50 Mo. 126; *Butts v. Phelps*, 79 Mo. 302; *Meier v. Thieman*, 90 Mo. 443. (5) The testimony excluded must be of a character adverse to the interest of the estate of the decedent. Where the issue does not involve any interest of the estate of the decedent the other party is a competent witness. The issue of lien did not relate to the contract with Everett. *Priest v. Chouteau*, 12 Mo. App. 252; s. c., 85 Mo. 409; *Ring v. Jamison*, 2 Mo. App. 584; *Bank v. Payne*, 20 S. W. Rep. (Mo.) 41. (6) No court of this state has ever held that the workman or material-man must show, in addition to the fact that he did work upon or furnish material for a building, that he did such work or furnished such material upon the credit of the building. In respect to the delivery of the materials it is only necessary to prove two things: That they were furnished for the building, and that they were used in the building. *Fatham, etc., v. Ritter*, 33 Mo. App. 407; *Henry et al. v. Evans*, 97 Mo. 47.

Lathrop, Morrow & Fox, for respondents.

(1) The plaintiffs absolutely failed to trace any contract relation between themselves and the landowner. This being true, the lien must fail. *Kling v. Construction Co.*, 4 Mo. App. 574. (2) The court committed no error in striking out and disregarding the testimony of witness Cahill, one of the plaintiffs. *Angell v. Hester*, 64 Mo. 142; *Meier v. Thieman*, 90 Mo. 442; *Leach v. McFadden*, 110 Mo. 584; 19 S. W. Rep. (Mo.) 947; *Leeper v. Taylor*, 111 Mo. 312; 19 S. W. Rep. (Mo.) 955; *Messimer v. McCray*, 113 Mo. 382; 21 S. W. Rep. (Mo.) 17. (3) The answer of the administrator of Everett, admitting the allegations of the plaintiffs' petition, does not help the appellants' contention. *Allen v. Allen*, 26 Mo. 327; *Melcher v. Derkum*, 44 Mo. App. 650; *Loan Co. v. Aid Ass'n*, 27 N. E. Rep. 952; *Chapman v. Dougherty*, 87 Mo. 617. (4) The authorities cited by the appellants are far from sustaining their position. Revised Statutes, 1889, sec. 8918.

ELLISON, J.—This action is to enforce a mechanic's lien. Plaintiff is a sub-contractor and defendant Miller is the owner of the building. Pierce Everett was the contractor and was made a defendant, but he died before the trial. His administrator was then made a party. The administrator admitted by answer the allegations of the petition. Plaintiff's testimony was excluded by the trial court, and that is the principal reason for his appeal. The facts necessary for plaintiff to prove, since he had no contractual relations with defendant Miller the owner, were that he sold the material to Everett, the contractor, and the price and amount thereof, as well as that it was *for use on Miller's building*. In other words the contracting

parties, the parties to the contract, were Everett and plaintiff. Everett was the sole contractor upon one side and plaintiff upon the other. Everett being dead, plaintiff the other party to the contract is disqualified. One of the issues here involved the question whether the material was sold for this building and was used therein, or was it sold on the individual credit of Everett? Everett, the other contracting party, being prevented by death from testifying to these things the plaintiff is disqualified. Such is the spirit and letter of the statute. The cases to be found in appellant's brief deciding that though one party to a contract is dead the other may testify, are not applicable. Those cases are where there is yet a surviving party who made the contract, such for instance, as a surviving partner.

The court having excluded the testimony of plaintiff gave a declaration to the effect that there was no competent evidence showing that the materials in controversy "were furnished for the building *and upon its credit.*" The words italicised are criticised by appellant. Whether it is necessary in order for a sub-contractor to establish a mechanic's lien against a building that he should take upon himself the burden to prove, affirmatively, that the material was furnished on the credit of the building, is not necessary to say. It may be conceded, and is perhaps true, that upon proof that material was furnished for a building it would be presumed to have been on its credit for lien purposes. If the fact was otherwise and the material was sold on the exclusive credit of the contractor, it could be shown in defense. But this case was tried without a jury and the words here criticised are doubtless merely cumulative on the previous expression, "for the building." At any rate an examination of the evidence of the witnesses mentioned by appellant fails to sustain

his statement that the material was by them shown to have been furnished by plaintiff *for the building*, and this fact justifies the declaration. The plaintiff lived in St. Louis and furnished goods to Everett, a dealer here. So far as the testimony of these witnesses is concerned, plaintiff knew nothing of where the goods were placed until after the buildings were completed.

The judgment will be affirmed. All concur.

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GEORGE E. DUDLEY, Respondent, v. THE WESTERN UNION TELEGRAPH COMPANY, Appellant.

Kansas City Court of Appeals, May 22, 1893.

Per Smith, P. J.

1. **Telegraphs:** PENALTY: TRANSMISSION AND DELIVERY: STATUTE. The penalty imposed by section 2725, Revised Statutes, 1889, for failure to transmit messages promptly and with impartiality and in good faith does not apply to the delivery to the addressee but merely to the transmission over the wire, following *Connell v. Tel. Co.*, 108 Mo. 459.

2. **Construction:** RULE AS TO PENAL STATUTES. A penal statute is not to be regarded as including anything which is not clearly and intelligently described in its very words as well as manifestly intended by the legislature.

3. **Telegraphs:** PENALTY: TRANSMISSION AND DELIVERY. ELLISON and GILL, JJ., concur solely because of the controlling authority of *Connell v. Tel. Co.*, *supra;* ELLISON, J., in a separate opinion *holding* that "transmit" in the statute covers the delivery of the telegram and that the amendment of the statute casting the burden of proof on the company that the wire was engaged as the reason of the delay in transmitting, in no wise controls the preceding provisions of the section, and does not mean that the wire being engaged was the only excuse to be allowed the company, but was merely an excuse peculiarily within its knowledge.

Appeal from the Jackson Circuit Court.—HON. R. H. FIELD, Judge.

REVERSED

Karnes, Holmes & Kruthoff, for appellant.

(1) Defendant contended in the circuit court that this statute applied only to the transmission of the message and that the transmission was required to be done "promptly and with impartiality and good faith." The circuit court, as will be perceived from its finding of facts and its refusal of defendant's declarations of law, extended the statute to a case of negligence in the delivery of the telegram. This statute has recently been construed by the supreme court of Missouri *in banc*. The court said, per BRACE, J.: "This section is, in form and substance, a penal statute and subject to the rules of construction which obtain in respect of such statutes, and require that 'no case shall be held to fall within it which does not fall both within the reasonable meaning of its terms and within the spirit and scope of its enactment.' Endlich on Interpretation of Statutes, ch. 12." *Connell v. Tel. Co.*, 18 S. W. Rep. 883; *Brooks v. Tel. Co.*, 19 S. W. Rep. (Ark.) 572. (2) That this is the scope of the statute under consideration is emphatically made clear by its closing clause: "The burden of proof shall be upon the company to show that the wire was engaged as the reason for the delay in transmitting such dispatch." It thus appears that of the defendant's appliances for transacting its business, only "the wire" was in the legislative mind. (3) By writing and signing the message in the form he did, the plaintiff signified both his knowledge of the rule of the company and his assent to it. *Hill v. Tel. Co.*, 11 S. E. Rep. (Ga.) 874, and cases cited; 2 Shearman & Redfield on Negligence, sec. 552; Endlich on Interpretation of Statutes, secs. 74, 75, 83; Sutherland on Statutory Construction, sec. 254. (4) There are statutes in other states similar to the one in question in this case. And it is generally held that

such statutes only extend to acts or omissions with partiality or in bad faith, and that under it there can be no recovery for mere negligence. *Tel. Co. v. Steele*, 108 Ind. 163; *Tel. Co. v. Swain*, 109 Ind. 405; *Tel. Co. Jones*, 116 Ind. 361; *Reese v. Tel. Co.* 123 Ind. 294; *Frauenthal v. Tel. Co.* 50 Ark. 78; Sutherland on Statutory Construction, sec. 350; *United States v. Ten Cases*, 2 Paine C. C. 162; *Tel. Co. Wilson*, 108 Ind. 308, 312.

Harkless & Marley, for respondent.

(1) Now, transmit where? The section does not say. Who says that it must mean transmit over the wires only? The telegraph company. Why so? Because they say that's what the telegraph people construe it to mean. But this question has been expressly determined against appellant by the court of appeals. *Brashears v. Tel. Co.*, 45 Mo. App. 433. Under a statute similar to ours, where the word "neglect" is used, same conclusion has been reached in Indiana. *W. U. Tel. Co. v. Buchanan*, 35 Ind. 429.

SMITH, J.—This was a suit brought by the plaintiff against the defendant a telegraph corporation doing business in this state, for a statutory penalty for a failure to transmit a message promptly with impartiality and good faith and to deliver the same to the addressee. It is conceded that the message was transmitted promptly and with impartiality and good faith. It is likewise conceded that the defendant was guilty of negligence in failing to deliver the message to the addressee. The statute, Revised Statutes, section 2725, imposes a penalty of $200 upon a telegraph company for refusing, on payment or tender of the usual charges for transmitting dispatches as established by the rules

and regulations of such telegraph company, "to transmit the same promptly and with impartiality and in good faith."

The decisive question which we have here to decide is whether this language of the statute imposes the penalty therein denounced for a failure by the telegraph company to deliver a message after it has transmitted the same promptly and with impartiality and good faith over its wires to the point on its line to which it is addressed? It is incontrovertably true that where a telegraph company undertakes to deliver under reasonable rules and regulations a message transmitted over its wires and neglects to do so that it is liable in damages to those injured by such neglect. But has the statute provided a penalty for the refusal to perform this duty as it has for the refusal to perform the duty of transmitting a message promptly and with impartiality and good faith? The language of the statute is not to transmit the message promptly and with impartialty and good faith, *and to deliver the same.* Its terms clearly limit the penalty to the refusal to transmit the message promptly with impartialty and good faith over the wires to the point on the line where it is addressed. It is a penal statute and as such it is not to be regarded as including anything which is not clearly and intelligently described in its very words as well as manifestly intended by the legislature, or which is the same thing stated in another way "no case shall be held to fall within it which does not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment." Endlich on Interpretation of Statutes, ch. 12. And where there is a doubt the statute ought not to be construed to inflict a penalty which the legislature may not have intended. When these rules are applied to this case we find it quite difficult to escape the conclusion that the plaintiff's judgment

cannot be sustained for the language of the statute does not plainly imply the intention to impose a penalty for the refusal to deliver a message.

But the plaintiff contends that the St. Louis court of appeals has ruled that the statutory term "transmit" was intended not only to embrace the transmission of messages over the wires but it necessarily includes the prompt *delivery of them* as well. *Biernett v. Tel. Co.*, 39 Mo. App. 599; *Brashears v. Tel. Co.*, 45 Mo. App. 453. The ruling of these cases on this point we cannot accept as the undoubted law. According to our understanding, while they do not purport to do so, they do in fact ignore the well recognized distinction which is always to be observed between remedial and penal statutes and the rules of construction severally applicable to them. If the statute in question were of the former instead of the latter class the reasoning and conclusion of the learned court would we think be above all criticism. But to say in a statute like this that the term "deliver" can be imported into it and annexed to the term "transmit" by implication would be to do violence to the very rule of construction quoted with approval by the court in the course of its opinion in the former of these cases. It seems to us that this amounts to no less than by construction to create a duty and a penalty for its non-performance which is not within the authority of any court.

The statute of Arkansas imposes a penalty upon a telegraph company for refusing to "transmit" over its wires to localities on its line any message tendered it for transmission. The supreme court of that state in the recent case of *Brooks v. Tel. Co.*, 19 S. W. Rep. 572, in construing that statute declared that the language is not "to transmit and deliver" the message. The terms of the statute say the court "confine the penalty to transmit over the wires to the locality on the

line to which the message is addressed" and that it cannot be said that the language plainly implies the intention to visit a penalty for a refusal to deliver. And in the same connection it is further stated that "where the message is transmitted and the company refuses to deliver it, the person injured is remitted to his common law remedy." In Georgia one section of the statute requires telegraph companies to transmit messages while another requires them to *deliver* all messages addressed to persons residing within one mile of the office. The supreme court of that state in the case of *Horn v. Tel. Co.*, 88 Ga. 538, in speaking of the duty to deliver said, "It is obvious that the reason here given cannot apply to the transmission of a dispatch from one office to another where it can be called for. This is a duty altogether different from that of delivery."

The supreme court of this state in *Connell v. Tel. Co.*, 18 S. W. Rep. 833, which was an action based on the statute, section 2725, to recover a penalty for the failure to deliver a message, declared that "the failure to deliver the message at that point to the person to whom it was directed may have been an act of negligence for which defendant might be made to respond in damages, but *it is not the failure of duty for which the statute imposes the penalty sued for.*" In discussing the effect of the statute as to interstate telegrams it is further declared that the "state in this enactment * * * simply attempts so far as its own citizens are concerned to secure their *prompt transmission.*"

We are unwilling to yield our assent to the plaintiff's contention that since the message in that case was addressed to a person at a point outside of this state that the ruling made is wholly inapplicable to the case in hand, where the message was addressed to a person at a point in this state. We understand the

supreme court's exposition of this statute in effect to be that for the neglect to deliver a message to the addressee whether at a point within or without this state it has imposed no penalty as it has for the neglect to perform the duty of transmission. The duty to transmit a message promptly with impartiality and good faith is one thing and that of delivery is another. The statute imposes a penalty for the failure to perform the former, but for a failure to perform the latter it does not.

It therefore follows that the recovery was improper and that the judgment should be reversed, which is accordingly ordered. ELLISON and GILL, JJ., concur in separate opinion.

ELLISON, J. *(concurring.)*—Judge GILL and I concur in the foregoing opinion solely on the authority of *Connell v. Tel. Co.*, 108 Mo. 439. If that case was not a controlling authority upon us under the constitution, we should rule that section 2725, Revised Statutes, 1889, in enacting that a telegraph company should "provide sufficient facilities at all its offices for the dispatch of the business of the public * * * and on payment or tender of their usual charges for transmitting dispatches * * * to transmit the same promptly and with impartiality and good faith, under a penalty of $200 for every neglect or refusal so to do," covered the delivery of the telegram.

Speaking for myself I will add that it was so held by the St. Louis Court of Appeals in *Brashears v. Tel. Co.*, 45 Mo. App. 433. It was likewise so expressly ruled *on a like statute in Little Rock Tel. Co. v. Davis*, 41 Ark. 79.

Our statute reads that, "on payment of the usual charges for transmitting dispatches as established by the rules and regulations" of the company the company

shall "transmit the same promptly." These charges, as every one knows, include the delivery. And so it is likewise well known that such companies have "established rules and regulations," excusing or restricting delivery to certain limits. Endlich on Statutes, at page 2, says that in construing penal statutes, "no case shall be held to fall within it which does not fall both within the reasonable meaning of its terms, and within the spirit and scope of the enactment." What is the reasonable meaning of the terms of our statute "to transmit promptly?" Is the dispatch merely to be transmitted promptly from the company's office in one town to the office in another town? If that is all, why send it at all? In ninety-nine cases out of a hundred it is no more likely to reach the person addressed than if it had remained in the sending office. The mail would be much more expeditious. The word "transmit" as used in the statute, and for which the charges and rules spoken of in the statute are made, evidently include the delivery. The transmission is *to the party addressed*, and not simply to the company's office in the town or city in which he resides. If a telegram is addressed to "John Doe, custom-house, St. Louis, Mo.," what is its destination; the company's office in St. Louis, or John Doe at the custom-house? It appears to us that to construe the statute as stopping short of delivery, is not alone contrary to its spirit and intent, but is in the face of its express language; for Webster gives as one of the primary definitions of the word "transmit" that it is to send from one person to another. It appears to us as quite apparent that the meaning, scope and spirit of the statute under all rules of construction is to inflict a penalty for a failure to deliver a dispatch to the party addressed. It is to so deliver that the company has been paid its charges provided for in the statute. To

restrict the statute to the mere sending a dispatch over the wire requires additional language to that which the statute now contains.

The courts in some of the states having statutes wholly unlike ours have made rulings under such statutes which are not at all applicable to our statute. In 1885 the statute of Arkansas was altogether changed, so that instead of reading, as it had theretofore read, substantially as ours, was made to read that the telegraph company should "transmit *over its wires to localities* on its line" all dispatches offered. The case of *Brooks v. Tel. Co.*, 192 S. W. Rep. cited by Judge Smith was a decision under such a statute, which the court held to mean what it says viz: to transmit over the *wire* to *localities* on the line. The court expressly notes that such a statute is different from their former statute, which reads like ours merely "to transmit." In the remaining case cited from 88 Georgia, 538, the statute of Georgia itself distinguishes between transmission and delivery. Our statute has, it is true, recently been amended concerning the amount of the penalty, etc.; and in addition there was added, that, "the burden of proof shall be upon the company to show that the wire was engaged as the reason for the delay in transmitting such dispatch." But this in no wise controls the preceding provisions of the section. It is merely the enactment that if the cause of delay was the fact that the wire was taken up with other business the burden of showing this was upon the company, which would have the knowledge of such fact. The amendment cannot mean that the wire being engaged was the only excuse to be allowed a telegraph company. The dispatch might not be sent for the reason that the wire was down or broken or for many unavoidable causes. The legislature doubtless selected an instance or cause of excuse which laid peculiarly

within the knowledge of the company and the proof of which the company should be required to assume the burden.

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A. Dymock, Appellant, v. The Missouri, Kansas & Texas Railway Company *et al.*, Respondents.

Kansas City Court of Appeals, May 22, 1893.

1. **Bills of Lading**: PLEDGES: TITLE. A bill of lading transferred to furnish security for advances is a pledge for the goods themselves unless circumstances indicative of a different intention appear, and the pledgee holds the legal title to the goods and is entitled to all the rights and remedies of a purchaser for value.

2. ———: COLLATERAL SECURITY: STOPPAGE IN TRANSITU: ANTECEDENT DEBT. A *bona fide* holder of a bill of lading as collateral security has a title to the goods which is paramount to the unpaid vendor's right of stoppage *in transitu*, but such right of stoppage is not cut off where the bill of lading is taken as collateral for or in payment of an antecedent debt.

3. ———: NOT NEGOTIABLE: STATUTE: COMMON LAW: CARRIERS. At common law a carrier can limit its liability and the statute relating to the bills of lading is in derrogation of the common law, and the object of the statute in requiring the insertion of the words "not negotiable" in bills of lading was not to effect any transfer of the title with notice that the shipper's vendor had not been paid the purchase price, etc., but to notify the shipper himself that the bill of lading was not subject to the operation of the statute.

4. ———: PARTY IN FAULT MUST SUFFER: ASSIGNABLE. One who clothes another with evidence of ownership of a bill of lading, thereby putting it in his power to deal with it as his own, is estopped to assert his real title as against a purchaser having no knowledge of such title; and this too though such bill be merely assignable.

Appeal from the Jackson Circuit Court.—Hon. Richard Field, Judge.

AFFIRMED.

Porterfield & Adams, for appellant.

(1) The Midland National Bank acquired no better right to the property in controversy than Brannock & Co., or the Currier Commission Company had therein. *Nat. Bank of Commerce v. Railroad, supra; The Brunswick Co. v. Martin Co.*, 20 Mo. App. 158. (2) As a matter of law, the words "not negotiable" printed on the face of the bill of lading were sufficient to put the bank upon notice of all equities attaching to the bill, and of all the infirmities of the holder's title. *Pruis v. Lumber Co.*, 20 Ill. App. 239; *Goodman v. Simonds*, 20 How. 365; *Andrews v. Pond*, 13 Pet. 65; Wade on Notice, sec. 90; *Hull v. Hale*, 8 Conn. 336; *Lallande v. Creditors*, 42 La. 705; *Lee v. Turner*, 15 Mo. App. 205; *Angle v. Ins. Co.*, 92 U. S. 342; Daniel on Negotiable Instruments, sec. 795*a*; *Booth v. Barnum*, 9 Conn. 286; *Rowland v. Fowler*, 47 Conn. 347; *Chouteau v. Allen*, 70 Mo. 340. (3) The bill of lading was appropriated by the bank in payment of a pre-existing debt. The bank is not, therefore, entitled to claim the property covered by the bill as a *bona fide* purchaser for value, as against the rights of the unpaid vendor. *Skilling v. Bollmann*, 73 Mo. 665, and authorities cited; *Goodman v. Simonds*, 19 Mo. 106; *Conrad v. Fisher*, 37 Mo. App. 352; *Eaton v. Davidson*, 21 N. E. Rep. (Ohio) 442.

Lathrop, Morrow & Fox, for respondents.

SMITH, P. J.—This was an action of replevin to recover possession of a car of sacked oats in the possession of the defendant railroad company. Under the writ of replevin the oats were delivered to the plaintiff. The Midland National Bank was made a party defendant, claiming an interest in the replevined property by

virtue of being the owner of a bill of lading covering it.

The facts disclosed at the trial were substantially as follows: Plaintiff was a grain dealer in Kansas City. On October 19, 1891, he made a contract with A. L. Brannock & Co. for the sale of the carload of oats in controversy. The contract was made with one G. B. Currier, who was a member of the firm of Brannock & Co., and also president of the Currier Commission Co. Nothing was said at the time of the sale, or at any other time, as to the terms upon which the oats were sold; but there was evidence tending to show that by a general custom existing in Kansas City sales of grain were to be paid for in cash on delivery. The carload of oats arrived in the city on October twenty-seventh, being shipped from Julesburg, Kansas, to plaintiff under a shipper's order bill of lading. The sale by plaintiff to Currier was made upon the terms "Memphis rates," which was shown to mean the price of the grain at Memphis, less the freight from Kansas City to Memphis.

On October twenty-seventh, in order to complete the terms of the sale, the plaintiff procured from the railroad company a bill of lading covering the car in controversy, whereby the oats were consigned to the plaintiff's order at Memphis. The plaintiff then made out an invoice of the car in question and procured weighers' certificates and certificates of inspection; he then indorsed this bill of lading by which the oats were consigned to Memphis, and delivered the bill of lading, invoice, inspectors' and weighers' certificates to Currier. Plaintiff received from Currier a check for the purchase price of the grain. This was shown by the evidence to be the usual and customary way of making sales of grain in Kansas City.

The check received by the plaintiff was upon the Midland National Bank and was deposited by plaintiff in the National Bank of Kansas City in the afternoon of the twenty-seventh. On the next day, October twenty-eighth, payment of the check was refused by the Midland National Bank and the check returned to the plaintiff. In the mean time, Currier proceeded to use this car to fill a contract of sale which he had with his correspondent, J. E. Mugge & Co., of San Antonio, Texas. He took the bill of lading which he had received from the plaintiff and surrendered it to the agent of the railroad company and received in lieu thereof the bill of landing in controversy, whereby the defendant railroad company undertook to ship the car of oats to San Antonio and deliver it to the order of the shipper, A. L. Brannock & Co. Printed in red letters across the face of this bill of lading were the words "*Not Negotiable.*" Currier then made out a draft upon J. E. Mugge & Co., San Antonio, Texas, for $323.62, the price for which he had sold the car, attached that draft to the bill of lading, and on about three o'clock of October twenty-seventh deposited the draft with the bill of lading attached in the Midland National Bank.

Since the decision of the case by us must, in a great measure, depend upon the nature of the transaction between the Currier Commission Company and the defendant bank, it becomes necessary to subject the evidence of that transaction to the closest scrutiny. The cashier of the defendant bank testified that, "the course of business between the Currier Commission Company and the bank was that the latter being in the grain business would ship large amounts of grain to different parts of the country and we accepted from them on deposit, and gave them credit for drafts drawn against these shipments with bill of lading attached, the bills of lading being made to *shippers' order* and covering

as we supposed the title to the property. These drafts with bills of lading attached were passed to the credit of the Currier Commission Company and they were drawn against as money. * * * The bank holds the draft and bill of lading for the reason that we have advanced the money to Mr. Currier *and bought the draft.* * * * This draft was deposited as cash and credit given in the bank book. The deposit was made in the usual and ordinary course of business. The draft has not been paid and is still held with the bill of lading by the defendant bank. The cashier on his cross-examination further testified that at the time the draft and bill of lading were received the account of the Currier Commission Company was overdrawn. * * * The proceeds of this draft went absolutely to *extinguish so much of the indebtedness of the Currier Commission Company to the bank.* It was not taken as *collateral security or for collection.* * * * We had a sort of understanding with the Currier Commission Company that any checks they might draw on their account to-day, for instance, which might be protested to-day, would be paid by us then, though they hadn't sufficient funds, provided they placed in our hands a sufficient amount of collateral. In other words the payment of a check was made something in the nature of a loan, the payment or loan being represented on our books by an overdraft against their *account and against which overdraft we held collateral.*" He further testified "that after the receipt of the draft and bill of lading the bank on that day paid two checks of the Currier Commission Company amounting to $534.20, which was greatly in excess of the amount of the draft. That on the next day when the Currier Commission Company failed its account was still overdrawn."

We must determine the nature and effect of this transaction in the light of the testimony of the cashier

of the defendant bank, the material portions of which are presented by the foregoing excerpts. Now if the defendant bank bought and paid for the draft by subsequently advancing the amount of it in payment of the checks of the Currier Commission Company, it is quite difficult to understand how it was taken to absolutely extinguish the priory overdrafts of the Currier Commission Company. And it is equally difficult to understand what bearing the agreement referred to by the cashier between the bank and the commission company had on the transaction, if the bank received the draft in absolute satisfaction of the overdraft of the commission company. If under this agreement the bank did not pay the overdrafts of the commission company only when the latter had in its hands drafts with bills of lading attached as collateral security sufficient in amount to cover such overdrafts, then it remains to be accounted for how it was that on the morning the commission company deposited the draft and bill of lading in question that it was appropriated to the extinguishment of unprovided for previous overdrafts, or why the bank afterwards on that very day permitted the commission company to still further augment the amount of its overdraft by paying other checks far in excess of the amount of the draft that day received. No doubt the cashier made what was intended to be an honest and conscientious statement of the transaction as he understood it, but it is greatly deficient in that clearness and consistency which ordinarily ought to characterize such a statement. However all this may be, looking at the transaction in the light thrown upon it by the cashier's testimony aided by that of common business knowledge and we must conclude that the advancements made on the day of the deposit of the check and bill of lading were made upon such check and bill of lading and would not have been made but

for such deposit. There is no evidence tending to show that the bank knew that the plaintiff had not been paid the purchase price of the grain.

This brings us to the consideration of the legal questions arising on the record before us. It may be as well conceded, as it is by the defendants, that as to the defendant railroad company leaving out of consideration the claim of the intervening bank, that upon the undisputed facts the plaintiff's right of stoppage *in transitu* is clear enough. *Hall v. Railroad*, 50 Mo. App. 179.

In the view of the evidence which we have taken, the bill of lading was transferred to the bank to furnish security for the advances that were made upon the faith of the transfer. Few transactions are of more frequent occurrence in the broad domain of commerce and trade than the transfer of bills of lading as collateral security to a bank making an advance upon the credit of the pledgee's ownership therein indicated. It seems to have become the customary mode of purchase and sale between parties who require the services of a carrier for delivery for the consignor to draw a draft for the price upon the consignee which with bill of lading attached he procures to be discounted. It is held as security for the consignees' acceptance or payment of the draft through the holder's agent at the terminal point of the transit. Such a transfer of the bill of lading is a pledge of the goods themselves unless circumstances indicative of a different intention appear. The pledgee holds the legal title to the goods and in respect to them is entitled to all the rights and remedies of a purchaser for value. *Dows v. Bank*, 1 Otto (U. S.), 618; *Tilden v. Muier*, 45 Vt. 195; *Bank v. Logan*, 74 N. Y. 568; *Bank v. Bagley*, 115 Mass. 228.

A *bona fide* holder of a bill of lading as collateral security has a title to the goods which is paramount to

the unpaid vendor's right of stoppage *in transitu*. *Skilling v. Bollman*, 73 Mo. 66; *Railroad v. McLiney*, 32 Mo. App. 167; Porter on Bills of Lading, secs. 512, 513; Benjamin on Sales, sec. 813; Colebrook on Collateral Security, sec. 384. But when the bill of lading is taken as collateral security for or in payment for antecedent indebtedness, the holder acquires no such title to the goods as cuts off the vendor's right of stoppage *in transitu*. *Skilling v. Bollman, supra; Goodman v. Simonds*, 19 Mo. 106; *Nappa Valley Wine Co. v. Rheinhart*, 42 Mo. App. 172. It inevitably results from these considerations that the bank acquired the title to the grain called for by the bill of lading, unless the words "not negotiable" which were stamped upon its face had the effect to reserve to the plaintiff as vendor the *jus disponendi* and thus prevent the *bona fide* purchaser, the bank, from acquiring the title it otherwise would have acquired by the transaction.

The statute of this state, section 744, prescribes that the manner of the negotiation of bills of lading shall be by indorsement and delivery in the same manner as bills of exchange and promissory notes. And it is further provided in the section just referred to that no printed or written conditions, clauses or provisions inserted in or attached to any such bill of lading shall in any way limit the negotiability or affect any negotiation thereof nor in any manner impair the right and duties of the parties thereto or persons interested therein; and that every such condition, clause or provision purporting to limit or affect the rights, duties or liabilities created or declared by chapter 18 shall be void and of no force or effect. The next section, 745, provides what shall be the effect of the transfer of a bill of lading by indorsement thereon in writing and delivery thereof so indorsed whether or not it contains any of the written conditions, clauses or provisions

affecting its negotiability or purporting to limit or affect the rights, duties or liabilities created or declared in said chapter, and which are rendered void by section 744; provided, however, such bill of lading which shall have the words *not negotiable* plainly written or stamped on the face thereof shall be exempt from the provisions of the act, that is, said chapter 18. It is well settled that a common-law carrier may limit its common-law liability by special contract with the shipper. *Ketchum v. Railroad*, 52 Mo. 390; *Levering v. Trans. & Ins. Co.*, 42 Mo. 88; *Oxley v. Railroad*, 65 Mo. 629; *Clark v. Railroad*, 64 Mo. 440; *Ball v. Railroad*, 83 Mo. 580.

By turning to the bill of lading received by the commission company of the defendant railroad and transferred to the defendant bank, and it will be seen that in addition to what such an instrument would ordinarily contain (Porter on Bills of Lading, sec. 4), it contains a great number of clauses specially limiting and effecting the rights, duties and liabilities of the parties thereto. Many of these conditions under the provisions of chapter 18 are void and inoperative. The statute in so far as it disables a public carrier from inserting in its bill of lading provisions of the character mentioned in section 744 is in derogation of the carrier's common-law right.

Now, when the carrier wishes to limit its liability to the extent allowed by the common law and to avoid the statutory prohibitions, it is required by the statute to have the words "*not negotiable*" plainly written or stamped across the face of the bill of lading so as to notify the shipper when he receives it that it is exempt from the operation of the statute. By this notice the shipper is warned to scrutinize the conditions of the policy and govern himself accordingly. The undoubted object of these words of the statute was not to affect any transfer of the bill of lading with notice that the

shipper's vendor had not been paid the purchase price, or of any other infirmity in the shipper's title to the goods, but to notify the shipper himself that the bill of lading was not subject to the operation of the statute. This was the only office these words were intended to perform. The rights, duties and liabilities of the parties to such a bill of lading is governed by the common law, unaffected by the statute in relation to bills of lading.

It is thus plain to be seen that the circuit court by its instruction erred in declaring that the plaintiff's right of stoppage *in transitu* as vendor of the grain existed against the bank notwithstanding the transference of the bill of lading by the commission company, the shipper to it for value.

The order of the court setting aside the verdict on account of the giving of the instruction of which the plaintiff by his appeal complains was proper and must be affirmed.

ELLISON and GILL, JJ., concur in separate opinion.

ELLISON and GILL, JJ. *(concurring.)*—We do not wish to be understood as combatting the views expressed by SMITH, P. J., but we prefer to place our concurrence on the ground that plaintiff placed the apparent title to the property in Currier, clothing him with the indicia of ownership and thereby putting it in his power to deal with the property as his own. Conceding that the bill of lading was not negotiable, it was at least assignable. The authorities are abundant here and elsewhere that by so doing he is estopped from asserting his real title as against a purchaser having no knowledge of such title. 18 American & English Encyclopedia of Law, 641; *Bank v. Bank*, 71 Mo. 183; *Nehoff v. O'Rielly*, 93 Mo. 162; *Dows v. Kidder*, 84

N. Y. 121; *Leigh Bros. v. Railroad*, 58 Ala. 165; *McNeil v. Bank*, 46 N. Y. 325; *Combes v. Chandler*, 33 Ohio St. 178; *Cosdsby v. Vandenburg*, 101 U. S. 572; *Shaw v. Railroad*, 101 U. S. 565.

GEO. W. SHARP, Respondent, v. E. P. GARNET, Appellant.

Kansas City Court of Appeals, May 22, 1893.

Bills and Notes: ORIGINAL LIABILITY OF ASSUMERS: INDORSERS: MAKER LIABLE: ACTION: PLEADING. Defendant and others bought plaintiff's land and placed the title in defendant who gave notes and deed of trust to secure deferred payments, but all the others were to be liable on the notes. Defendant then sold his interest to two of his syndicate who assumed to pay the notes, and defendant also conveyed their several interests to the other members of the syndicate. The two members paid the first note and afterwards at plaintiff's request discounted the remaining one which plaintiff indorsed. After its maturity the two brought suit against plaintiff and defendant as maker and indorser. They answered setting up the facts and the liability of the plaintiffs therein on the notes and their assumption thereof and that the transaction between them and plaintiff was a payment and not an indorsment. A non-suit was then taken as to the defendant herein and judgment was obtained against plaintiff who paid it and then brought this action. *Held*:

(1) The payment of the judgment vested title to the note in plaintiff who could maintain this action against defendant regardless of his agreements with his syndicate; and plaintiff was not compelled to accept them as payors.

(2) The petition declares on the note and not on the judgment.

Appeal from the Jackson Circuit Court.—HON. JAMES GIBSON, Judge.

AFFIRMED.

McDougal & Sebree and *R. B. Garnett*, for appellant.

(1) This action is not on the note, but is based on the judgment of Huling and Chapman against Sharp;

and the payment of said judgment by Sharp. The note was not in plaintiff's possession when this suit was instituted. The trial court so held, and by its judgment awarded plaintiff exactly the amount paid out by him on the judgment and costs, with interest at *six* per cent., when the note provided for interest at *eight* per cent. The judgment ought therefore to have been for the defendant, as, if plaintiff had any cause of action at all, it was on the note and not on the judgment or for money paid. *Fenn v. Dugdale*, 31 Mo. 580; *Peers v. Kirkham*, 46 Mo. 146. (2) The note, although made by Garnett, was made for and in behalf of, and was the note of all the members of the syndicate, including Huling and Chapman, and even before the agreement of Huling and Chapman with Garnett, by which they assumed and agreed to pay the note and protect him therefrom, they were bound as makers. *Ferris v. Thaw*, 72 Mo. 446; s. c., 5 Mo. App. 279. (3) But, in addition to their original liability as makers, Huling and Chapman agreed with Garnett that they assumed and would pay the whole of the note, and this agreement was the consideration for the conveyance by Garnett to them of his interest in the land, which was incumbered by the deed of trust securing the note, and, being bound to pay the note, it was extinguished and paid when they became possessed of it from Sharp. *Putnam v. Collamore*, 120 Mass. 454; 1 Jones on Mortgages, 864–865; *Lilly v. Palmer*, 51 Ill. 331; *Drury v. Holden*, 121 Ill. 131; *Johnson v. Walter*, 60 Iowa, 315; *Russell v. Pistor*, 3 Seld. (N. Y.) 171; 2 Daniel on Negotiable Instruments, 1285.

Sherry & Hughes, for respondent.

(1) Appellant cannot complain that judgment was not rendered against him for enough. (2) The petition is a good petition on the note. It does not

matter what the pleader had in his mind. The allegations make a good petition on the note. It was proper to allege the facts from which the law transferred note to plaintiff. Revised Statutes, 1889, sec. 2039; *Corpenny v. Sedalia*, 57 Mo. 88; *Putnam v. Railroad*, 22 Mo. App. 589; *Spurlock v. Railroad*, 93 Mo. 537, 538; *Roberts v. Walker*, 82 Mo. 200; *Groves v. City of Kansas*, 75 Mo. 672. (3) Huling and Chapman were not liable on the notes. The evidence does not show any contract upon which Sharp could sue Huling and Chapman. If the members of syndicate were liable *inter sese*, then Garnett has his remedy against other members when he pays the note, and this obligation is not one which Sharp can enforce or with which he has anything to do. *Sparks v. The Dispatch Transfer Co.*, 104 Mo. pp. 541, 542; Tiedeman on Commercial Paper, sec. 87; Randolph on Commercial Paper, sec. 131; Revised Statues, 1889, sec. 5186; *Bercherling v. Katz*, 37 N. J. Eq. 150; *Kiersted v. Railroad*, 69 N. Y. 343; s. c., 27 Am. Rep. 199; *Briggs v. Partridge*, 64 N. Y. 357; s. c., 21 Am. Rep. 617; *McLeod v. Skyles*, 81 Mo. 604; *Bobb v. Bobb*, 89 Mo. 419.

ELLISON, J.—The following statement is taken substantially from that prepared by defendant's counsel (appellant here), as it gives a sufficient history of the case and the facts connected therewith: In 1886 a syndicate composed of the defendant, Garnett, Huling and Chapman, and Davidson Brothers, purchased of plaintiff a tract of land in Clay county, Missouri. They paid him part of the purchase money in cash and, for convenience, had the plaintiff convey the land to the defendant, and the defendant executed to plaintiff for the unpaid purchase money his two notes, one for $3,500 and one for $1,750, bearing eight per cent. interest and secured the same by deed of trust on the land.

Defendant held the land in trust for the members of the syndicate in the following proportions: One half interest for Huling and Chapman, one fourth interest for Davidson Brothers, and one fourth interest for himself, and each of the parties in the syndicate was liable on the notes, and, as between themselves, were liable in the same proportion as they were interested in the land.

A short time after the purchase the defendant sold his interest in the land to said Huling and Chapman, the consideration of the sale being that said Huling and Chapman assumed and agreed to pay said notes and relieve defendant from all liability thereon, and defendant thereupon conveyed to said Huling and Chapman a three fourths interest in said land, being the one half interest he held in trust for them and the one fourth interest he sold them. Plaintiff was not a party to this agreement. At about the same time, in order to entirely rid himself of the title, he conveyed to Davidson Brothers the other one fourth interest which he held in trust for them.

The $3,500 note matured first, and just prior to the time of its maturity the plaintiff approached defendant in regard to its payment and the defendant informed him that he had sold his interest in the land to Huling and Chapman, and that they had assumed and agreed to pay both the notes, and that plaintiff could call upon them and Davidson Brothers for payment. When the $3,500 note became due plaintiff did present the same to Huling and Chapman and they paid it.

After the payment of the $3,500 note and before the maturity of the $1,750 note, the plaintiff needed money badly, and went to Huling and Chapman to let them have the note at a discount. The parties finally agreed upon a discount of $600 and plaintiff indorsed and delivered the note to them, and they paid him its

face, less the discount. Afterwards said Huling and Chapman instituted a suit on the note against this plaintiff as indorser and defendant as maker, claiming that there was a balance due thereon and that this plaintiff and defendant owed the same. This plaintiff and defendant filed an answer in the case in which they set out all the material facts in relation to the purchase of the land by the syndicate and the proportion owned by each; the execution of the notes for unpaid purchase money, and that Huling and Chapman were liable on said notes; the sale of defendant Garnett to Huling and Chapman, and their assumption and agreement to pay the notes; that plaintiff Sharp had not indorsed the note to Huling and Chapman, but that they had simply paid the same as they were bound to do. After the filing of said answer there was a non-suit entered as to defendant Garnett, but judgment was rendered against this plaintiff and he paid same, which with costs amounted to $412.90.

The answer after a general denial of the allegations of the petition, pleaded the facts as to the purchase of the land, the execution of the notes, the liability of Huling and Chapman on the notes, and their agreement and assumption with defendant to pay same, and that the note in evidence had in fact been paid by Huling and Chapman. The trial was before the court without a jury and the finding was for plaintiff for the amount paid by him in satisfaction of the judgment on the note rendered as above set forth, with six per cent. interest. Defendant appeals.

The trial court has necessarily found that Huling and Chapman did not pay off the note, but that it was sold and indorsed by plaintiff; that coming to the hands of Huling and Chapman they instituted suit and obtained judgment thereon against this plaintiff as indorser. The plaintiff paid the judgment. This by

operation of law vested title in the note in plaintiff with a right to recover from defendant as maker. We scarcely see how the court could have found otherwise. Nor do we see how the arrangement between the defendant and the other members of his syndicate concerning their interests in the land purchase and the relation they bore to one another could affect this plaintiff. Plaintiff had the note of this defendant for the remainder of the purchase money, and it was plaintiff's right and privilege to look to him only for payment. *Sparks v. The Dispatch Co.*, 104 Mo. 541. And though Huling and Chapman agreed with defendant to assume payment of the note, plaintiff could not be *compelled* to accept them as payors. If he refused to accept them he would deal with them as indorsees.

But defendant insists that this suit is not on the note which plaintiff as indorser has paid by paying the judgment rendered thereon. He insists that it is a suit on that judgment. In this we think he is clearly in error. The petition clearly states a case on a note which had been paid by an indorser, and such is the indorser's proper remedy. *Pers v. Kirkham*, 46 Mo. 146. It sets forth the facts which in law, by reason of his relation to the note, entitles him to recover against this defendant.

We discover no error in the case and affirm the judgment. All concur.

THE STATE OF MISSOURI, Appellant, v. HENRY WATSON *et al.*, Respondents.

St. Louis Court of Appeals, May 23, 1893.

Criminal Law: BAIL: RECOGNIZANCE TAKEN WITHOUT PREVIOUS ISSUE OF WRIT OF HABEAS CORPUS. When a person has been indicted and arrested for a bailable offense, only the judge of the court wherein the indictment is pending has authority to admit him to bail without first issuing a writ of *habeas corpus* for him; and if any other judge admits him to bail and takes his recognizance without first issuing that writ, the recognizance is void and unforceable.

Appeal from the New Madrid Circuit Court.—HON. H. C. O'BRYAN, Judge.

AFFIRMED.

R. B. Oliver, for appellant.

Wilson Cramer, for respondents.

BOND, J.—The defendant Watson was indicted for forgery by the grand jury of New Madrid county, and, at the same term of court when the indictment was found, the circuit court entered an order of record fixing Watson's bail at the sum of $300. Watson was subsequently arrested and lodged in jail. In the absence of the circuit judge from the county, the probate court of New Madrid county admitted Watson to bail, and in so doing took a recognizance from him in the sum of $300, which, as above seen, was the amount of his bail as fixed by the circuit court. The defendants, Dawson and Young, signed this recognizance as Watson's sureties. When the forgery case was called for trial in the circuit court, Watson failed to appear, and the court entered a conditional judgment of for-

feiture on the recognizance, and issued a *scire facias* against the sureties, requiring them to appear and show cause why the judgment should not be made absolute. The sureties appeared and answered that the recognizance was void, because the officer taking and approving the same had no legal right so to do. It appearing upon the trial of the *scire facias* that the probate court had taken the recognizance without first issuing a writ of *habeas corpus* for Watson, the court rendered a judgment in favor of the defendant sureties. The state appeals, and assigns for error that this judgment under the conceded facts is erroneous.

We are of the opinion that the probate court under the circumstances had no authority to admit Watson to bail, and that for this reason the recognizance taken by him is absolutely null and void. A recognizance is in the nature of a confession of a judgment, to be suspended or vacated if the principal in the bond personally appears and answers to the indictment or information preferred against him. The requisites of such a recognizance are "that it be taken by a *competent court or officer, in a case existing before such authority*, and for the performance of some act that the law allows to be secured in that way, and in the form prescribed for that purpose." *State v. Randolph*, 22 Mo. 474.

After indictment the judge of the court where the indictment or information is pending may admit a prisoner to bail without issuing a writ of *habeas corpus* (Revised Statutes, 1889, sec. 4123), but no other judge has such authority. This has been expressly decided by the supreme court in the recent case of *State v. Field*, 20 S. W. Rep. 672. It was said in that case that "the judge of the court under whose process the accused is in custody has power (within his jurisdiction) to act in

the matter of bail without issuing any writ of *habeas corpus*. Revised Statutes, 1889, sec. 4123. But where some other judge must be invoked, and the use of that writ becomes necessary, section 5414 is intended to define the line of procedure thereon."

The cases of *State v. Nelson*, 28 Mo. 13, and *State v. Ferguson*, 50 Mo. 409, were decided under section 33, Revised Statutes, 1855, p. 1179. This section, which conferred jurisdiction on a judge of the county court where the indictment was pending to admit a person to bail, was repealed in the revision of 1879, and section 1829 of the Revised Statutes, 1879, now section 4123, *supra*, was enacted in its stead. The decision in the case of *State v. McElhaney*, 20 Mo. App. 584, was governed by section 4049 of the Revised Statutes, 1889, which expressly provided that, when a defendant in a criminal case has been committed to jail by an examining magistrate, any judge of a court of record of the county, in the absence from the county of the judge of the court having criminal jurisdiction, may admit the accused to bail without issuing a writ of *habeas corpus*, provided the offense charged is bailable.

In the case of *State v. Woolery*, 39 Mo. 525, the defendant was admitted to bail by a judge of the county court. The recognizance was held to be valid for the reason that there was enough in the record to show that the defendant had been released on *habeas corpus* proceedings, and that, in the absence of proof to the contrary, it would be presumed that the proceedings were regular. In the present case it is expressly admitted that Watson was not admitted to bail on writ of *habeas corpus*.

It follows that the judgment of the circuit court will be affirmed. Judge BIGGS concurs. Judge ROMBAUER is absent.

THE MIDDLETON GROCER COMPANY, Appellant, v. JOHN C. DAY, Sheriff, Etc., Respondent.

St. Louis Court of Appeals, May 23, 1893.

Practice, Appellate: REVIEW OF ERRORS NOT SAVED BY MOTION FOR NEW TRIAL. When the appellant's motion for new trial is based wholly on alleged error in the exclusion of evidence, this court will not consider rulings of the trial court on instructions, nor the claim that the verdict is against the law and the evidence.

Appeal from the Greene Circuit Court.—HON. W. D. HUBBARD, Judge.

AFFIRMED.

James W. Silsby and *J. A. Frink*, for appellant,

Sebree & Tatlow, for respondent.

Neither of the four errors assigned by the appellant for the reversal of the judgment in this cause was brought to the attention of the trial court by its motion for a new trial, nor even hinted at therein, and for that reason they can not now be considered in this court. *Bacon v. Perry*, 25 Mo. App. 73; *Ray v. Thompson*, 26 Mo. App. 431; *Brady v. Connelly*, 52 Mo. 19; *Acock v. Acock*, 57 Mo. 154; *Curtis v. Curtis*, 54 Mo. 351; *Ward v. Quinelvine*, 65 Mo. 453; *McCord v. Railroad*, 21 Mo. App. 96; *German Savings Inst. v. Jacoby*, 97 Mo. 617; *Railroad v. Carlisle*, 94 Mo. 166; *Klotz v. Perteet*, 101 Mo. 215.

BOND, J.—This is an action of replevin for the possession of goods held by the sheriff under writs of attachment against one J. A. Bilyeu. There was a

trial before the court sitting as a jury and a verdict and judgment in favor of respondent, from which this appeal was taken.

The errors assigned are: *First.* The judgment is against the law. *Second.* It is against the evidence. *Third.* The instruction of the court is wrong. *Fourth.* The instruction asked by appellant ought to have been given.

Appellant's motion for a new trial is as follows:

"Comes now plaintiff and moves the court for a new trial of this cause, and states for reasons therefor that the court erred in not admitting proper evidence offered; and the court further erred in admitting improper evidence."

This motion in terms excludes each of the four errors now assigned. They are not, therefore, reviewable on appeal. *Ray v. Thompson*, 26 Mo. App. 431–437; *Klotz v. Perteet*, 101 Mo. 215–217; *McCord v. Railroad*, 21 Mo. App. 96. Hence there is nothing before us for review.

The judgment herein is affirmed. Judge BIGGS concurs. Judge ROMBAUER is absent.

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W. H. COGGSHALL, Plaintiff in Error, v. ORIN L. MUNGER, Defendant in Error.

St. Louis Court of Appeals, May 23, 1893.

1. **Transfer of Partnership Property to one Partner:** RIGHT OF ACTION AT LAW BY TRANSFEREE. One who has purchased the interest of his co-partner in personal property of the co-partnership, which is subsequently levied upon under legal process against the vendor, may recover the property in an action at law from the officer making the levy.

2. **Levy of Interest of Partner in Personalty:** RIGHT OF REPLEVIN BY OTHER PARTNERS. *Held*, in the course of discussion, that the interest of a partner in the assets of the co-partnership may be levied upon under process for the collection of his individual indebtedness, but that his co-partners may have the value of this interest ascertained in an action of replevin for the property levied upon, and may retain the property upon the payment of its value as thus determined.

3. **Practice, Appellate:** PROCEEDING ON THEORY NOT RAISED IN TRIAL COURT. A judgment of non-suit cannot on appeal therefrom be sustained on the ground that the plaintiff failed to file a reply to affirmative defenses, when no advantage was claimed on that ground in the trial court.

Error to the Carter Circuit Court.—HON. JOHN G. WEAR, Judge.

REVERSED AND REMANDED.

L. O. Nieder, for plaintiff in error.

James Orchard, *J. H. Winningham* and *Olden & Orr*, for defendant in error.

BOND, J.—The plaintiff filed the following petition in the circuit court of Carter county:

"W. H. Coggshall, Plaintiff, } In the Circuit Court,
v. } April Term, 1891.
"Orin L. Munger, Defendant. }

"Plaintiff for cause of action states that on and prior to the sixth day of December, 1890, plaintiff and one L. W. Keen were co-partners in trade and doing business in the county of Carter under the firm name and style of the Keen & Coggshall Lumber Company. That as such co-partnership the plaintiff with the said L. W. Keen became indebted to divers persons in large sums, to-wit, in the sum of $2,000, and that said co-partnership was possessed of the following described personal property, to-wit: A stock of general merchandise at their place of business of what is known

as Hoagland Mill, in the county of Carter. That said stock of general merchandise is of the value of $400, and was also possessed of three yoke of work oxen of the value of $150, and one log wagon of the value of $50, one ferry boat and wire cable of the value of $100, and one single story box house on the right of way of the Current River railroad at what is known as Keen's ferry of the value of $50. That afterwards, to-wit, on the eighth day of December, 1890, the said L. W. Keen became insolvent in business at the county of Shannon in said state of Missouri; that afterwards, to-wit, on the —— day of December, 1890, the said L. W. Keen conveyed and assigned to this plaintiff all his right, title and interest in and to the above described personal property for the purpose of payment of the indebtedness of said co-partnership as above set forth.

"Plaintiff further states that defendant is the sheriff of Carter county, Missouri, and as such wrongfully took and now wrongfully detains the possession of said property from this plaintiff; that by reason of the wrongful taking and detention of said property he is damaged in the sum of $500. Wherefore by reason of the facts plaintiff prays judgment for the possession of said property and $500 for his damages, and that an elisor be appointed in some suitable person to serve the process of the court.

"W. H. Coggshall,
by L. O. Nieder, his attorney."

The defendant's amended answer to the above petition admitted that he, as sheriff of Carter county, held the goods described in plaintiff's petition under various writs of attachment which he had levied thereon on December 13, 1890, for the purpose of subjecting the one half interest of L. W. Keen therein to the payment of the amounts for which the writs of attachment were issued against him. He

denied that the partnership (Keen & Coggshall Lumber Co.) were indebted in the sum of $2,000 to any other than members of the firm; averred that said firm was largely indebted to L. W. Keen when he became insolvent, and when this suit was brought; denied that the sale by Keen of his interest in the co-partnership was in good faith, and averred that same was fraudulent and for the purpose of defrauding his creditors who had secured the attachment writs in the hands of the sheriff; and denied that the property was wrongfully taken and detained, and asked judgment for its return.

Upon the calling of the case for trial, a jury was selected, the petition read, and a statement made of the substance of defendant's answer. Thereupon after a witness for plaintiff was sworn the court refused to permit any evidence to be introduced, on the ground that it had no jurisdiction of the matters alleged in the petition in an action at law. The plaintiff duly excepted to this ruling, and has preserved such exception as his assignment of error to this court.

The only question to be solved is whether or not the trial court erred in sustaining the objection made by defendant to the introduction of evidence under the foregoing pleadings. The proposition urged in the defendant's brief, that a member of a co-partnership after its dissolution by bankruptcy or death has the right by proceeding in equity to compel the appropriation of the partnership assets to the partnership indebtedness, may be safely affirmed as a correct statement of the law. *Level v. Farris*, 24 Mo. App. 445, 448; 3 Pomeroy's Equity, sec. 1243.

We fail to see how jurisdiction vested in equity to enforce what is termed a "partner's lien" for the benefit of firm creditors, or a general accounting before settlement between the partners themselves, could warrant the action of the trial court in excluding

testimony on the ground that it had no jurisdiction at law under the facts stated in the petition above quoted. The petition set out by sufficient general implication (*Keen v. Munger*, 52 Mo. App. 660) a cause of action arising from the purchase by one of two partners of the interest of the other in the firm assets, and the wrongful seizure and detention of such interest by the defendant as sheriff, and a demand for judgment for the possession of the property and damages for its detention.

The answer to the petition justified the seizure by alleging the levy of writs of attachment in the hands of defendant as sheriff and against the retiring partner on his interest in the goods described in the petition, and averred the want of consideration and fraud in the contract of purchase set forth in the petition. That the sheriff was entitled to levy the writ of attachment in his hands, issued for the private debt of one of the partners, on whatever interest or right the defendant in the writ had in the assets of the firm of which he was member, is expressly decided in *Wiles v. Maddox*, 26 Mo. 77. That the solvent member of the firm might replevy the attached property, and cause the interest of the defendant in the attachment therein to be ascertained in the replevin suit, and might thereafter pay and satisfy the value of his interest and retain possession of the property is the law of this state. *Gillham v. Kerone*, 45 Mo. 487; *Rapp v. Vogel*, 45 Mo. 524; *Dilworth v. McKelvy*, 30 Mo. 149; *Hickman v. Dill*, 32 Mo. App. 509, 519.

Under the doctrine of the foregoing cases the appellant might have maintained an action of replevin against the sheriff, as the seizor of the firm assets, under process against one of its members for the purpose of having an admeasurement in that action of the value of the interest levied upon.

In the case at bar the petition shows that the defendant in the attachments had sold out his interest to the plaintiff, and had no ownership whatever in the firm assets seized by the sheriff. These facts were put in issue by the answer. The plaintiff was clearly entitled to offer proofs on the issues thus accepted, and the court erred in holding they presented matters not cognizable under the pleadings in this cause.

In support of the action of the court in refusing to permit the plaintiff to introduce any evidence, it is now urged that there was no reply to the defendant's amended answer. The specific and only objection made to the introduction of evidence was that the issues involved could only be adjudicated by a court of equity. There was not the least intimation that the objection was based on the failure of the plaintiff to file a reply. Having failed to specifically call the attention of the court to the absence of a reply, the defendant will not be allowed now to profit by the omissions or oversight of the plaintiff's counsel. *Hall v. Water Co.*, 48 Mo. App. 356; *Thompson v. Wooldridge*, 102 Mo. 510.

The judgment is reversed, and the cause remanded for trial in conformity herewith. Judge BIGGS concurs. Judge ROMBAUER is absent.

THE STATE OF MISSOURI, Respondent, v. AL. RAYMOND, Appellant.

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St. Louis Court of Appeals, May 23, 1893.

Criminal Law: INDICTMENT FOR STATUTORY CRIME: EXCEPTIONS IN DEFINITION OF CRIME. Indictments for statutory crimes must show that the defendant is not within an exemption or exception contained in the enacting clause of the statute defining the offense.

Appeal from the Howell Circuit Court.—Hon. W. N. Evans, Judge.

Reversed and remanded *(with directions)*.

. . *Winningham* and *Livingston & Green*, for appellant.

The exceptions made by the statute, and contained in the words "unless the same is so surrounded by artificial or natural barriers," were not negatived by the indictment. This is fatal to the validity of the indictment. 1 Wharton's Criminal Law, sec. 379. When there is an exception in the enacting clause of the statute defining a crime, the indictment charging a violation of the statute must show that the defendant is not within the exception. Malone, Criminal Brief, page 44; *State v. Sutton*, 24 Mo. 377; *State v. Crenshaw*, 41 Mo. App. 24; *State v. Barr*, 30 Mo. App. 498.

No brief filed for respondent.

Bond, J.—The appellant was indicted under the provisions of section 3850 of the Revised Statutes, 1889, making it a misdemeanor for any keeper of a male horse or jack for teasing and serving mares to cause such teasing or service to be done "near a public highway * * * unless the same is so surrounded by artificial or natural barriers as to obstruct the view of persons traveling such highway."

The indictment framed under this section, omitting the caption, was as follows, to-wit:

"The grand jurors for the state of Missouri summoned from the body of Howell county, empaneled, sworn and charged to inquire within and for the body of Howell county, upon their oaths present and charge that Al. Raymond, late of the county aforesaid, on the

seventeenth day of April, 1891, at and in the county of Howell and state of Missouri, did then and there unlawfully have and cause a certain male animal, to-wit, a jack, to tease and serve a certain mare near a public highway, to-wit, the public road and highway leading from West Plains, Missouri, to Ash Flat, Arkansas, and commonly called West Plains and Ash Flat road, the said place of teasing and serving the said mare by said jack not being then and there so surrounded by *artificial and barriers* as to obstruct the view of persons traveling such road and highway, and against the peace and dignity of the state.

"J. B. TILLMAN, Prosecuting Atty.

"A true bill. JACOB HOPKINS, Foreman Grand Jury."

The objection to the sufficiency of the indictment preserved in the motion in arrest, and now assigned as error, is that no offense is charged therein in this, that it wholly fails to negative the exceptions set forth in the enacting clause of the statute under which it was drawn.

We are of opinion that this assignment is well taken, and that the motion in arrest of judgment on that ground should have been sustained. *State v. Kindrick*, 21 Mo. App. 507, 509. There is nothing better settled than that indictments for statutory crimes should show that the defendant is not within an exemption or exception contained in the enacting clause of the statute defining the offense with which he is charged. *State v. Sutton*, 24 Mo. 377. The qualification or exception contained in the statute must be negatived; otherwise no offense is charged. *State v. Crenshaw*, 41 Mo. App. 24, 26; *State v. Meek*, 70 Mo. 357; *Wild v. Howe*, 74 Mo. 551.

In the case at bar the language of that portion of the indictment referable to the cause of exception or

exemption contained in the statute wholly omitted to set forth the terms of the statute, *i. e.*, "unless the same (place of service) is so surrounded by *artificial or natural barriers.*"

In lieu of these statutory words descriptive of the offense the indictment only contained the following: "Not being then and there so surrounded by artificial and barriers." It is obvious that this phraseology of the indictment is not the substantial equivalent of the language of the statute. By the statute there is no offense committed, provided the public highway (place of service) is surrounded in either of two ways. Under the indictment the defendant may be found guilty notwithstanding the existence of one of the alternatives of innocence set forth in the statute creating and describing the offense. In other words, there is nothing in the indictment negativing the exception "natural barriers," even if we should hold that the copulative "and" between "artificial" and "barriers" might be elided as surplusage.

We are of opinion that the indictment in this case did not fully inform the defendant of the offense charged. Such a defect is not curable. Revised Statutes, 1889, sec. 4115, last clause.

It may be well to state that the instruction given by the court is erroneous. Under the statute there is no offense committed, unless the view from the public highway is unobstructed either by "artificial or natural barriers;" whereas the instruction authorized a conviction, unless the view was obstructed by "artificial barriers" only.

We are of the opinion that the circuit court erred in overruling the motion in arrest of judgment, and that it also committed error in its instruction. We think, however, that from the testimony preserved in the record, "there is reasonable ground to believe that

the defendant can be convicted of an offense if properly charged." Revised Statutes, 1889, sec. 4275; *State v. Wacker*, 16 Mo. App. 417.

The judgment is reversed, and the cause remanded with directions to proceed under the provision of the foregoing section of the statute. All the judges concur.

ISAAC RENFROE *et al.*, Plaintiffs in Error, v. FOREST RENFROE, *et al.*, Defendants in Error.

St. Louis Court of Appeals, May 23, 1893.

1. **Action in Equity to Vacate Proceedings at Law: LACHES OF COMPLAINANT.** An action in equity to vacate proceedings at law, on the ground that an unfair advantage was taken of the complainant, can be maintained only when it is made to appear that the complainant himself was free from negligence.

2. ——: ——. And *held*, that, under the facts of the case at bar, the complainant was guilty of laches, and therefore was precluded from the relief sought.

Error to the Cape Girardeau Circuit Court.—HON. H. C. O'BRYAN, Judge.

AFFIRMED.

W. H. Miller, for plaintiffs in error.

Wilson Cramer, for defendants in error.

BOND, J.—This is a writ of error from the judgment of the trial court sustaining a demurrer to the following petition, and entering final judgment of dismissal.

The substance of the petition is that these plaintiffs, as devisees and heirs of their father, George Renfroe, were made defendants to partition suits brought by other heirs and devisees to divide the land belonging

to the estate of said George Renfroe, which suit was filed in the Cape Girardeau court of common pleas on May 3, 1890. The petition further alleges:

"That at said term of the common pleas court, the regular judge thereof, Maurice Cramer, being physically unable to hold said term of court, the attorneys present elected J. W. Limbaugh, Esq., an attorney of that bar having all the qualifications of a circuit judge, to hold said term of court.

"That said Limbaugh qualified and entered upon the discharge of his duties as such special judge.

"That the regular judge of said court, Maurice Cramer, was disqualified from trying said cause by reason of his prejudice or bias against the defendants, but said causes for a change of venue did not exist as against the special judge then elected and presiding.

"That at that time and now said real estate was and is capable of being divided in kind among said plaintiffs and defendants, without injury to the parties in interest and with benefit thereto.

"That they are informed and believe that at said May term of said court, and on the fourth day of said term, and before the time had expired in which they as defendants had a right to file their answer to said partition suit, the court, without hearing proof or testimony, found that said real estate could not be divided in kind among the parties in interest."

That the land was sold under said decree and brought about one half its value; that before the sale, however, one of the defendants in the partition suit died, and then there was no revivor of said cause and no one representing the deceased in the subsequent proceedings; that one of the present plaintiffs filed a motion setting out the grounds; that said motion was by consent of all parties and of the court continued until the next term of the court, to-wit, the January term, 1891.

That at said January term, 1891, of said court, the regular judge thereof presiding at said court and being disqualified from sitting in said cause for the reasons hereinbefore set out, on the first day of said court the said Isaac Renfroe, one of the plaintiffs herein and one of the parties making said motion so as aforesaid continued, filed his application and affidavit for a change of venue on said motion. In which said application for a change of venue of said matter from said Cape Girardeau court of common pleas was stated the nature of said suit, the motion made, the continuance of said motion, and that said Isaac Renfroe, the mover and applicant, could not have a fair and impartial trial of said motion before the Hon. Maurice Cramer, the judge of said court, on account of the prejudice of said judge as aforesaid, and because the parties opposing the said motion (to-wit the purchasers) had an undue influence over the mind of said judge.

That due and legal notice of the filing of said application for a change of venue was given.

That the Hon. Maurice Cramer had actual as well as constructive notice of the filing of the same.

That said application for a change of venue was never abandoned or withdrawn.

That immediately upon the filing of said application it was agreed between the parties thereto, and with the full knowledge of said Maurice Cramer, judge as aforesaid, that J. W. Limbaugh, Esq., who had presided at the regular term of said cause should also sit as special judge in the disposition of said motion, and that, in the event he would not consent to act in that capacity, the venue should be awarded to the circuit court of Cape Girardeau county, Missouri.

That, relying upon said agreement and believing that the filing of the application for a change of venue

ousted the jurisdiction of said judge further than possibly to direct the clerk to hold an election for a special judge, the plaintiff's counsel left the court room and gave the matter no further immediate attention.

That notwithstanding all this, and while said motion and application was still pending and pending said agreement, said judge without warrant of law, and in utter disregard of the rights of parties plaintiffs, and in violation of their rights, and in great damage to their interests and possession of said real estate, disregarded said application for a change of venue, dismissed said motion to set aside said judgment and sale and directed the approval thereof.

That plaintiffs are informed and believe that said judge had no authority to act in that behalf pending said application for a change of venue; that he was without jurisdiction, and his acts in that behalf utterly void.

That plaintiffs were unaware of the action of said court, as above stated, until after the final adjournment of the court for the term, and the time for taking an appeal had elapsed.

So these plaintiffs say they have been and are about to be wrongfully and fraudulently deprived of their property without due process of law.

The petition concluded with a prayer for relief.

There is only one question arising on this record, whether or not the plaintiffs in error are precluded from the relief sought by virtue of their own laches. There can be no doubt that the errors complained of in this action were reviewable on a direct appeal. Have the plaintiffs in error exercised the due diligence in the prosecution of their rights in the court below, and does this petition show any sufficient excuse for their failure to take an appeal?

We are constrained to hold that the express showing of the petition herein negatives the exercise of that diligence which the law imposes as a duty on a party litigant, and affirmatively discloses such inattention and negligence on their part as shuts out relief in equity. The averment is that, when the application for the change of venue was filed (which was the first day of the January term, 1891), it was agreed that, if Limbaugh would not agree to act as special judge in the disposition of the plaintiffs' motion to set aside the sale of the land, the venue of the cause should be changed to the circuit court of the county. It is fairly inferable from other averments that the plaintiffs paid no further attention to the matter during that term, but allowed the court to adjourn without knowing or ascertaining what action, if any, had been taken. It was not a part of the agreement that no action should be taken, nor is there the slightest intimation that the plaintiffs were led to believe by anything said or done, either by their adversary or the court, that no action would be taken at that term. This presents a case of gross negligence or inattention, which should preclude any relief by a court of equity.

In an action like the present to arrest proceedings at law on account of unfair advantage, this court said: "But equitable relief is granted in such cases only when it is made to appear that the complainant himself was free from negligence." *Sanderson v. Voelcker*, 51 Mo. App. 328. This doctrine is recognized in *Wingate v. Haywood*, 40 N. H. 437. We therefore affirm the judgment of the trial court sustaining the demurrer and entering judgment on the refusal of the plaintiffs in error to plead further. It is so ordered. Judge BIGGS concurs. Judge ROMBAUER is absent.

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E. H. NEWMAN, Respondent, v. THE WESTERN UNION TELEGRAPH COMPANY, Appellant.

St. Louis Court of Appeals, May 23, 1893.

1. **Damages for Non-Delivery of Telegram**: MENTAL SUFFERING. The sender of a telegram cannot recover damages for mental suffering caused by the non-delivery of it, when these are the only damages suffered.

2. **Evidence**: COMPETENCY OF ESTIMATE OF DAMAGES FOR MENTAL SUFFERING. The opinion of a witness as to the money value of anxiety and worry on his part is not competent evidence.

Appeal from the Greene Circuit Court.—HON. H. E. HOWELL, Special Judge.

REVERSED.

John O'Day and *E. C. O'Day*, for appellant.

W. G. Robertson, for respondent.

BOND, J.—This action was brought for mental suffering caused by the non-delivery of a telegram sent by the respondent from Marshfield, Missouri, to the city of St. Louis.

The respondent states that his mother and sister and her family lived in St. Louis, which was visited by a cyclone on or about January 12, 1890; that his concern about their personal safety induced the sending of the message, whose non-delivery caused him mental anxiety and anguish to the amount of $2,000.

The defendant's answer sets up, *first*, a general denial; *second*, that, under the law and the terms of the contract whereunder the message in question was received, no duty was cast upon defendant to deliver

said message, because it was addressed to a point outside of the free delivery limits in the city of St. Louis, and that the respondent failed and refused to pay the charge for delivery beyond said limits fixed in said contract; *third*, that no liability accrued, because no written claim was made within sixty days after the transmission of said message; *fourth*, that no liability attached, because the respondent failed and refused to cause said message to be repeated, as provided for in said contract.

The evidence tended to prove that the respondent, a salesman at Marshfield, Missouri, noticed in an evening paper of January 13, 1890, that a cyclone had passed over a certain portion of the city of St. Louis, where his mother and sister resided; that he thereupon, about 5:45 P. M., telegraphed his sister as follows:

"JANUARY 13, 1890.

"*Mrs. M. M. Newman, 1657 South Jefferson Avenue, St. Louis, Missouri:*

"Are you all safe and well; answer at once.

"E. H. NEWMAN."

This message was contained on a form provided by appellant, embodying the conditions as to liability set out in its answer herein and reciting that its terms were agreed to by the sender.

The residence address of the foregoing telegram was outside of the free delivery limits as then established. The telegram was never delivered. The respondent called at the depot at Marshfield several times during the evening, and, receiving no reply, wrote the next day to his sister and received a telegram in reply that all were well, and that his message had not been received. The time between the sending of respondent's message and the reception of his sister's telegram was about thirty-six hours.

The following questions were put to the respondent, who made answers as follows (to which evidence appellant duly preserved its objections), to-wit:

"*Q.* During the thirty-six hours, state to jury what your condition was by reason of the telegram not being delivered, and how much in your opinion you were damaged in dollars and cents? *A.* Well, my physical condition was good, but then mentally I was worried; I went down to the depot probably a dozen times the next day inquiring; thought probably they had received the message and answered, and they had probably delayed in bringing it up, and I went down and inquired myself, and I wasn't relieved until I heard from them that they were all well.

"*Q.* Can you place any value upon the damages? If you have an opinion as to the amount, go ahead and state it. *A.* I was in my opinion damaged in the sum of $2,000."

There was a verdict and judgment for respondent for $300, from which an appeal was taken to this court.

The errors assigned are: *First*, that the petition states no cause of action; *second*, that the court erred in allowing respondent to give his opinion in evidence as to the amount of damages suffered by him during the delay of thirty-six hours before he heard from his sister; *third*, errors in the giving and refusing of instructions, and in overruling motions for new trial and in arrest of judgment.

The petition states the negligent failure of appellant to transmit and deliver the said message; it then adds, to-wit: "Whereby plaintiff says he was greatly worried and harrassed, and suffered great mental anguish, and by reason of said suffering and mental anxiety and anguish he was damaged in the sum of $2,000." It is apparent, therefore, that the only basis of recovery relied upon in this case is the mental

anxiety felt by the respondent during the interval between sending his message of inquiry and receiving the telegram of his sister relieving his fears. The question, therefore, on the first assignment of error is purely one of law, to-wit: Can there be a recovery in an action of negligence for non-delivery of a telegram, causing mental suffering but no physical injury or pecuniary loss to the sender?

This question has not heretofore been directly decided in the appellate courts of this state. The first decision in other states was held in *So Relle v. Tel. Co.*, 55 Tex. 308. In that case the doctrine was broadly stated that mental suffering discerpted from bodily pain or pecuniary injury was a proper element of recovery in an action for negligent non-delivery of a telegram. The conclusion expressed in that case was unsupported, except by a quotation of opinion expressed by Shearman & Redfield in their book on negligence. (*Ibid.*, sec. 756.)

In *Railroad v. Levy*, 59 Tex. 563, the *So Relle case*, *supra*, was expressly overruled, and the rule announced that the mental suffering of the addressee of an undelivered telegram was no ground of recovery, and that no authority in this country held that "the person *to whom* the message is sent may maintain an action for the negligence of a telegraph company in transmitting, without averment and proof of some actual pecuniary injury sustained thereby."

In the case of *Stuart v. Tel. Co.*, 66 Tex. 580-586, the court, speaking of its previous decision (*So Relle case*, *supra*), said: "That authority was overruled in the elder Levy case only in so far as it held that such damage alone would sustain an action. The two cases conflict in but this one point. *We find no case, except So Relle, which holds that a party may come into court solely to redress an injury to his feelings.* Such injury

is not to the name, person or property; but if to either of these an actionable injury is done, the complaining party may then recover as actual damages compensation for the proximate results of the wrongful act. When injury to the feelings is such result, it forms an element of the actual damage." It was also said, as to the principle of liability for mental suffering, "that it is caused by and contemplated in the doing of the wrongful act."

In *McAllen v. Tel. Co.*, 70 Tex. 243-246, it was held that the sender of an undelivered telegram could not recover because he failed to make known the sickness of the addressee, wherefore any mental suffering caused by non-delivery could not have been "contemplated by defendant's agent, nor was it the necessary or usual consequence of a failure to perform such a contract." In that case there was one feature strikingly similar to the one at bar, *i. e.*, the *groundlessness* of the mental suffering complained of. As to this the court said: "In this case it seems that the plaintiff's mental anguish was not the result of any real or adequate cause. * * * If grief or sorrows produced by things unreal, mere figments of the brain, are held to give a cause of action for a breach of contract or a tort, an individual of a somber, glowing imagination would often be entitled to large damages on account of mental suffering, while others of a buoyant fancy for the same breach of duty would not be entitled to anything; and damages, instead of being measured by the rules of law as applied to the real facts, would largely depend upon the fertility of the imagination of the suitor."

In *Rowell v. Tel. Co.*, 75 Tex. 26, the facts were that a message was sent asking the plaintiff's wife to come to her mother who was dangerously sick, whereupon the plaintiff sent the following telegram:

"*To W. C. Scott, Athens, Texas.*

"How is mother? If no better, Josie comes to-night. Answer—my expense.

"[Signed] J. H. ROWELL."

The answer sent to the above message was *not delivered*, whereupon plaintiff sued, demurrer being sustained. The court held on appeal as follows to-wit: "We are of the opinion that the demurrer was properly sustained. The damage here complained of was the mere continued anxiety caused by the failure promptly to deliver the message. Some kind of unpleasant emotion in the mind of the injured party is probably the result of a breach of contract in most cases, but the cases are rare in which such emotion can be held an element of the damages resulting from the breach. For injury to the feelings in such cases the courts cannot give redress. Any other rule would result in intolerable litigation."

In the late case of *Tel. Co. v. Beringer*, 84 Tex. 38, the suit was brought by the addressee for failure to deliver a telegram informing him of the death of his father, and directing him to "come up at once." The court held that the action was properly brought, and added: "It has been repeatedly decided by this court that compensation for mental anguish may be recovered in such cases."

It is obvious from the initial case until the one last quoted that the trend of decisions in the courts of Texas has been marked by vacillating uncertainty, and subjected to varying qualifications in its assertion of the doctrine and conditions of liability in actions for mental suffering. As a whole, the Texas cases seem to demonstrate their embarrassed efforts to escape the consequences of the doctrine announced in the earliest case. (*So Relle v. Tel. Co., supra.*) They do not, therefore, contribute on this topic anything of value to legal science, and should not be accorded any persuasive

force in the solution of this question by the courts of other states. Their last ruling, however, has been measurably adopted in certain other states.

In *Chapman v. Tel. Co.* (Kentucky Court of Appeals), 30 Am. & Eng. Corp. Cases, 626, the court, upon the authority of Shearman & Redfield, *supra*, held: "Whether the injury be to the feelings or pecuniary, the act of the violator of a right secured by contract has caused it. The source is the same, and the violator should answer for all the proximate damages."

In *Wadsworth v. Tel. Co.*, 86 Tenn. 695, the opinion of the majority of the court follows the rule laid down in some of the Texas cases, to the effect that the addressee of the telegram has a right of action for injury to his feelings caused by its non-delivery. That case, aside from presenting nothing new in support of its conclusions, is so thoroughly confuted by the learned and logical argument contained in the dissenting opinions of Judges Lurton and Fowlkes, that it may be laid out of view in the further consideration of this subject.

In *Rese v. Tel. Co.*, 123 Ind. 294, the decision is rested upon the Tennessee case as authority for holding that the sending of a telegram by a husband, conveying notice of sickness of his wife to his brother-in-law, would entitle the husband to recover for his *mental suffering caused by the failure of his brother-in-law to come*, because of non-delivery of the telegram.

In *Young v. Tel. Co.*, 107 N. C. 370, it was held that the addressee of a telegram might sue for delay in its delivery, and in addition to nominal damages might recover for mental suffering caused by the delay, citing the Indiana case and the Texas cases.

In *Tel. Co. v. Henderson* (Alabama, 30 Am. & Eng. Corp. Cases, 615), the conflict in the authorities was

noted and the case at hand distinguished, the court saying: "The right of the plaintiff to sue for the breach of the contract to deliver, if within the free delivery distance, takes the case out of the rule, if a sound one, that mental distress will not maintain the suit when there is no other element of recoverable damage."

Aside from the suggestion contained in Shearman & Redfield, *supra*, there was no original authority adduced as the foundation of the views expressed in the foregoing cases, and, while each cites those which were prior, in the last analysis the only tangible support of the whole superstructure of opinions is the paragraph quoted; and singularly enough that paragraph (section 756, [4 Ed.]) *now cites* as its only support one of the Texas cases which was founded upon it.

The theory upon which the foregoing cases sustain the right to bring an independent action solely for mental suffering does not commend itself to us as sound in principle, nor are we satisfied with the authority quoted in its favor. The question is *res integra* with us, and in solving it we are controlled by two considerations: *First*, its consistence with established principles of legal procedure; *second*, its utility. We are aware of no valid argument in favor of permitting recoveries purely for mental suffering for non-delivered telegrams, which would no tapply with equal force to an action against common carriers for mental suffering caused by the non-delivery of a passenger at his destination. Yet it is well settled that for mental sufferings inflicted on a lady, who has been carried beyond her station but not physically injured there can be no recovery. *Trigg v. Railroad*, 74 Mo. 147, 153. To the same effect is *Wilcox v. Railroad*, 52 Fed. Rep. 264.

If a suit for *anxiety* for the welfare of relatives who were not injured can be sustained in an action against a telegraph company for negligently failing to deliver a message of inquiry, why could not a passenger hemmed in a wreck train at one point, seeing the same afire at another point, but who was extricated uninjured before the flames reached the place where he was pinioned, recover for the fright, horror and mental distress experienced? That such incidents take place in modern traveling is undoubted; yet no precedent is preserved of the institution of such a suit, and no authority can be shown for its maintenance. Wood's Mayne on Damages, p. 75, and notes; *Ewing v. Railroad*, 147 Pa. St. 40; *Commissioners v. Coultas*, 13 Appeal Cases, 222; *Fox v. Borkey*, 126 Pa. St. 164; *Purcell v. Railroad*, 48 Minn. 134; *Lehman v. Railroad*, 47 Hun, 355.

The law is fixed and elementary, that civil methods of redress for torts do not include pain of mind, except the same be derived from pain of body or pecuniary injury. A wrongful act not affecting the person or the purse is *not tortious* in the eye of the law. This distinction will be found to prevail in all the strained analogies drawn from recoveries in a libel, slander, seduction, etc., in support of the contrary cases. In suits for defamation of character the theory of the law is, that plaintiff has a property right in his reputation which should be vindicated when damaged, as any other thing of value would be protected by law if impaired. So in the cases of seduction or of injuries to minor children (outside of statutory provisions) the prerequisite to recovery is the proof of loss of services. It is evident, therefore, that all such actions have for their foundation an infracted property right, and are radically different from actions for injury to feelings, unconnected with any injury to a property right. In

the latter case the condition for legal redress does not subsist on account of the absence of its essential basis. *Wyman v. Leavitt*, 71 Me. 227.

It is the universal law that, in actions for bodily injuries, the physical pain and mental suffering caused by such injuries are proper elements of damages to be recovered. *Brown v. Railroad*, 99 Mo. 310, 319. When mental suffering is distinct and separate from the bodily injuries, it has been held that it cannot be considered as an element of damages. *Johnson v. Wells, Fargo & Co.*, 6 Nev. 224; *Triggs v. Railroad, supra; Railroad v. Stables*, 62 Ill. 313; *Jock v. Dankward*, 85 Ill. 331; *Keyes v. Railroad*, 36 Minn. 290; *City of Salina v. Trosper*, 27 Kan. 544; *Dorrah v. Railroad*, 65 Miss. 14.

It is the law of this state that, under a statute authorizing a parent to recover damages not exceeding $5,000 for the death of his minor child, although there might be a recovery for actual and also punitive damages, if the circumstances warranted the latter, there could not be a recovery therein for the mental suffering of the parent. *Parsons v. Railroad*, 94 Mo. 286, 300; Cooley on Torts, secs. 271, 273; *Schaub v. Railroad*, 106 Mo. 74.

That there can be no substantial recovery by legal procedure for mental anxiety or suffering alone, occasioned by failure to deliver a telegram, is maintained with much ability and bearing by the supreme court of Georgia in an opinion reviewing all the authorities and supporting its conclusions with irrefragable legal reasoning. *Chapman v. Tel. Co.*, 39 Am. & Eng. Corp. Cases, p. 567, citing *West v. Tel. Co.*, 39 Kan. 93; *Russell v. Tel. Co.*, 3 Dak. 315; *Western Union Tel. Co. v. Rogers*, 68 Miss. 748; *Chase v. Tel. Co.*, 44 Fed. Rep. 554; *Crawson v. Tel. Co.*, 47 Fed. Rep. 544.

In the principal case *Chapman v. Tel. Co.*, 39 Am. & Eng. Corp. Cases, *supra*, the question was whether a person to whom a telegraphic message announcing the dying condition of a brother was sent, but by gross negligence of the company was not delivered with due promptness, so that he was unable to reach the brother's bedside before death transpired, can recover substantial damages for the mental suffering caused by the company's failure of duty. The court after an exhaustive review of the authorities decided this question in the negative, saying: "The body, reputation and property of the citizen are not to be invaded without responsibility in damages to the sufferer. But outside of these protected spheres the law does not yet attempt to guard the peace of mind, the feelings or the happiness of everyone by giving recovery of damages for mental anguish produced by mere negligence. * * * The civil law is a practicable business system dealing with what is tangible, and does not undertake to redress psychological injuries"

In the well considered case of *Tel. Co. v. Rogers*, 68 Miss. *supra*, where the action was for delay in delivery of a telegram stating the death and time of burial of plaintiff's brother, whereby he was prevented from attending the obsequies, the court reviewed the question from the standpoint of reason and authority and rejected it as unsustained by either, saying: "We are not disposed to depart from what we consider the old and settled principles of law, nor to follow the few courts in which the new rule has been announced."

"The difficulty of supplying any measure of damages for bodily injury is universally recognized and commented on by the courts, but in that class of cases demands for simulated or imaginary injuries are far less likely to be made than will be those in suits for mental pain alone. No one but the plaintiff can

know whether he really suffers any mental disturbance and its extent and severity must depend upon his own mental peculiarity. In the nature of things money can neither palliate nor compensate the injury he has sustained. 'Mental pain and anxiety the law cannot value, anddoes not pretend to redress when the unlawful act complained of causes that alone.' *Lynch v. Knight*, 9 H. L. 577."

The two last cited cases have reached this conclusion after subjecting all the prior decisions pro and con to a rigid analysis. Their judgment is in some measure that of the law after full hearing and broad presentation of the issues. In our judgment it is eminently clear and sound, and brings the question within the logical limits of legal procedure. Any other view of the question would involve methods of redress outside the pale of the law. We therefore hold that a recovery solely for mental suffering not caused by injury to the person, property or reputation, is not within the scope of legal procedure, as defined and limited by right reason.

Nor do we think that relief for mental suffering independently of other actionable grounds is useful or contemplated by legal polity. The immediate result of the admission of such a doctrine would be a rush of suits for fanciful and speculative damages; this has been practically illustrated in the growth of this class of litigation in Texas. It is not wise or true legal polity to countenance a class of litigation resting on no substantial basis cognizable at law, and wholly indeterminate in the measure of damages or liability. On the other hand there is no question but that for breaches of tract or negligence in transmitting or delivering messages, telegraph companies can be held liable according to established legal methods for the proximate damages caused by their default. Revised Statutes, 1889, sec.

2729; *Markel v. Tel. Co.*, 19 Mo. App. 80; *Tel. Co. v. Hall*, 124 U. S. 444. Nor do we exclude from view the fact that telegraphy is one of the greatest agencies of civilized life and business, and should be held in full performance of its duties to the public who contribute to its employment. This reflection does not, however, justify us in breaking down the barriers of redress fixed by law. It does address itself to the legislature, and that body with commendable wisdom has enacted a limit of recovery by convention for the breach of the duty and obligation of telegraph or telephone companies. Revised Statutes, 1889, section 2725.

It is said, *Burnett v. Tel. Co.*, 39 Mo. App. 599, *arguendo* of the policy of this act: "Yet it is apprehended that the well known general rule, which would deprive the sender of a telegraphic message from the recovery of damages beyond the amount paid for transmitting the dispatch where the damages would be given as a mere *solatium* for wounded pride, affection or other so called mental feelings, *may have been one of the reasons which induced the legislature on grounds of public policy to enact a statute giving damages in such cases in the form of a penalty.*" This is also in accordance with the suggestion in the opinion. *Chapman v. Tel. Co.* 39 Am. & Eng. Corp. Cases, *supra*. That such legislation is constitutional and does not impinge on interstate commerce, is settled in this state. *Connell v. Tel. Co.* 108 Mo. 459. In the construction of section 2,725 of the Revised Statutes, 1889, it was decided that the operation of this statute was not obnoxious to the rule announced in *Tel. Co. v. Pendleton*, 122 U. S. 347, nor any case before or since that decision. 108 Mo. page 465. To the same effect is *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181; and see Acts of Legislature of Missouri, 1891, p. 75, section 1.

The second assignment of error as to the admission of evidence of the opinion of plaintiff as to the money value of his mental suffering was well taken, not only on the grounds set forth in this opinion but also according to the general rules as to the testimony of that sort, which is: "A witness not testifying as an expert, testifying merely as to matters with which the jury may well be supposed to be as conversant as himself and as capable of drawing a correct conclusion, is not allowed to give an opinion." *Hurt v. Railroad*, 94 Mo. 260; *Smith v. Young*, 26 Mo. App. 575.

Our conclusion is that the plaintiff in this case is not entitled to recover the damages claimed in his action for the failure of the appellant to promptly deliver the message sent. The judgment of the lower court will, therefore, be reversed. Judge BIGGS concurs. Judge ROMBAUER is absent.

Since writing this opinion we have received a copy of a decision of the supreme court (*Connell v. Tel. Co.*, unreported*), holding same views herein expressed.

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THE STATE OF MISSOURI *ex rel.* THE STATE SAVINGS BUILDING & LOAN ASSOCIATION, NUMBER 1, Respondent, v. CHARLES H. R. DAVIS, Appellant.

St. Louis Court of Appeals, May 30, 1893.

1. **Mandamus**: PROCEEDING TO COMPEL SURRENDER OF CORPORATE BOOKS AND PAPERS BY RETIRING OFFICER. *Mandamus* will lie upon the petition of a private corporation to compel the surrender of its records, books and papers, when these are withheld by one of its former officers. Especially will the courts exercise this jurisdiction when it is made to appear that the books and papers have been concealed and cannot be reached by ordinary legal process.

* This opinion has been published in 22 S. W. Rep. 815.

2. ———: ———: AUDITING OF OFFICER'S ACCOUNTS. When the term of a secretary expires, it is his absolute legal duty, whether his accounts have been adjusted or not, to deliver up on demand all the property in his possession by virtue of his office. Accordingly, such surrender will be enforced by writ of *mandamus* without first requiring the adjustment of his accounts.

3. ———: PEREMPTORY WRIT. *Held*, in the course of discussion, that in proceedings by *mandamus* the peremptory writ must in all particulars strictly conform to the alternative writ, and, therefore, that a peremptory writ must be denied, if the relator is not entitled to the performance of the command of the alternative writ.

Appeal from the St. Louis City Circuit Court.—HON. LEROY B. VALLIANT, Judge.

AFFIRMED.

Chester H. Krum, for appellant.

W. M. Kinsey and *Frank E. Richey*, for respondent.

BIGGS, J.—This is a proceeding by *mandamus* to compel the defendant to deliver to the relator the records, books and papers connected with and pertaining to the relator's business.

It was alleged in the petition, and also in the alternative writ, that the defendant obtained possession of the relator's said property as secretary of the association; that at the annual meeting of the stockholders held in December, 1892, a new board of directors of the association was selected for the ensuing year, and that on January 16, 1893, the defendant's successor in office was duly elected and had qualified, and that the defendant had not only refused on demand to surrender to the relator its said property, but had concealed the same so that it could not be reached by ordinary legal process.

Three reasons are stated in the return why a peremptory writ of *mandamus* should not issue: *First*.

That the defendant is the lawful secretary of the association, and as such is the lawful custodian of its records, books and papers. *Second.* That he should not be compelled to surrender the books of account until his accounts as secretary are properly audited and settled; and that he had frequently applied to the relator to have such accounting made, which the relator had refused to have done. *Third.* That the alleged election of the new board of directors was illegal and void, for the reason that the president of the association failed to appoint inspectors to receive and count the votes polled by shareholders, as required by the laws of the association.

The reply put in issue the new matter set forth in the return. On the hearing a peremptory writ was ordered to issue, requiring the immediate and unconditional surrender of the property.

The record of the annual meeting of the stockholders of the association, which was held in conformity with the by-laws on the third Monday in December, 1892, was read in evidence by the relator. It showed that at that meeting an election was held, and a new board of directors was selected for the ensuing year. There was a meeting of this board held on January 16, 1893. The record of the proceedings of that meeting shows that new officers were elected by the board, and that Ben M. Lowenstein was chosen as secretary of the association. There was no evidence to the contrary, or in anywise impeaching the regularity of the proceedings either at the meeting of the stockholders or at that of the newly elected board of directors. Neither was there any evidence to sustain the averment in the return, that the defendant had asked and the relator refused to have the books audited and the defendant's accounts as secretary adjusted. Hence

there is but one question presented for our determination, and that is whether the relator was entitled to a peremptory writ of *mandamus* for the absolute and unconditional surrender of its property.

It is now well established that *mandamus* will lie upon the petition of a private corporation to compel the surrender of its records, books and papers, which are unlawfully withheld by one of its former officers. *American Frog Co. v. Haven*, 101 Mass. 398; *St. Luke's Church v. Slack*, 7 Cush. 226; *Fasnacht v. German Ass'n*, 99 Ind. 133; *State ex rel. etc. v. Goll*, 32 N. J. L. (3 Vroom) 285; *Rex v. Wildman*, 2 Strange, 879; High on Extraordinary Legal Remedies [2 Ed.] sec. 74. Especially will the courts exercise the jurisdiction when it is made to appear, as in the present case, that the property has been concealed and cannot be reached by ordinary legal process.

We do not understand counsel to deny that *mandamus* is the proper remedy in a case like we have here, but the contention is that the peremptory writ should have required the adjustment of the defendant's accounts as secretary as a condition precedent to the surrender of the books. This contention is not tenable, for the reason that such a conditional order would not have conformed to the terms of the alternative writ or to the prayer of the petition. The rule in this state now is that the relief asked in the petition for *mandamus* is the only relief that can be granted on a final hearing. When this question was first before the supreme court *(Railroad v. County Court*, 53 Mo. 156), it was decided that the court in its final order might disregard the prayer of the petition and grant such additional or modified relief as the facts warranted. But in the subsequent case of *State ex rel. v. Railroad*, 77 Mo. 143, the contrary doctrine was held, and the case of *Railroad v. County Court, supra*, was expressly

overruled. It was there held that the peremptory writ must in all particulars strictly conform to the alternative writ. Therefore, if the alternative writ commands the doing of one thing, it is incumbent upon the relator to show that he is entitled to the performance of the thing specified, and, if he fails in this, the peremptory writ will be denied. This rule was adhered to in the latter case of *School District v. Lauderbach*, 80 Mo. 190.

As the alternative writ in the present case required the immediate and unconditional surrender of the property, it was not within the power of the circuit court on the final hearing to modify or attach conditions to the original order. If the relator failed to establish the right as against the defendant to the immediate possession of its property, the court should have denied the peremptory writ and dismissed the proceedings.

We are of the opinion that the relator was entitled to the absolute and immediate possession of its property, and that the circuit court was right in its conclusions. The possession of the property by the defendant was at all times the possession of the relator, and at the expiration of his term of office it was his absolute legal duty, whether his accounts as secretary had been adjusted or not, to deliver up on demand all property which had come into his possession by virtue of his office. This view is sustained by equitable considerations as well. The adjustment of the defendant's accounts could have been made as well after as before the delivery of the books; whereas their retention by him has undoubtedly produced great confusion, if not actual loss, in carrying on the relator's business.

In the case of *State ex rel. v. Goll, supra*, the defendant, who had been acting as secretary of the relator, justified his retention of its books upon

the ground that he had purchased the books with his own money, for which and arrears of salary the relator was still indebted to him. It was said by the court, that, since possession of the officer is regarded as the possession of the corporation, it is not sufficient objection to granting the writ *(mandamus)* that he has purchased the books with his own money, nor will relief be withheld because the corporation is still indebted to him for the purchase price of the books or for arrears of salary.

The judgment of the circuit court will be affirmed. Judge BOND concurs. Judge ROMBAUER is absent.

THE STATE OF MISSOURI, *ex rel.*, JOHN M. MARTIN *et al.*, Appellants, v. JESSIE BUCKNER *et al.*, Respondents.

St. Louis Court of Appeals, May 30, 1893.

Alteration of Boundary of School District: LIMITATION AS TO ASSESSED VALUATION OF PROPERTY. Under section 7972 of the Revised Statutes of 1889 a change of the boundary line between two school districts, which left one of the districts with property of an assessed valuation of less than $30,000, was permissible only if such district contained within its limits nine square miles, or more, of territory.

Appeal from the Greene Circuit Court.—HON. W. D. HUBBARD, Judge.

AFFIRMED.

L. H. Mushgrave, for appellants.

John A. Patterson, for respondents.

BOND, J.—This is a proceeding by *mandamus* brought in the circuit court of Greene county to compel

the teachers and trustees (respondents) of Coleman school district number 5, township 30, range 24, to admit the children of the relator to all the privileges of said school district. It is conceded by the relator that prior to April, 1889, he was a resident of Flat Rock school district, which adjoins the Coleman school district. He claims that in April, 1889, by a change of the boundary line between the two districts his residence was changed to the Coleman district. The contention of the defendants is that the attempted change of boundaries was illegal and void, and therefore the relator was not a resident of Coleman school district, and that his children were not entitled to attend school therein. There was a judgment for the defendants, from which an appeal was taken, wherein the only error assigned was the refusal by the court to give the following declaration of law:

"That there are three classes of schools provided for in section 7972, code, 1889, relating to the change of boundary lines of school districts: *First*, where the districts changed have each thirty pupils; *second*, where there is $30,000 taxable property in a changed district; *third*, where there is an area of nine square miles in the district."

In lieu of the above, the court declared the law as follows, to-wit:

"The court declares the law to be that no school district could have been formed in 1889 with less than thirty pupils and $30,000 worth of taxable property, unless said district contained nine square miles of territory."

On the trial it was admitted that Flat Rock school district after the change of boundaries had within it less than $30,000 worth of taxable property, namely, $23,000, and that neither district contained at any time as much as nine square miles of territory.

The statute in existence at the time of the proceedings to change the boundaries of said two districts (Revised Statutes, 1889, section 7972) was as follows:

"*Provided, however*, that no new district shall be created, or boundary line changed, by which any district shall be formed containing within its limits, by actual count, less than thirty pupils of school age, or by which any district shall be left containing within its limits, by actual count, less than thirty pupils of school age, or by which any district shall be formed or left with less than $30,000 assessed valuation at the time, unless such district shall contain within its limits nine square miles or more of territory."

The plain import of the foregoing statutory language is that thereunder two conditions were affixed to the formation of school districts: *First.* That such school district, whether newly created or altered by change of boundaries, should not contain within its limits less than thirty pupils of school age. *Second.* Or less than $30,000 assessed valuation, unless it contained nine square miles of territory.

The evident purpose of the legislature in adding the alternative of nine square miles to the last condition was to guard against the necessity which might otherwise arise in sparsely settled communities of sending the children too great a distance to reach school facilities. But this forethought on the part of the legislature does not do away with either of the prescribed conditions; it can only be a substitute for the latter, provided the first is shown to exist.

Under the admitted facts in this record neither school district contained as much as nine square miles of territory, although the Flat Rock school district contained less than $30,000 of taxable property. It follows that neither the two conditions prescribed by statute, nor the first condition and the substitute for the

second existed with reference to the Flat Rock school district after its limits were lessened by the change of boundary line. The result is that such change was without statutory authority, and cannot be made the basis of a *mandamus* to compel the admission of the relator's children into a school district of which he is not lawfully a resident.

Although the statutory conditions have been abridged by the Act of 1891, p. 206, section 1, striking out the second condition and its substitute, still they existed in full vigor when this proceeding was begun, and the circuit judge committed no error in declaring the law in accordance with the statutes then prevailing.

The judgment is affirmed. Judge BIGGS concurs. Judge ROMBAUER is absent.

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B. F. FINLEY, Guardian of Ida Potter, a minor, Respondent, v. ANDREW H. SCHLUETER, Appellant.

St. Louis Court of Appeals, May 30, 1893.

1. **Practice, Appellate:** APPEAL FROM FINAL SETTLEMENT OF THE GUARDIAN. The rules applicable to appeals in equitable actions will govern an appeal from the judgment on the final settlement of the guardian of a minor.

2. ———: REVIEW OF MATTERS OF FACT IN ACTIONS IN EQUITY. In chancery causes appellate courts are invested with full power to make their own findings of fact.

3. **Guardian and Ward:** NATURE OF THE GUARDIAN'S OBLIGATIONS. In the care and management of the ward's estate a guardian is bound to employ such diligence and prudence as in general prudent men of discretion and intelligence in such matters employ in their own like affairs; but, in the absence of gross negligence, a guardian is not liable for more than he actually receives.

Appeal from the Cape Girardeau Circuit Court.—HON. H. C. O'BRYAN, Judge.

REVERSED AND REMANDED *(nisi.)*

W. H. Miller, for appellant.

J. W. Limbaugh, for respondent.

BOND, J.—The appellant made his final settlement as guardian of Ida Potter in the probate court of Cape Girardeau county. Exceptions to this settlement were taken and filed by the respondent as the new guardian of said ward, which were overruled by the probate court, from which ruling an appeal was taken to the circuit court, where on a trial *de novo* judgment was rendered sustaining said exceptions, to-wit:

"In the Matter of the Final Settlement of Andrew H. Schlueter, Guardian of Ida Potter, a Minor. Appeal from Probate Court.

"Now come the parties herein by attorneys, and this cause coming on to be heard is taken up and submitted to the court, and by the court seen and heard. The court finds that the said Andrew H. Schlueter, guardian of Ida Potter, a minor, has failed to charge himself with and account to his said ward in his final settlement for the sum of $157.20, being one half of $56.40, unpaid rent of land for the year 1889; one half of $95, unpaid rent of land for year 1891; one half of $63, unpaid claim against G. W. Carlton, and $50, amount overpaid on claim of John Mogler. It is thereupon ordered and adjudged that said final settlement as stated by the said Andrew H. Schlueter be disallowed, and his said settlement be and is disapproved; and it is further ordered and adjudged that said account be stated as follows:

DR.

To one half of $56.40, unpaid rent of land for the year 1889	$ 28 20
To one half of $95, unpaid rent of land for the year 1891	47 50
To one half of $63, unpaid claim against G. W. Carlton	31 50
To amount overpaid on claim of John Mogler	50 00
November 15, 1890—To amount due ward on settlement	311 93
August 15, 1891—To amount interest on $200 for nine months	11 97
August 15, 1891—To one half cash on rent	13 00
August 15, 1891—To one half wheat taken on rent	19 68
	$513 78

CR.

By one half paid for rails—21	$ 8 62	
By one half paid for taxes—22	2 32	
By one half paid on attorney's fee—23	5 00	
By one half cost in suit for rent v. Geo Carlton et al. before H. C. Hinton—24	2 45	
By one half cost paid in attachment suit against Noah Noland—25	3 85	
By two per cent. commission—26	7 31	
By extra services rendered by guardian in looking after repairs on farm	10 00	
By probate fees—27	4 05	
By amount paid John Mogler, caring for, board, etc., of ward—28	70 30	
By amount paid successor	225 00	
By balance	174 87 1-2	
	$513 78 1-2	
To balance due ward		$174 87 1-2

"Which sum of $174.87 1-2 the court finds is a balance due the said minor on final settlement. And it is further ordered and adjudged that the said Andrew H. Schlueter pay over to the present and acting guardian of said minor the balance found due on final settlement, together with the costs in this behalf expended, and that a certified copy of this judgment, together with the original papers, be transmitted to the probate court of this county."

On appeal from this judgment the appellant assigns for error: *First.* The action of the circuit court in charging the guardian over and beyond the charges

approved by the probate court. *Second.* The overruling of his motion for new trial.

It has been held by this court that the trial of objections to items of final settlement of administrators must be had without the intervention of a jury, and that, in reviewing such causes, the rules applicable to appeals in equitable actions will govern. *In re Estate of Meeker*, 45 Mo. App. 186. If that rule is to be applied to the conduct of administrations, we perceive no valid reason why it should not govern a trial of objections to the final settlement of a guardian. In chancery causes, appellate courts are invested with full power to make their own findings, and the statement of some of the decisions that they will defer somewhat to the findings of the chancellor only means "that, when there is a conflict of testimony, or where the testimony is evenly balanced, and the finding of the chancellor appears to be correct," then it will be sanctioned by the appellate tribunals. *Benne v. Schnecko*, 100 Mo. 250, 258; *McElroy v. Maxwell*, 101 Mo. 294, 308.

In this state the liability of guardians is regulated by the principle applicable to the relations of trustee and *cestui que trust.* Guardians are therefore bound to employ in the care and management of the ward's estate "such diligence and such prudence * * * as in general prudent men of discretion and intelligence in such matters employ in their own like affairs." They are not, however, liable beyond what they actually receive, unless in case of gross negligence. *Taylor v. Hite, Curator*, 61 Mo. 142, 144. The case at bar must be determined in accordance with the foregoing principles.

The first assignment of error as to failure to give the appellant credit for $19.68, being one half of amount paid on account of growing wheat taken for part of rent, is well taken. Although the prior settlement of

the appellant in the probate court contained this item of charge against himself as guardian, yet the uncontradicted testimony on the trial in the circuit court tended to prove that the wheat, for which this was the assumed value, was turned over to a renter named French, who paid it to the respondent as the successor in guardianship to appellant. The circuit court, therefore, should have embraced this $19.68 among the credits allowed on re-stating the account.

The second assignment of error is the charge against the appellant of $31.50, *i. e.*, one half of unpaid claim of G. L. Carlton. The testimony discloses that this was an unpaid balance of a note given by Carlton, Bright & McDill; that two of the parties had about paid what they estimated to be the proportion of the note due from them, and one of them (Carlton) testifies he tried to get the guardian to sue on this note in 1889, when the other maker had a good wheat crop out of which it could have been made; that the guardian "did not do it and did not want to do it," and never brought suit until 1891. We think this evidence tended to show gross negligence on the part of the guardian in failing to sue on the note when requested so to do by one of its makers and at a time when there was a probability of its collection, which justified the action of the circuit court in charging the guardian with the unpaid balance of said note.

The third assignment of error questions the propriety of the claim against the appellant for one half of the rent for the year 1889. The evidence shows that the total rent due for that year was $160, of which $78 were collected in money and allowances to the tenant for work, and a mortgage taken to secure the remainder, $82. This mortgage embraced two horses and a cow. Twenty-six dollars were collected under this

mortgage, leaving $56 uncollected. The testimony of Carlton on this point is as follows:

"*Q.* Do you remember of Nolan offering to turn over any corn to Schlueter for the rent of the second year? *A.* Yes, sir.

"*Q.* How much? *A.* I do not know; it was supposed to be between seven hundred and eight hundred bushels.

"*Q.* Did Schlueter accept it? *A.* Yes, sir; he turned it over to me. I was his agent. He told me to sell it and send him the money, and he told Nolan before he left—I heard it—he told Nolan, if he could sell it for the money to pay the rent, to do so. I considered it taken out of my hands then, and did not look after it as close as I would.

"*Q.* Do you know what Nolan did with the corn? *A.* No, sir."

It is fairly inferable from this testimony that the guardian had the means of making the debt due him under the mortgage for rent of 1889, and that he voluntarily surrendered to the debtor the right to dispose of the property turned over for the payment of the rent. This was inexcusable negligence under the circumstances, and in the light of his previous experience of the disposition of the debtor to avoid the payment of rent due for former years, we think the trial court committed no error in making this charge against the guardian.

The fourth assignment of error challenges the charge against the guardian for one half of the unpaid rent for the year 1891. The evidence is that the guardian a third time rented the place to the same tenant, Nolan, for $150. The guardian failed to collect $95 of this rent. On this point the agent employed by the guardian testified, to-wit:

"*Q.* What crops did Nolan have on the place at the time of the lawsuit for $150 rent? *A.* A crop of wheat and corn.

"*Q.* How much corn at that time? *A.* He made a right smart of corn, but on the trial day he did not have it.

"*Q.* Do you know how much he made. *A.* No, sir.

"*Q.* About how much? *A.* About eight hundred bushels.

"*Q.* Was there enough corn to secure $150. *A.* Yes, sir.

"*Q.* What did he do with the corn? *A.* He hauled it off and sold it; he hauled it to Kogler's; I could not give the dates that he hauled it, but at early corn gathering time. Schlueter had told me to not let him haul it, unless he was hauling it off to pay the rent. I did not know until it was pretty near all hauled. I told him that he must pay the rent. He said that is what he was hauling it for; when he got the money he would settle the rent. Schlueter told me, if he hauled the corn to pay the rent, to let him haul it."

We think this testimony fairly shows that, except for the positive instructions of the guardian, the agent Carlton could have taken steps to secure the rent for that year, and that the circuit court committed no error in holding the guardian responsible for a loss superinduced by his instructions to his agent.

The last assignment of error is directed at the charge of $50 for overpayment made by the guardian to one Mogler. The evidence shows that the ward was placed with the family of Mogler to be treated as one of them until she became of age (eighteen years), without charge for her maintenance; that her guardian had paid for clothes while she was at Mogler's; that he has not paid the $50 for board for which he now asks

credit, and is not to pay it unless allowed on his settlement.

We are not disposed to revise the action of the circuit court in disallowing this credit. There was no proof of any express contract whereby the ward was to pay for her board otherwise than by rendering services. If there was no intention of a charge being made for board when the ward was taken to Mogler's, it is clear that it could not be insisted thereafter. *State v. Slevin*, 93 Mo. 253. If, on the other hand, in the absence of an express contract a charge was made by Mogler on an implied agreement, we do not think the evidence adduced justified its allowance in the form of a credit to the guardian.

The first assignment of error sustained in this opinion will necessitate a reversal of this cause, unless the respondent will within ten days remit that amount ($19.68) from the recovery before the circuit court, in which event the judgment of that court for the residue will be affirmed and the costs of this appeal taxed against respondent; otherwise the judgment will be reversed, and the cause remanded. It is so ordered. Judge BIGGS concurs. Judge ROMBAUER is absent.

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THE CITY OF CLARENCE, Respondent, v. ELI C. PATRICK, Appellant.

St. Louis Court of Appeals, May 31, 1893.

1. **Admission of Irrelevant Evidence:** PREJUDICIAL EFFECT. Irrelevant evidence was admitted in this cause, and the verdict was against the weight of the evidence. *Held*, that the error in the admission of this evidence must be deemed to have been prejudicial.

Per Bond J.:

2. **Affidavit**: JURAT. A complaint for the violation of an ordinance of a city of the fourth class was verified by the marshal before the mayor of the city. The jurat was signed by the mayor in his own name individually without any reference to his office, but it was sealed with the official seal, which bore the name of the city and the words, "mayor's office." *Held*, that the verification was sufficient.

3. **Municipal Corporations**: EVIDENCE OF ORDINANCES. A municipal ordinance need not be proved by a printed or certified copy of it; it may be proven by entries on the books of the corporation.

4. **City of the Fourth Class**: JUDICIAL NOTICE OF INCORPORATION. Courts will take judicial notice of the reorganization of all cities of the fourth class.

Appeal from the Shelby Circuit Court.—HON. THOMAS H. BACON, Judge.

REVERSED AND REMANDED.

W. O. L. Jewett, for appellant.

(1) There was no affidavit as a foundation of this case. The pretended affidavit was simply signed "M. Dimmitt." It does not appear that he had any authority to administer oaths. At the top of the instrument, it says: "Before M. Dimmitt, mayor of the city of Clarence, Missouri." But that is no part of the complaint, and does not cure the defect below. (2) There was no legal proof that Clarence was a city of the fourth or any other class. (3) There was no proof such as is required by section 4846 of the Revised Statutes of 1889 of the passage of any ordinance. No printed or certified copy of the ordinance was offered as provided by section 4846 of the Revised Statutes. (4) The court permitted witnesses over defendant's objection to testify that defendant's cow and other stock had been seen on the streets at other times than that at which she was taken up by the boys,

to-wit, the night of April 24, 1891. This was calculated to and did prejudice the defendant before the jury. The question involved was whether defendant's cow was legally impounded this time; not what might have been done at other times.

R. P. Giles, for respondent.

(1) The complaint is duly verified by the affidavit of the marshal. The failure of M. Dimmitt, the mayor, to append tha word "Mayor" to his signature is of no consequence. His official character fully appears from the words used at the beginning of the complaint and the seal attached. (2) Appellant contends that there was no legal proof that Clarence was a city of the fourth class. No proof was necessary, as the court will take judicial notice that Clarence is a city of the fourth class. Revised Statutes, sec. 1579; *City of Savannah v. Dickey*, 33 Mo. App. 522. (3) The ordinance was duly proved by the ordinance book read in evidence. *Tipton v. Norman*, 72 Mo. 380; 1 Dillon on Municipal Corporations [4 Ed.] sec. 422. The original ordinances or the book in which they are recorded are the primary evidence. 1 Dillon on Municipal Corporations, sec. 422, *supra*. The provision in the statute, Revised Statutes, sec. 4846, admitting printed ordinance to be read in evidence, does not affect the right to introduce the book of ordinances, which is the best evidence. That section is cumulative; it furnishes an additional mode of proof, but it does not render inadmissible that which was evidence before its passage. (4) It was proper to admit evidence that defendant's cow and other stock had been running at large at other times prior to April 24, 1891, and was made so by the line of defense set up by the defendant. The question of intent was involved upon which this

evidence has a bearing. Again it was made admissible, in response to certain statements of defendant, made in his examination in chief, about the boys of the town annoying him and his family about that cow.

BOND, J.—This was a prosecution for a violation of an ordinance of the city of Clarence founded on the complaint of the marshal, as to which the only objection urged by appellant is that the jurat was attested by M. Dimmitt without any addition of his official character as mayor of the city.

The section of the ordinance which defendant was charged with having violated is as follows, to-wit:

"Whoever shall, either directly or indirectly, open, break or otherwise injure or interfere with the stray pen provided for in section 2 of this ordinance, or shall lend or take out any animal or animals of the species mentioned in section 1 of this ordinance, inclosed in said stray pen, without the consent of the city marshal, mayor or president of the board of aldermen, shall be deemed guilty of a misdemeanor, and upon conviction thereof be fined not less than $5 no more than $50 for each such offense."

There was a trial in the mayor's court; upon appeal therefrom to the circuit court a verdict of conviction was rendered upon conflicting evidence. From this judgment of the circuit court an appeal has been prosecuted to this court and the following errors are assigned: *First.* The insufficiency of the signature of the mayor to the affidavit of the marshal to the complaint, in that the mayor only signed his personal name "M. Dimmitt" to the jurat. *Second.* Insufficiency of proof of ordinance charged to have been violated. *Third.* That there was no legal proof that the city of Clarence was one of the fourth or any other class. *Fourth.* The reception of evidence offered against

defendant's objection that his cow and other stock had been seen on the street at other times than as charged in the complaint. *Fifth.* The refusal of instructions asked by the defendant.

We do not think there is any merit in the first assignment of error. Section 1635 of the Revised Statutes, 1889, provides that the complaint of the marshal of the violation of a city (fourth class) ordinance, if the defendant be not present in court or in custody, "shall be in writing and sworn to." In the case at bar the complaint was sworn to before the mayor, who signed his individual name to the jurat and affixed thereto the seal of his office bearing these words, to-wit: "City of Clarence, Missouri, mayor's office." We hold that this was sufficient to validate the affidavit.

Neither is there any merit in the second assignment of error, that the ordinance was not proved because a printed or certified copy thereof was not offered in evidence. It was proved by an entry on the books of the corporation. This we held was sufficient at the present term. *City of Billings v. Dunnaway*, *ante* p. 1.

We have also decided in the case cited that, in a proceeding for the violation of one of its ordinances, the question of corporate existence cannot be raised against a city acting as one of the fourth class (*Inhabitants of Fredericktown v. Fox*, 84 Mo. 59, 65); that such issue could only arise upon proceedings of ouster on behalf of the state, and that we would take judicial notice of the reorganization of all cities of the fourth class as required by section 1579 of the Revised Statutes, 1889. These conclusions dispose of the third assignment of error, to the effect that there was no legal proof that the city of Clarence was one of the fourth class. It is untenable.

The fourth assignment of error, to-wit, the reception of evidence that the stock of defendant and the cattle of others had been seen on the street at other and different times in violation of the terms of the ordinance, was well taken. Such evidence related to different transactions than the one being investigated, and should not have been received over the objection of the defendant. It was calculated to influence the minds of the jury unduly against the theory of the case as presented by the testimony of his witnesses. Since the verdict seems to be against the weight of the evidence, it was necessarily prejudicial. Judge BIGGS concurs in the result. We therefore reverse the judgment and remand the cause for another trial. Judge ROMBAUER is absent.

CONCURRING OPINION.

BIGGS, J.—The defendant admitted that he took his cow from the stray pen without the knowledge or consent of the authorities of the town. The case was tried on the theory (in which both sides acquiesced), that this act of the defendant was a violation of the ordinances, provided the impounding of the cow was under the facts and circumstances the reasonable exercise of municipal power. The defense was that the animal was left temporarily in charge of the defendant's daughter on unfenced ground at the rear of defendant's premises while defendant went to his supper, and that pending the interval the cow, under the orders of the town marshal, was taken from the custody of the child against her will and impounded in the stray pen. This state of facts was established by the testimony of five or six witnesses, and the court instructed the jury that, if they found that the cow was at large under such circumstances, the defendant should be acquitted. The

court, against the objections of the defendant, admitted evidence in rebuttal to the effect that during the previous year the defendant had been in the habit of permitting other stock belonging to him to run at large in the town; that the marshal had been put to a great deal of trouble on this account; and that the marshal in the discharge of his official duties acted impartially, that is, that he impounded stock belonging to other parties when found running at large contrary to the terms of the ordinance.

This testimony was irrelevant, and as the weight of the evidence is in our opinion clearly in favor of the defendant on the only issue tried, the reasonable conclusion must be that the jury was misled by the objectionable testimony. This precludes us from holding that the error was a harmless one. I therefore concur in reversing the judgment.

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JAMES MCMAHON, Respondent, v. THE SUPREME COUNCIL, ORDER OF CHOSEN FRIENDS, Appellant.

St. Louis Court of Appeals, June 10, 1893.

1. **Benefit Association**: DUTY OF CLAIMANT TO EXHAUST REMEDIES WITHIN THE ORDER. The laws of a benefit association provided that claims for relief should be passed upon by designated officers, and that their denial of a claim should be conclusive, unless reversed by the Supreme Council of the organization on appeal thereto by the claimant. *Held*, that it was the duty of a claimant to first exhaust his remedy by such appeal before resorting to the courts for the enforcement of his claim.

2. ———: ———: WAIVER BY ASSOCIATION OF ITS RIGHTS. But the association loses its right to require such appeal, if the Supreme Council on the motion of one of its members reviews the ruling of these officers and affirms their rejection of the claim.

3. ———: PERMANENT DISABILITY. Such an association undertook to furnish relief to any member who was "totally and permanently disabled from following his or her usual occupation." *Held*, that under the various provisions of its laws the total disability provided for was one which prevented the member from following an occupation whereby he could obtain a livelihood, and that, in determining whether such a disability exists in a given case, both the mental and the physical capabilities of the member should be considered.

4. ———: ———. The fact that a member could enable himself to pursue an occupation by wearing an appliance (in this case a truss) will not lessen the character of the disability as a total one, when the use of the appliance would endanger his life or would subject him to intolerable discomfort.

5. ———: MEMBER IN GOOD STANDING. *Held*, that a limitation of the right to relief in cases of such disability to members in good standing required only that they should be in good standing when disabled.

6. ———: EVIDENCE: COMPETENCY OF REPORT OF MEDICAL EXAMINER. The laws of the association provided for the examination of the applicant for relief by a physician appointed by the association and for the physician's report in regard to the character and permanency of the disability. *Held*, that such report was not competent evidence against the applicant in a suit by him for the recovery of the relief.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL D. FISHER, Judge.

AFFIRMED.

L. A. Steber, for appellant.

W. C. and *J. C. Jones*, for respondent.

BIGGS, J.—The plaintiff holds a benefit certificate in the defendant order for $1,000. In addition to the insurance afforded its members the defendant undertakes, in consideration of the assessment and dues paid, to grant relief to its aged members, and also to those who have from accident or disease become disabled from following any occupation, provided such members have complied with the rules and regulations of the order.

Article 2, section 4, of the relief fund law reads: "Should a member become totally and permanently disabled from following his or her usual or other occupation by reason of disease or accident, such member upon the receipt and approval of satisfactory proofs as hereinafter provided for shall be entitled to a benefit of not exceeding one half the amount of the relief fund certificate held by him or her."

The plaintiff alleges in his petition that on the nineteenth day of January, 1889, by reason of disease and accident he became totally and permanently disabled from following his occupation or any other; that at the time the disability arose he was a member in good standing of defendant order, and that the defendant after receipt of notice and proof of such disability refused to pay his claim.

The answer admitted the issuance of the certificate, but denied that the plaintiff had complied with the requirements regulating the adjustment of disability claims; denied that the plaintiff was a member of the defendant order at the time of the *institution of the suit;* and denied that plaintiff was permanently and totally disabled.

There was a verdict and judgment for the plaintiff for $507.60, from which the defendant has prosecuted this appeal.

Section 6 of the relief fund law reads: "On receipt of the proper notice of disease or accidental disability under section 4 of this article, the supreme councilor shall proceed to investigate the same. If at any time he deems the fact to warrant it, he may appoint one or more physicians, whose duty it shall be to make a careful examination of the member's condition and report as to the character and permanency of the disability. If such report shows a disability of an unquestionably total and permanent disabling charac-

ter, the supreme councilor, supreme recorder and supreme medical examiner may approve the same and order the benefit paid. If, however, in the opinion of said officers there is any doubt concerning the permanence of the disability, they shall postpone the matter for any period they may determine upon, not exceeding one year, and shall then order a new examination either by the same or other physicians. If the results of this second examination be also uncertain, said officers may in like manner provide for a third, upon the result of which they shall either pay or refuse to pay the benefit claimed. This decision shall be final and conclusive upon the parties affected thereby, unless reversed upon appeal by the supreme council in regular session. Any claimant feeling aggrieved may take such an appeal by serving notice thereof upon the supreme recorder within thirty days after receipt of notice of decision by the claimant or his or her legal representatives. The supreme council shall accord the appellant a hearing at its next regular session and dispose of the matter."

Acting under this section the supreme councilor, the supreme recorder and the supreme medical examiner of the defendant appointed Drs. F. J. Lutz and R. J. Stoffel to make an examination of the plaintiff's condition. Upon the report of these physicians the supreme officers decided adversely to the claim. The plaintiff having failed to appeal to the supreme council as required, it was urged on the trial and is insisted now that such appeal is a condition precedent to the right to maintain the action.

It is clear from the reading of the by-laws that a member before resorting to the courts for aid in the enforcement of his claim must exhaust the remedies provided in the contract, that is, appeal from the decision of the supreme officers in vacation to the supreme

council in session, or show some cause for failing to do so. We deem this requirement just and reasonable and beneficial alike to the order and to the individual member. By this mode of procedure the supreme council is afforded an opportunity to look into the merits or equities of each rejected claim, and to settle or compromise without cost to itself or the member. *Supreme Council of Order of Chosen Friends v. Forsinger*, 125 Ind. 52. But it is in evidence that the ruling as to the plaintiff's claim was reviewed by the supreme council on motion of one of its members, and that the action of the supreme officers in rejecting the claim was affirmed. This was clearly a waiver by the defendant of the right to require an appeal.

The instruction, that under the law and the evidence the plaintiff could not recover, was properly overruled. The words of the contract are: "Totally and permanently disabled from following his or her usual or other occupation." What is meant by "total and permanent disability" is explained by the latter clause of section 11 of the relief fund law, which reads: "Such a permanent and disabling sickness as shall render the member helpless to the extent of permanently preventing the member from following any occupation whereby he or she *can obtain a livelihood.*" This makes it very clear that what is and what is not a "total disability" within the meaning of the contract is a relative question, depending upon the attainments of the person disabled. A physical ailment which would render an illiterate laboring man totally unfit to earn a livelihood might not prevent a lawyer from practicing his profession, or take away from him all other chances of earning a living in some other avocation. Therefore, in determining the liability in such a case, the courts must consider both the mental and the physical capabilities of the assured, otherwise such a

benefit certificate would be a delusion and a snare. *Walcott v. U. L. & Ac. Ass'n*, 28 N. Y. St. 481; *Sawyer v. U. S. Cas. Co.*, 8 Am. Law Reg. (N. S.) 233; Bacon on Benefit Societies, sec. 395 a.

The plaintiff's evidence tended to prove that in the fall of 1889 he became disabled as the result of hernia; that he was operated on three times without securing any relief; that his occupation was that of a day laborer—engaged in digging cellars; that the rupture was of such a character as to unfit him for performing manual labor, and that he had been unable during the four years preceding the trial to earn a livelihood. His physical condition was well established by the testimony of three reputable physicians, all of whom concurred in the opinion that the plaintiff was permanently incapacitated to perform such labor as required lifting or unusual exertion. They were also of opinion that this rupture was so large that a truss could not be worn without great danger of serious injury, and that, even though the hernia could be reduced and held in place by a truss, the plaintiff could not perform labor which required much exertion. This evidence tended to prove that the plaintiff was totally and permanently incapacitated to follow his usual avocation, for the use of a pick, spade or shovel, certainly requires unusual exertion.

In determining whether the plaintiff was disabled to such an extent as to prevent him from pursuing some *other* avocation in which he could earn a livelihood, his former occupation, his education and business experience, his natural abilities, and his age must be considered. The plaintiff's evidence bearing on this branch of the case tended to show that the plaintiff was fifty-eight years old; that he was enfeebled and weakened by sickness to such an extent that he could walk only a few blocks at a time; that he could neither

read nor write; that he was naturally weak minded, and exceedingly ignorant, all of which had a tendency to prove that he was incapable of earning a livelihood in any of the pursuits suggested by the defendant. We, therefore, conclude that the court committed no error in submitting the case to the jury.

There was evidence that the plaintiff had failed to pay his dues and assessments after the presentation of his claim. The defendant asked the court to instruct the jury that, to entitle the plaintiff to recover, it must appear that he was a member in good standing *at the time the suit was instituted.* The court struck out the words italicized, and inserted in lieu thereof "*at the time of making his claim on defendant.*" This left the instruction more favorable to the defendant than the law warranted. If the plaintiff was a member in good standing at the time he became disabled he is entitled to recover.

The defendant asked the court to instruct as follows:

"5. Even though from the evidence the jury may believe that the plaintiff, at the time of making his claim upon defendant, was or is now by reason of hernia totally and permanently disabled from pursuing any occupation for a livelihood, yet, if they further believe and find that the hernia was then or is now reducible with a truss (without serious injury or inconvenience to the plaintiff), and that a suitable truss worn by him would enable him to pursue an occupation for a livelihood, and he nevertheless refused and refuses to wear one; then and in that event the jury must find a verdict for the defendant." The court added the clause in parenthesis of which the defendant complained. There was evidence tending to prove that the hernia was so large that to wear a truss would endanger the plaintiff's life. The plaintiff testified

that the truss which he attempted to wear hurt him so much that he could not wear it. This proof warranted the modification of the instruction. The plaintiff ought not to be required to endanger his life, or render his existence intolerable, in order to save to the defendant order a few hundred dollars.

The admission of the testimony of Dr. Dalton touching the physical condition of the plaintiff at the date of the trial was competent and relevant. The evidence bore on the question of the permanency of the plaintiff's disability, and directly tended to corroborate the testimony of the physicians who made the original examinations.

There was no error in excluding the written report of Dr. Lutz in reference to the physical condition of the plaintiff at the time he made the examination. The only legitimate object or purpose of such an examination was to furnish information to the defendant to control its action in admitting or rejecting the claim in the first instance, and not to produce independent and competent proof of the plaintiff's condition in legal proceedings. Especially was the action of the court justifiable, since it appears that Dr. Lutz was present in court ready to testify, and that he did testify, as to the result of his examination.

The other errors assigned we do not deem it necessary to discuss, as they would not affect the result. Judgment affirmed. Judge BOND concurs. Judge ROMBAUER is absent.

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CORNELIUS DEWEESE, Respondent, v. THE MERAMEC IRON MINING COMPANY, Appellant.

St. Louis Court of Appeals, May 9, 1893; Motion for Certification of Cause to the Supreme Court Sustained June 20, 1893.

1. **Mines**: DUTY OF MASTER TO USE REASONABLE CARE TO PREVENT INJURY TO EMPLOYES. When persons at work in a mine are, owing to the condition of its slopes, in danger of injury from stones rolling down these slopes, and the owner of the mine knows of this danger, it is his duty to use reasonable care to prevent injury to his employes therefrom.

2. **Master and Servant**: EFFECT OF NEGLIGENCE OF FELLOW-SERVANT. In an action by a servant against his master for personal injuries, it is only when the negligence of a fellow-servant is the whole cause of these injuries that it will avail the master as a defense.

3. **Instructions**: ERROR IN ONE CURED BY THE OTHERS. When the instructions in a case, taken as a whole, properly present it to the jury, the fact, that one of them standing alone would be misleading, will not cause a reversal of the judgment of the trial court.

4. ———: ———. But *held* by BOND, J., *dissenting*, that the one instruction above referred to was more than misleading and was inconsistent with the others, since it directed a verdict for the plaintiff without requiring a finding of the facts essential to the right of recovery, and that the error therefore was not cured by the other instructions.

Appeal from the Crawford Circuit Court.—HON. C. C. BLAND, Judge.

AFFIRMED AND CERTIFIED TO SUPREME COURT.

Lee, McKeighan, Ellis & Priest, for appellant.

(1) The court erred in giving instruction number 1. This instruction entirely ignores any supposed or alleged negligence or want of care on the part of the defendant or its superintendent. It makes the fact of

a supposed unsafe condition, and the fact of a rock falling, sufficient to fix the liability of the defendant to plaintiff without any regard as to whether or not the defendant or its superintendent had been guilty of negligence or want of care. Again, the phrase "unsafe condition" is not connected with the loose rock in such a manner as to show that the unsafe condition refers to a loose rock. The two facts are entirely separated in the the instruction and do not appear to have any relation to each other. Again, the general instruction with respect to "unsafe condition" is entirely too obscure and indefinite to found a verdict on in such a case. A master is not a warrantor or insurer of his servants or employes' safety. *Hayden v. Mfg. Co.*, 29 Conn. 548; *Ballon v. Railroad*, 54 Wis. 259; *Porter v. Railroad*, 71 Mo.; *Anderson v. Clarke*, 29 N. E. Rep. 589; *Heath v. Whitebreast Coal, etc., Co.*, 65 Iowa, 737. This instruction also ignores whether or not the unsafe condition was one which could have been prevented by the exercise of even the greatest care by the defendant. This was erroneous because the evidence of defendant showed without contradiction that nothing more could have been done than was done to make the mine safe. (2) The verdict is against both the weight of the evidence and the entire evidence and even against the instructions given. The evidence shows that all precautions were taken that could have been taken; that the rocks had been falling down before this, but that plaintiff knew it and that the pickers and shovelers watched for each other, and that the injury resulted from an accident the risk of which plaintiff knew, or ought to have known, and must be held to have assumed. *Watson v. Kansas & Texas, Coal Co.*, 52 Mo. App. 366; *Walsh v. Railroad*, 27 Minn. 367; *Olson v. McMullen*, 24 Minn. 94; *Anderson v. Clarke*, 29 N. E. Rep. 589.

J. T. Woodruff and *L. B. Woodside*, for respondent.

BIGGS, J.—An action for personal injuries received by the plaintiff while engaged as a day laborer in the defendant's iron mine. The mine is represented as having been excavated in a circular form, and is about one hundred and twenty feet deep. There is what is called a lower lift and an upper lift. The upper lift is about one hundred feet from the entrance to the mine, and is about three hundred yards in circumference. The lower lift is a smaller excavation on one side of the upper lift. The ore is elevated from the upper lift by an inclined railway. At the foot of the railway is a turn table in the center of the upper lift with four or five railroad tracks radiating therefrom to the sides of the mine. For the first twenty-five or thirty feet from the level of the upper lift the ascent is perpendicular, and for the remainder of the distance it is at an angle of about forty-five degrees. The perpendicular portion of the wall is iron ore, the slope is composed of dirt, gravel and stone. While the plaintiff was at work on the upper lift, he was struck by a stone which fell from the slope of the mine. It is claimed that the negligence of the defendant caused the injury.

The petition, after charging that Patrick J. Whalen was the superintendent of the mine, averred that the defendant wrongfully, negligently and carelessly suffered and permitted said mines to become and remain in a condition that rendered them insecure, unsafe and extremely hazardous for men to work them, in this, that one of the said mines was continually caving in and rocks falling therefrom down into the mines, and that this was known to the defendant and to its superintendent but not to the plaintiff; that the

superintendent wrongfully, carelessly and negligently ordered and directed the plaintiff, who it is charged was utterly ignorant of the danger and hazard, to work at a particular place in the mine and immediately under the wall, and to separate the dirt from the ore, and to shovel the same into ore buggies; that the plaintiff went to work, and, while working, a large rock fell from the wall and struck him on the back and hip, etc.

The answer admitted that Whalen was the superintendent of the mine as alleged, and that the plaintiff at the time he received the injuries was in the employ of the defendant. All allegations of negligence were denied, and it was averred that the plaintiff entered the service with full knowledge of the attending dangers, and that his injuries were to be attributed to his own recklessness or carelessness. There was a judgment for plaintiff for $2,500 and the defendant has appealed.

It is claimed that the condition of the slope is such, being composed of loose dirt, gravel and small stones, that the falling of pebbles and stones is unavoidable; that it was impossible for defendant to adopt safeguards sufficient to fully protect its employes against dangers arising therefrom; and that the evidence conclusively showed that the defendant adopted all reasonable means to minimize such attending risk. It is also contended that the evidence showed without contradiction that the plaintiff was an experienced miner, had worked in this particular mine off and on for ten years prior to the time he received his injuries, and that he had engaged in the work with full knowledge of the inevitable risk or hazard of the employment.

As this assignment challenges the sufficiency of the proof to sustain the judgment, a brief reference to the facts is necessary. The plaintiff's evidence tended

to prove that prior to the accident he had been working on the lower lift; that under the order of Whalen he quit work there about two o'clock in the afternoon, and commenced to work at a place near the perpendicular wall on the upper lift, where he had never worked before; that he had been at work about fifteen minutes when the first stone that fell (which weighed about six pounds) struck him on the back, inflicting permanent injuries; that during the day pebbles and stones of the size mentioned had been falling continually at the place where the plaintiff was instructed to work, and that Whalen knew of it and that the defendant did not know of it; that the weather was such that the dirt on the face of the slope would freeze at night and thaw during the day, thereby tending to loosen the pebbles and stones and to cause them to fall; that there was a seepage of water on the slope above where the plaintiff was at work, which was calculated to render that particular spot more dangerous than other portions of the mine, and that the plaintiff was not aware of this, and that Whalen did know or ought to have known of it.

On the other hand the defendant's evidence tended to prove that it was impossible to prevent the falling of stones, or to guard against all danger to the miners therefrom; that at short intervals the defendant was in the habit of having the surface of the slope raked off, and that its superintendent had this done either two or three days before the accident; that, for the better protection of the employes, it was ordered that the pickers should watch for falling stones while the shovelers shoveled, and that the shovelers should in turn watch while the pickers were at work; but there was no evidence that any one was watching at the time plaintiff was hurt, or that there was a gang of pickers then at work at that place; that the plaintiff

had been repeatedly warned to watch for falling stones, which warnings he had disregarded, but there was no evidence that he was warned at the time he was hurt, or that he knew or had any means of knowing that stones had been falling during the day at that place.

We readily concede the proposition that from the extent of the surface of the slope it was impracticable, if not impossible, for the defendant to adopt means which would effectually prevent pebbles and stones from falling; but it was nevertheless a duty which the defendant owed to its employes to adopt all reasonable means and precautions to lessen the danger. Recognizing this obligation, the defendant caused the slope of the mine to be raked off every few days, and its superintendent also ordered the men when not otherwise engaged to watch for each other. It is in evidence that Whalen knew that pebbles and large stones had been falling continually during the day at that particular place; that he also knew that the freezing and thawing of the surface was calculated to loosen the stones, and that there was a seepage of water on the side of the slope from where the stones were falling; therefore a failure on his part to stop the work and rake off the slope, or at least to notify the plaintiff of the special peril, was a neglect of duty which he as the representative of the defendant owed to plaintiff, and the defendant must answer for the resulting injuries received by the plaintiff, unless the latter knew or might have known by the exercise of ordinary care the extent of the risk. Concerning the plaintiff's knowledge of the special peril, there is no pretense that he was actually informed of it, and the uncontradicted evidence is that, prior to the time he was put to work on the upper lift, he was working on the lower lift where it was not likely that his attention would have been attracted to the falling stones. It is undisputed that the stone fell from the

slope. As the plaintiff was working near the perpendicular wall, it was impossible for him to observe the condition of the slope, or to see the stone before it struck him. This evidence we think tended to prove that Whalen was derelict in his duty, and it was fairly inferable that his negligence was the proximate cause of the plaintiff's injuries.

We have been referred to the recent case of *Watson v. Kansas & Texas Coal Company*, 52 Mo. App. 366. In that case a large stone, which composed a part of the roof of a coal mine, fell and killed the plaintiff's husband. It appeared without contradiction that the danger was patent and was actually known to the deceased. In the case at bar Deweese knew that stones were liable to fall from the slope, but he did not know that on the day he was injured the stones had been falling in that particular place in unusual numbers. In obeying the orders of Whalen he had a right to presume that the latter had adopted the usual precautions, and that in going to work he would only incur the usual risk attending the employment. Therefore we think that the case was properly submitted to the jury, and, if it was properly tried in other respects, the judgment must be affirmed.

The defendant complains of the plaintiff's first and second instructions which read:

"1. The court instructs the jury that, if they believe from the evidence that the mine and the slope thereof at the place where plaintiff claims to have been injured was in an unsafe condition, and that its condition was known to its superintendent Whalen, and that the same was not known to plaintiff, and that a stone fell from said bank or slope and struck plaintiff, whereby he was injured, the jury will find the issues for the plaintiff, unless they further find that the danger was so patent and obvious that a man of ordinary intel-

ligence and observation in his situation would have seen it.

"2. The court instructs the jury that, if it appears from the evidence that the defendant was operating an iron mine and had the plaintiff employed therein, and that working in said mine was dangerous at the time, then it was the duty of the defendant to use every reasonable precaution to insure the safety of its employes; and if the jury find from the evidence that, through the negligence of defendant, loose rock and stone were permitted to remain on the face or slope of such mine, and that the plaintiff was working under said slope and was not aware of the existence of such loose rocks and stones, and a rock fell therefrom and struck the plaintiff, whereby he was injured, and the defendant did not use reasonable precaution under all circumstances to insure plaintiff from injury by the falling of rocks or stones, then the jury should find the issues for the plaintiff unless the danger was so patent that an ordinarily observant man in his situation would have observed it."

The instructions given by the court at the instance of the defendant are as follows:

"1. The court instructs the jury that, to entitle the plaintiff to recover in this suit, it must appear from the evidence that the injury complained of was occasioned by the want of attention, carelessness or negligence on the defendant company or its servants, as charged in the declaration, and was not simply the result of an accident; and if you believe from the evidence that the injury to plaintiff resulted from an accident which could not have been forseen or guarded against by the exercise of ordinary and reasonable care and prudence on the part of the defendant, then the plaintiff cannot recover, and you should find for the defendant.

"2. The court instructs the jury that ordinary care, as used in these instructions, depends upon the circumstances of each particular case, and is such care as a person of ordinary prudence and skill would usually exercise under the same or similar circumstances."

"7. The court instructs the jury that, if they believe from the evidence that the mine of the defendant was hazardous on account of debris and loose stones falling into it, and that the plaintiff knew of the hazardous condition of the mine, then he took upon himself the risk of such hazard by voluntarily working in it. And if the jury further believe from the evidence that the defendant used such care and precaution in the management of its mine as was reasonably necessary to protect its employes from its hazardous condition, and was guilty of no negligence toward the plaintiff, then the plaintiff cannot recover in this action, and your verdict should be for the defendant."

The objection made to plaintiff's first instruction is that it ignores any supposed negligence or want of care on the part of Whalen, or that the alleged unsafe condition of the slope could have been remedied by the exercise of due care. The instruction is inartificially drawn, and standing by itself would be misleading. But the two instructions, when considered together, presented the issues to the jury in a way that the jury could not have been misled as to the true issues, especially when the defendant's own instructions are considered.

The jury were told in effect that, if the condition of the slope was unsafe by reason of loose stones; that Whalen knew of the unsafe condition of the mine and the plaintiff did not; and that by reason of such unsafe condition a stone fell and struck plaintiff; and that the defendant did not use reasonable care under the circumstances to prevent the injury; then the plaintiff was

entitled to recover, unless the danger was so patent that a man of ordinary intelligence and observation in the situation in which the plaintiff was placed would have observed it. It may be added that similar instructions given in the case of *Aldridge v. Midland Blast Co.*, 78 Mo. 565, were expressly approved by the supreme court.

The court refused the following instructions asked by the defendant:

"3. The jury are instructed that, where a person enters into the service of a mining company, he thereby undertakes to run all the ordinary risks incident to the employment, including his own negligence or unskillfulness and that of his fellow-servants who are engaged in the same line of duty, provided the mining company has taken reasonable care and precaution to engage competent servants to discharge the duties assigned to them.

"4. The court instructs the jury that in the term fellow-servant, as used in these instructions, are included all who under the direction and management of the defendant company or Patrick J. Whalen, its superintendent, were engaged with the plaintiff in the prosecution of the same common work in which they were all engaged at the time of the alleged injury of plaintiff, without any dependence upon or relation to each other except as co-laborers with plaintiff at the time without rank.

"5. If the jury believe from the evidence that the plaintiff Deweese was engaged in the employment of the defendant when he was injured, and that such injury was received while in the discharge of his duties as such employe, and if the jury further believe from the evidence that such injury was occasioned either by his own negligence or carelessness, or by that of his fellow-servants engaged in the same line or character of work as explained in these instructions, then the

jury should find the issues for the defendant company, provided you further believe from the evidence that the defendant was not guilty of any lack of care or prudence in selecting or retaining such fellow-servants to discharge the duties assigned them."

These instructions were properly refused, because there is no evidence that the plaintiff's injuries were caused by the negligence of one of his fellow-servants. There is some evidence that the pickers and shovelers were to watch for each other, but it was not shown that there were any pickers there or that there were any watching while the plaintiff worked. Even though there had been such evidence, we would then have a case of combined negligence, which would not excuse the defendant. It is only where the negligence of a fellow-servant is the whole cause of the injury that the master is excused. *Young v. Schickle, etc., Iron Co.*, 103 Mo. 324.

We cannot say that the judgment is excessive. The plaintiff's physician testified that he had examined the plaintiff a short time before the trial, and that his injuries were serious and permanent, and that there was great danger that they would bring about fatal kidney troubles.

The judgment of the circuit court will be affirmed. Judge ROMBAUER concurs in this opinion. Judge BOND is of the opinion that the instructions asked by the defendant and refused by the court ought to have been given. Therefore he dissents.

ON MOTION TO CERTIFY.

BOND, J.—The court at the request of the plaintiff gave the following instruction as follows, to-wit:

"The court instructs the jury that, if they believe from the evidence that the mine and the slope thereof at the place where plaintiff claims to have been injured

was in an unsafe condition, and that its condition was known to its superintendent Whalen, and that the same was not known to plaintiff, and that a stone fell from said bank or slope and struck the plaintiff, whereby he was injured, the jury will find the issues for the plaintiff, unless they further find that the danger was so patent and obvious that a man of ordinary intelligence and observation in his situation would have seen it."

And the court seemingly of its own motion gave the following instructions:

"The court instructs the jury that, to entitle the plaintiff to recover in this suit, it must appear from the evidence that the injury complained of was occasioned by want of attention, carelessness or negligence on the defendant company or its servants as charged in the declaration, and was not simply the result of an accident; and if you believe from the evidence that the injury to plaintiff resulted from an accident which could not have been foreseen or guarded against by the exercise of ordinary and reasonable care and prudence on the part of the defendant, then the plaintiff cannot recover, and you should find for the defendant.

"The court instructs the jury that, if they believe from the evidence that the mine of the defendant was hazardous on account of debris and loose stones falling into it, and that the plaintiff knew of the hazardous condition of the mine, then he took upon himself the risk of such hazard by voluntarily working in it. And if the jury further believe from the evidence that the defendant used such care and precaution in the management of its mine as was reasonably necessary to protect its employes from its hazardous condition and was guilty of no negligence towards the plaintiff, then the plaintiff cannot recover in this action, and your verdict should be for the defendant."

I think instruction number 1 given by the court at the instance of the plaintiff was not only "misleading," as is conceded in the opinion of the majority of the court on the hearing, but I deem that instruction in conflict with instructions numbers 1 and 7, given (apparently) on the court's own motion. The former instruction *excludes* negligence of the defendant, and the others *include* it as a basis of recovery. This is reversible error. *Bluedorn v. Railroad*, 108 Mo. 439; *Stevenson v. Hancock*, 72 Mo. 612.

In the case first cited the rule is stated as follows: "It is reversible error to give conflicting instructions, no matter at whose instance they are given." I do not understand the supreme court in *Aldridge v. Midland Blast Co.*, 78 Mo. 565, to do more than hold that an instruction similar to number 1, requested by plaintiff in this case, could *consist* with another instruction supplying the element of danger patent and obvious to ordinary observation; and that, failing to include this element, both of them would be defective in a suit predicated on a negligent command to work in a place of extra hazard and danger. I do not think the court in that case undertook to give a stereotyped form of an instruction applicable to all cases, or to a case where the other instructions were inconsistent.

The court held (Aldridge case) in effect that the omission to include the negligence of plaintiff was a defect in the instruction then before it, but *non constat* that the instruction, although remedied in this particular, was not defective in some other.

It is neither wise practice nor fair to the judiciary to assume that their approval of an instruction is intended to go beyond the facts then before the court, and the *points of objection then* urged. The courts are loth to establish any rule not essential to the decision of the issues and facts in judgment.

In the case at bar the theory presented by plaintiff's instructions was an assumed case of negligence as to the condition of the mine—not a case of liability for ordering a servant into a place of danger unknown to him, but known to the employer. It is well settled that on appeal a party is bound by the theory of the case presented by him on the trial, and that the issues then accepted cannot be abandoned on review of the instructions applicable to them.

I do not see how the conflict between instruction number 1 (requested by plaintiff) and the others given by the court could be avoided upon *any* theory of plaintiff's cause of action. I think that conflict is *a fortiori* palpable, when it is observed that it was a case of unsafety of the mine, and not a case of ordering plaintiff into unknown danger, that was tried below. I also think the instructions requested by the defendant, presenting the hypothesis both of the negligence of his fellow-servant and his own assumption of the risks incident and natural to his employment, should have been given. I think these issues were presented in the pleadings, and that there was evidence tending to sustain them. The issue as to contributory negligence was *impliedly* presented by the averment in the plaintiff's petition that there was extra hazard in the working of the defendant's mine, which was known to defendant and unknown to plaintiff, and by the denial of these allegations in the answer. *Aldridge v. Furnace Co.*, 78 Mo. 564. The reply of plaintiff went still further and expressly denied all contributory negligence whatever.

Under the rule laid down by our supreme court the negligent acts of a fellow-servant are included in the risks assumed upon taking employment. *Steffen v. Mayer*, 96 Mo. 420, 422. I deem the decision of the majority of this court in the case at bar contrary to

the law as declared in the decisions of the supreme court cited herein.

The clerk of this court is hereby ordered to certify and transfer the original papers on file in this case, and a transcript of the proceedings of this court therein, to the supreme court, as provided in section 6 of the amendment of article 6 of the constitution. Judge BIGGS concurs in the order certifying the case. Judge ROMBAUER is absent.

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THE STATE OF MISSOURI *ex rel.* CHARLES L. PATTERSON, Respondent, v. EUGENE C. TITTMAN, Administrator of William H. Horner, Deceased, *et al.*; JOHN B. C. LUCAS, Appellant.

St. Louis Court of Appeals, May 9, 1893; Motion for Rehearing Overruled June 20, 1893.

1. **Guardian and Ward:** LIABILITY ON GUARDIAN'S BOND. A guardian, under leave of the proper probate court bought in for his ward property sold under a deed of trust belonging to the ward; but the guardian took the title to the property in his own name, and afterwards mortgaged it to secure his individual indebtedness. *Held*, that this constituted waste, for which a recovery could be had by the ward on the guardian's bond.

2. ———: ———: COUNSEL FEES. The mortgage thus given was canceled in an action in equity, instituted by the ward after the death of the guardian. The surety on the guardian's bond was notified of the proceeding and requested to prosecute it, but, though his attorney assisted in the prosecution, the burden of the work was left with the attorney for the ward. *Held*, BOND, J., *dissenting*, that the fees paid by the ward to his attorney for services in that proceeding could be recovered from the surety in a suit on the bond.

3. **Administration:** LIMITATION OF TIME FOR PRESENTATION OF CLAIMS. A party having a claim against the estate of a decedent does not lose his right of action against the administrator of that estate by his failure to present his claim for allowance within the two years limited therefor by statute, when, though entitled to nominal damages, he had no right of substantial recovery during that period. This rule is applied to the ward's above mentioned claim for counsel fees as damages for waste committed by his guardian.

4. ———: ———: PRINCIPAL AND SURETY. And *held* further by BOND, J., that a ward does not lose his right of action against the sureties on the bond of his deceased guardian by his omission to have his claim allowed against the estate of the guardian within the time limited by statute.

Appeal from the St. Louis City Circuit Court.—HON. JACOB KLEIN, Judge.

AFFIRMED AND CERTIFIED TO THE SUPREME COURT.

Lee, McKeighan, Ellis & Priest and *Montague Lyon*, for appellant.

(1) The plea of the statute of limitations contained in the appellant's amended answer should have been sustained. 1 Revised Statutes, 1889, secs. 183, 5329; *Johnson v. Smith's Adm'r*, 27 Mo. 591; *Coleman v. Willi*, 46 Mo. 236; *State ex rel. v. Hoshaw*, 86 Mo. 193; *Bent v. Priest*, 86 Mo. 475; *State v. Blake*, 2 Ohio St. 147; *Bridges v. Blake*, 106 Ind. 332; *Auchaumpaugh v. Schmidt*, 70 Iowa, 642; *Ratcliff v. Leunig*, 30 Ind. 289; *Bonham v. The People*, 102 Ill. 434; *Glass v. Woolf's Adm'r*, 82 Ala. 281; *Mann v. Everts*, 64 Wis. 372. (2) The court erred in giving the instruction asked by the respondent, for the reason that the appellant's liability could only be determined by the strict terms of his obligation, and he was not liable for the expenses and counsel fees incurred by the respondent relator in the prosecution of the suit in equity. 1 Brandt on Suretyship & Guaranty [2 Ed.] sec. 93; *Mann v. Everts*, 64 Wis. 372; *State v. Cutting*, 2 Ohio St. 1; *Kennison v. Taylor*, 18 N. H. 220; *State v. Bishop*, 24 Md. 310; *Woodstock Bank v. Downer*, 27 Vt. 539; *Henry v. Davis*, 123 Mass. 345; *Hallock v. Belcher*, 42 Barb. 199; *Oelrichs v. Spain*, 15 Wall. 211.

Orr, Christie & Bruce, for respondent.

(1) There is no merit in the appellant's plea of the statute of limitations. If there be a breach of a bond or of covenants in a deed of warranty, the cause of action on account thereof does not accrue until there exists the right of substantial recovery. *Miller v. Woodward*, 8 Mo. 169; *Finney v. State to Use Estiss*, 9 Mo. 227; *Chambers v. Smith*, 23 Mo. 174; *Burton v. Rutherford*, 49 Mo. 255; *Singleton v. Townsend*, 45 Mo. 379; *Jameson v. Jameson*, 72 Mo. 640; *Tenny v. Lasly*, 80 Mo. 664. (2) In law it was appellant's duty to protect respondent against any loss or damage arising from the unfaithfulness of Horner as his curator. Since respondent was bound to institute a suit for the defense of his title, which suit was rendered necessary by reason of his curator's unfaithfulness, the appellant, having approved of the suit and having participated in it, is liable for the costs incurred therein, including counsel fees. *Strong v. Phœnix Ins. Co.*, 62 Mo. 299; *N. Y. State Mar. Ins. Co. v. Ins. Co.*, 1 Story, 458; *Hastee v. De Peyster*, 3 Haines, 190; *Robins v. City of Chicago*, 4 Wall. 657; *N. H. & N. Co. v. Hayden*, 117 Mass. 433; Sedgwick on Damages [8 Ed.] sec. 236; *Mors, LeBlanch v. Wilson*, L. R. 8 C. P. 227; *Dubois v. Hermance*, 56 N. Y. 673; *Kip v. Brigham*, 7 Johns. 168; *Byerson v. Chapman*, 66 Me. 557; *Spelman v. Terry*, 74 N. Y. 451.

Biggs, J.—Action on a guardian's bond. The facts are undisputed. In December, 1874, John B. Johnson, curator of the estate of the relator (who was then a minor of about ten years of age), resigned his trust, and W. H. Horner, now deceased, was appointed in his stead by the probate court of the county of St. Louis. Horner accepted the trust, and he as principal,

with the appellants, J. B. C. Lucas and William Lucas as his sureties, executed a bond conditioned that he would, "truly and faithfully discharge the duties of his office of curator according to law."

A principal note of Phebe Hunt for $5,000, dated January 27, 1871, payable three years after date, and one semi-annual interest note for $200 of the same date, were among the property turned over by Johnson to Horner, and to secure them Phebe Hunt had given a deed of trust on certain real estate in the city of St. Louis. There was also another note of Phebe Hunt for $6,385.34, dated October 26, 1874, payable three years after date, and three annual interest notes for $638.33 each, to secure which another deed of trust was given on the same property and certain other real estate in said city.

The trustee in the first deed of trust having refused to act, Horner as curator on May 20, 1881, applied to the circuit court of the city of St. Louis for the appointment of another trustee, which was done, the court appointing R. D. Lancaster.

Default having been made in the payment of all the notes, the property was advertised for sale under both deeds of trust, the sale to take place June 20, 1881.

On June 17, 1881, Horner represented to the probate court that the property was advertised for sale, that the total indebtedness amounted to about $12,000, and that, unless he would bid on the property, he believed that it would be sold at a sacrifice. Thereupon the court by an order entered of record authorized Horner to buy the property for his ward at the sale, provided it did not sell in excess of $10,000. Horner bought under both deeds of trust for $2,500. He received deeds from both trustees conveying to him *individually* the entire property; in one of the deeds, however, was embodied the order of the circuit court reciting the fact

that Lancaster had been appointed trustee at the instance of Horner as curator of the estate of Charles L. Patterson. The deeds of the trustees also recited the fact that J. B. Johnson, curator of Charles L. Patterson, was the original beneficiary in both deeds of trust.

On June 25, 1881, Horner executed a deed of trust to R. D. Lancaster as trustee for the State Savings Association of St. Louis, whereby he conveyed the property so purchased by him to secure the payment of his *individual debt*, amounting at the time to $2,500.

On June 17, 1882, Horner executed and placed on record a quitclaim deed conveying the property to the relator; no reference, however, was made in this deed to the deed of trust previously given to secure the note held by the State Savings Association.

On June 21, 1882, Horner filed in the probate court his seventh annual settlement as curator, in which he set forth the purchase of the land for his ward for the sum of $2,500, and the subsequent conveyance by him of the property to the relator. The statement contained no reference to the incumbrance which the curator had placed on the property.

On August 16, 1885, the relator reached his majority, and on October 23, 1886, Horner died without having made a final settlement of his curatorship.

On November 9, 1886, letters of administration on the estate of Horner were granted to the defendant, Eugene C. Tittman, notice of which was afterwards published as required by law.

On January 10, 1887, Tittman, as administrator of Horner, made a final settlement of the curatorship. At the time this settlement was made, neither the relator nor Tittman had notice of the incumbrance on the property, and therefore the relator made no objection to the approval of the settlement.

In April, 1887, Lancaster advertised the land for sale under the deed of trust given by Horner, and by that advertisement the relator learned for the first time of the fraud that had been practiced by Horner. At this juncture the relator brought a suit in equity in the circuit court of the city of St. Louis to enjoin the sale and to cancel the deed of trust, and also to set aside the final settlement of the curatorship. The circuit court by its decree set aside the settlement, and also decreed a cancellation of the deed of trust. The holders of the note secured by the deed of trust appealed to the supreme court, where, on February 23, 1891, the judgment of the circuit court was affirmed. *Patterson v. Booth*, 103 Mo. 402.

It also appears from the evidence that, either before or just after the relator filed the suit in equity, he notified the appellant of the institution of the suit, and he required him to appear and conduct the suit. It is conceded that the appellant's attorney assisted in the conduct of the case, but left the burden of the work to the relator's attorney. In the prosecution of the suit the relator paid $500 counsel fees, and incurred other necessary expense amounting to $103.65.

The relator claimed that the foregoing facts, which were stated in the petition, constituted a breach of the conditions of the bond, in that Horner had *impaired the title* to the trust property in his attempt to charge it with the payment of his individual debt, and that the defendants were answerable to the relator for all proximate damages resulting from this breach of trust, including counsel fees and other necessary non-taxable costs paid by him in the prosecution of the equity suit.

The defendants denied the alleged breach of the bond, and that they were liable for counsel fees and other non-taxable costs as alleged; and they pleaded

in bar of the action the failure to present the alleged claim for allowance against the estate of Horner within two years after the grant of letters. The replication put in issue the new matter set forth in the answers.

The court sitting as a jury rendered judgment against both defendants for the penalty of the bond, to be satisfied by the payment of $644.37, which was the amount of the attorney's fees and non-taxable costs paid by relator, with six per cent. interest thereon from the date of payment. The defendant Lucas only has appealed.

The execution by Horner of the deed of trust, in which he attempted to charge the real estate of his ward with the payment of his individual debt, was a breach of the conditions of his bond. By this wrongful and unlawful act he committed waste. Any act of his which tended to decrease the value of the real estate held by him for his ward, or which *impaired the evidence of title thereto*, was waste for which his estate and the sureties on his bond are liable. *Bond v. Lockwood*, 33 Ill. 212; Field's Law of Guardians, sec. 98, and authorities cited.

Did the court err in the assessment of the damages is the next question.

The recovery for the violation of contracts of indemnity includes all damage which is the natural or proximate result of the breach. The supreme court in the case of *Kansas City Hotel Co. v. Sauer*, 65 Mo. 279, held that the liability of the obligors for the violation of such a contract is measured "by a sum sufficient to put the plaintiff in as good plight as if defendant had kept his covenant." This is the general rule, and we can see no good reason for adopting a different rule in actions on bonds of guardians or curators. The doctrine of *strictissimi juris*, which is here invoked for the protection of appellant against liability for the

special damages assessed, has application only in determining the liability of a surety in the first instance, and not to the *extent* of such liability when once determined. *Fisse v. Einstein*, 5 Mo. App. 78; *Yeatman v. O'Reilly*, 12 Mo. App.* 568.

Now, it must be conceded that the institution of the equity suit was made necessary by the wrongful act of Horner; therefore the expenses necessarily incurred by the relator must be considered as the natural or proximate result of the breach of the bond. As it is admitted that the defendant had notice of the suit, that he was given an opportunity to take charge of its prosecution, and that its successful prosecution redounded to his benefit, we think the action of the court in the assessment of damages was clearly right. It met the equities of the case and gave full idemnity for the wrong done. We also think that the action of the court is sustained by analogous cases.

The case of *Johnson v. Meyers, Executor*, 34 Mo. 255, was an action for a breach of warranty of title to a slave. The complainant was compelled to defend a suit brought against him for the recovery of the slave. The court held that he could recover his costs in defending this suit, if he gave his vendor notice of it.

In the case of *Kansas City Hotel Co. v. Sauer, supra*, the plaintiff sued for a violation of the covenants in a bond of indemnity. The bond was given to save the plaintiff harmless from certain mechanic's lien claims. The recovery in the action included attorney's fees and other expenses paid by plaintiff in defending against the claims, and the supreme court sustained the judgment.

In the case of *Ryerson v. Chapman*, 66 Me. 557, it was held that the grantee in a deed of general warranty, after eviction by one having superior title, is entitled to

recover in an action on the covenants the amount of all judgments obtained against himself by the party dispossessing him, together with all reasonable expenses of litigation, including counsel fees.

Mr. Sedgwick says: "Where a plaintiff has become involved in another suit by defendant's acts, he should recover the amount of reasonable expenses in which he has become involved, and there seems to be no reason for distinguishing between counsel fees and other proper costs and expenses. Sedgwick on Damages [8 Ed.] sec. 236.

The defense of the special statute of limitations, barring the allowance of claims against an estate, unless presented within two years after the grant of letters, is without merit. It may be true that there was a technical breach of the bond the moment Horner executed the deed of trust, but in contemplation of law the cause of action did not accrue to the relator until his right to recover substantial damages existed. *Tenny's Adm'r v. Lasley's Adm'r*, 80 Mo. 664; *Chambers' Adm'r v. Smith's Adm'r*, 23 Mo. 174.

In *Chambers Adm'r v. Smith, Adm'r, supra*, the suit was brought against an estate for damages for the breach of the covenant of seizin, contained in a deed. The suit was instituted more than three years after the grant of letters. The court in disposing of a similar plea said: "In reference both to the limitation and to the person entitled to the benefit of the covenant, we look in a case of the present character to the right of substantial recovery, and will not hold a party barred by the lapse of time which ran before he was allowed to recover (for we make no destinction here between no recovery and a mere nominal one)." This language is applicable to the case at bar; for at no time could the relator have recovered anything in excess of nominal damages until the final determination of the

equity case in the supreme court in February, 1891. We must therefore rule this assignment likewise against the appellant.

The judgment of the circuit court will be affirmed. Judge ROMBAUER concurs. Judge BOND dissents.

BOND, J. *(dissenting.)*—I am unable to agree with the disposition of this case in the majority opinion of this court.

This is an action on a curator's bond, executed by W. H. Horner with appellant as one of the sureties thereon, for the purpose of recovering certain expenses and counsel fees incurred and paid by relator in the successful prosecution of a suit to vest title in himself in certain real estate, alleged in the petition herein to have been purchased by the curator with money of relator, and to have been conveyed to said curator in his individual name and subsequently incumbered for his private use and benefit.

The facts are that W. H. Horner, curator of respondent, came into possession as such curator of certain notes due his ward which were secured by a deed of trust. Upon foreclosure of this deed of trust, said curator bid in the property and took a deed therefor in his individual name, and credited the purchase price on the notes in his hands belonging to his ward. A few days after this purchase, to-wit, June 25, 1881, said Horner and wife conveyed by deed of trust duly recorded the said property to secure a loan of $2,500 made to him and interest notes thereon, all payable in one year. On June 7, 1882, the said Horner, then a widower, executed to relator a quitclaim deed duly recorded to said property. On July 21, 1882, the said Horner made a seventh annual settlement, in which among other things he reported the purchase by him of the property at

said foreclosure sale for the benefit of his ward and the subsequent conveyance thereof to said ward, not disclosing his having mortgaged it before he quitclaimed to his ward. On August 16, 1885, said ward who was a non-resident of the state reached his majority. On October 23, 1886, said curator, W. H. Horner, died without having made final settlement of his said curatorship. The public administrator took charge of his estate and on December 9, 1886, gave the statutory notice for the exhibition of claims.

Neither Charles L. Patterson relator, nor his counsel knew of the making of the deed of trust by said Horner, dated June 25, 1881, to secure his said note of $2,500 until informed of the fact sometime in April, 1887. They then learned also that said note had been transferred in due course of trade, and that the last holders were causing an advertisement of sale under said deed to secure payment.

On September 7, 1887, suit was brought by relator Charles L. Patterson to set aside and annul the said trust deed given by said Horner as aforesaid on the property in question to secure his individual indebtedness. A decree sustaining the petition of relator was entered in the circuit court, and upon an appeal affirmed in the supreme court on February 23, 1891. Appellant was notified by relator of the institution of his suit to cancel said trust deed and vest title in himself. Appellant's attorney cooperated with relator's attorney in the prosecution of said suit in the circuit court. Relator paid his counsel for services and expenses in said suit the sum of $603.65. No claim nor demand was exhibited or presented against the estate of W. H. Horner by relator. Said estate, though insolvent, paid out a dividend of forty-two hundredths on debts established; total payment $11,916.40.

There was a judgment for relator from which an appeal was taken, whereon two errors are assigned. *First.* That the court erred in overruling appellant's plea of statute of limitations. *Second.* In the giving of respondent's instructions. It is clear the court committed no error in overruling appellant's plea that the surety on the curator's bond was released from liability, because the claim sought to be enforced against him was not exhibited nor presented during the course of administration of the estate of the principal on the bond.

If it were admitted for argument that the present cause of action is barred as a demand against the estate of W. H. Horner, the principal in the bond, under the statute of limitations in the administration act, *non constat* that it is barred thereby against the surety on the bond executed by the deceased curator. This exact point was before the supreme court of Arkansas. *Ashby v. Johnston*, 23 Ark. 163. That was a suit by two wards against the sureties of the deceased guardian, who interposed the defense that the claim was not presented "within two years after grant of letters." The judgment of the trial court sustaining a demurrer to this plea was affirmed in the supreme court, who stated the rule thus: "But it is well settled that where, from mere omission of the obligee to probate the claim in time, the cause of action is barred against the estate of the principal, in the hands of his executor or administrator, by the statute of non-claim, this of itself does not discharge the sureties in the bond."

To the same effect is *Chapin v. Livermore*, 13 Gray, 561; *Marshall v. Hudson*, 9 Yerg. 63; *Ordinary for use, etc., v. Smith*, 55 Ga. 15.

I am, however, satisfied that the cause of action alleged in the petition in this cause did not arise until the payments sued for had been made, to-wit, the date

of the final decree of the supreme court (February, 1891), vesting title in relator and annulling the deed of trust attacked in his suit. It was therefore not a demand against the estate of curator prior to that time. The statute of limitations only begins to run on the accrual of the cause of action, and no bar attached when suit was brought. *Tenny's Adm'r. v. Lasley's Adm'r.*, 80 Mo. 664.

The next assignment presents a question of new impression, namely, whether counsel fees and expenses of litigation, other than taxable costs, are recoverable in the present action on the curator's bond? I am of the opinion that they are not elements of recovery against a surety on a curator's bond in a suit thereon to enforce his liability under the stipulations and conditions of a bond framed (as the present one) according to the provision of section 5299, Revised Statutes, 1889.

This action is brought on the bond of appellant as surety for the compliance of the curator with its conditions. The liability of appellant is measured by the obligations imposed by the terms of the bond. The law does not permit a surety to be held on the default of his principal beyond the precise terms of the instrument of suretyship. The liability of a curator is to account for and pay over all the estate of his ward which either came into his possession as curator, or would have come into his possession by the exercise of ordinary care and diligence. In the case at bar the curator credited certain notes of his ward in payment of the purchase money of a lot of ground conveyed to the curator in his personal capacity. He then mortgaged the lot to secure his personal debt, and then executed a quitclaim of the lot to his ward, and at his next settlement as curator reported (erroneously) to the probate court that the lot had been purchased for

and conveyed to his ward. The ward ascertained (1887) after the death of his curator that the lot was incumbered for the curator's private debt. The ward was, therefore, entitled to two remedies: *First.* To refuse the quitclaim deed and enforce payment by the sureties of his curator of the guardianship funds invested by the curator in the purchase of the lot. *Second.* To accept the quitclaim deed, and to set up his title as the beneficiary of a resulting trust in the lot, by virtue of the purchase of the same with his money, against the creditors secured in the deed of trust made by Horner while he held the title individually on the ground of notice to them of relator's equitable title. *Robinson v. Robinson*, 22 Iowa, 428; *Phillips v. Overfield*, 100 Mo. 466, 473; Pomeroy on Equity Jurisprudence, secs. 422, 587, 1049; 9 American & English Encyclopædia of Law, 148, 149; *Evertson v. Evertson*, 5 Paige, 644; *Ferris v. Van Vechten*, 73 N. Y. 113; *Fogler v. Buck*, 66 Me. 205. The bond which the curator gave upon the assumption of his trust obligated himself and his sureties to "the faithful discharge of his duties." Revised Statutes, 1889, sec. 5299. Under this condition there would have been no liability on the part of the sureties for counsel fees and expenses of litigation, had the ward brought a direct action against them for the money invested by his curator in the purchase of the lot as aforesaid. That the ward declined this method of redress, and elected to establish a trust in the property bought by the misuse of his money by his curator, cannot in reason be held as enlarging the obligations assumed by the surety in signing a curator's bond containing the foregoing condition of liability. The scope of the condition is measured by its terms, and not by the election of remedies on the part of the obligee. The restriction of the obligations of the bond of a curator to the faithful

discharge of his duties is the equivalent in law to a stipulation to perform the special duties (legally) charged upon him. There is no provision in the statute imposing the penalty of counsel fees and non-taxable costs on sureties for the defaults and misfeasances of guardians and curators. Such a rule has never been applied in actions on bonds of administrators nor public officers, although the conditions of such bonds are as broad, if not broader than those of guardians and curators. If the theory of respondent were sound, it would follow that under the condition in the bond sued upon respondent would have a right to demand that appellant, the surety in that bond, should employ counsel to conduct respondent's litigation against third persons to establish a resulting trust in property bought by his curator by converting the money of respondent. No such obligation is contained in the "condition" of the bond executed by the surety, nor is the bringing of such a suit the necessary result of the breach of the curator's bond. The direct result of the breach is to fasten liability on the curator and his sureties for the money (in this case $2,500), applied by the curator to his own use. The alternative result of that breach is to afford the ward an option to get the thing represented from anyone receiving it with notice in law that it was bought with the ward's money. I do not think that it is logical to hold that by adopting this second course the ward could impose a liability on the surety not mentioned nor contemplated in his bond or undertaking, and not recoverable in a direct suit thereon against him as bondsman.

In the case of *State to use, etc., v. Bishop*, 24 Md. 310, which was an action on the guardian's bond, the facts showed that the ward had received from third parties certain shares of stock belonging to him which his guardian had illegally transferred. The

court held that in the action by the ward for breach of the guardian's bond only nominal damages could be recovered.

In *Mann, Judge, etc., v. Everts*, 64 Wis. 372, the supreme court reversed a judgment of the trial court, permitting a recovery for counsel fees in a suit on an administrator's bond given for sale of the real estate, saying: "We do not think such counsel fees are covered by the obligation of the surety on this bond, therefore they should not be recovered."

In *Henry v. Davis*, 123 Mass. 345, the facts were that the bond sued on contained a condition, that defendant should abide the decision of arbitrators selected to establish a boundary line between his estate and that of plaintiff, and should execute plaintiff a quitclaim deed according to the award of the arbitrators. Defendant committed breach by refusing to carry out the award of the arbitrators by giving a quitclaim deed, and brought a bill in equity to set aside the award, which after a hearing was dismissed with costs. Thereupon plaintiff sued defendant upon said bond to recover the expenses incurred in the equity suit to set aside the award. The court held: "The plaintiff has been awarded his costs in that suit. The theory of the law is, that the taxable costs awarded to the prevailing party in a suit furnish a full indemnity to him for all his expenses incurred in the suit. Therefore a defendant who successfully defends a suit brought against him has no right of action or claim beyond the amount of the taxable costs against the plaintiff therein. It follows that the plaintiff in the case at bar has no claim against the defendant for the expenses he seeks to recover, which he can enforce either directly by a suit or indirectly as damages for a breach of his bond." To the same effect are *Oelrichs v. Spain* (15 Wall.), 82

U. S. 211, 220; Sedgwick on Damages [2 Ed.] sec. 680, 692; *State to use Roe v. Thomas*, 19 Mo. 613, 618.

There are exceptional cases in which counsel fees may be recovered in suits on contracts or bonds, although the general rule confines such recoveries to actions of tort. It has been held that they are embraced in injunction bonds, attachment bonds or any other contract made by a surety, broad enough *in its stipulations* to cover damages or loss incurred in the employment of counsel or discharge of the contract. But the distinct ground of these holdings is that the peculiar condition or stipulation of the bond or contract in question provides such *general or special indemnification of damages* as necessarily embraces counsel fees and non-taxable expenses.

The authorities relied upon by respondent belong to this class. In *N. H. & N. Co. v. Hayden*, 117 Mass. 433, the contract on which defendants were held liable for counsel fees was one that bound them to secure the plaintiff a right of way *free of charge*. Upon breach it was held that stipulation would cover counsel fees in securing the right of way. In *Dubois v. Hermance*, 56 N. Y. 673, a contract to *perform all the outstanding contracts* of plaintiffs was held to embrace counsel fees paid by plaintiffs in defending one of their contracts which defendants had failed to perform. In *Strong v. Ins. Co.*, 62 Mo. 289, the doctrine is stated that a second insurer is bound by the judgment of the assured against the first insurer, there being a contract of indemnity between the two insurers binding the second insurer to pay the first insurer a certain part of the loss. It was decided in that case that there is no privity between the assured and the second insurer, the liability of the latter being wholly to the first insurer. For this reason, and because that liability would become absolute in the event of a judgment after loss against the

first insurer, and because the second insurer had a right to control the defense to a suit against the first insurer, he was concluded by the judgment. That case is useful in defining the extent to which one not a party to the record may be concluded by the results of a litigation in which he has participated, or which he could have controlled; but it throws no light on the measure of a surety's liability on a bond containing the conditions set forth in this record.

I fail to see that analogy between the cases (containing the clauses of full indemnity or warranty) cited in the opinion of the majority of the court and the case at bar. Each of those seems to be clearly one of the class of contracts, in which the obligatory words by express terms or necessary implication warrant the recovery had. No case has been adduced where a recovery for counsel fees was had in a suit on a guardian's bond or any bond with *similar conditions*, and the contrary has been held in the cases cited *supra* in this opinion. I do not think the conditions of a bond should be strained against sureties; they are favorites in law, and have a right to stand upon the strict terms of their obligations when such terms are ascertained.

In the event of a suit upon an *implied promise* by the appellant to pay the counsel fees and expenses incurred by respondent after his election to sue for the lot rather than the money, the doctrine of *Strong v. Ins. Co.*, 62 Mo. 289, might be relevant under the facts herein tending to show appellant's connection with the litigation of respondent. As to the maintenance of such action I express no opinion. Unquestionably there can be no recovery in the *present action* on the *special* contract expressed in the bond, even if it were admitted that the evidence tended to show an implied agreement on the part of appellant to reimburse respondent for the litigation to establish his title to the

lot. A party cannot sue on one cause of action and recover on another. In *Haynes v. Town of Trenton*, 108 Mo. 123, 130, it was said: "The purpose of a petition is to advise the court and the adversary party of plaintiff's claim. This court has always given a liberal construction to pleadings under the code, but it has sternly set its face against the attempt to sue on one cause of action and recover on another." *Warson v. McElroy*, 33 Mo. App. 553; *Eyerman v. Cemetery Ass'n*, 61 Mo. 489.

For the error of the circuit court in giving the instruction authorizing a recovery in this action for counsel fees and non-taxable expenses, I think the judgment herein should be reversed and judgment entered for nominal damages.

ON MOTION FOR REHEARING.

BOND, J.—Appellant cites the case of *Haeussler v. Laclede Bank*, 23 Mo. App. 282, as a controlling decision of this court entitling him to a rehearing of this cause. I do not concur with my associates in refusing the rehearing prayed for by appellant, and I deem their opinion on the hearing of this cause contrary to the rule expressed in the opinion of this court in *Haeussler v. Laclede Bank*, *supra*.

The clerk of this court is hereby ordered to certify and transfer the original papers on file in this cause, and a full and complete transcript of the proceedings of this court therein, to the supreme court to be there reheard and determined as provided in section 6 of the amendment of article 6 of the constitution of Missouri.

Judge BIGGS concurs in the order certifying the case. Judge ROMBAUER is absent.

J. W. SCONCE *et al.*, Respondents, v. THE LONG BELL LUMBER COMPANY, Appellant.

St. Louis Court of Appeals, June 20, 1893.

Res Adjudicata: EFFECT OF JUDGMENT IN ACTION OF REPLEVIN. The judgment in an action of replevin, adjudicating the ownership of the property and the right of possession, is conclusive against the claim of an artificer's lien on the property by the defeated party, and may accordingly be invoked as *res adjudicata* of that claim in a subsequent action of trover between the same parties.

Appeal from the Howell Circuit Court.—HON. W. N. EVANS, Judge.

REVERSED (*Biggs, J., dissenting*).

W. R. Cowley, for appellant.

Livingston & Green, for respondents.

BOND, J.—This suit is for the conversion of certain sawed lumber. There was a judgment in favor of the plaintiffs for the value of the lumber, and an appeal therefrom.

The answer of the appellant was a general denial, and a special plea of *res judicata*, based on a judgment in its favor in an action of replevin for this lumber to which the respondents were parties. The evidence tended to prove that the respondents were employed to saw lumber for the McCaskill Mercantile Land and Lumber Co. under a contract providing for monthly payments; that the lumber was stacked up and billed out according to measurements by the respondents, or their agent, and was under their control or in their custody until so billed out; and that at the end of each month respondents had an accounting with their employers,

and, after being charged with supplies furnished, were paid the balance due them for sawing lumber. The evidence disclosed that about April 28, 1891, the respondents instituted an attachment suit against the McCaskill Mercantile Land and Lumber Co., and caused a levy thereunder to be made on the lumber sued for in this action. That attachment suit was based upon a claim made by the respondents for sawing lumber for the defendants therein. On February 27, 1892, said attachment suit was dismissed for want of prosecution.

On May 9, 1891, the appellant began an action of replevin against the sheriff and deputy sheriff of Oregon county for the property levied upon by them, and in their custody, under the writs of attachment issued in the aforesaid suit of the respondents. The writ of replevin was duly executed. During the progress of said replevin suit the respondents were made parties thereto, and, voluntarily entering their appearance, filed answer therein. On February 24, 1892, final judgment was rendered in this replevin suit in favor of the appellant, adjudging it to be the owner of the lumber replevied and entitled to its possession.

The errors assigned are: *First.* That the respondents, having taken the lumber sued for in the present action by attachment in a former action, are estopped from setting up a lien thereon for sawing the lumber. *Second.* That the issues in this case are concluded by the final judgment unappealed from, rendered between the same parties in the replevin suit for the same lumber.

In the view we take of this case, it is only necessary to consider the second assignment of error.

The transcript of the proceedings in the replevin suit shows that the respondents became parties defendant thereto, and that the court rendered the following judgment:

"And afterwards, to-wit, at the February term, 1892, of the Oregon county circuit court, the following entry of record was made in the above entitled cause:

"The Long Bell Lumber Co., incorporated, Plaintiff,
v.
S. H. Jones, Sheriff; E. J. Bates, Deputy, and Sconce, Smith and Company, a firm composed of J. W. Sconce, D. S. Smith and D. M. Dunn, Defendants. } Replevin.

"Now, to-wit, on this twenty-fourth day of February, A. D. 1892, the same being the third day of the regular February term, A. D. 1892, of the Oregon county circuit court, this cause coming on for trial in its regular order, the plaintiff appeared by its attorneys, Braswell and Brooks and W. R. Cowley; the defendants appeared by their attorneys, Smith, Livingston, Green and Norman, and thereupon both parties announced ready for trial, and, a jury being waived, the cause was submitted to the court for trial and judgment.

"The court, after hearing evidence and arguments of counsel, doth find the issues herein joined in favor of the plaintiff and against the defendants; finding that, at the commencement of this action, the plaintiff was the owner of and entitled to the possession of the lumber described in the petition filed in this cause, and that the same was wrongfully detained from its possession by the defendants herein.

"It is therefore considered, ordered and adjudged, by the court that the plaintiff have and recover of and from the defendants the said lumber and property, together with its costs in this behalf expended and taxed at $———"

That judgment shows by express statement on its face that the issues as to *ownership and right of possession* were determined "after hearing evidence," and were adjudged against the present respondents, and in favor of the present appellant. *Murphy v. DeFrance*, 101 Mo. 151, 159.

Affirmative statements of the issues decided, contained in a judgment between the same parties, cannot be contradicted by parol evidence introduced in another suit wherein the judgment is offered in bar as *res judicata*. The only cases in which parol evidence may be introduced are where the record is not conclusive, either because it shows a number of issues on which the case might have been decided, or is silent as to the issues on which it was decided. *Armstrong v. City of St. Louis*, 69 Mo. 309, 310; *Case v. Gorton*, 33 Mo. App. 606, 609; *Hickerson v. City of Mexico*, 58 Mo. 61; *West v. Moser*, 49 Mo. App. 201.

The transcript shows that the present respondents had filed answer denying generally the allegations of the petition therein filed by appellant, which claim ownership and right of immediate possession of the goods replevied. Under these issues the respondents would have been entitled to a judgment for the possession of the lumber by virtue of their artificers' lien, if the evidence adduced had been sufficient to warrant the finding of such lien. *Young v. Glascock*, 79 Mo. 574; *Dilworth v. McKelvy*, 30 Mo. 149. The judgment could not have been rendered in favor of appellant and against respondents, except the trier of the facts found against their defence of lien, coupled with possession, for labor expended on the lumber. That such a defense, if sustained, would have entitled respondents to a judgment against the general owner is well settled. *Nettleton v. Jackson*, 30 Mo. App. 135, 138; *Dickey v.*

Heim, 48 Mo. App. 114, 120; *Mo. Pac. R'y Co. v. Levy*, 17 Mo. App. 501, 508.

The present action is for the alleged conversion of the same lumber. The evidence adduced by the respondents, if it tends to establish any right in them to lumber in question, tends only to show such a special property right as belongs to an artificer in possession of property, which he has manufactured or upon which he has bestowed labor. The unquestioned law is that such a lien subsists only while the lienor retains possession of the property subject thereto, or has not voluntarily surrendered such possession. The right of possession is ordinarily the only question in actions of replevin. *Mo. Pac. R'y Co. v. Levy*, *supra*, l. c. 508.

That this issue was finally adjudicated is *apparent* from the transcript of the replevin suit and the *statement in the judgment entry therein.* That it was necessarily determined in that action, results from the purpose for which it was employed. The judgment therein was final and no appeal taken, and embraced the same property now sought to be recovered. We hold that judgment conclusive upon the parties to the present suit. *Ewald v. Waterhont*, 37 Mo. 602; *Beckner v. McLinn*, 107 Mo. 277, 288.

It results that the judgment of the trial court will be reversed. It is so ordered. Judge ROMBAUER concurs. Judge BIGGS dissents.

CASES DETERMINED

BY THE

ST. LOUIS AND THE KANSAS CITY

COURTS OF APPEALS.

OCTOBER TERM, 1893.

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CHARLES H. BOBB *et al.*, Appellants, v. ELIZA J. WOLFF, Administratrix of estate of MARCUS A. WOLFF *et al.*, Respondents, and ABRAHAM SIEGEL, Appellant.

St. Louis Court of Appeals, April 4, 1893; Motion for Rehearing Overruled October 2, 1893.

1. **Special Taxes:** APPORTIONMENT BETWEEN LIFE TENANT AND REMAINDER-MAN. A special tax against realty, held by a life tenant, will be ratably and equitably proportioned between him and the remainder-man, when the work for which it is assessed is likely to substantially benefit the latter in the enjoyment of the property, as where the tax is levied for the granite pavement of a street; and it appears that the probable duration of this pavement is much greater than the life tenant's expectation of life.

2. ———: ———: TRANSFER OF LIFE-ESTATE. The transfer of his estate by the life-tenant will not release him from his obligation to the remainder-man to pay a special tax against the property, levied during his tenancy and payable prior to such transfer. Accordingly, his payment of the tax after the transfer will not be treated as voluntary in a proceeding by him to enforce the payment of the remainder-man's share.

3. **Costs:** APPORTIONMENT IN ACTIONS IN EQUITY. Where substantial issues in an equity case are found for both the complainant and the defendant, the apportionment of the costs vests in the discretion of the chancellor, and will not be disturbed when no abuse of that discretion has been shown.

4. **Practice, Trial:** CROSS-BILL IN ACTION IN EQUITY. *Semble* that, when one of the defendants in an action in equity seeks affirmative relief against a co-defendant, the latter is entitled only to ample time to answer the claim to such relief, and that it is not the practice in this state to issue new process in such a case.

Appeal from the Circuit Court of the City of St. Louis.
HON. SHEPARD BARCLAY, Judge.

AFFIRMED.

T. J. Rowe and *Collins & Jamison*, for appellants.

(1) A granite pavement is not such a permanent improvement to the realty as can be taxed against the remainder-men. Whatever may be the decisions in other states upon this point, the question is certainly settled in this state by *Reyburn v. Wallace*, 93 Mo. 326. See, also, *Mehle v. Bensel*, 2 South. Rep. 201; *Hitner v. Ege*, 23 Pa. St. 305. (2) The payment of the tax in question, having been made by Wolff after he had conveyed his title, was voluntary; therefore it cannot be made the basis of a recovery against the remainder-men. *Union Savings Ass'n v. Kehlor*, 7 Mo. App. 158; *Greenabaum v. Elliott*, 60 Mo. 25; *Bobb v. Dillon*, 20 Mo. App. 309; *Busche v. McElroy*, 12 Mo. App. 598; *McMahon v. Vickey*, 4 Mo. App. 225.

Frank Hicks, for respondent.

(1) Betterments to the estate, which are not voluntarily imposed by the life tenant, and which enhance the value of the realty, should be charged upon the life estate and remainder proportionately. 1 Washburn's Real Property [5 Ed.], p. 130; 2 Perry on Trusts [3 Ed.], Sec. 554. Especially is this true where the improvements are of such a permanent character as that a substantial portion of the life thereof and benefit therefrom would be enjoyed by the remainder-men. *Plympton v. Boston Dispensary*, 106 Mass. 544; *Peck v. Sherwood*, 56 N. Y. 615; *Fleet v. Dorland*, 11

How. Pr. 491; *Cairus v. Chabert*, 3 Edwards Ch. 312; *Miller's Estate*, 1 Tuck. 346; *Reyburn v. Wallace*, 93 Mo. 326. (2) The payment of the special tax by Wolff was not voluntary. His liability for the tax was not extinguished by his transfer of his title.

BIGGS, J.—This suit was instituted December 5, 1885, by Charles H. Bobb and Philip M. Bobb, each the owner of an undivided one-sixth of the remainder in certain improved realty on Eighth street, between Market and Walnut, in the city of St. Louis, against the respondent Marcus A. Wolff, since deceased, who was then the holder of the life estate (for the life of Charles Bobb) in the premises, and Abraham Siegel (appellant) the owner of four-sixths of said remainder, and also against divers other persons alleged to have or claim some interest in the premises.

The petition alleged in substance that Wolff had failed to pay the general taxes, and a certain special tax bill for granite pavement for reconstruction of Eighth street, on which the realty fronted, and that he had otherwise been guilty of waste in failing to keep the premises repaired. The relief prayed was that Wolff be restrained from collecting rents; that a receiver be appointed to collect the rents and to pay therefrom the delinquent taxes and to make repairs, and for general relief.

On December 14, 1885, a receiver was appointed, who took possession of the premises.

On May 4, 1887, plaintiffs filed an amended petition, which contained the additional averments that, since the appointment of the receiver, he had paid from the rents the general taxes levied against the property for the years 1883 and 1884; that he had paid the court costs in the suit to enforce the payment of the special tax bill for the granite pavement; that he had made sundry repairs on the houses, and that there was not

then a sufficient balance in his hands to place the houses in proper condition. It was also averred that on the eleventh day of June, 1886, Wolff had conveyed to Newell G. Larimore (who had been made a party defendant) whatever right and title he possessed in the property at the time the suit was instituted. The prayer was that the order appointing the receiver be confirmed and continued; that the receiver be instructed to continue in the collection of the rents for the purpose of paying the taxes and repairing the houses; and that Wolff and Larimore be restrained from collecting the rents from the houses or in any way interfering with the possession thereof.

On May 23, 1887, Wolff filed an amended answer in which he denied the allegations in the amended petition, and averred the payment by him of all general taxes and that on the twenty-second day of April, 1887, he had paid the amount of the special tax bill for the granite pavement, which amounted to $753.15. The answer then averred that a granite pavement was a permanent improvement; that its life was forty years, and that, at the time the pavement was completed, the probable duration of the life of Charles Bobb (the life tenant) was, according to statistical experience, six and two-thirds years. The answer prayed apportionment and contribution from the remainder-men as to the special tax.

At the hearing, the plaintiffs' evidence tended to establish the averments of the bill. The evidence adduced by Wolff tended to prove that he had maintained the buildings in as good condition as they were then; that, considering the age and location of the buildings, the repairs made by him were reasonable; that the condition of the buildings was not improving under the management of the receiver; that some of the buildings were vacant; that all of the general taxes

had been paid; that on the twenty-second day of April, 1887, he had paid the special tax bill amounting to $715.15, and that no useful purpose was being subserved by a continuance of the receivership. Evidence was also heard as to the life of a granite pavement. Mr. Turner, the street commissioner of the city, gave it as his opinion that the pavement would last, without additional cost to the owners of the property, twenty-five years. It was also shown that the expectation of the life tenant, who was seventy-six years old at the date of the tax bill, was five years and eighty-eight hundredths.

Upon the evidence adduced the court found that the appointment of the receiver in the first instance was justifiable. To this extent the issues were found for the plaintiffs. The court further decreed that Wolff was entitled to have the amount of the special tax paid by him apportioned between him and the remainder-men. Estimating the life of the pavement at twenty-five years, and the life of Charles Bobb at about six years, from the date of the completion of the work, the court in its decree charged, in favor of Wolff, the respective interests of the remainder-men with their proportion of three-fourths of the special tax bill. All costs accruing prior to May 7, 1887, were charged against Wolff, and one-half of those accruing subsequently were also adjudged against him, and the residue were to be borne by the remainder-men. The receiver was discharged, and he was ordered to surrender the possession of the property to Wolff. From this decree the plaintiffs and the defendant Siegel have appealed.

The appellants insist that, whatever may be the law in other jurisdictions, it has been settled by the supreme court of this state (*Reyburn v. Wallace*, 93 Mo. 326) that no part of the cost of a granite pavement can be charged against the remainder-man. The

Reyburn case reached the supreme court on a demurrer to the bill. It was held that the demurrer was properly sustained. The petition stated that Reyburn, the life tenant, had paid large sums of money for the construction of granite pavements in front of the property. It was also averred that Reyburn was twenty-eight years old, but the life of the pavement was nowhere alleged. According to the life tables, the expectation of Reyburn's life was thirty-six years. The court said: "It can hardly be hoped that these improvements will last that long (thirty-six years) without renewal." When the allegations of the bill are considered, no fault can be urged against the conclusion reached by the court. But it is confidently believed that the decision would have been different, had the petition contained the additional averment that the granite pavement would last for fifty years without additional cost to the owners of the realty. It is the universal law that, where the special tax is for the cost of a permanent improvement which is likely to substantially benefit the remainderman in the enjoyment of the property, the incumbrance must be ratably and equitably apportioned between the tenant for life and the remainder-man. We understand that the supreme court fully recognized this principle, and that its conclusion on the demurrer was reached on the theory that, in the absence of an averment to the contrary, the court would not assume that the life of the pavement was longer than thirty-six years. In the case at bar the petition averred, and the proof tended to show, that according to statistical experience the life tenant would live about six years, counting from the date of the improvement, and that the pavement would ast, without additional expense to the owners of the realty for twenty-five years.

It is urged that the payment of the special tax bill by Wolff was voluntary, as he admitted that he

had conveyed his interest by quit claim to Larimore before he paid the special tax. We cannot agree to this. The special tax bill became due during Wolff's ownership of the life estate. He was in possession and collecting the rents. Therefore his obligation to the remainder-men to pay his *pro rata* share of the incumbrance existed at the time he parted with his interest, and the subsequent sale of it by him could not operate as a release. If the remainder-men had paid the special tax, Wolff would have been liable for contribution notwithstanding his sale to Larimore.

One of the objects of the original bill was to compel the payment of the special tax out of the rents, upon the idea that it should be paid by Wolff, the owner of the life estate. Subsequently Wolff paid it, and sought by way of cross bill to have the amount ratably apportioned. Contribution and apportionment being matters of equitable cognizance, it was competent for the court to adjudge by whom the tax bills should be paid, and grant complete relief. It was within the scope of the issues presented by the original petition. The objection of the appellants on this score is without merit.

Neither do we think that the court abused its discretion in dividing the costs. In equity cases, where substantial issues are found for both parties, the power of the chancellor to apportion the costs is recognized in this state. In the case of *Turner v. Johnson*, 95 Mo. 431, the court held that, when "substantial issues are found for one party and like issues found for the other, the taxation of costs will rest in the discretion of the court, and will not be disturbed unless there has been a clear abuse of that discretion." To the same effect is the case of *Plant Seed Co. v. Michel Plant & Seed Co.*, 37 Mo. App. 313.

That the court ordered the receiver to restore the

possession of the property to Wolff instead of to Larimore does not concern the appellants. Larimore does not complain.

The decree of the circuit court is in all things affirmed. All the judges concur.

ON MOTION FOR A REHEARING.

ROMBAUER, P. J.—A motion for rehearing filed by the defendant Siegel claims that the cross-bill filed by defendant, Wolff, in seeking relief against him, is a departure from the original bill, and seeks relief which which is legal and not equitable in its character. It is further claimed that for these reasons the defendant Siegel could have interposed a demurrer to the cross-bill, but that he had no opportunity to do so, since he was not served with a copy thereof after suffering default on plaintiffs' petition. Conceding the premises, the conclusion does not follow. It is intimated by the supreme court in *Tucker v. Ins. Co.*, 63 Mo. 588–595, that it is not the practice is this state to issue new process in such cases, and that all that a defendant has a right to demand, where a co-defendant seeks affirmative relief against him, is that he should have ample time to answer to the relief sought.

In the case at bar the amended answer of the defendant Wolff was filed May 23, 1887, and the final hearing did not take place until June 17th following. The defendant Siegel had, therefore, ample time to take issue either of law or fact on the amended answer of Wolff, if he desired to do so. He was in no way concluded by the default he suffered on plaintiff's petition as to the truth of the allegations contained in the answer of his co-defendant, Wolff, which sought affirmative relief against him. He failed to plead to said answer. He did not in his motion for new trial even complain that the opportunity so to plead

was not afforded to him; on the contrary, by asserting therein that the court refused to admit legal and competent evidence offered by him at the trial he took the position of having actively participated therein.

Under these circumstances we are not warranted in disturbing a judgment, which has reached the right result, on the technical ground that the method by which it was reached is not in conformity with the chancery practice in other states, as long as the only intimation found in our reports is to the effect that the chancery practice in this state is different.

The motion for rehearing is overruled. All the judges concur.

JAMES R. CRAIG, Appellant, v. CHICAGO AND ALTON RAILROAD COMPANY, Respondent.

St. Louis Court of Appeals, December 22, 1891; Motion for a Rehearing Overruled, October 2, 1893.

1. **Master and Servant:** DUTIES OF MASTER. It is the duty of the master to furnish his servant with the requisite force, and with suitable appliances, for the accomplishment of the work in which the servant is engaged.

2. ———: RISKS ASSUMED BY SERVANT. The rule that the servant takes the risks of the service, which includes the negligence of fellow servants, presupposes that the master has secured proper servants and proper machinery for the conduct of the work. Hence the master is answerable for injury to his servant, if his failure to discharge his duty in these respects concurs with the negligence of a fellow servant in causing that injury.

3. ———: CONTRIBUTORY NEGLIGENCE. The evidence in this cause is considered, and is held (THOMPSON, J., dissenting) to conclusively establish contributory negligence on the part of the plaintiff, and therefore, to debar a recovery for the injuries sued for.

Appeal from the Louisiana Court of Common Pleas.—HON. JOHN W. MATSON, Special Judge.

AFFIRMED.

Fagg & Ball, for appellant.

The chief point relied upon by the appellant for the reversal of this cause is the giving of the instruction at the conclusion of the evidence offered by plaintiff, withdrawing the case from the consideration of the jury. This was manifest error. *Conroy v. Vulcan Iron Works*, 62 Mo. 39; *Stoddard v. Railroad*, 65 Mo. 514; *Thorp v. Railroad*, 89 Mo. 650; *Devlin v. Railroad*, 87 Mo. 545; *Bridges v. Railroad*, 6 Mo. App. 389; *Dale v. Railroad*, 63 Mo. 455; *Huhn v. Railroad*, 92 Mo. 440; *Stephens v. Railroad*, 96 Mo. 207; *Soeder v. Railroad*, 100 Mo. 673; Wood's Master & Servant, sec. 359; *Grant v. Railroad*, 25 Mo. App. 227; *Taylor v. Short*, 38 Mo. App. 21; *Fugler v. Bothe*, 43 Mo. App. 44.

Geo. Robertson, for respondent.

The defendant is not liable for the negligence of a fellow servant. *Lee v. Detroit etc. Works*, 62 Mo. 565; *Moran v. Brown*, 27 Mo. App. 487. When a plaintiff seeks to recover damages for a personal injury caused by the incompetency of a fellow employe, he must prove the incompetency of the fellow employe and that it was known to defendant or its officers, and that the direct cause of the injury was such employe's unfitness. *Zumwelt v. Railroad*, 35 Mo. App. 661; *Huffman v. Railroad*, 78 Mo. 50. The servant assumes the ordinary and natural risks incident to the employment. *Renfro v. Railroad*, 86 Mo. 332; *Price v. Railroad*, 77 Mo. 508; *Porter v. Railroad*, 71 Mo. 66; *Steffin v. Mayer*, 96 Mo. 420. When the risk is such as to be perfectly obvious to the sense of any man, the servant will be held to have assumed it. *Keegan v. Kavenaugh*, 62 Mo. 230; *Nolan v. Shickle*, 3 Mo. App. 300; *Cum-*

mings v. Collins, 61 Mo. 520. There is no obligation on the defendant to furnish appliances or machinery to its servants to work with, when the work can be done by hand, nor is it bound to furnish absolutely safe appliances. *Huhn v. Railroad*, 92 Mo. 440; *Tabler v. Railroad*, 93 Mo. 97; *Bowen v. Railroad*, 95 Mo. 268.

BIGGS, J.—This is an action for personal injuries. The circuit court sustained a demurrer to plaintiff's evidence, and he thereupon submitted to a non-suit. The court having refused to set aside the non-suit, the case has been appealed to this court.

The plaintiff's evidence concerning the accident tends to prove that on the tenth day of November, 1888, he was in the employment of the railroad company as a bridge carpenter; that John Sneed was his foreman and had full charge of the gang of workmen to which the defendant belonged; that on the day mentioned Sneed ordered the plaintiff and James Lonergan, another carpenter, to move some pieces of timber, which were lying across a bridge trestle, from one side of the piling to the other; that the timbers were eighteen feet long, eight inches wide and six inches thick, and the ends rested on four other timbers of a smaller size, which extended lengthwise of the bridge and were fastened on both sides of the piling; that the plaintiff and Lonergan were required by Sneed to do this work without any headlines or other apparatus ordinarily used in such work, and that, while they were trying to accomplish the task, one of the pieces of timber slipped off the trestle, thereby tilting the other end up, and in this way the plaintiff's leg was caught between the timber and other superstructure of the bridge. In connection with this accident the defendant was charged with negligence: *first*, in employing Lonergan, who was known to the defendant

to be an incompetent and inexperienced mechanic, and whose negligence contributed to the plaintiff's injuries; *second*, in requiring the plaintiff and Lonergan to do work which could not be safely done with less than four or five men; *third*, in failing to furnish machinery with which to remove the timber, instead of having it done by hand.

The evidence tends to show that Lonergan was a carpenter of ordinary experience, but that he was somewhat reckless in performing his work. This latter fact was not brought to the attention of the defendant until after the accident, and in fact there is no proof that he was reckless or careless until the accident and afterwards. This justifies the conclusion that the defendant was not negligent in hiring Lonergan. On the other branches of the case the evidence tended to prove that the work assigned could not have been safely done with less than five men, and that under any circumstances the only proper and safe way was to use either head-lines or a block and tackle, so as to take away all chances of the timbers slipping from the trestle.

In *Stoddard v. Railroad*, 65 Mo. 514, the supreme court held that a failure on the part of the master to furnish the requisite force to safely accomplish any work was negligence. It is also the law that, if the master fails to supply the servant with suitable appliances for the proper discharge of the duties imposed, he fails in his duty to the servant. In the present case the evidence tends to prove that the defendant was remiss in both respects, and it is for us to determine whether the plaintiff was guilty of contributory negligence in attempting to do the work, or whether the accident was brought about by some cause other than the negligence imputed to the defendant. In either case the defendant is not liable.

Whether the plaintiff was guilty of legal negligence in attempting to accomplish the work with the assistance of only one man, and without the usual appliances, is a question concerning which the members of this court are not in accord. *(Fugler v. Bothe,* 43 Mo. App. 44.) As we are of the opinion that the plaintiff's action must fail for other reasons, it will not be necessary to discuss the question.

The plaintiff's own evidence showed that, at the time of the accident, he was standing on the outside timber running lengthwise, and was astride the timber that was being moved; that Lonergan was standing on the inside timber on the opposite side of the trestle, and that they were facing each other. But the statement is made in the plaintiff's brief that, on account of the superstructure, the plaintiff could not see what Lonergan was doing. In this position they were shoving the timber towards to plaintiff, so as to get the end next to Lonergan on the opposite side of the piling, and in doing so the timber was slipped too far. The plaintiff describes the accident in this way: "I was standing on this trestle here and Lonergan on that (pointing to model). I was launching the timber to me, and he was shoving it. We got it, it must have been six or eight inches. I asked if it was not about as far as it would stand, and he (Lonergan) says, 'no, you can pull it a *foot*, yet,' and I pulled it again, I guess about two and a half or three inches, and it fell and caught my leg."

If the plaintiff had not been standing astride of the timber, the strong probabilities are that he would not have been hurt. He voluntarily assumed the position of the greatest danger without any necessity therefor. He could as well have stood on the inside of the trestle, which was a much safer place, and it might be said was comparatively free of danger. In

doing so he would probably have been compelled to stand with his back to Lonergan, but, as it was, he could not see what Lonergan was doing, and in this respect he would have been at no greater disadvantage in the one position than the other. This shows that the plaintiff by his own negligence directly contributed to his injuries, and this of itself was fatal to his action.

It is true that Lonergan was guilty of negligence, and this neglect on his part directly contributed to plaintiff's injuries. Lonergan told the plaintiff that the timber could with safety be moved a *foot* farther, whereas the plaintiff moved it not exceeding three inches when it fell. The rule that the servant takes the risks of the service, which includes the negligence of co-servants, supposes that the master has secured proper servants and proper machinery for the conduct of the work. Hence, if the defendant in this case was negligent in these respects, and injury to the plaintiff resulted from such neglect, the defendant is liable, although the immediate negligence was that of Lonergan. The negligence of the defendant concurred, and this fixed the liability. *Booth v. Railroad*, 73 N. Y. 38; *Fisk v. Railroad*, 72 Cal. 38.

The judgment of the lower court will be affirmed. Judge ROMBAUER concurs. Judge THOMPSON dissents.

THOMPSON, J. *(dissenting)*.—I am unable to agree to the result in this case, because I think that the question, whether the plaintiff was guilty of such recklessness as ought to bar a recovery on the ground of contributory negligence, cannot be decided as a question of law, but is a question for a jury. But, with that exception, I agree to the discussion in the opinion.

ON MOTION FOR REHEARING.

ROMBAUER, P. J.—The motion in this case was continued under advisement to await the decision of the supreme court in *Fugler v. Bothe*, reported in 43 Mo. App. 44, and certified to the supreme court, as the decision of that case one way or the other would decide the proposition left undecided in this case. The supreme court has since decided that case in a manner furnishing an *additional* reason for upholding our judgment herein. The motion for re-hearing will, therefore, be overruled. All the judges concur.

THE MISSISSIPPI RIVER & BONNE TERRE RAILWAY COMPANY, Appellant, v. GEORGE F. JONES *et al.*, Respondents.

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St. Louis Court of Appeals, October 2, 1893.

1. **Railroads**: CONDEMNATION OF RIGHT OF WAY: SERVICE OF NOTICE OF FILING OF COMMISSIONER'S AWARD. Sections 2033 and 2034 of the Revised Statutes, being the general provisions of the code in regard to the service of notices, are applicable to the notice which section 2738 of the Revised Statutes requires the clerk of the circuit court to give of the filing of the award of the commissioners in proceedings of eminent domain by railway companies.

2. ———: ———: REVIEW OF JUDGMENT OBTAINED ON CONSTRUCTIVE NOTICE. *Quære*, whether a party, who has been served by constructive notice in such proceedings, may avail himself of the provisions of section 2218 *et seq.* of the Revised Statutes for the review of final judgments obtained on such service.

Appeal from the St. Francois Circuit Court.—HON. J. E. FOX, Judge.

REVERSED.

Wm. Carter & Weber, for appellant.

John S. Clay and *M. R. Smith*, for respondents.

BOND, J.—This suit was brought in St. Francois county by appellant against respondent and others for condemnation of a right of way over their lands. The defendants being non-residents, an order of publication against them was had and regularly published, as required by section 2735, Revised Statutes, 1889.

On the second day of July, 1891, according to said order and notice of publication, three duly qualified commissioners were appointed to assess damages to the defendants by reason of the location, construction and maintenance of appellant's railroad.

These commissioners filed a report of their assessment on July 11, 1891; on which day the clerk of the circuit court of St. Francois county posted up in his office a notice to the defendants of the filing of said report.

At the November term, 1891, of said circuit court a judgment of confirmation of said report was made.

At the November term, 1892, of said circuit court, respondent, George F. Jones, after giving notice thereof, filed a motion to set aside said judgment of confirmation.

The motion alleged in substance that respondent was a non-resident, and then the foregoing facts as to the institution of said condemnation proceedings, and the rendition of judgment thereon, which it alleged was void, "because the notice, required to be given defendants (respondents) by section 2738 of the Revised Statutes of 1889, was not given, and if it was given, it was not done as the law requires;" it was then prayed that said judgment be set aside, and that

defendants (respondents) be allowed to file exceptions to the report of the commissioners.

The case was heard on this motion upon the following agreed statement of facts:

"It is agreed that the plaintiff company filed in the office of the clerk of the circuit court of St. Francois county, Missouri, the county in which the land described in defendants' motion and which were sought to be condemned are situate, its petition for the condemnation of its right of way on June 4, 1891; that said clerk duly made an order of publication against the defendants, who were at that date and still are non-residents of the state of Missouri; that said order notified and required the defendants to appear before the judge of the St. Francois county circuit court at chambers, in the office of the circuit clerk of said county, at the court house in the city of Farmington, in said county, on the second day of July, 1891; that said order was duly made and regularly published as required by section 2735 Revised Statutes of Missouri, 1889; that on the said second day of July, 1891, the circuit judge aforesaid appeared at the time and place designated in said order and notice of publication aforesaid, and proceeded to appoint three duly qualified commissioners to assess the damages done to defendants' land aforesaid by reason of the location, construction and maintenance of the plaintiff's said railroad over the said lands of defendants; that said commissioners met in pursuance of said order of appointment on the eleventh day of July, 1891, and proceed to assess the damages as by said order of appointment required; that said commissioners filed a report of their proceedings and assessment of damages in the office of the clerk of said circuit court on said eleventh day of July, 1891. It is submitted by the parties hereto that all steps taken and proceedings had

were regular up to this date and in conformity to the laws of this state, except that the damages assessed were not apportioned among the defendants. That, after the filing of the said report of the commissioners as aforesaid on the eleventh day of July, 1891, as aforesaid, the clerk of the circuit court of said St. Francois county proceeded to give notice required by section 2738 of the Revised Statutes, 1889, to the defendants, the land owners, of the filing of said report of said commissioners in his office as provided in section 2034 of the Revised Statutes, 1889, which said notice and the return indorsed thereon, as well as the manner of giving the same, are as follows:

"Notice of filing of commissioners' report.

"FARMINGTON, Mo., July 11, 1891.

"STATE OF MISSOURI, } ss.
"County of St. Francois. }

"The Mississippi River and Bonne Terre Railway, a Corporation, *Plaintiff*,
v.
"George Frederick Jones, Katie A. Franklyn and Fannie K. Jones, *Defendants*.

"To George Frederick Jones, Katie A. Franklyn and Fannie K. Jones, the above named defendants.

You are hereby notified that the commissioners, appointed by the court to assess the damages which you may sustain by reason of the appropriation of your property by said plaintiff for the purpose mentioned in the petition, did on the eleventh day of July, 1891, file and report all their proceedings as such commissioners.

"Witness John C. Alexander, clerk of the circuit court for the county of St. Francois, this eleventh day of July, 1891.

[SEAL.] "JOHN C. ALEXANDER, Clerk,
by W. M. HARLAND, D. C.

"STATE OF MISSOURI, } ss.
"County of St. Francois. }

"I, John C. Alexander, clerk of the circuit court within and for the county of St. Francois, and state of Missouri, do hereby certify that I served the within notice by putting the same up in my office at the court house in the city of Farmington in said county and state, neither of the within named defendants nor their attorneys being residents of this state, on the eleventh day of July, A. D. 1891, and the same remaining so posted in my office for more than ten days continuously thereafter.

"JOHN C. ALEXANDER, Clerk.

"Subscribed and sworn to before me this second day of December, 1892.

[SEAL.] "WILLIAM HARLAN, Notary Public.

"My commission as notary public will expire August 26, 1896."

The court sustained this motion, set aside said final judgment confirming the report of said commissioners, and gave leave to respondent Jones to file his exceptions to the report of said commissioners. To this action of the court the appellant excepted at the time, filing its bill of exceptions; and it brings its case to this court by appeal.

The errors assigned are:

First. The vacation of the judgment, as prayed in respondents' motion.

Second. The ruling of the court, that the notice given by the clerk to defendants of the filing of the commissioner's report was insufficient.

Third. The action of the court in sustaining a separate motion of one of several joint owners of the property.

The decision of this case turns on the sufficiency of the notice of the report of the commissioners, served

upon respondents by the clerk as set out in the above agreed state ment of facts.

The effect of the failure of the clerk to notify a land owner of the filing of the commissioners' report, assessing damages for the taking of his land under condemnation proceedings, was considered at length in the case of *Swan v. Railroad*, 38 Mo. App. 588, 594. It was there said of the necessity of giving a *non-resident* defendant such notice: "The defendant is, under this statute, certainly entitled to notice of the filing of the report of the commissioners. There is no method provided in the statute by which this requirement can be dispensed with. It is an essential in the proceeding; the court could go no further in the proceedings, until it was made to appear that the notice was given. We take it that a judgment of condemnation upon the report of the commissioners without the notice first being given to the defendant, whose property is affected by the report, would be *coram non judice.*"

The rule is, that personal service must be had of a notice required to be given by statute, unless some other method of service has been substituted. In proceedings *in rem* it is always competent for the legislature to provide for notice thereof by publication or other constructive agency, "but such notice is restricted in its legal effect, and cannot be made available for all purposes. It will enable the court to give effect to the proceedings so far as it is one *in rem*, but when the *res* is disposed of, the authority of the court ceases." Cooley on Constitutional Limitations, 6 Ed., 497, 498; *Wilson v. Railroad*, 108 Mo. 588, 596, 597.

As the proceeding at bar *is* one *in rem*, the only point to be decided is whether or not the constructive notice, shown to have been given by the clerk (agreed facts, *supra*), was authorized by law in this proceeding.

The notice was given by the clerk under the first clause in section 2738, Revised Statutes, 1889, to-wit: "Upon the filing of such report of said commissioners, *the clerk of the court wherein the same is filed shall duly notify the party whose property is affected of the filing thereof.*" In discharging the duty thus imposed, the clerk adopted the method prescribed for service on non-residents by section 2034, Revised Statutes, 1889. That section and the one preceding it are are as follows, to-wit:

Section 2033. "Notices shall be in writing, and shall be served on the party, or his attorney, in the manner prescribed in this article, unless otherwise provided by law. The service may be made by delivering to the party, or his attorney, a copy of such notice, or by leaving a copy at the usual place of abode of the party, or his attorney, with some person over the age of fifteen years, or with the clerk of the party, or his attorney."

Section 2034. "If neither the adverse party nor his attorney reside in this state, such notice may be put up in the office of the clerk of the court wherein the suit is pending or the proceedings are intended to be had."

The argument of appellant is that these two sections supply the specific method for the service of the notice, required of the clerk in condemnation proceedings, upon unknown or non-resident parties whose property is affected by the report of the commissioners assessing damages; section 2738 *supra*. It must be admitted that, unless this view can be taken, there is no way in the present status of the law by which the report of the commissioners in condemnation proceedings can be confirmed as against unknown or non-resident owners of the property affected, who do not appear in the action; since the law is plain that, in the absence of a statutory substitute, personal service is indispensable.

That the legislature had no intention of stopping such proceedings at this stage, is apparent from section 2734 (Revised Statutes, 1889), giving the corporations therein named the power of condemning the lands in case the owner "*be unknown, or be a non-resident of the state.*" The same purpose is manifested by section 2735 (Revised Statutes, 1889), which provides as follows, to-wit:

"If the name or residence of the *owner be unknown, or if the owners, or any of them, do not reside within the state,* notice of the time of hearing the petition, reciting the substance of the petition and the day fixed for the hearing thereof, shall be given by publication for three weeks consecutively, prior to the time of hearing the petition, in a newspaper published in the county in which the proceedings are pending."

Unless it was the purpose of the legislature that the notice required by section 2738, *supra,* should be construed in *pari materia* with the general provisions of the law with reference to the service of notices in pending suits, sections 2033 and 2034, it is difficult to perceive why the former section 2738 (when it was adopted in 1873) should not have set forth the method of service which the legislature intended thereunder both as to residents and non-residents, especially when it is borne in mind that the latter sections (2033 and 2034), defining the method of service in both cases, were at that time a part of the statute law. General Statutes, 1865, p. 656, sections 22, 23, and 24. "The legislature is presumed to know existing statutes, and the state of the law relating to subjects with which they deal." Sutherland on Statutory Construction, section 287. Unless it was the purpose of the legislature in enacting section 2738 (that the clerk "shall duly notify," etc.), that this act should be subjected to the several acts (sections 2033 and 2034) defining

notices and how they should be served, then the result is that section 2738, standing alone, makes it necessary, after a proceeding for condemnation has been validly *begun* by publication or constructive notice against non-residents or unknown owners, and *jurisdiction* of the subject matter thus *obtained*, that a second *personal* notice should be served on the *same* non-residents or unknown owners before a final judgment could be rendered, if indeed such *personal* notice would be sufficient under the ruling in *Wilson v. Railroad, supra*,—and we do not think it would, unless made upon a direct statutory authority and in a proceeding *in rem*.

We cannot hold that the legislature intended to hinder and thwart condemnation proceedings by such results. We do not think that the silence of section 2738 as to the *mode* of service of notice presents a *casus omissus* in view of the general provisions as to service of notices in pending suits, then contained in sections 2033 and 2034, now Revised Statutes, 1889. The law never presumes a *casus omissus*, nor accepts the same, when there are other existing provisions which can be logically used to carry out the legislative will.

We concede that the statutes referring to condemnation of land by railroad corporations are particular enactments, whose express provisions must regulate the procedure thereunder, and also that, being in derogation of common right, they should be strictly adhered to. But we do not hold that the plain purpose and scope of these statutes should be defeated because of *their silence as to how* an interlocutory notice may be given, when there are other statutes which existed when this provision as to notice was adopted, setting forth the proper mode of service of notices in pending suits. That a notice in a condemnation proceeding is a notice in a judicial proceeding (pending suit) is clear. *Plum v. City of Kansas*, 101 Mo. 525. That the sec-

tions of the practice act regulating changes of venue, and the ordinary incidents of jury trials, are applied in condemnation proceedings is settled. *Railroad v. Fowler*, 20 S. W. Rep. 1069; *Railroad v. Story*, 96 Mo. 611. Why, therefore, is not the *incident* of the service of notices in pending suits, as provided for in the practice act, to be applied to the section of the condemnation acts requiring a notice (but not specifying how it should be served) in the progress of the proceedings thereunder? We are unable to discover any distinction in principle, calling for the aid of the practice act in the one case, and denying it in the other.

We are of the opinion that sections 2738 and 2033 and 2034 of the Revised Statutes, 1889, should be taken together in determining the mode of service of the notice required to be given in the former. This construction harmonizes the character of the service of notice of the filing of the commissioner's report (section 2738) upon non-residents with the kind of service prescribed (section 2735) for making non-residents parties to the proceedings against the land, in the first instance; and it voids the incongruity of holding constructive service to be sufficient in bringing the suit, and personal service to be necessary in subsequent proceedings therein.

The question, whether in condemnation proceedings, a party served by constructive notice may avail himself of the provisions of sections 2218, and following, of the Revised Statutes of 1889, by filing a petition for review within three years after final judgment, does not arise upon this record. It was held in *Swan v. Railroad*, *supra*, that he cannot, but we desire to be understood as not expressing any opinion on the subject either way.

All the judges concurring, the judgment is reversed.

JOHN B. CLAYTON, Plaintiff in Error, v. JOHN L. ROBARDS, Defendant in Error.

St. Louis Court of Appeals, October 10, 1893.

1. **Trusts in Favor of Successive Classes:** VESTING OF BENEFITS. When several classes are successively entitled to the benefit of a trust, and one class fails, the right to the benefit of the trust at once vests in the next successor.

2. ———: ———. An instrument, creating a trust fund in favor of one R. conditionally, provided that, upon the death of R., the fund should be applied to the theological education of any descendant of the donor who might be preparing for the ministry of a named church, and, in default thereof, should be settled upon a designated theological institution. *Held*, that in equity the fund vested in that institution at once upon the death of R., if no descendant of the donor was then preparing for the said ministry.

3. ———: ———: CONSTRUCTION OF PROVISION IN FAVOR OF PERSONS PREPARING FOR THE MINISTRY. And *held*, further, that no descendant of the donor was preparing for the ministry within the purview of said provision, unless he was at the time receiving a theological preparation therefor; and that the pursuit of an ordinary or classical course, though followed by theological studies and an admission to the ministry, did not suffice.

Appeal from the Pike Circuit Court.—HON. E. M. HUGHES, Judge.

AFFIRMED *(Bond, J., dissenting.)*

Harrison & Mahan, for plaintiff in error.

John L. RoBards, for defendant in error.

ROMBAUER, P. J.—This is a proceding in equity to compel the defendant as trustee to carry out the provisions of the following instrument:

"In the name of God, amen.

"I, John B. Helm, of the city of Hannibal and state of Missouri, being *compos mentis*, and having the fear of God before my eyes, do hereby set apart and commit to the keeping of John L. RoBards, as trustee in trust, the sum of five hundred dollars ($500), to be used for the purpose and under the conditions now to be mentioned, viz:

"The said sum to be put and kept at interest until the second son of J. L. RoBards and Sarah C. RoBards, who has this day received in the act of holy baptism the christian name of John Helm (he being eight days old), arrives at the age of sixteen years; when the interest, in whole or in part, at the option of the trustee may be expended in securing for him, the said John Helm RoBards, a good literary and classical education; and if, when he is twenty years old, or before he is twenty-two, he shall elect to become an itinerant preacher in the M. E. Church South, then any remaining interest together with the principal ($500) shall be dovoted to his theological preparation for that sphere, and here the trusteeship of J. L. RoBards shall end.

"*But if the said John Helm RoBards shall die before attaining the age of twenty years, or if he on reaching that age should esteem it his duty to follow some other vocation in life, then the trustee, John L. RoBards, shall devote the principal and remaining interest to the theological education of any other of my descendants who may be preparing for the ministry in the same church.*

"On failing to find such party, he shall settle the principal, with whatever of interest there may be, upon the Missouri Annual Conference of the M. E. Church, South, which amount shall constitute a principal to remain intact, the interest of which shall go annually to the support of superannuated preachers, widows and orphans of that conference.

"In testimony that I have done this, I here append my signature, and affix my seal, this the twentieth day of July, A. D. 1871. JOHN B. HELM,
"MARY A. HELM."

The plaintiff in his petition claims that he is entitled to the accumulated trust fund in the trustee's hands under the clause which is placed in italics above. Upon a trial of the cause the court entered a judgment for defendant.

Touching the facts there is no substantial controversy under the evidence. We find them to be as follows: John B. Helm died June 1, 1872, and towards the close of said month John Helm RoBards, the beneficiary specially named, also died. The plaintiff at that date was twenty years old, and was attending a Baptist school in the state of Tennessee, where he then resided. It does not appear whether he was the member of any church at that time. In the fall of 1873 the plaintiff went to the University of Virginia and remained there as a student until the fall of 1875, when he went to Vanderbilt college in Nashville, Tennessee. As far as the evidence shows, the plaintiff pursued no theological studies until he entered Vanderbilt college, which as above seen was more then three years after John Helm RoBards, the first beneficiary named, died. The plaintiff held a license as a preacher in the Methodist Episcopal Church South when he entered Vanderbilt college, but there is no pretense in the evidence that he held such license when John Helm RoBards died or for years thereafter. He had ceased to be a preacher of that church, and had even severed his connection with it as a member, when this cause was tried.

These being substantially all the facts bearing upon the question at issue, we must uphold the judgment of the trial court.

The plaintiff's claim that he was, at the time when John Helm RoBards died, *preparing for the ministry* of the Methodist Episcopal Church within the meaning of that phrase in the trust instrument is not tenable. That phrase necessarily means a theological preparation, and not purely literary or classical studies. It is true that the latter may be necessary as a foundation for the former, but a primary education is still more so. Yet it would lead to the most absurd results, were we to hold that, if any descendant of John B. Helm was receiving a primary education at the date of John Helm RoBard's death, then it was the duty of the trustee to wait until such descendant entered upon a theological course, and then expend the fund for his theological education, for which alone he was authorized to expend it. As there may be any number of descendants of John B. Helm, all of whom we trust are receiving some kind of education, which might be considered as a foundation for subsequent theological studies, the second class in the trust might never be exhausted, and yet never be reached, because in point of fact neither of such descendants might ever enter upon a theological education.

We do not conceive there is any ambiguity in the phrase "preparing for the ministry," so as to necessitate a resort to other clauses of the trust instrument. But a resort to other clauses, if admissible, merely strengthens the view already taken. It appears from them that it was the intention of the donor that the Methodist Episcopal Church South should in some manner be the recipient of his bounty. His hope was that his infant grandson named would avail himself of it for the benefit of himself and the church. In default of his grandson named doing so, the donor expected that some other of his descendants might do so. In default of them doing so, the confer-

ence of the church was to receive it. The church, however, was under all circumstances to derive some benefit from the fund. What benefit the church would derive from it by its being turned over to one who is neither a preacher in it, nor a member of it, and who at the date when John Helm RoBards died was neither preacher nor member, and who did not even know of the existence of the fund while entering upon a theological education, is not conceivable.

It is an elementary proposition that, where there are successive classes in the benefit of a trust, upon one class failing the benefit of the trust at once vests in the next successor. If at the date of the death of John Helm RoBards there was no descendant of the donor preparing for the ministry within the meaning of the trust instrument, the trust fund at once became in equity the property of the Missouri Annual Conference of the Methodist Episcopal Church South, and a *subsequent* preparation of any of the donor's descendants for the ministry could not divest the title thus acquired.

The decree is affirmed. Judge BIGGS concurs. Judge BOND dissents.

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HUBERT R. ESTES Respondent, v. HAMILTON-BROWN SHOE COMPANY, Appellant.

St. Louis Court of Appeals, October 24, 1893.

1. **Contracts:** SUFFICIENCY OF THE EVIDENCE. There was evidence that the plaintiff entered the defendant's employment in order to eventually become a salesman, and that, when he did so, the defendant's president stated to him that the defendant paid each of its salesmen as compensation two per cent. of the amount of his sales. Afterwards the plaintiff acted as salesman for the defendant without any express agreement concerning his compensation. *Held*, that this evidence warranted the inference of an agreement to pay him the percentage stated.

2. ———: IRRELEVANCY OF EVIDENCE. But *held*, that statements of the defendant's officers to the plaintiff in regard to the compensation paid to its salesmen, made casually and not in reference to his own future employment, were not relevant.

3. **Oral Contracts**: LAW AND FACT. If the terms of an oral contract are ambiguous, the meaning or intention of the parties is a question of fact for the jury.

4. **Account Stated**: STATUTE OF LIMITATIONS. When a running account is balanced and adjusted by one of the parties thereto with the assent of the other, it becomes an account stated and its items become subject to the statute of limitations. This is true, though the result or balance is not paid but is transferred to a succeeding account; but the balance is in such case treated as an item of a new running account.

4. **Running Account**: CHANGE OF ITS CHARACTER. A running account is the result of a mutual agreement, express or implied. Either party to it may accordingly stop the running of the account by communicating to the other party his intention or determination to do so.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL D. FISHER, Judge.

REVERSED AND REMANDED.

Silas B. Jones, for appellant.

(1) Where it is expressly agreed or impliedly understood between the parties to an account, while it is accruing, that the account is to be kept open and continued as one and the same continuous transaction and course of dealing, the account is considered as one continuous account and one demand. *Ring v. Jamison*, 2 Mo. App. 584 (589); *Ring v. Jamison*, 66 Mo. 424 (428); *Boylan v. St. Bt. Victory*, 40 Mo. 244; *Harrison v. Hall*, 8 Mo. App. 167; *Loeffel v. Hoss*, 11 Mo. App. 133; *Roeder v. Studt*, 12 Mo. App. 566; *Thompson v. Brown*, 50. Mo. App. 314 (320). On the other hand, unless the parties do expressly or impliedly agree that their dealings shall constitute one continuous and

unbroken transaction and course of dealing, their dealings do not constitute an open and running account between them. (2) Since the existence of a running account depends upon the continuing mutual assent of the parties thereto, it may be terminated on any day by either of the parties thereto plainly refusing to so deal with the other party any longer. *Gunn v. Gunn*, 74 Ga. 555, (569); 2 Wood on Limitations, [2 Ed.] p. 715. (3) The theory upon which the statute is based, which exempts mutual accounts from the statute of limitations, is that the parties thereto permit them to run with a view of their ultimate adjustment as a whole. *Green v. Disbrow*, 79 N. Y. 1 (9); 2 Wood on Limitations, pp. 715, 716 and notes. (4) An account may become stated against a party by his tacit admission. An express admission of the correctness of an account is not essential to its becoming stated; nor is it necessary to the stating of an account that there be any formal meeting or computation between the parties thereto. *Powell v. Railroad*, 65 Mo. 658; *Brown v. Kimmel*, 67 Mo. 430; *McCormack v. Sawyer*, 104 Mo. 36; *Kent v. Highleyman*, 17 Mo. App. 9; *Mulford v. Caesar*, 2 Mo. Legal News, 512. (5) It is not essential to the stating of an account that the balance found be paid; but the balance may be carried forward, and this does not render the account open and running from the beginning. *Union Bank v. Knapp*, 3 Pick. 96; Angell on Limitations [6 Ed.], sec. 151.

Collins & Jamison, for respondent.

(1) Where services are rendered under an agreement which does not fix any certain time for payment, nor when the services shall end, the contract of employment will be treated as continuous, and the statute of limitations will not begin to run until the

services are ended. The right of action at the close of the service is an entire right, and applies to the entire service, and the employee is entitled to claim for the whole amount of all unpaid wages for all the services rendered under the agreement; it is not the subject of account. *Carter v. Carter*, 36 Mich 207; *Taggart v. Tevanny*, 27 N. E. Rep. (Ind.) 511; *Story v. Story*, 27 N. E. Rep. 573; *Litter v. Smiley*, 9 Ind. 116. It is a well-established principle of law in this state that in the case of a running account the statute of limitations does not begin to run until the date of the last item in such account. Revised Statutes of 1889, sec. 6778; *Ring v. Jamison*, 2 Mo. App. 584; 66 Mo. 428; *Murphy v. People's Railway Co.*, 15 Mo. App. 595; *Phinney v. Brant*, 19 Mo. 42 and 49; *Penn v. Watson*, 20 Mo. 13; *Boylan v. St. Bt. Victory*, 40 Mo. 251. To constitute an "account stated" two things are necessary: First, that there be a mutual examination of the claims of each other by the parties; and, second, that there be a mutual agreement between them as to the correctness of the account, and of the allowance and disallowance of the respective claims, and of the balance; and this is struck upon final adjustment of the whole account on both sides. The minds of the parties must meet upon the allowance of each item or claim allowed, and upon the disallowance of each claim or item rejected; they must mutually concur upon the final adjustment, and nothing short of this will fix and adjust their respective demands as an "account stated." *Lockwood v. Thorne*, 18 N. Y. 288; *Bussey v. Gant*, 10 Humphrey (Tenn.), 238; *Railway Co. v. Kimmel*, 58 Mo. 83; *Edwards v. Hoeffinghof*, 38 Fed. Rep. 635, 645. Balancing an account of a person's own books does not constitute an "account stated," where there is no evidence that

it was done with the consent of the other party. *Nostrand v. Dittmis* 28 N. E. Rep. 27; *Railway Co. v. Kimmel*, 58 Mo. 83.

BIGGS, J.—The plaintiff recovered a judgment against the defendant for $1,067.37. It is urged by the defendant on this appeal that the proof failed to establish the plaintiff's alleged cause of action. We will dispose of this question first.

It is averred in the petition that on the first day of January, 1886, the defendant employed the plaintiff as a traveling salesman; that it was then agreed that the plaintiff should receive as compensation for his services two per cent. on all goods sold by him; that the plaintiff continued to sell goods for the defendant until April 1, 1892; that the commissions on the goods sold by him during that time amounted to $18,240; that during the time the defendant paid to him on account of his commissions various sums of money amounting in the aggregate to $17,080, and that there remained due to him $1,160, for which judgment was asked.

The matter in controversy is the plaintiff's salary for the year 1886. It is conceded that after the first year the plaintiff was to receive two per cent. on all sales, and that he was credited accordingly on the defendant's books. There is no dispute concerning the amounts paid to the plaintiff during any of the years. At the close of the year 1886 the defendant credited the plaintiff on its books with $1,800 as salary for that year, and the account was balanced and closed by carrying the balance into the account for 1887.

The officers of the defendant, with whom the contract of employment was made, testified that the employment of the plaintiff as a traveling salesman was an experiment, and that it was expressly agreed

that for the first year he was to receive what they deemed his services to be reasonably worth; that at the end of the year they concluded that $1,800 was a fair and just compensation; that this amount, with the plaintiff's knowledge and without objection by him at the time, was passed to his credit on the defendant's books, the account closed, and the balance transferred to the books of 1887.

On the other hand, the plaintiff's testimony was to the effect that in the year 1882 he applied to the president of the defendant company for employment as a traveling salesman; that, having had no experience in the boot and shoe business, it was agreed that he should go to work in the store for the purpose of learning the business, and that, as soon as he had acquired the requisite knowledge, he was to be sent upon the road. The plaintiff also testified that with this understanding he accepted a position in the house and continued there until January, 1886, except for about a month in the fall of 1885, when he was requested to take the place of one of the defendant's traveling salesmen. Concerning the wages he was to receive he testified that, at the time he first made the application for employment, the president of the defendant informed him that the house paid all of the salesmen two per cent. on the amount of their sales; that, afterwards, during his employment in the house, he often heard the president and other officers of the defendant say the same; but he would not say that, at the time he was actually or definitely employed to travel for the defendant, there was anything said about his compensation.

Under the plaintiff's own testimony, the defendant at no time expressly agreed to pay to him a definite compensation for the year 1886; but the statement made to him in 1882 by the president of the defendant that the latter paid all of its traveling men two per

cent. on sales, and the repetition of the same statement by the officers of the defendant at the time the plaintiff was requested to go temporarily on the road furnished substantial evidence, from which the jury was authorized to infer a promise in 1882 to pay plaintiff that amount whenever he fitted himself for the position. Therefore, if at the time the plaintiff was actually employed to travel for the house, nothing to the contrary was said, and the plaintiff in good faith relied on these statements as a continuing promise, the defendant would be estopped from denying that it had so agreed.

There was evidence tending to prove that during the year 1886 the plaintiff sold goods to the amount of $143,912.59, for which, under the contract as claimed by him, he ought to have received credit for $2,878.25, whereas the defendant allowed him only $1,800.00. This being the only matter in dispute, the defendant interposed the statute of limitations. It is insisted by the plaintiff that the account is a mutual and running account, and that in this way the contested item is withdrawn from the operation of the statute. On the other hand it is contended that in December, 1886, the account for that year was "stated," which rendered the account for that year a stated account. It is further insisted that, even though the plaintiff did not consent or agree to the account as adjusted, the defendant by its unequivocal act in balancing and closing it, which was communicated to the plaintiff at the time, clearly indicated an intention to close the business for that year and to cut it loose so to speak from the business of the succeeding year, thereby breaking the continuity of the account.

On this branch of the case the court at the instance of the plaintiff instructed the jury as follows:

"No. 4. And the court instructs the jury that, if they believe from the evidence in this cause that the plaintiff was in the employ of the defendant as traveling salesman from the first day of January, 1886, to the first day of April, 1892, and that the defendant kept an account with said plaintiff during said time, and that the balance due said plaintiff from said defendant was at the end of each year carried forward to the succeeding year, then the jury are instructed that such an account and dealings between the parties to this suit constituted a running account, and the statute of limitations does not begin to run until the date of the last item properly embraced in said account."

This instruction virtually cut up by the roots, or rather ignored, the real defense attempted to be made on this branch of the case. That the plaintiff sold goods for the defendant from January 1, 1886, to April 1, 1892, and that this account at the end of each year was balanced and the balance carried forward on the defendant's books, was in no way disputed. The defendant's own books, which were read in evidence, showed this. But the defendant's evidence, as we have shown, tended to prove that in the latter part of December, 1886, the plaintiff's account, with his knowledge and assent, was balanced and adjusted, the account thereby becoming "stated." *Powell v. Railroad*, 65 Mo. 658; *Brown v. Kimmel*, 67 Mo. 430; *McCormack v. Sawyer*, 104 Mo. 36; *Kent v. Highleyman*, 17 Mo. App. 9. If a running account is at any time "stated," it is no longer a running account, and all of its items at the date of the adjustment become subject to the operation of the limitation statute (*Gunn v. Gunn*, 74 Ga. 555; *Schall v. Eisner*, 58 Ga. 190; *Harrison v. Hall*, 8 Mo. App. 170); and it would make no difference that the amount found to be due on such accounting was

not paid, but was transferred to the account of the succeeding year. Such balance would be treated as an item in a new account. *Bank v. Knapp*, 3 Pick. 96; Angell on Limitations [6 Ed.] sec. 151; *Inhabitants, etc., v. Bridgman*, 118 Mass. 486. Therefore under the evidence the instruction was incomplete. The only question is whether the defendant's instructions, which presented the theory of a "stated" account, supplied the omission. If the instruction had inferentially presented that view of the evidence, or if the jury had been expressly referred to the defendant's instructions on the subject, the defect would have been cured. As it did neither, the instruction as given was incomplete and calculated to mislead and confuse the jury.

There is another phase of the defendant's evidence, which was entirely ignored by this instruction. A running account is the result of a mutual agreement either expressed or implied. *Gunn v. Gunn*, 74 Ga. 555. It necessarily and logically follows from this premise that, if such a course of dealing has been adopted, either party may change the character of the account by communicating to the other party his intention or determination to do so. Therefore, even though the evidence failed to show an account "stated," the entering of the item of salary at the end of the year 1886, and the balancing of the account, furnished evidence from which the jury might have inferred an intention on the part of the defendant to separate or cut loose the transactions of that year from those of the succeeding year for the purpose of changing the character of the account.

In opposition, the theory is advanced for the first time in this court, that the plaintiff's claim for wages is not the subject of account for the reason that no time was fixed for payment, nor was it agreed when the services should end, and that for these reasons the employ-

ment must be treated as continuous, and that the statute of limitations would not begin to run until the services were ended. The evidence cannot be made to harmonize with such a theory. The principle, as stated, is to be found in the books, but to make it of any value here, it must have appeared that the plaintiff was not entitled to any compensation until the service was terminated. All of the evidence negatives any such idea. Besides, the plaintiff tried the case upon an entirely different theory.

At the instance of the plaintiff the court also gave the following instruction, of which the defendant complains:

"The court instructs the jury that, if they believe from the evidence in this cause that, at the time *or at various times prior* to the time of the employment of plaintiff by the defendant as traveling salesman, the president of the defendant, in conversation with the plaintiff, stated to the plaintiff that the defendant paid to all its traveling salesmen their necessary traveling expenses and two per cent. commissions on all goods sold by said traveling salesmen, and that said plaintiff, relying upon said statements of the defendant's president, and believing the same to be true, and that said plaintiff, without other agreement with defendant, went to work for the defendant as traveling salesman, then the court instructs the jury that said facts *constituted a contract* between said parties, that the defendant would pay said plaintiff his necessary expenses as traveling salesman while in the employ of the defendant, and two per cent. commissions on all goods sold by the plaintiff for and on account of the defendant."

It was competent for the plaintiff to show what was said to him by the president of the defendant at the time of the employment, or what had been previously said to him *in view* of his future employment.

But it was not competent to show what the president or any other officer of the defendant company may have said in a casual conversation concerning the wages paid to traveling salesmen. To make such prior conversations evidence of the terms of the plaintiff's employment, the conversations must have been had *in connection with or in reference to his future employment.*

The instruction is also wrong in that it told the jury that, if they found that the plaintiff's version of the contract was true, it *constituted* a contract to pay to plaintiff two per cent. commissions on all sales made by him. The rule in reference to the construction of verbal contracts as adopted by this court *(Norton v. Highbee,* 38 Mo. App. 467; *Willard v. Siegel Co.,* 47 Mo. App. 1) is thus stated in *Festerman v. Parker,* 10 Ired. Law, 476. "If verbal, and the parties dispute about the terms of the agreement, it involves a question of fact, as to the terms, to be decided by the jury; but if there is no dispute as to the terms, and *they* be precise and explicit, it is for the court to declare their effect." In other words, if the terms of an oral contract are ambiguous, the meaning or intention of the parties is a question of fact for the jury. According to the plaintiff's testimony as to what was said by the officers of the defendant, no definite promise was made to pay to plaintiff a stipulated compensation. It only furnished evidence from which the jury might infer such a promise.

There are other objections and questions presented in the briefs, which we do not deem it necessary to discuss. We think that the case in other respects was properly tried. For the errors pointed out, the judgment will be reversed and the cause remanded. All the judges concur.

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MARY E. WALKER, Respondent, v. GEORGE HOEFFNER, Appellant.

St. Louis Court of Appeals, October 24, 1893.

1. **Evidence**: COMPETENCY OF TESTIMONY OF DECEASED WITNESS AS PRESERVED IN BILL OF EXCEPTIONS. *Quære*: Whether, in order to entitle a party to read from a bill of exceptions the testimony given by a deceased witness on a former trial of the cause, preliminary proof of the correctness of the statement of that testimony in the bill of exceptions is essential.

2. **Review of Rulings on Admission of Evidence**: SUFFICIENCY OF OBJECTION. The grounds of an objection to the admission of the evidence must be stated as fully as the nature of the objection will permit. And they will not be considered on appeal, when an inquiry of the trial court in regard thereto is answered indirectly and evasively by counsel for the objector, and the objection, if properly disclosed, could have been obviated by the production of preliminary proof.

3. **Slander**: ALLEGATION AND PROOF OF MEANING OF AMBIGUOUS LANGUAGE. When the words constituting the basis of an action of slander are ambiguous in meaning, and not necessarily defamatory, but are alleged to have been used in a stated actionable sense, proof of the allegation is essential to the right of recovery.

4. **Practice, Appellate**: INSUFFICIENCY OF THE EVIDENCE: ESTOPPEL BY COMMON ERROR IN INSTRUCTION. Error in the submission of an issue to the jury on insufficient evidence, when alleged as ground for a new trial in the motion therefor, will be considered on appeal, notwithstanding that the appellant has himself asked an instruction submitting that issue.

5. ———: COSTS. The judgment appealed from herein was for two different causes of action, and was held erroneous because of the insufficiency of the evidence as to one of them; but the judgment was affirmed on the *remittitur* of the recovery on that branch of the case, and this cause of action was submitted to the jury only under an instruction asked by the appellant. *Held*, that the entire costs of the appeal should be taxed against the appellant owing to these features of the case.

Appeal from the St. Louis City Circuit Court.—Hon. Daniel Dillon, Judge.

Reversed and remanded *(nisi)*.

John J. O'Connor, for appellant.

(1) The court erred in permitting plaintiff, over the objection of defendant, to read from an alleged bill of exceptions the alleged testimony of the deceased witness, John J. Kenney, alleged to have been given a former trial of the cause, without first having introduced any evidence or proof that such testimony had been given as alleged by said Kenney, or that the testimony to be read was substantially the same as that given by said Kenney at the former trial. *Scoville v. Railroad*, 94 Mo. 87; *State v. Able*, 65 Mo. 357; *Jaccard v. Anderson*, 37 Mo. 95.

(2) There is no evidence on which to sustain the judgment on the second count, and the damages assessed thereon are excessive and lead to the conclusion that the jury acted in prejudice of defendant. Under such circumstances an appellate court will reverse the judgment. *Ogleby v. Coby*, 96 Mo. 285; *Fairgrieve v. City*, 39 Mo. App. 31.

Dodge & Mulvihill, for respondent.

(1) There was no error in the admission of the testimony of the witness, Kenney, as contained in the bill of exceptions. 1 Greenleaf on Evidence [15 Ed.] 163, *et seq.* (2) The appellant cannot be heard in this court to complain of the instructions which were granted at his own request. Thompson on Charging the Jury, sec. 122, p. 163; *Flowers v. Helm*, 29 Mo. 324; *Thorpe v. Railroad*, 89 Mo. 650, 666; *Demetz v. Benton*, 35 Mo.

App. 565; *Railroad v. Vivian*, 33 Mo. App. 583, 588; *Culver v. Railroad*, 38 Mo. App. 140; *Musser v. Adler*, 86 Mo. 445. (3) When substantial justice has been done the parties, where the verdict is for the right party, and where a new trial would lead to the same result, a new trial should not be granted. Thompson on Charging Juries, secs. 118, 119, 120; *Bragg v. City of Moberly*, 17 Mo. App. 221.

BIGGS, J.—Action for slander. The petition contains two counts. The cause of action stated in the first count was that the defendant, in the presence of others, called the plaintiff "a slut, a bitch and a whore." In the second count the alleged defamatory matter was stated as follows: "'You,' meaning plaintiff, 'are a street walker,' 'and that you,' meaning the plaintiff, 'fooled with the roomers to support Mr. Walters,' meaning the plaintiff's husband, and that 'the $10 a week you,' meaning the plaintiff, 'paid while Mr. Walters,' meaning plaintiff's husband, 'was at the hospital was made in a dishonest way,' intending and meaning to accuse the plaintiff of adultery, by means of which the plaintiff has been, and is, greatly injured in her good name," etc.

The answer contained a general denial.

On a trial before a jury the verdict was for $250 on each count, and judgment was entered for the total amount. The defendant has appealed.

I. The plaintiff was permitted by the court to read in evidence the testimony of a deceased witness, as preserved in a bill of exceptions which was filed on a former trial of the cause. In this it is claimed the court committed error, for the reason that there was no independent evidence that the testimony of the deceased witness, as contained in the bill, was correct or substantially so.

The rule of evidence, which has been heretofore recognized and followed in this state (*Jaccard v. Anderson*, 37 Mo. 95; *State v. Able*, 65 Mo. 357; *Scoville v. Railroad*, 94 Mo. 87) is that, before the testimony of a deceased witness as preserved in a bill of exceptions filed on a former trial can be read, a proper foundation for its admission must be established—that is, it must be shown by other independent evidence that the testimony as offered is substantially the same as the deceased witness testified to. But it may be very well questioned whether this rule should longer prevail in this state in view of the recent enactments providing for the appointment of official stenographers, who are required to keep full stenographic notes of the oral evidence offered at the trial of every cause. This question, however, we need not discuss or decide, for the reason that the objection to the introduction of the evidence was too general, and for this reason alone the assignment ought to be overruled. The colloquy between the court and the defendant's counsel will best explain the nature of the objection. Mr. O'Connor: "I object to the reading of the testimony of John J. Kenney, as found in the bill of exceptions, because there has been no legal or proper foundation laid for it." The Court: "What do you mean by this?" Mr. O'Connor: "I simply say that there is no proper foundation laid for it; that is all." The Court: "Do you mean to say they have not shown that it is his testimony at the former trial?" Mr. O'Connor: "It is in this bill of exceptions, but there has been no evidence showing that they are entitled to read that evidence."

The rules of practice require the grounds of an objection to the admission of testimony to be stated as fully as the nature of the objection will admit of. Ordinary fairness to the court and the opposing litigant requires this. That the rule is a just and wise one is

exemplified in this case. If the question propounded by the court had been answered directly and not evasively, the true nature of the objection, as now urged, would have been disclosed, and in all probability the objection would have been obviated by the introduction of the preliminary proof. *Clark v. Conway*, 23 Mo. 438.

II. In the second assignment of error the defendant challenges the sufficiency of the evidence to support the finding of the jury on the second count.

It is manifest that the defendant's counsel entertained the opinion at the trial that there was some evidence to authorize the submission of this branch of the case to the jury. His own instructions prove this. But as instructions cannot take the place of evidence—that is supply an entire failure of proof—and as one of the grounds for a new trial was that the finding was against the evidence, we must review the question. *Link v. Harrington*, 47 Mo. App. 262; *State ex rel. v. Durant*, 53 Mo. App. 493.

The plaintiff testified that the defendant, at the time and place stated in the second count, said to her, in the presence of others: "You better go home and take your crazy husband yourself and tie him to the bed post; do like you did before; put him in the hospital, and make the ten dollars a week out of your boarders in a dishonest way." This was all the evidence in support of the second count.

There was no proof to show that the words were spoken in the sense stated in the innuendo, and that the hearers so understood them. This we think was necessary. The words of themselves are not necessarily defamatory. If the defendant meant to charge that the plaintiff, who was a married woman, had been guilty of acts of adultery with her boarders, and if the hearers so understood them, then a cause of action as stated accrued, "for the slander and damage consist

not only in speaking the words, but in the apprehension of the hearers." On the other hand, if the defendant meant to charge that the plaintiff was in some way cheating or defrauding her boarders, and the hearers so understood him, then there could be no recovery under the allegations of the petition. Therefore, there should have been some evidence from which the jury could have rightly inferred that the defendant spoke the words in the sense alleged in the innuendo, and that the hearers so understood him. This view we think finds ample support in the books.

In *Dyer v. Morris*, 4 Mo. 214, the defendant charged that the plaintiff's daughter had gone to the "goose-horn at St. Louis." Judge McGirk held that the meaning of the word "goose-horn" should have been averred, and it should have been alleged that the word was used in that sense, and that the hearers so understood it.

In the case of *Unterberger v. Scharff*, 51 Mo. App. 102, the following words were alleged to have been spoken: "What did you sell the butcher?" To which the plaintiff replied, "Nothing," and thereupon defendant said to the plaintiff, "You're a liar; you did, and stuck the money in your pocket." We held in that case that the words were not actionable in themselves, and that it was necessary for the plaintiff to allege and prove that the words were meant to convey a sense in which they were actionable, and were so understood by the hearers.

So the supreme court in the case of *Christal v. Craig*, 80 Mo. 367, ruled that, where the words are not necessarily defamatory, it must be alleged and proved that they were spoken in such a sense as to make them actionable.

Mr. Townsend in his work on slander says: "When the language is *ambiguous* and it is doubtful in

what sense the publisher intended it, the question is in what sense the hearers understood it, for " the slander and damage consist in the apprehension of the hearers." Townsend on Slander [4 Ed.] p. 641.

In the case of *Binford v. Youny*, 115 Ind. 174, the court said: "Charges of unchaste conduct are seldom made in plain words, and it is often necessary to prove what the persons who heard the slanderous words understood the person who uttered them to mean." To the same effect is *Branstetter v. Dorrough*, 81 Ind. 527.

Mr. Newell in speaking of words susceptible of two meanings, one defamatory and the other not, says: "If, however, the words are capable of the meaning ascribed to them by the innuendo, and there is any evidence to go to the jury that they were used with that meaning, then it will be for the jury to decide whether in fact the words were understood in that sense by those who heard or read them." Newel Slander, 770.

Odgers says: "Whenever the words sued on are susceptible both of a harmless and injurious meaning, it will be a question for the jury to decide which meaning was in fact conveyed to the hearers or readers at the time of publication." Odgers on Libel and Slander [2 Ed.] 436.

We conclude that the finding of the jury on the second count was unauthorized, and to that extent the judgment is unsupported by the evidence. If, however, the plaintiff will, within ten days after the filing of this opinion, remit two hundred and fifty dollars, the judgment for the residue will be affirmed. If this is not done, the judgment will be reversed and the cause remanded. All the judges concur.

ON MOTION TO TAX COSTS.

ROMBAUER, P. J.—The plaintiff has remitted her recovery on the second count, which results in an affirmance of the judgment for the residue. She now moves that the costs of the appeal be taxed against the appellant, owing to the peculiar features of the case.

Although by the express provisions of section 2931 of the Revised Statutes, the appellate or plaintiff in error is entitled to costs only where the judgment is reversed, all the appellate courts in this state have awarded him costs in cases wherein the judgment was modified, or affirmed in part only. This ruling was on the theory that, if the judgment is modified in any particular, however slight, the judgment of the trial court is reversed *pro tanto*.

The present case, however, presents this peculiar feature. The consideration of the second count was not submitted to the jury either in the court's instructions, or in those of the plaintiff. The defendant himself by an instruction asked by him brought that count to the consideration of the jury, and his only valid complaint in this court now is that the jury have considered it at all and found on it, after he himself has requested them to do so. The necessity of the appeal was thus the result of the defendant's own improvident conduct. Since the judgment is affirmed against him in part and he is not entitled to costs under the literal terms of the statute, we feel warranted in departing from our usual rule and taxing the costs of the appeal against him. All the judges concurring, it is so ordered.

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BRIDGET TRACY, Defendant in Error, v. J. E. GREFFET, Plaintiff in Error.

St. Louis Court of Appeals, October 24, 1893.

1. **Conveyances**: EFFECT OF WORDS, GRANT, BARGAIN AND SELL: CONSISTENCY OF IMPLIED COVENANTS WITH SPECIAL WARRANTY. A covenant of special warranty against the claims of all persons by, through or under the covenantor is not inconsistent with the covenants implied under the statute (Revised Statutes, section 2402) from the use of the words, "grant, bargain and sell." Accordingly, the statutory effect of these terms attaches to a deed which contains them and also such special warranty.

2. ———: COVENANT OF TITLE: EVICTION OF COVENANTEE. An eviction justifying substantial damages for breach of a covenant of title to land is shown, when it appears that an action to establish a paramount title was prosecuted to a successful termination against the covenantor and covenantee, and that the covenantee thereon availed himself of a provision of the judgment permitting him to retain the land upon the payment of its assessed value.

Error to the St. Louis City Circuit Court.—HON. DANIEL DILLON, Judge.

AFFIRMED.

Thomas A. Russell, for plaintiff in error.

Rudolph Schulenburg, for defendant in error.

BOND, J.—Plaintiff bought a lot in the city of St. Louis from defendant for the consideration of $625. A deed to the lot in question was executed by defendant, in which the operative words, "grant, bargain and sell" were employed. The deed also contained a subsequent clause, to-wit: "The said J. E. Greffet (plaintiff in error), hereby covenanting that he will

warrant and defend the title to the said party of the second part (defendant in error), and unto her heirs and assigns forever, against the lawful claims and demands of all persons by, through or under him." The defendant in error took possession of the lot under said deed and thereafter a suit was begun in the circuit court of the city of St. Louis by one Mena Highfield and husband, claiming title to said lot, to which the plaintiff and defendant in error herein were made parties. The ground of this action was that the lot in question had been sold for special taxes in a proceeding against the plaintiffs therein, resting upon constructive notice, and that the period of redemption had not expired, and that plaintiff in error and defendant in error, whose title was under the sale for such taxes, had refused the amount of the tax judgment and costs tendered them by said plaintiffs within two years after such tax sale. These proceedings resulted in a decree sustaining the title of Mena Highfield and husband to the lot in question, and requiring defendant in error to pay into court the value of said lot or surrender all right, title and possession thereof. The defendant in error complied with the decree by paying the value of the lot as found by the court, and the costs of the proceeding, to-wit, $784.63; her title to the lot in question was thereupon confirmed upon final decree in that court.

The present suit is brought by plaintiff in error upon the first general covenant given by statute (Revised Statutes, section 2402) from the use of the words "grant, bargain and sell." The first covenant, which the statute raises against a grantor in a deed containing the terms in question, is "*that the grantor was, at the time of the execution of such conveyance, seized of an indefeasible estate, in fee simple, in the real estate thereby granted.*" The statute further provides

that this, and the two other covenants therein mentioned, shall be created by the use of the words, "*grant, bargain and sell,*" in all conveyances in which any estate of inheritance in fee simple is limited, "unless restrained by expressed terms contained in such conveyances," "and may be sued upon in the same manner as if such covenants were expressly inserted in the conveyance."

The plaintiff in error insists that the subsequent special warranty of title against the grantor and all claiming under him, contained in the deed, constitutes a restriction of the prior unlimited covenant of seizin of an indefeasible estate in fee simple, on which the suit is brought. The rule is that, "where the first covenant is general, a subsequent limited covenant will not restrain the generality of the preceding covenant, unless an express intention to do so appear, or unless the covenants be inconsistent." Rawle on Covenants for Title [5 Ed.], sections 288 and 291; *Rowe v. Heath*, 23 Texas, 614. In accordance with this principle the statute under consideration provides that its effect can only he restrained by "expressed terms." It follows therefore that, unless the deed in question shows an express intention on the part of the grantor to limit his preceding statutory covenant by the terms of his special warranty, or that the two covenants are inconsistent, we must hold that the breach of the statutory covenant of seizin and title is well assigned. That there are no words nor terms in the special warranty referring *expressly* to the preceding statutory covenant, nor purporting to confine, by negative expressions, the liability of the grantor to that assigned in his special warranty, is apparent from the language employed in framing the special warranty. The grantor in his special warranty says, in substance, that he will warrant the title against himself and those

claiming under him. He does not say that his preceding prior covenant of title as against the world shall not be further binding than he has afterwards covenanted.

It may be granted that the two covenants refer to the same subject, *i. e.* title to the lot in question, and that the special warranty was superfluous, because the assurance therein contained was fully covered by the undertakings in the prior statutory covenant; yet it does not follow that for these reasons the two covenants are inconsistent. This was the exact question decided in two causes by Judge Napton, *Alexander v. Schreiber*, 10 Mo. 460, and *Collier v. Gamble*, 10 Mo. 471. In those cases the first and second statutory covenants of seizin and against incumbrances were held to embrace the same objects *pro tanto*, the latter being included in the former and "apparently superfluous;" but it was also decided that the latter did not on this account restrain nor limit the former covenants of seizin. *Collier v. Gamble*, 10 Mo. *loc. cit.* 471.

In *Shelton v. Pease*, 10 Mo. *loc. cit.* 482, the same judge held that the statutory warranty against incumbrances (which, if an encumbrance existed, would be broken when made) was restrained by a special warranty (which would only be broken by eviction or its equivalent) against a particular mortgage existing and mentioned in the deed, saying *arguendo:* "Can we suppose that, where a party in a deed makes a special covenant to warrant and defend against a particular mortgage recited in the deed, he at the same time intends by a general covenant against incumbrances, to covenant against the existence of this particular mortgage? Can the two covenants stand together? If we allow the covenant against incumbrances to include the mortgage of Languemare, we have a party first recognizing the existence of this

mortgage and making a special covenant in relation to it, based upon the hypothesis of its existence and only providing against any *disturbance or eviction* under it, and at the same time covenanting that the land was free from all mortgages. Upon this construction of the deed, the grantor covenants against an incumbrance, the existence of which he acknowledges in the deed containing the covenant. Such a construction does violence to the language of the deed, and the manifest intention of the parties."

It is clearly apparent from this case, and the two others above cited, that the test of inconsistency between covenants having the same objects is not that the two covenants differ as to measure of their obligation, but whether or not the different obligations are so opposed that they cannot stand together; for, if they may, it is evident that there is no inconsistency between them. Tested by this rule, it is evident there is no repugnancy between the two covenants in question. Their relation to each other is similar to that of the whole and some of its parts; the statutory covenant of seizin was an assurance of title as against the grantor and all others; the special warranty ran against the grantor and some others, *i. e.*, those claiming under him.

It is evident from the wording of the special warranty that its "expressed terms" do not show any restriction of the prior statutory covenant. We hold that the grantor did not intend thereby to restrict his foregoing covenant of seizin, and that the deed containing the two covenants was competent evidence. Our conclusions herein are sustained by the supreme court of Iowa in a case as to the effect of a statutory covenant of seizin in a statute identical with ours, where the deed also contained a special warranty similar to the one in this case. *Brown v. Tomlinson*, 2

Green, 525. Speaking of the two covenants, the court said: "Though the latter and more limited covenant may be mainly comprised within the former, it is still perfectly reconcilable with them, and as they are in no way restrained or excluded by express words in the deed, we can come to no other conclusion than that the covenants, which were expressed by virtue of the statute which enters into the conveyance, should co-exist and operate with that which is especially set forth in the deed."

There is no merit in the point made by plaintiff in error, that there was not sufficient evidence of an eviction to justify a recovery of substantial damages in this action. The record shows that an action to establish-lish a paramount title was begun and prosecuted to a decree, adjudging the same valid against the covenantor and covenantee, and that the covenantee yielded to the final judgment establishing such paramount title. This was equivalent to an actual eviction, and entitled the defendant in error to the same measure of damages. *Lambert v. Estes*, 99 Mo. 604.

It follows, from the views herein expressed, that the court committed no error in the reception of the deed and the proceedings in the suit to set up paramount title in evidence, and that the judgment rendered in this case should be affirmed. It is so ordered. All concur.

I. H. Labold, Respondent, v. Southern Hotel Company, Appellant.

St. Louis Court of Appeals, October 24, 1893.

Hotels: LIABILITY OF PROPRIETOR. When the proprietor of a hotel employes a servant to receive and keep the property of guests while at meals, his liability for the default of this servant in the custody of property so received is not affected by the fact that he has also provided a check-room for the safe keeping of such property.

Appeal from the St. Louis City Circuit Court.—Hon. Daniel D. Fisher, Judge.

Affirmed.

Harvey & Hill, for appellant.

M. B. Jonas, for respondent.

Rombauer, P. J.—The plaintiff is a traveling salesman, who had frequently put up at the defendant's hotel. The defendant had at its hotel a cloak room where its guests deposited their overcoats and hand baggage for temporary storage, receiving checks therefor; and the plaintiff was aware of that fact. The defendant had also a servant stationed at the entrance of its dining room, who received from guests entering it their hats and overcoats, and kept them in temporary custody while the guests were at their meals. The fact that this servant was in the habit of doing this was well known to the managers of the hotel, and they never objected to it either to their servant or to any of the guests who thus left their overcoats in the servant's charge. The plaintiff, arriving at defendant's hotel one morning, registered and at once repaired to the dining room, and, upon entering it, delivered his hat and overcoat to the servant stationed there as above stated. The hat and overcoat were either stolen, or delivered by mistake to the wrong party, while the plaintiff was in the dining room. The plaintiff demanded reparation for the loss from the defendant, which the defendant conceded as to the hat, but denied as to the overcoat on the ground that the loss was the result of the plaintiff's own negligence. The plaintiff thereupon instituted this action, and upon its trial recovered a judgment for the value of the overcoat.

The defendant appeals, and assigns for error the action of the court in refusing the following instruction.

"If the court, sitting as a jury, finds that the defendant had prepared a place of deposit for safekeeping of overcoats, satchels and like personal property and apparel of its guests, in which all such property might be deposited and checks given therefor, and that plaintiff at and before the loss complained of had full knowledge of such arrangement, and that said arrangement had been made by defendant company as a means of mutual protection to the defendant and its said guests, all of which was known to plaintiff, then the court will declare the law to be, that it was the privilege of the plaintiff to avail himself of the right to deposit his said overcoat in said room of deposit so provided, and that his failure to do so amounted to such carelessness and negligence on his part which relieved the defendant from any liability on account of the loss of said property; and that plaintiff under these facts, could not recover, and will find for the defendant."

This instruction was properly refused. All the facts therein stated, if found by the court to be true, have no tendency to show that the plaintiff was guilty of any negligence which caused or contributed to the loss, much less that he was guilty of such negligence as would debar him of recovery. The fact, that the defendant had prepared a place for the safekeeping of the overcoats of its guests, does not negative the fact that it had prepared other places for that purpose likewise. On the contrary the evidence conclusively shows that the defendant had prepared another place at which the plaintiff, under the uncontroverted evidence, was justified in assuming he might leave his coat with safety.

The judgment for the plaintiff was the only admissible conclusion of law on uncontroverted facts, and hence was the only one which the court could have rendered. The judgment is affirmed. All concur.

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CONRAD LINNENKOHL, *et al.*, Respondents, v. CHRISTIANA WINKELMEYER, Appellant.

St. Louis Court of Appeals, October 24, 1893.

Quantum Meruit: NON COMPLIANCE WITH PROVISIONS OF CONTRACT. A party who has performed work of value under a building contract can maintain an action of *quantum meruit* therefor, notwithstanding that he has failed without justification to complete his contract; nor will such right of action be affected by a provision of the contract, that his compensation shall be payable on the completion of the work and its acceptance by the architect.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL D. FISHER, Judge.

AFFIRMED.

Rassieur & Schnurmacher, for appellant.

The time when payment is to be made, if provided for in a building contract, is binding upon all the parties to it, and no lien can be enforced until its expiration; or, when a precise date is not specified, but a mode for ascertaining or fixing the time of payment has been adopted—as, where the parties have agreed that the superintendent shall pass upon the work—his decision is final, and payment cannot be enforced until he shall have found it to be due, unless fraud or mistake upon his part is shown. Phillips on Mechanics' Liens, sec. 290; Lloyd on Building and Buildings [Ed. 1888], pp. 25, 26; *St. Joseph Iron Co. v. Halverson*, 48 Mo. App. 383; *Holmes v. Richet*, 56 Cal. 307.

Seneca N. Taylor, Charles Erd and E. L. Powers, for respondent.

A contractor who fails to comply with his contract loses whatever damages such failure may occasion, and is not allowed, under any circumstances, to claim beyond the contract price; but at the same time, after deducting such damages as resulted from any inferiority of the work or materials to what is required by the contract, he is entitled to be paid for what his labor and materials are reasonably worth to the party using them; and this allowance is not based upon the contract by any theory of waiver of acceptance, but on the idea that the work is of value, and should be paid for, *Yates v. Ballentine*, 56 Mo. 530; *Davis v. Brown*, 67 Mo. 314; *Lee v. Ashbrook*, 14 Mo. 379; *Lowe v. St. Clair*, 27 Mo. App. 318; *Marsh v. Richards*, 29 Mo. 105; *Lamb v. Brolaski*, 38 Mo. 53; *Creamer v. Bates*, 49 Mo. 525; *Grigg v. Dunn*, 38 Mo. App. 278; *Grutzner v. Aude, etc. Co.* 28 Mo. App. 266; *Ibers v. O'Donnel*, 25 Mo. App. 121; *Fleischmann v. Miller*, 38 Mo. App. 180.

ROMBAUER, P. J.—The only question presented by this appeal is whether the condition in a building contract, which makes the payments due the contractor depend upon the acceptance of the work by the architect and superintendent, is a condition *fixing the time of the payment*, so as to make the suit by a contractor on a *quantum meruit or quantum valebant* premature, if brought before acceptance of his work by the architect, provided the architect was justified in his refusal to accept the work.

The question arises in this wise. The plaintiffs contracted to erect a certain building for the defendant. They admittedly failed to perform their contract by failing to replace some defective plastering by sound

work, and the architect justly refused to accept the building before this defect was remedied. The contract between the parties contained these conditions: "The architects' and superintendents' opinion, certificate, report and decision on all matters to be binding and conclusive on the parties of the second part; and in case the said parties of the second part shall fail or refuse to fulfill the orders of said architects and superintendents, then said architects and superintendents shall have full power and lawful right to terminate forthwith any further work by said parties of the second part under this contract, and to have the work done by other parties at the cost of said parties of the second part and securities.

"The said party of the first part agrees and binds herself, for and in consideration of the faithful performance of said work as aforesaid, to pay unto the said parties of the second part the sum of twenty-seven thousand, seven hundred and thirty-three dollars ($27,733) during the progress and on the completion and delivery of said work by the said parties of the second part, and its acceptance by the architects and superintendents."

The plaintiffs thereafter sued for the value of the work and material which was in excess of the contract price, but gave a voluntary credit on their account so as to bring their claim within the contract price. The defendant interposed as a defense the non-acceptance of the work by the architect. The referee who tried the cause, allowed the defendant an additional credit for the defective plastering, and recommended a judgment for the residue of the claim of the plaintiffs. This holding was approved by the court, and the defendant appeals, and complains that the court erred in not holding the affirmative on the proposition stated at the head of this opinion.

Under the law in this state and some other states, it is well settled that, although a building contractor fails to perform his contract, he may recover for the value of his labor and material which went into the building. Where the non-performance of the contract is due to the default of the other party, the contractor may recover in such an action the entire value, even beyond the contract price. Where the non performance is due to the contractor's default, and the work has been of value to the other party and is within the general line of the contract, the contractor may recover the value of the work within the contract price, subject to a recoupment for damages caused to the other party by the non-fulfillment of the contract. *Lee v. Ashbrook*, 14 Mo. 379; *Lamb v. Brolaski*, 38 Mo. 53; *Yeats v. Ballentine*, 56 Mo. 530; *Haysler v. Owen*, 61 Mo. 270. This view of the law is not controverted by the defendant, but it is claimed that the rule has no application to the case at bar, because here the condition is one relating to the *time of payment*, and the contractor could not, by abandoning his contract, change the time when he had a right to exact payment.

This attempted distinction is fanciful. In all contracts of this character, final payment is generally to be made upon completion of the work, which is also a fixed time; yet, in all these cases, the owner, by declining to complete some slight portion thereof left unfinished by the contractor, and maintaining that the time fixed for payment had not arrived, might defeat a recovery altogether. The entire work here was of the value of over $30,000; the portion left uncompleted of the value of $62.50. Under the express terms of the contract, the owner had the right to have the work done at the contractors' expense, and thus complete the contract. For the purpose of defeating a recovery altogether, she left this part unfinished. It is evident

that the recovery had is in consonance not only with the decided law of this state, but also with the true equities arising from undisputed facts.

We are asked to affirm the judgment with damages. The only cases cited by appellant in support of her contention are *St. Joseph Iron Co. v. Halverson*, 48 Mo. App. 383, and *Holmes v. Richet*, 56 Cal. 307. The Missouri case is to the effect that, where one sues in *assumpsit* to recover a stipulated price fixed by contract, he must show that all antecedent conditions of recovery, as fixed by the contract, exist. The court is careful in distinguishing such a case from the one where a recovery is sought upon a *quantum meruit*. The California case is to the effect that no recovery can be had for extra work without a previous valuation by arbitrators, where the contract provides that such valuation must precede the right to payment. The case also decides that, where a valid lien against the building has been filed and is subsisting at the date when an installment of payment becomes due in point of time, no recovery of such installment can be had under a contract, which provides that the installments shall be payable only, if no lien is on file against the building. We consider neither of these cases of sufficient analogy to the case at bar to justify the taking of this appeal—which is otherwise devoid of merit—although they may furnish a partial excuse therefor.

The judgment will be affirmed with five per cent. damages. All the judges concur.

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HUGO KINNER, Respondent, v. PAULINE TSCHIRPE'S Executors, Appellants.

St. Louis Court of Appeals, October 24, 1893.

1. **Instruction, Defect In:** WHEN CURED BY CORRECT INSTRUCTION. Before the error in one instruction can be cured by another instruction which is correct, the entire charge must be consistent.

2. **Contracts:** RIGHT OF PARTY RENDERING SERVICES TO COMPENSATION. If a party rendering services intends that they should be gratuitous when he renders them, he cannot subsequently recover therefor; nor is it necessary, in order that he should be debarred from the right to compensation, that the party accepting the services should also have considered them as gratuitous.

Appeal from the St. Louis City Circuit Court.—HON. JACOB KLEIN, Judge.

REVERSED AND REMANDED.

Rassieur & Schnurmacher, for appellants.

Lubke & Muench, for respondent.

ROMBAUER, P. J.—The plaintiff, who is a practicing physician, exhibited in the probate court for allowance an account for medical services rendered to the defendants' testatrix. The account being disallowed by that court, he appealed to the circuit court, where upon a trial before a jury he recovered judgment for $1,088.00, from which the defendants prosecute this appeal, assigning for error that the court misinstructed the jury, and that the verdict is not supported by the evidence.

The account presented for allowance is as follows:

"Pauline Tschirpe, to Dr. Hugo Kinner, Dr.

"To medical attendance during last illness as follows:

1886.	January and February, 30 visits at $3	$ 90.00
	"September to December, inclusive, 120 visits at $3	360.00
1887.	January, February, March, April, May, June, July, August and September, 290 visits at $3	870.00
1888.	February and March, 25 visits at $3	75.00
	"October and November, 15 visits at $3	45.00
1889.	September, October, November and December, 35 visits at $3	105.00
1890.	March and April, 20 visits at $3	60.00
	"November and December, 15 visits at $3	45.00
1891.	January, February, March, April and to date of death, 115 visits at $3	345.00
	And occasional medicines	$1,995.00"

The evidence tended to show that the deceased was an aunt of the claimant, and his only relative in St. Louis outside of his own family. She resided at a considerable distance from the claimant, and maintained her own establishment. She was of a very advanced age and had been for years prior to her decease in very delicate health, suffering from a complication of diseases. The claimant attended her in a professional capacity during the periods stated in the account, but there was some conflict in the evidence whether such attendance was voluntary or by request of the deceased. There was no proof of the exact number of visits, but their frequency within the years mentioned in the account was shown to such an extent as to warrant the inference that the account in that regard was not excessive. The expert evidence offered by the claimant fixed the minimum value of professional visits, when made at a distance from the physicians' residence, at $3.00 per visit. There was evidence that medicines had been furnished by the claimant, but no evidence of their value.

The court upon plaintiff's request instructed the jury as follows:

"The court instructs the jury that, if they believe from the evidence that plaintiff rendered medical services and gave medicines to the deceased, Pauline

Tschirpe, at her request, then her estate is liable to plaintiff for the reasonable value of such services and medicine, to be determined by the jury from the evidence, unless the jury should find from all the evidence and circumstances in evidence before them that such services and medicines were furnished by plaintiff and accepted by her with the expectation, on the part of both plaintiff and said Pauline Tschirpe, that such services and medicines should not be paid for.

"The court further instructs the jury that from the rendition of valuable services by one party for another, which such other party receives the benefit of, the law implies a promise on the part of the person receiving the same to pay all reasonable value of such services, unless the same were rendered by the one and accepted by the other with the expectation on the part of both that such services should not be paid for."

And upon defendants' request:

"If the jury believe from the evidence that Dr. Kinner, the claimant, made the visits here sued for voluntarily and without request on the part of the deceased, and that at the time he made said visits he had no intention of charging for the same, then the jury cannot now return any verdict in his favor on account thereof.

"The court instructs the jury, if they should find for the claimant, they can only, in assessing his damages, take into account such of the visits in the account charged for as the jury are satisfied from the evidence the claimant made. The account itself is not to be regarded by the jury as evidence of the number of visits made."

The defendants claim that these instructions are irreconcilable in this, that, while the defendant's first instruction tells the jury that the plaintiff cannot

recover if he did not *intend* to charge for his services when they were rendered, yet the instructions given for plaintiff advise the jury that in order to defeat such recovery *both parties must have expected* that such services should not be paid for.

That these instructions cannot be reconciled on this particular point seems to be evident, and, if the defendant's instructions do state the correct rule, the judgment must be reversed. We have always adhered to the rule that, before the error in one instruction can be cured by another, the entire charge must be consistent, and the qualification of an incomplete instruction by another must distinctly appear. *McNichols v. Nelson*, 45 Mo. App. 446; *State v. Brumley*, 53 Mo. App. 126, 130.

The defendant's instruction under the uncontroverted evidence states the correct rule. There certainly was evidence in this case from which it was fairly inferable that the plaintiff at the time of rendering the services did so gratuitously. The deceased was the near relative of the claimant, although not a member of his household. One of the plaintiff's witnesses, a servant of Mrs. Tschirpe for many years, stated that, while she went for medicines to the doctor frequently, she was not instructed by her mistress to call him; that the plaintiff called voluntarily, and sometimes called "because she was his aunt." Although these visits extended through a period of years, it was not shown that any cotemporaneous entries touching them were made by the claimant, such entries being provable and admissible in evidence under our statute, as construed in *Anchor Milling Co. v. Walsh*, 108 Mo. 277.

Now, if the services, when rendered, were intended to be gratuitous, the plaintiff could not by a subsequent change of intention turn them into services to be paid for. *Lippman v. Tittmann*, 31 Mo. App. 69. The right

to compensation accrued immediately upon the rendition of the services, it at all. If I *give* my property to to another, I cannot recover from him its value upon a bare showing *that he received it with the expectation to pay for it.* In absence of an express promise, the cotemporaneous intention of both parties that the services should be paid for must be implied to create an enforceable promise to that effect; the donor's cotemporaneous intention *to give and not to sell* is sufficient to defeat a recovery on his part. *Bittrick v. Gilmore*, 53 Mo. App. 53. The error in the instructions consists in not recognizing this distinction, and was clearly prejudicial to the defendants under the evidence.

In view of a retrial we add that we find no reversible error in other respects in the instructions. It clearly appears from the account filed that no separate charge was intended to be made for medicines to be furnished, but that they formed part of the visits. There was no evidence of the value of such medicines, and in the absence of any claim on their account, and of any evidence in support of the claim, we cannot for the purpose of defeating the verdict indulge in the presumption that the jury allowed anything on their account. The court and jury evidently treated the foot note about medicine in the account as part of the item of visits. Upon a retrial, however, the word medicines had better be omitted from the instructions.

Equally unfounded is the defendant's complaint, that the instructions given for the plaintiff erroneously ignore the relationship between the parties as a fact to be considered by the jury in determining whether there was an implied promise to pay. The fact is that the court did not ignore the fact, but misdirected the jury as to what circumstances would negative an implied promise. Had it entirely omitted the qualification, it would have been a mere non-direction,

supplemented by the defendant's instructions. We suggest, however, that it is the safer rule in these cases to add the qualification to the instruction itself, as was done in *Hart v. Hart's, adm'r*, 41 Mo. 444, where an instruction thus qualified is approved by the supreme court.

The judgment is reversed, and the cause remanded to be proceeded with in conformity with this opinion. All the judges concur.

THE STATE OF MISSOURI, Respondent, v. WILLIAM SWEENEY, Appellant.

Kansas City Court of Appeals, November 6, 1893.

Bill of Exceptions: POWER OF JUDGE, AS TO EXTENSION OF TIME TO FILE. A bill of exceptions was not filed within the time allowed, and after the expiration of such time the judge could not legally extend the time, nor could he at a subsequent term sign and allow the bill; and no error appearing on the record, the judgment is affirmed.

Appeal from the Daviess Circuit Court.—HON. C. H. S. GOODMAN, Judge.

AFFIRMED.

J. F. Harwood, for appellant.

R. F. Walker, Morton Jourdan, for respondent.

(1) The alleged bill of exceptions in this case cannot be considered; it was not filed within the time allowed by the court. The trial judge had no authority to, nor could he legally extend the time for filing the bill of exceptions after it had once expired, nor could he at a subsequent term of the court sign and allow the bill of exceptions. Revised Statutes, 1889, sec. 2168;

State v. Mosley, 22 S. W. Rep. (Mo.) 804; *State v. Scott*, 109 Mo. 226; *State v. Hill*, 98 Mo. 570; *State v. Broderick*, 70 Mo. 622; *Boardman v. Vaughn*, 44 Mo. App. 549; *McHoney v. Ins. Co.*, 44 Mo. App. 426; *State v. Apperson*, 22 S. W. Rep. (Mo.) 375; *State v. Berry*, 103 Mo. 367; *State v. Harben*, 105 Mo. 603; *State v. Seaton*, 106 Mo. 208; *State v. Ryan*, 22 S. W. Rep. (Mo.) 486; *State v. Mansfield*, 106 Mo. 110. (2) No error is presented by the record on which this case must be determined. The information filed by the prosecuting attorney clearly charges the crime of which the defendant has been found guilty; the judgment should, therefore, be affirmed.

SMITH, P. J.—On the twenty-fourth day of April, 1891, the prosecuting attorney of Daviess county filed an information before W. W. Arnold, a justice of the peace, in which the defendant was charged with having sold certain fermented and spirituous liquors in quantities less than five gallons without having a license as a dramshop keeper.

At the February term, 1892, of the Daviess circuit court, the defendant was tried, convicted, and his punishment assessed at a fine of $100 and costs. After unsuccessful motions for a new trial, and in arrest, he appealed to this court.

The alleged bill of exceptions in this case cannot be considered; it was not filed within the time allowed by the court (during the June term, 1892). When this term adjourned, the time for filing bill of exceptions expired, and the record in the case was closed. The trial judge had no authority to, nor could he legally, extend the time for filing the bill of exceptions after it had once expired, nor could he at a subsequent term of the court sign and allow the bill of exceptions. Revised Statutes, 1889, sec. 2168; *State v. Mosley*,

22 S. W. Rep. (Mo.) 804; *State v. Scott*, 109 Mo. 226; *State v. Broderick*, 70 Mo. 622; *State v. Hill*, 98 Mo. 570; *Boardman v. Vaughn*, 44 Mo. App. 549; *McHoney v. Ins. Co.*, 44 Mo. App. 426; *State v. Apperson*, 22 S. W. Rep. (Mo.) 375; *State v. Berry*, 103 Mo. 367; *State v. Harben*, 105 Mo. 603; *State v. Seaton*, 106 Mo. 208; *State v. Ryan*, 22 S. W. Rep. (Mo.) 486; *State v. Mansfield*, 106 Mo. 110.

No error is presented by the record on which this case must be determined. The information filed by the prosecuting attorney clearly charges the crime of which the defendant has been found guilty; the judgment should, therefore, be affirmed. All concur.

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SCOTT T. HAYNES, Respondent, v. WABASH RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, November 6, 1893.

1. **Justice's Court:** PLEADING: STATEMENT: NEGLIGENCE. A statement in a justice's court which is sufficient to bar another action is good, though the allegation of negligence is, that there was a defective car with defective slats.

2. **Evidence:** OPINION OF WITNESS HARMLESS. The opinion of a witness as to how long a horse had been down in the car is harmless error in this case.

3. **Appellate Practice:** EVIDENCE: VERDICT: PROOF OF NEGLIGENCE. The evidence in this case reviewed and considered sufficient, since the jury found a verdict on it and the trial court refused to set it aside. Proof of negligence need not be by direct testimony, but may be inferred from facts and circumstances.

4. **Carriers:** SAFE VEHICLES: SPECIAL CONTRACT. The carrier must furnish vehicles to safely carry on his business of transportation, and public policy will not permit him to make a contract exonerating himself for a failure to do so.

Appeal from the Daviess Circuit Court.—HON. E. J. BROADDUS, Judge.

AFFIRMED.

Geo. S. Grover, for appellant.

(1) The general allegation of defects in the car, upon which a recovery was permitted, was insufficient to authorize an instruction or to support a verdict in plaintiff's favor. *Gurley v. Railway*, 93 Mo. 445. (2) The witnesses were allowed to usurp the province of the jury, by giving opinions and drawing conclusions therefrom wholly unwarranted by any testimony in the case. *Muff v. Railroad*, 22 Mo. App. 584; *Russ v. Railroad*, 20 S. W. Rep. 472. (3) There was a complete failure of proof, as the car was not shown to be defective, nor was any negligent management of the train proved, nor was it shown that the injury received was occasioned by either cause. In such a case, no presumption of negligence arises from the mere fact of an accident followed by an injury. *Yarnell v. Railroad*, 21 S. W. Rep. 1. And the burden of proving such negligence was upon the plaintiff. *Witting v. Railroad*, 101 Mo. 631. (4) The contract in evidence is a perfect defense to this action. *Halliday v. Railroad*, 74 Mo. 159; *McFadden v. Railroad*, 92 Mo. 343; *Conover v. Express Co.*, 40 Mo. App. 173; *Rogan v. Railroad*, 51 Mo. App. 674.

W. D. Hamilton, for respondent.

(1) No formal pleadings are required in actions commenced before a justice of the peace. If it informs defendant of nature of plaintiff's claim and would bar another action, it is sufficient. *Witting v. Railroad*, 101 Mo. 631. (2) The question of defendant's negligence

in permitting the horse to remain down in the car was not submitted to the jury and the opinion of the witnesses as to how long he was down could not have had any effect on their verdict. (3) It is the duty of a common carrier to furnish cars suitable in every respect, including strength and mode of construction, for the property they undertake to carry. *Brown v. Railroad*, 18 Mo. App. 568; *Potts v. Railroad*, 17 Mo. App. 394. (4) While the burden of proof is on plaintiff to prove negligence, yet such negligence may be shown by circumstances. *Hance v. Express Co.*, 48 Mo. App. 179; *Witting v. Railroad*, 101 Mo. 631. (5) The contract in evidence is no defense to plaintiff's action. All oral negotiations between shipper and carrier are merged in the written contract. This is a written contract between the shipper and C. R. I. & P. R'y Co., for the shipment of a car-load of horses at a reduced rate from Clyde, Kansas, to Gallatin, Missouri, and not to St. Louis. It does not contemplate the employment of any connecting line. *McFadden v. Railroad*, 92 Mo. 343; *Halliday v. Railroad*, 74 Mo. 159.

ELLISON, J.—Plaintiff recovered a judgment in the court below against defendant for an injury to his horse, the injury occurred by reason, as alleged by plaintiff, of a defective car in which the animal was shipped from Gallatin to St. Louis.

The statement of plaintiff's cause of action is objected to for the reason that it makes a general allegation of negligence without specifying any particular act of negligence. The case was begun before a justice of the peace. The statement is quite sufficient to bar another action for the same cause, and being so, we hold it good; the negligence mentioned in the statement was a defective car with defective slats. *Witting v. Railroad*, 101 Mo. 631.

The fact that a witness was permitted to state his opinion as to how long the horses must have been down in the car could have resulted in no possible harm to defendant. The damage done to the horse far exceeded the amount of the verdict, as shown by the undisputed testimony.

The only question that has given us any trouble is that in regard to the sufficiency of the evidence to establish negligence against defendant. The horse was received by defendant, with others, at Gallatin in good condition. He was shown to have remained uninjured until within a few miles of St. Louis, when he was found lying in the car on his back with one hind foot sticking through or between the slats of the car. These slats were shown to be from three to four inches apart. There is no question but what the primary cause of the injury to the horse was his getting his foot between the slats. Defendant's witnesses gave evidence tending strongly to show that the car was of standard make and that it was in first-class repair, and that the horse could not have gotten his foot between the slats as it was, except by a violent kick. On the other hand, the evidence for plaintiff tended to show that the car was old and much out of repair; though as to the *slats*, which, as before stated, *were the cause* of the injury, the evidence is slight; yet we have concluded to hold it sufficient, since it has resulted in a verdict which the trial court has, in its discretion, refused to set aside. Proof of negligence need not be by direct testimony. It may be inferred by the jury from facts and circumstances in evidence. Plaintiff himself testified that the car had been used so long that it was worn—that "it was a bad car, and that the slats were badly worn." He also stated that "the frame part was all right." But by this expression he evidently did not intend to say that the slats were in good condition, for the

expression immediately follows his statement that the slats were bad. Defendant's conductor testified that the slats were in good condition and were not broken where the horse's foot was fastened. He also stated that "it would have almost been impossible for the horse to have gotten his foot through the opening; it could only have been done by *violent force* as *kicking.*" He further said that "I saw no evidence of this horse kicking; *I did not see any such marks on the slats.*" The jury might very well infer from this statement that the horse's foot went between the slats without resistance. For, if the foot had been forced through from the vicious propensity of the horse in kicking, it would reasonably have left some mark. It is true the witness further stated that he had to saw or chip away a part of the slat in order to release the foot. But it will be readily seen that this might become necessary by reason of the horse's position in lying upon his back with his hind foot sticking out between the slats.

The carrier must furnish vehicles to safely carry on his business of transportation. His calling implies that he will do business for the public with reasonable safety and security to the property of those who patronize him. It is so much his duty to do so that public policy will not permit him to make a contract exonerating him for a failure to do so. *Potts v. Railroad*, 17 Mo. App. 394; *Brown v. Railroad*, 18 Mo. App. 568. "The utmost effect which can be given to a general notice, *or special contract*, although as broad and absolute in its terms as it can be, will not discharge a common carrier from liability for negligence, malfeasance, or want of ordinary care, either in the seaworthiness of the vessel, or her proper equipments and furniture; nor is it allowed to exempt the carrier from accountability for losses occasioned by a defect in a vehicle, or mode

of conveyance used in the transportation." *Welsh v. Railroad*, 10 Ohio St. 65.

In our opinion, granting the contract in evidence made with the Rock Island road would cover the shipment over defendant's road, it does not relieve defendant from the negligence which the jury have found in this case. The instruction given for plaintiff would ordinarily be too general in its terms as to the defective car. But as the evidence as to the injury went only to one defect as causing the injury, we think it was not erroneous as applied to the facts. We will affirm the judgment. All concur.

RAY COUNTY SAVINGS BANK, Appellant, v. JAMES I. CRAMER, *et al.*, Respondents.

Kansas City Court of Appeals, November, 1893.

1. **Mechanics' Lien**: BUILDING FOR A RELIGIOUS SCHOOL. A college building erected and maintained by a religious society is not a school building erected in accordance with public law, nor is it exempt upon any grounds of public necessity from seizure and sale under execution, and a mechanics' lien may be enforced against such building.

2. ———: DEBT FROM CONTRACTOR TO LIENOR: PETITION. The petition in this case sufficiently alleges a contract and that a debt is due from the contractor to the plaintiff, and asks judgment therefor.

3. ———: OWNER OF MATERIAL: CHATTEL MORTGAGE: BREACH. Plaintiff took a chattel mortgage from one N. on certain brick, and therein authorized him to sell and deliver same to the defendant contractor to go into the college building and to collect the proceeds and pay the same on the mortgage debt. *Held*, if the mortgage covered the brick, yet until N. made default in the payment of the debt or some other breach of the mortgage, the mortgagee was not entitled to the possession of the brick, nor became their owner so as to enforce a mechanics' lien against the building into which they went.

4. ———: BENEFIT OF LABOR AND MATERIAL-MEN, NOT THEIR CREDITORS OR ASSIGNEES. The mechanics' lien statute was designed for the sole benefit of the laborer or material-man himself, for his own personal protection, and not for his creditors or assignees.

Appeal from the Ray Circuit Court.—HON. JAMES M. SANDUSKY, Judge.

AFFIRMED.

J. W. Shotwell for appellant.

(1) The action must be prosecuted in the name of the real party in interest, which in this case is the Ray County Savings Bank. Revised Statutes, Mo. (1889), ch. 33, sec. 1990, art. 1, p. 526. (2) The mechanics' lien in this case could not have been filed or maintained in the name of Charles W. Nicholson, for the reason that Nicholson had parted with his interest in the brick to the Ray County Savings Bank before they were sold and put in the walls of the high school. He had only the right under the mortgage to sell, remove and put in the walls of the building, collect the proceeds and pay them to the bank; all of which he did except to collect and pay over. (3) The mortgage being on record at the time the brick was sold and put in the wall by Nicholson, all persons purchasing said brick were charged with notice thereof, and if plaintiff had not given Nicholson the privilege, in the mortgage, to sell to the high school, collect and pay the proceeds on the note secured, the plaintiff might have maintained an action against the defendant for conversion of its property, it being the real owner at the time of the sale. (4) Plaintiff before and at the time the brick was sold to the contractor, Cramer, and put in the walls of the high school building, was the real owner of the brick and Nicholson was only its agent and servant to sell and put them in the wall as alleged in the petition. Wherefore the legal title being in plaintiff at the time the lien accrued, plaintiff is the real material-man, furnishing the brick and having them put in

the wall and was the only party under the statute who might enforce the lien. (5) Plaintiff is not the mere assignee of Nicholson in the subject matter of this action as argued by defendants. Plaintiff only might enforce the lein, consequently the arguments and authorities cited for the respondents have no application in this case. *Steadman v. Hays, et al.*, 80 Mo. 319. (6) Even though Nicholson may have made the contract for furnishing and putting up the brick in his own name with Contractor Cramer, yet plaintiff may show by parol that Nicholson was its agent and that it was the real owner of the brick. *Bank v. Jennings*, 18 Mo. App. 951; *Snider v. Express Co.*, 77 Mo. 523. (7) The lien is not created by the contract, but by furnishing the material and performing the labor. *Hannon v. Gibson*, 14 Mo. App. 33. (8) The better doctrine now is that the statute relating to mechanics' liens should receive a liberal construction in order to advance the just and beneficent objects in view in their passage. *DeWitt, et al., v. Smith, et al.*, 63 Mo. p 263. (9) Whether plaintiff is the real party in interest is an issuable fact and should be put in issue by the answer and cannot be raised on demurrer. *Nansan v. Jocob*, 93 Mo. 331. (10) A contract made by a party for the benefit of another may be enforced by either party. *Rogers v. Grosnell*, 51 Mo. 466; *Same v. Same*, 58 Mo. 589; *Schuster v. Railroad*, 60 Mo. 290; *Mossman v. Bender*, 80 Mo. 579.

C. T. Garner & Son, Lavelock, Kirkpatrick & Divelbiss, for respondents.

(1) The mechanics' lien law only applies to the property of private individuals. 11 R. S. of Mo., sec. 6705; *Dunn v. Railroad*, 24 Mo. 493; *McPheeters v. Bridge Co.*, 28 Mo. 465; *Abercomb v. Ely*, 60 Mo. 23;

Hastings v. Woods, 2 Mo. App. 148; *Atascosa Co. v. Angus*, 18 S. W. Rep. 563. (2) The right to perfect a lien on a building for material furnished or labor performed in its erection is a strictly personal privilege. 11 Jones on Liens, secs. 1493, 1494; *Griswold v. Railroad*, 18 Mo. App. 52; *Brown v. Railroad*, 36 Mo. App. 461; *O'Connor v. Railroad*, 111 Mo. 185. (3) If material was sold to contractor no judgment can be obtained enforcing lien against the property until judgment has been rendered against contractor for the debt. 11 McQuillin Pleadings and Practice, sec. 1690; *Wibbing v. Powers* 25 Mo. 599; *Steinkamper v. McManus*, 26 Mo. App. 51; *Steinman v. Strimple*, 29 Mo. App. 478; *Murdock v. Hillyer*, 45 Mo. App. 287; *Crane Co. v. Hanley*, 2 Mo. Legal News, 494.

SMITH, P. J.—This is a suit on a mechanics' lien. The trial court adjudged the plaintiff's petition insufficient on demurrer. It alleged that all of the defendants, except Cramer, were the trustees of the college building and grounds belonging to the Plattsburg district conference of the Missouri conference of the Methodist Episcopal Church, South, situate in Richmond, Ray county; that C. W. Nicholson, as agent for plaintiff, sold and delivered 150,000 brick to defendant, Cramer, the original contractor, for the erection of said college building; that said brick were furnished for and used in the erection of said building belonging to said Methodist conference, situate on certain real estate.

From these allegations it clearly appears that said college building was erected by the defendant, Cramer, under a contract with the other defendants, as trustees, as aforesaid, on real estate, the title of which was in said trustees for said Methodist conference. It is contended that this college building was erected for the public benefit and held, controlled and maintained by a religious society for the good of all, and was in that

sense a public institution, and for that reason the provisions of the statute in relation to mechanics' liens did not extend to said buildings.

Section 6705, Revised Statutes, provides that every mechanic or other person who shall perform any work upon, or furnish any material for, any building, erection or improvements upon any land, under any contract with the owner or proprietor thereof, or his agent, trustee or contractor or sub-contractor, by complying with the provisions of Article 1, Chapter 102, Revised Statutes, shall have a lien for the work done or materials furnished upon such building, erection or improvements. It is believed that the mechanics' lien law was framed with reference to such property as is subject to be sold under execution. The proceeding for the enforcement of mechanics' liens, under its provisions, are in the nature of a proceedings *in rem*. In considering the question of lien the whole remedy, including the right to issue execution, must be considered whether it is the proper remedy in any given case. The lien abstractly is nothing, its consequences everything. If the lien is incapable of practicable results assigned by law, there is no lien. Property, which on grounds of public necessity, is exempt from seizure and sale under execution, is equally exempt from the operation of the mechanics' lien law, unless it appears by the law itself, that property of this description was meant and included. Therefore, under our statute, a mechanics' lien cannot be acquired for work done, or materials furnished towards the erection of the state capitol, or the state university, or state normal school, or a public schoolhouse, or county courthouse, or jail, or other public buildings, erected in accordance with public law.

A college building erected and maintained by a religious society is not a school building erected in accordance with public law, nor is it exempt upon any

grounds of public necessity, from seizure or sale under execution. We can discover no reason, either religious, moral or civil, why a mechanics' lien law does not apply to the erection of a college building belonging to and under the government and supervision of a religious society.

The further objection is made to the petition, that it did not show there were any contractual relations between Cramer, the contractor, and the plaintiff, nor any debt due by Cramer to plaintiff upon which a judgment was asked. It was decided by this court in *Steinkamper v. McManus*, 26 Mo. App. 52, and in several later cases, that there can be no recovery had charging the premises with a lien in such cases, except as an incident to a personal judgment against some one with whom the contract for the work or material was made. But the objection here is not well taken, for the reason the petition not only expressly alleges that Cramer was the contractor and that the brick were sold to him by plaintiff for the building, but it asks for a personal judgment against him as well.

It is lastly contended that the petition does not show a right in plaintiff to perfect a lien on the college building for the brick furnished to Cramer, the contractor. The petition alleges that on the thirtieth of July, 1891, the plaintiff loaned Nicholas a certain sum of money and then took from him a chattel mortgage on the brick in controversy, in which he was authorized to sell and deliver to said college building the said brick and to collect the proceeds and pay the same on the mortgage debt. It is further alleged, that on the tenth day of August, 1891, the said Nicholas, as agent of plaintiff, sold and delivered said brick to Cramer. It is not in terms alleged at what time or who made the contract with Cramer for the sale and delivery of the brick. It may be fairly inferred that Nicholas

made the contract with Cramer before he executed the mortgage. The mortgage, in effect, exempted the brick from its operation, except in so far as it bound Nicholas to pay over the proceeds arising from the sale on the mortgage debt. Even if the mortgage did cover the brick, yet, until Nicholas made default in the payment of the mortgage debt, or until there had been a breach of some condition contained in the mortgage, which is not alleged to have been the fact, the plaintiff, as mortgagee, was not entitled to the possession of such brick. *Brown v. Hawkins*, 54 Mo. App. 75; *Kennedy v. Dodson*, 44 Mo. App. 552; *Bank v. Metcalf*, 29 Mo. App. 391.

There is nothing stated in the petition which shows that the plaintiff had ever acquired the ownership of the brick under the mortgage, or otherwise, or that they were delivered to Cramer by him under a contract for that purpose. It appears that Nicholas had never parted with the title to the brick until their delivery to Cramer.

The statute was designed for the sole benefit of the laborer or material-man for his own personal protection. It cannot be made to do service for those who may have claims against him. It does not give it to his assignees but to the laborer or material-man himself. *Griswold v. Railroad*, 18 Mo. App. 52; *Brown v. Railroad*, 36 Mo. App. 458; *O'Conner v. Railroad*, 111 Mo. 185.

For these reasons, we do not think the plaintiff is entitled to the beneficial provisions of the mechanics' lien law. It results that the judgment of the circuit court will be affirmed. All concur.

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R. S. MARTIN, Respondent, v. ESTATE OF PARTHENA NICHOLS, *et al.*, Appellants.

Kansas City Court of Appeals, November 6, 1893.

1. **Evidence** ACCOUNT BOOK: DATE OF ENTRY: STATUTE. In an action against an estate on an account, in order for plaintiff to qualify his account book as proper evidence, he must show that the entries were made at the time of the performance of the service, and this is the sense of the statute.

2. **Practice, Appellate:** FINDING OF TRIAL COURT. In this case there is evidence tending to support the finding, and the appellate court will not disturb it on account of the superior means and facilities for arriving at a just conclusion.

3. **Administration:** COSTS. An allowance against an estate was set aside on the affidavit of an heir, under the statute, and the demand was subsequently disallowed, but an appeal was allowed in the circuit court, and the cost taxed against the heir. *Held*, error, as the heir was not a party to the action, and the costs should have been taxed against the estate.

Appeal from the Boone Circuit Court.—HON. JOHN A. HOCKADAY, Judge.

REVERSED AND REMANDED.

C. B. Sebastian & Eli Penter, for appellant.

(1) The evidence in this case shows that the credits were not just, and fails to show that they were placed on this account with the knowledge and consent of Parthena Nichols. The account being barred by the statute of limitations, the book of accounts should have been excluded. *Goddard v. Williamson, Adm'r*, 72 Mo. 131; *Loewer v. Haug*, 20 Mo. App. 163; *Haver, Adm'r, v. Schwyhart*, 39 Mo. App. 303; *Thompson v. Brown*, 50 Mo. App. 314. (2)

The trial court erred in taxing all the costs of the case against W. T. Nichols. *Harrington v. Evans*, 49 Mo. App. 372.

Ev. M. Bass and *N. T. Gentry*, for respondent.

(1) The account book was admitted in evidence as is provided by section 8918, of Revised Statutes, 1889. Not only was this book proven to be the account book of and in the hand-writing of respondent by respondent himself, but also by Dr. Abner Martin, who swears positively that it was Dr. R. S. Martin's account book and in his hand-writing. Respondent testified: "Those entries are in my hand-writing, and they were entered at the time they purport to be. This is the book I kept my accounts in, and this is the account as I kept it." In the case of *Anchor Milling Co. v. Walsh*, 108 Mo. 285, city by appellant, Judge BLACK, in delivering the opinion of the court, said account books are admitted in evidence for the person by whom they are kept when the entries are made at the time, or nearly so, of doing the principal fact. *Nelson v. Nelson*, 90 Mo. 463; *Robinson v. Smith*, 111 Mo. 205; Greenleaf on Evidence; Redfield on Evidence, sec. 118; 3 Mo. App. 587; *Kincheloe v. Gorman, Adm'r*, 29 Mo. 421. (2) "To the court or jury belongs the duty of determining for themselves what weight, considering all the circumstances, they will attach to the testimony of the various witnesses on the point in question, and whether or not a witness has been successfully impeached." *Osborne v. Oliver*, 25 Mo. App. 667; *Conrad v. Fisher*, 37 Mo. App. 352; *Nichols v. Nichols*, 39 Mo. App. 291. (3) The trial court, and not the appellate court, judges of the weight to be given to the evidence of the various witnesses, and its findings are binding upon this court. *Irwin v. Wood-*

mansee, 104 Mo. 407; *Handlan v. McManus*, 100 Mo. 124; *Warren & Son v. Maloney*, 39 Mo. App. 295. (4) The court committed no error in taxing the costs against W. T. Nichols, the complainant, he was the one who had caused the allowance to be set aside by the judge of probate, and had caused the respondent to appeal to the circuit court. It would not be just to allow him thus to squander the estate's money in litigation which did not interest him, but was done simply to please an outside real estate speculator. By sections 205, 2920, 21 and 22 of Revised Statutes, 1889, the matter of adjudging the costs is left entirely to the discretion of the trial court. "The appellate court will not interfere in the taxation of costs by the trial court, unless there has been an abuse of the discretion." *Redman v. Thomas*, 39 Mo. App. 143; *Griffith v. Jackson*, 45 Mo. App. 169; *Turner v. Johnson*, 95 Mo. 453; *Shields et al. v. Bogliolo*, 7 Mo. 134; *Walton v. Walton*, 19 Mo. 668; *Wilson v. Drumite*, 24 Mo. 304; *Plant Seed Co. v. M. P. & Seed Co.*, 37 Mo. App. 324; *Vineyard v. Lynch*, 86 Mo. 686; *Hannon v. Shotwell*, 55 Mo. 429; *Johnson v. Devlin*, 31 Mo. 427; *Miller v. Muegge*, 27 Mo. App. 670.

ELLISON, J.—This is an action on an account filed in the probate court, amounting to $523.50, for medicine and treatment of Mrs. Parthena Nichols, deceased, by plaintiff, a physician. There are credits amounting to $95.25, leaving a balance of $427.75, for which he asks judgment against the estate of Parthena Nichols. The first item of the account is dated October 11, 1877, and successive charges follow up to August 31, 1882; after this there are no items until October 25, 1889, when there is a charge of $2, and another charge of $1.50, February 4, 1890, both for medical services. The first credit is April 24, 1879, and credits continue until

1882, when they cease and the only other credits are one in October, 1889, of $10 for rails, and another of $10.25 for pasturing sheep, January 1, 1890.

In the probate court judgment was give for plaintiff. This was afterwards set aside on the affidavit of W. T. Nichols, the son and heir of the deceased. A trial was had in the probate court, resulting in a disallowance of the demand. Plaintiff appealed to the circuit court, where the claim was allowed as asked, less $1.50. The court taxed the costs against the son and heir, and he appeals, complaining of the action of the court in both respects.

Plaintiff's account book was offered in evidence, after introductory testimony given by plaintiff, as follows: "*Q.* State whether those entries are in your handwriting or not, and whether they were entered at the time they purport to be?" "*A.* Yes, sir; this is the book I kept my accounts in, and this is the account as I kept it." The proviso to section 8918, Revised Statutes, 1889, which permits plaintiff to testify against the estate of deceased, is as follows: "In actions for the recovery of any sum or balance due on account, and when the matter at issue and on trial, is proper matter of book account, the party living may be a witness in his own favor so far as to prove in whose handwriting his charges are, and when made, and no farther."

The evident intention and object of this statute was to authorize the admission of account books as evidence in a plaintiff's favor, though the other party was dead. But has plaintiff testified to what the statute permits him or privileges him to testify? We think not. In order to render an account book legitimate evidence, the entries must be contemporaneous with the transaction entered. *Nelson v. Nelson*, 90 Mo. 463; 1 Greenleaf on Evidence, sec. 118; *Anchor Milling Co. v. Walsh*, 108 Mo. 285; *Robinson v. Smith*, 111 Mo. 205.

In this way it becomes a part of the *res gestæ*, which latter ground is the base of the rule. The statute which we have quoted was not intended to alter this rule or the reason upon which it rests. So when the statute permits a party himself to qualify his book of entries as evidence in his favor against a deceased, it means that he must show the entries to have been made at the time (or about the time) when the transaction occurred. The language of the statute, "and when made," is used with reference and in regard to *the time of the transaction*. Otherwise, the words, "when made," would be of no substantial use in qualifying the book of entries. For one might sell merchandise of any sort to another, and six months or a year thereafter, enter it in his book, giving the dates of his entry. This would not be contemporaneous, or a part of the *res gestæ*; and yet, it could be truly answered in the language of the plaintiff in this case, that the entry "was made at the time it purported to be." Proof that an entry was made at the time it purports to have been made, is by no means proof that the service was rendered at that time. The plaintiff should have stated, or otherwise shown, that the entries were made at the time of the performance of the services, and this, as before stated, is the sense of the statute. This interpretation of the statute is especially applicable and useful in this case, if credit is to be given to much of defendant's theory of defense. The evident meaning of much of the defense is that the account was irregularly kept; made up at one time and largely manufactured.

Other than the foregoing, we have found no error in the trial except as to taxing costs. The credits were shown to have been directed by the deceased at about the time they were entered. Much of the argument of counsel has been directed to the contention that plaintiff's showing made no case for him. But a careful

examination of all the record has satisfied us that there was evidence tending to support the court's finding and judgment. The rule that the finding of the triers of the facts will not be disturbed, on account of their superior means and facilities for arriving at a just conclusion, could hardly be more aptly applied than to this case.

The court taxed the costs against W. T. Nichols, the son and heir of deceased, on whose application the original allowance in plaintiff's favor was set aside by the probate court as provided by section 213, Revised Statutes, 1889. When the allowance was set aside, that court, upon a trial, disallowed the claim, and the plaintiff appealed. W. T. Nichols does not appear to be a party to the cause at any stage after filing his affidavit to set aside the allowance first made by the probate court, until he makes himself a party to the appeal to this court, by asking a new trial and taking the appeal. It does not appear in the record as presented in the abstract, that he was a party to the trial which was had in either court. The cause is styled against the estate, and in the absence of anything to the contrary, we must suppose the estate defended through the administrator. Under these circumstances, the costs should have been taxed against the estate. See *Harrington v. Evan*, 49 Mo. App. 372.

Judgment reversed and cause remanded. All concur.

SAMUEL BEACH, Appellant, v. ALBERT HECK, *et al.*, Respondents.

Kansas City Court of Appeals, November 6, 1893.

1. **Unlawful Detainer:** DEMAND: WHEN QUESTION FOR JURY. In an action of unlawful detainer, plaintiff offered a written demand, which showed on its face an alteration in the description of the land in

question and an issue was made on the evidence, whether the alteration was made before or after service. *Held*, such issue was a question for the jury and not for the court.

2. ———: DEMAND: WRONG IN PART, RIGHT IN PART. A demand in unlawful detainer wrong in the description of some of the tracts of land, and right in others, is sufficient for those tracts which are covered by both the complaint and the demand.

Appeal from the Carroll Circuit Court.—HON. E. J. BROADDUS, Judge.

REVERSED AND REMANDED.

Tyson S. Dines, Morton Jourdan for appellant.

I. The affidavit of William Griffin, the party who served the written demand, was of itself sufficient to establish a *prima facie* proof of service. Revised Statutes, 1889, sec. 5124. (2) While this *prima facie* proof could have been rebutted by evidence showing it was untrue, or that written demand for this identical land had not in fact been made of the defendants, the evidence should have all gone to the jury. *Herriman v. Railroad*, 27 Mo. App. 443; *Wood v. Ins. Co.*, 50 Mo. 112; *Wilson v. Board of Education*, 63 Mo. 136; *Dowling v. Allen*, 74 Mo. 13; *Wells v. Lea*, 20 Mo. App. 352; *Barclay v. Bates*, 2 Mo. App. 143; *Noeninger, v. Vogt*, 88 Mo. 589; *Fisher v. Railroad*, 23 Mo. App. 201; *Bruik v. Railroad*, 17 Mo. App. 177; *Jackson v. Ins. Co.*, 27 Mo. App. 73; *Wilkerson v. Railroad*, 26 Mo. App. 154. (3) Had the change been made in the written demand as contended by respondents, it was still correct as to one tract of the land, and plaintiff should have been permitted to go to the jury as to that tract.

Musser & Sasse for respondents.

ELLISON J.—This is an action of unlawful detainer. The judgment below was for defendants and plaintiff appeals. The land claimed by plaintiff is two 80-acre tracts, viz: S. 1-2 S.-W. 1-4 sec. 10, and N. 1-2 N.-W. 1-4 sec. 15, all in Twp. 53, R. 20, Carroll Co., Mo.

I. The cause was taken by *certiorari* to the circuit court. There plaintiff discovered that he had misdescribed the land he was claiming; that he had erroneously described both tracts as in section 10, when he should have described the N. 1-2 N.-W. 1-4 as in section 15. He was permitted to amend his complaint in this respect without objection being made and the cause was continued. At the trial at a succeeding term plaintiff undertook to prove his written demand of possession as is required by statute in such case, by introducing a paper describing the land as he claims it in his testimony and as it is described in the amended complaint. But this paper, as originally written, also put both tracts in section 10, thus corresponding with the complaint as it stood before amendment. The paper had, however, been altered, as it showed upon its face and made to correspond in description with the complaint as amended, that is, placing one of the tracts in section 15. A contest here arose between the parties, before the court, on objection made to the paper by defendants, as to whether the change had been made in the paper before or since the service of a copy thereof on the defendants. Plaintiff offered evidence to show that the change was made before service and that the copy served on defendants contained the exact description now in the copy sought to be introduced. The defendant offered evidence tending to show the contrary. The court held that there was no demand that the change in the paper offered had been made since

the service on defendant; that the copy served on defendants located both tracts in section 10, as the complaint had located them before amendment.

The plaintiff made the point in the court below, that the question thus raised was one for the jury and not the court. That the question whether the paper served upon defendants was a copy of the demand paper he sought to introduce was an issue on the matter of demand which arises in such cases and that it was a question of fact for the jury. We are of this opinion. If it was established as a fact that the paper served upon defendant was not a copy of the paper sought to be introduced at the trial, then there was no demand as required by statute. If, on the contrary, the paper served was a copy of that produced at the trial, then there was a demand. The question whether there has been a demand made is a fact for the jury to determine. It must be borne in mind that there was no question raised as to the sufficiency of the paper *per se* which was sought to be introduced. There was no point of objection made as to any inherent defect in the paper. Nor as to its sufficiency as a notice, provided a copy of it had been served on defendants. It thus was a mere question of fact arising out of one of the issues in the case and should have been submitted to the jury.

II. On this issue, precipitated by the attack which defendants make on the notice and within the limits of the objections, as made, we are of the opinion that if it should be found as a fact that the copy served upon defendants placed both tracts in section 10, when only one of the tracts which plaintiff is claiming is in that section, that he may recover for that tract; since his demand covers it. The fact that one sues for several specific, defined tracts in his complaint and makes demand for certain specific tracts, some of which are in his complaint and some not, ought not to debar

him from recovering those which are covered by both his complaint *and* demand.

The judgment will be reversed and the cause remanded. All concur.

CRANE COMPANY, Appellants, v. HAWLEY, KERAGHAN & Co., *et al.*, Respondents.

Kansas City Court of Appeals, November 6, 1893.

Appellate Practice: DISCRETION OF TRIAL COURT: MOTION TO RE-DOCKET. A motion to re-docket a cause dismissed for want of prosecution is addressed to the discretion of the trial court; and the appellate court will not interfere with such discretion, unless manifestly abused. In this case there is no such abuse.

Appeal from the Jackson Circuit Court.—HON. R. H. FIELD, Judge.

AFFIRMED.

Crysler, Sherlock & Stearns, for appellant.

(1) The case was a *jury case* and the appellant's attorney had so announced in writing under rule one, and *no waiver* of a jury had ever been made or entered. *The records of the court show no waiver; the minutes of the court show no waiver of a jury.* (2) Appellant insists that error was committed to its prejudice in overruling the motion to set aside the order of dismissal and refusing to reinstate the case. The evidence upon the motion, by the defendant's as well as plaintiff's witnessess, all agree in regard to all the matters about which they testify to; *there is no conflict of evidence.* Hence the court of appeals will look into the court's declaration of the law upon *the undisputed facts. Rothschild v. Railroad*, 92 Mo. 91; *Avery v. Fitzgerald*, 94 Mo.

207. In passing upon the facts in this case upon the trial of the motion to reinstate the case, as well as the motion for a new trial, it was the duty of the trial court to make every inference of fact in favor of the evidence offered which a jury might with any degree of propriety have inferred in favor thereof, which in the light of all reason the appellant insists the court did not do. *Jackson v. Ins. Co.*, 27 App. Rep. 62; *Walton v. Railroad*, 32 App. Rep. 634.

Porterfield & Pence, for respondent, J. S. Chick.

A motion of this kind is addressed to the sound discretion of the court in which it is made, and, as stated in *Griffin v. Veil*, 56 Mo. 310, a similar case: "It would require a very strong case to require the discretion of this court to be substituted for that of the courts of first instance."

GILL, J.—On January 27, 1892, this cause was pending in division number 1 of the Jackson circuit court. The court was that day engaged in trying "court cases," or those wherein a jury was not wanted or had been waived. When this case was called for trial, the plaintiff failing to appear, it was dismissed for want of prosecution. On the second day thereafter plaintiff filed a motion to set aside the dismissal and reinstate the cause on the docket. In due season the court heard evidence on the motion and overruled the same, and the plaintiff appealed.

The reasons assigned in the motion to set aside the dismissal were two: *First*, that at the time the cause was called for trial in division one, Crysler and Sherlock, two of the three attorneys named in the record as appearing for plaintiff, were absent and actually engaged trying cases in divisions four and three of said

court; and, *second*, that this cause was improperly called on the court docket because trial by jury had not been waived.

The record, as now amended by *nunc pro tunc* entry, shows that trial by jury was waived by the parties in open court, and hence this disposes of the second ground of the motion, to-wit: that the cause was improperly set on the court docket.

As to the first ground—that is the alleged unavoidable absence of attorneys Crysler and Sherlock—we have examined with care all the evidence adduced in the trial of the motion and fail to discover any reason for our interference. The rule adopted by the appellate courts of this state in matters of this kind is well understood. Such motions are addressed to the sound discretion of the trial court; and with that discretion we will not interfere, unless manifestly abused. We find no such abuse in this proceeding. We take it that in this cause a jury had been waived in open court—the record so recites, and the evidence in support of the *nunc pro tunc* order fully sustains the court in making such entry. We assume also that the cause was regularly docketed and set for a day certain on the court's calendar. It was then the duty of plaintiff's counsel to attend and answer for their client on the day set for trial. The alleged excuse for not doing so, as shown by the evidence, is that attorney Crysler (one of the plaintiff's counsel) was after about eleven o'clock of that day engaged in another court. Whether or not he might not have looked after this case before entering into the trial of a cause in division four is not clear. For aught that appears here he could well have answered to the case in division one before going into the trial in division four.

But more than this, the record shows that *three* attorneys, Crysler, Sherlock and Stearns, were engaged

to appear for this plaintiff; and there is no excuse shown for the absence of Sherlock and Stearns. Nor is it shown that Crysler was relied upon by the plaintiff to take care of the case.

We fail to discover anything in the court's rules (which plaintiff has incorporated in this record) that lend any aid to plaintiff's contention.

We must affirm the judgment, and it is so ordered. All concur.

CHAS. A. SCOTT, Respondent, v. ISAAC R. BROWN, Appellant.

Kansas City Court of Appeals, November 6, 1893.

1. **Account:** EVIDENCE. In an action on an account, if plaintiff's evidence only tends to prove three of several items on the debt side, which amount to less than the aggregate admitted credits on the credit side, the plaintiff cannot recover.

2. **Sales:** WAGER: CONTRACT: EVIDENCE. A sale of goods to be delivered in the future is valid; but if under the guise of such a contract, valid on its face, the real purpose is merely to speculate in the rise or fall of prices and the goods are not to be delivered, but the difference between the contract and the market price only paid, then the transaction is a wager and the contract is void; the evidence in this case is reviewed and the sale found to be a wagering contract.

Appeal from the Carroll Circuit Court.—HON. E. J. BROADDUS, Judge.

AFFIRMED.

Virgil Conkling, for appellant.

(1) Defendant's demurrer to the evidence should have been sustained. There was no evidence whatever even tending to sustain the greater portion of the charges against the estate. Testimony was given only

upon three of the twelve grain charges. The credits upon plaintiff's account will be presumed to be just (except where denied) but the charges must be proven. This was not done, hence the judgment should have been for defendant. (2) The evidence was insufficient to support the jndgment rendered. This we have shown above, but we now specially refer to the charge on account of the oats "deal." If this was a legitimate transaction—an actual sale, then it was to be followed by delivery in May, 1891. If not delivered at that time, then an action might lie against the estate for breach of contract. The only liability, if any, which attached against Trotter on account of this transaction, was the contracual duty of delivering the oats in May, 1891, at the price agreed upon in September, 1890. This contract was never changed in any way during that time. It is true that Trotter seems to have vested Scott with some powers in the matter as his agent, sending him word to take care of the trade, but certainly it must be conceded that the agency, if any existed, became terminated upon the death of Trotter, the principal. *McDonald v. Black*, 20 Ohio, 185; *Clayton v. Merrett*, 52 Miss. 353; *Rapp v. Ins. Co.*, 113 Ill. 390; *Krumdick v. White*, 92 Cal. 143; 28 Pac. 219; *Weber v. Bridgman*, 113 N. Y. 600; 21 N. E. 985.

Hale & Son, and *J. W. Sebree*, for respondent.

(1) Before a contract of sale or purchase of personal property can be brought within legal inhibition against "option dealing," it must appear by the evidence, that at the time of the sale or purchase, both principals to the contract must intend that no delivery in fact shall take place, and that both agreed at the time that the differences should be paid without delivery. It

is not sufficient that one only of the parties should intend that no delivery should be made, and that the differences should be settled without delivery. *Crawford v. Spencer*, 92 Mo. p. 498, and cases cited. This case fully covers all that can well be said on the subject of option deals, so-called. See also, *Teasdale v. McPike*, 25 Mo. App. 340; *Irwin v. Williar*, 110 U. S. 498. (2) The court will not upon mere suspicion hold that the transaction was such as is forbidden by law, but require the defendant to prove it as a defense. *Cockrell v. Thompson*, 85 Mo. 520.

GILL, J.—This action is based on an account for various alleged sales and purchases of grain made by plaintiff, Scott, in behalf of the deceased, Calvin W. Trotter. Scott, it seems, was engaged at Carrollton, Missouri, in negotiating "deals" of grain on the St. Louis market. His business was done by telegraph through a commission firm at St. Louis. According to the testimony adduced, Trotter, who lived at Carrollton, made several deals through Scott, and this suit is for an alleged balance of $474.31, on about a dozen different transactions. On the debit side of the account sued on appear charges for some eleven different purchases which plaintiff claims to have made for Trotter, while on the other side of the account Trotter is credited with several sales of grain made for him by the plaintiff.

At the close of the evidence the administrator interposed a demurrer, asking the court to declare as a matter of law that plaintiff was not entitled to recover. The court declined so to do, and proceeded to enter judgment for the plaintiff for $474.31, the balance claimed, and the administrator appealed.

After a careful reading of this record, we discover two valid objections to plaintiff's right to recover.

In the first place, waiving the character of these deals, and admitting them to be legitimate and not wagering transactions, the evidence fails to show that Trotter's estate was indebted to plaintiff for any balance of account. As to the several matters charged in the complaint—that is, on the debtor side—plaintiff introduced evidence tending to prove only *three*, which aggregated less than $10,000, while there stands admitted to the credit side of the account more than $40,000. With this showing, then, it is clear the Trotter estate owed plaintiff nothing. The proof would show an indebtedness the other way.

But more than this, it conclusively appears from the evidence that the "deals," on account of which plaintiff seeks to recover, were mere wager contracts, and such as the courts will not attempt to enforce.

The only transaction undertaken by Scott for Trotter during his, Trotter's, lifetime of which there was any evidence, was that of September 2, 1890. It was then that Scott contracted in the St. Louis market to sell for Trotter 10,000 bushels of oats at the price of thirty-six and one-fourth cents per bushel, and which were to be delivered in the following May. A few days thereafter Trotter was taken sick, and he died during the month of September, 1890. While Trotter was sick, however, plaintiff's evidence tends to prove that Trotter sent the plaintiff word to "take care of his trade during his sickness." Shortly after Trotter's death plaintiff applied to Brown, Trotter's administrator, for instructions as to what should be done with the alleged oats deal. The administrator refused to have anything to do with the matter, or in anyway to recognize the transaction. Subsequently, on October 20th, Scott, assuming to act without the consent of Trotter's personal representative, bought on the St. Louis market

10,000 bushels of oats at forty-five and one-half cents per bushel, and thereby, he says, settled the oats transaction at a loss of something over $700. And on the same day, October 20th, and, as already said, some time after Trotter's death, plaintiff, pretending still to act for the dead man, purchased in like manner, on the St. Louis market, 10,000 bushels of *corn*, to be delivered the following May. This corn transaction was soon thereafter closed, and with a profit, which plaintiff says he credited to Trotter's account.

The law, in dealings of this class, is thus expressed in what may be termed the leading case in this state: "A sale of goods to be delivered in the future is valid; * * * but if, under the guise of such a contract, valid on its face, the real purpose and intention of the parties is merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but the difference between the contract and the market price only paid, then the transaction is a wager, and the contract is void." *Crawford v. Spencer*, 92 Mo. 498.

Now, don't the testimony here, in connection with the conduct of the parties, unquestionably show that the pretended sale of oats on September 2, to be delivered the following May, was intended by all concerned as a mere wager on prices—such a deal as could and was to be closed on settling the differences. The evidence is that such had been the uniform practice between these same parties in the course of numerous dealings prior to that date. It was all the time well understood that no actual delivery of grain was intended, but that the deals were to be closed in the settlement of differences. If the contract in September was in good faith for delivery of oats in May, 1891, why did plaintiff, Scott, close out the transaction in October, 1890, seven months before the contract time for delivery? Why not wait till May and give Trotter's estate

a chance to comply with the alleged contract of sale? If the September contract for delivering oats in May following was what it purported to be, on what authority did Scott close it out in October? He testified that Trotter, during his illness in September, sent him word to *attend to his trade.* He seems to have construed this to mean to close it out in October and settle differences. If the oats deal was a legitimate transaction, then clearly Scott acted without authority in closing it out in October and submitting to a demand to pay the difference between the price of May oats then, and at the time the alleged contract was entered into.

The judgment was manifestly for the wrong party, and will be reversed. All concur.

JOHN W. ANDREWS, Respondent, v. THOMAS E. WARDELL, Appellant.

Kansas City Court of Appeals, November 6, 1893.

1. **Damages:** LOSS ON SERVICE OF CHILD: NURSING: ASSUMING FACT: INSTRUCTIONS. The instructions in this action by the father to recover for loss of services, etc., of his minor son, resulting from personal injury occasioned by defendant's negligence, are reviewed and *held*, not subject to the objections:

   (1) That they advised the jury to take into their account every day till the minor arrived at his majority, with no allowance for sickness, death or other casualty.

   (2) That they allowed plaintiff to recover as nurse the same amount he was making in the mines.

   (3) That their assuming as a fact a period of total disability renders them fatally erroneous.

Appeal from the Macon Circuit Court.—HON. ANDREW ELLISON, Judge.

AFFIRMED.

Dysart & Mitchell, for appellant.

(1) Under the most favorable decisions for the plaintiff by the courts of this state, his instruction No. 4 on the measure of damage, was erroneous and prejudicial to the defendant. These are the recent cases of *Buck v. Railroad*, 46 Mo. App. 555; and *Schmitz v. Railroad*, 46 Mo. App. 380. The latter case overrules the decision in *Mathews v. Railroad*, 26 Mo. App. 75, as to deducting board from the amount of services. The plaintiff's fourth instruction conclusively presumes that his son would live till he arrived at twenty-one years of age, and would continue in the service of plaintiff, free from sickness and other casualties. (2) Plaintiff's fourth instruction allowed plaintiff to recover as a nurse the same he was making in the mines, and also for the nursing of his wife at the same time, without any proviso in their finding that two nurses were necessary, and without any evidence as to the value of the wife's services. There was no attempt to prove the value of the wife's services, and it was error to include them in the instruction. *State v. Howell*, 97 Mo. 105; *Stone v. Hunt*, 94 Mo. 475; *Nichols v. Jones*, 32 Mo. App. 657; *Martinowsky v. City of Hannibal*, 35 Mo. App. 70; *Schmitz v. Railroad*, 46 Mo. App. 395. (3) Plaintiff's fourth instruction assumes that his son was not able to go back to work until June, 1891, and that he was totally disabled from the fourteenth of August, 1890, until the eighteenth day of June, 1891, which was a fact in issue.

It is only where a fact is admitted, or the case has been tried upon the theory of its assumption, or the

evidence is conclusive and uncontradicted, that the truth of it may be assumed by an instruction.

Even then the practice has been condemned and criticised. *Schmitz v. Railroad*, 46 Mo. App. *supra*, pp. 392 and 393, and cases cited.

Ben Eli Guthrie, for respondent.

(1) Plaintiff's instruction, numbered 4, is not subject to criticism offered by appellant. It does not presume that the boy would live till he was twenty-one years old. "The diminished value, if any, of his time and labor" was the question submitted to the jury by the instruction. There was nothing to prevent their considering the probability of loss of time and death, in fact the instruction invited such considerations, as it required them to consider the value of such time and labor, if the boy had not been hurt, so as to arrive at the diminished value, if any, and such value would depend, as the jury is presumed to know, on the loss of time and the probability of death. Juries are presumed to have common sense and to act on the common experience of men. What is more, in this case, the jury seem most clearly to have acted on common experience and made a large deduction for lost time and the probability of death. The case of *Buck v. Railroad*, 46 Mo. App. 568, does not support appellant's contentions; but on the contrary is against it. *Frick v. Railroad*, 75 Mo. 542, 546. (2) If the fourth instruction is subject to the criticism that it allowed the plaintiff to recover as a nurse the same he was making in the mine, it would seem that the jury did not so understand it, or the verdict would have been larger. From the size of the verdict it is very doubtful if the jury allowed anything for nursing. There is no necessary contradiction between the plain-

tiff's instructions and the defendant's. The latter was simply a limitation on the former, and the jury seems to have followed it, regard being had to the small verdict. (3) Plaintiff testifies that he took the boy back to the pit to work before he was able to work with his arm in a sling, and this he repeats two or three times. This was the eighteenth of June, 1891. Defendant did not even cross-examine him in the matter. On June 15, 1891, Dr. Rowland testifies he was not able to go to work, and he was not cross-examined on that point. There was no attempt to contradict the fact that he went to work before he was able. There is no intimation in the whole record that he was able to work before June 18. Therefore the instruction is not subject to the criticism of appellant that it assumes a fact in issue.

GILL, J.—Defendant Wardell owned and worked a coal mine in Macon county, and among the hands there employed was Michael Andrews, a fifteen-year-old boy, the son of plaintiff. On the fourteenth day of August, 1890, the plaintiff's said minor son was badly injured by the falling of a large stone from the roof of the mine. His right arm between the shoulder and elbow experienced what the doctors called a "compound complicated fracture," being crushed and broken into some eight pieces. The boy was laid up on account of the injury some ten months, and the evidence tended to prove that his capacity for future labor was much impaired.

This action was brought by John Andrews, the boy's father, for loss of services, etc., based on the negligence of defendant in failing to provide a reasonably safe place for the minor to work in the said mine.

On a trial before a jury, plaintiff had a verdict for $700, but pending the motion for a new trial he remitted

$200, and judgment was entered for $500, and from this defendant appealed.

The principal matters of which defendant complains in this appeal relate to the court's instruction as to the measure of damages. Plaintiff's fourth instruction, and which the court gave, told the jury that if they found for the plaintiff, then in asssessing his damages they should take into consideration the money laid out and expended in doctor's bills, drugs and medicines, also labor and loss of time of plaintiff and his wife in nursing the said Michael, and they should also consider the value of the time and labor of the said Michael from the date of said injury, August 14, 1890, to June 18, 1891, when he went back into the pit, and the diminished value, if any, of the time and labor of said Michael after said June 18, by reason of said injury until the said Michael shall attain the age of twenty-one years. Coupled with the foregoing, the court, at defendant's request, gave the following instruction: "No. 6. If the jury allow plaintiff for nursing his son while injured, the allowance should not exceed what a competent nurse would have cost, or a sufficient number of nurses would have cost for the time the same were necessary."

Defendant's learned counsel assails plaintiff's instruction above quoted on three separate grounds, neither of which we think are well taken. In the first place, it was said in oral argument, and as well asserted in brief, that by this instruction the jury were advised to take into their account every day till the minor arrived at his majority, with no allowance for sickness, death or other casualty such as might overtake the plaintiff's son and thereby deprive the father of his services. We do not think the instruction is subject to this criticism. The jury was in substance directed to consider the diminution of the value of the boy's services from the time

he resumed work for his father until he arrived at the age of twenty-one years. This called first for the ascertainment of the probable net value of the services, sickness, loss of time, etc., considered, had the boy not been injured, and then what proportion of this had been lost by the minor's being maimed and disabled. The evidence tended to show that his laboring capacity had been impaired at least one-half. In arriving now at the net value of the son's services in future years and until his majority, any reasonable man would naturally consider the probable intervention of sickness and other disabilities, or even death, as lessening the gross value of such future services. And, in the absence of convincing proof to the contrary we should assume the jury so treated the matter in fixing these damages. If it affirmatively appeared here, as in the *Schmitz case* (46 Mo. App. 396), that the jury in fixing the damages had made no allowance for sickness of the minor or probable loss of time from other causes, or for the possibility of death during the boy's minority, then defendant would have cause to complain. But no such complaint is proper here when this record is considered. The amount of this verdict, in the light of the testimony, argues strongly that the jury were quite conservative and that they did not allow plaintiff any exaggerated amount for loss of future services.

Plaintiff's fourth instruction is next objected to, because it is said, "it allowed plaintiff to recover as a nurse the same he was making in the mines," etc. While now this instruction, when read alone, may be a little dubious on this point, yet when it is considered along with defendant's number 6, there is no ground to believe the jury was misled. We have quoted above defendant's No. 6 along with plaintiff's No. 4, and a mere reading the two together is complete answer to defendant's objection. The jury are there told, in terms not

to be mistaken, that in allowing plaintiff for nursing his son the amount "should not exceed what a competent nurse would have cost or a sufficient number of nurses would have cost, for the time the same were necessary."

The further objection that instruction number 4 assumes that plaintiff's son was not able to go back to work until June 18, 1891, is also more technical than substantial. While it would perhaps have been better practice to have left it to the jury to find just when the boy was able to resume work, and thereby fix the time of total disability, yet, since the evidence in this regard is all one way and without conflict, and as there is convincing proof that the lad resumed work even before he had fully recovered, we feel warranted in holding that if there was error it was entirely harmless.

As to the amount of the verdict, there is no just cause to complain. Speaking for myself, I would say that this testimony would warrant even a larger verdict than the one returned by the jury.

We discover no reason for disturbing this judgment and it is, therefore, affirmed. All concur.

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HANNAH L. BUREN, Appellant, v. W. W. HUBBELL, *et al.*, Respondents.

Kansas City Court of Appeals, November 6, 1893.

1. **Covenant for Title:** INCUMBRANCES. A covenant against incumbrances is one *in presenti* and if broken at all, the breach occurs at the moment of its creation.

2. ———: ———: LEASE: DAMAGES. A lease of coal under land in an incumbrance and the entire damages are at once to be ascertained and assessed to the convenantee, according to the injury arising from its continuance.

3. ———: ———: MORTGAGE: DAMAGES. Where the incumbrance, such as a mortgage, etc., is of a kind that does not affect the possession of the covenantee, he cannot have more than nominal damages, until he extinguishes the incumbrance and thereby suffers substantial damages.

4. ———: ———: BREACH: EXTINGUISHMENT: RUNNING WITH LAND. Where the incumbrance, such as a lease, easement, etc., is not removable, the breach caused thereby extinguishes the covenant and renders it incapable of running with the land and converts it into a mere right of action, which can be taken advantage of only by the covenantee, or his personal representative, and neither passes to the heir, devisee or subsequent purchaser.

5. ———: ———: MEASURE OF DAMAGES. Where a covenant against incumbrances is broken by the existence of a lease of the coal under the land conveyed, but the coal remains in the natural state and its value is not affected or changed by the lease and the covenantor, while the coal is in such condition, tenders a release from the lessee, the damages are merely nominal

Appeal from the Grundy Circuit Court.—HON. LUTHER COLLIER, Special Judge.

AFFIRMED.

A. H. Burkeholder and *Geo. Hall*, for appellant.

(1) The first count in appellant's first amended petition distinctly sets out in plain and concise language each of the covenants contained in the deed made by the respondent, the intermediate conveyances to appellant and the breaches thereof, and states a cause of action against the respondent unless the same is barred by limitation. *State ex rel. v. Carroll*, 63 Mo. 156. (2) The demurrer admits the truth of all facts pleaded. *Butler et al. v. Lawson*, 72 Mo. 227–248; *Plant and Seed Co. v. Michel Plant and Seed Co.*, 23 Mo. App. 579. (3) The covenants of quiet enjoyment, for further assurance and of warranty, run with the land, for the protection of the owner in whose time the breach occurs, passes with the estate by descent,

by purchase, or voluntary or involuntary alienation. Rawle on Covenants [5 Ed.], sec. 213, and notes; *Ib.* sec. 204 and note, secs. 210 and 212; *Jones v. Whitsett*, 79 Mo. 188; *Allen v. Kennedy*, 91 Mo. 324. (4) The covenant of seizen is a covenant of indemnity, runs with the land if the covenatee takes any estate however defeasible, or if possession accompanies the deed, and enures to the benefit of the grantee upon whom the loss falls at the time of the substantial breach. Rawle on Covenants [5 Ed.], sec. 211, and notes; Revised Statutes Missouri, 1889, sec. 2402; *Dickson v. Desire's Adm'r*, 23 Mo. 151–159; *Chambers Adm'r v. Smith Adm'r*, 23 Mo. 174–178; *Maguire v. Riggin*, 44 Mo. 512; *Jones v. Whitsett*, 79 Mo. 188; *Allen v. Kennedy*, 91 Mo. 324; *Wyatt v. Dunn*, 93 Mo. 459. The same rule applies to covenants against incumbrances. Rawle on Covenants [5 Ed.], sec. 212 and notes. (5) The statute of limitation does not begin to run until a substantial breach of the covenants occurs. *Chamber's Adm'r v. Smith's Adm'r*, 23 Mo. 174–178; *Cole v. Kimball*, 52 Ver. 639; *Richard v. Butt*, 57 Ill. 38; Revised Statutes, 1889, sec. 2402; *Walker v. Deaver*, 79 Mo. 664; *Dickson v. Desire's Adm'r, supra; Winningham v. Pennock*, 36 Mo. App. 688; *Barnhart v. Hughes*, 46 Mo. App. 318; *Wyatt v. Dunn, supra; Blondeau v. Sheridan*, 81 Mo. 545; *Priest v. Deaver*, 23 Mo. App. 276; *White v. Stevens*, 13 Mo. App. 240; Revised Statutes, 1889, sec. 6774. (6) Respondent could not compel appellant to accept his after-acquired title after suit was brought, the option was in plaintiff to accept or not, and the court erred in giving respondent's instruction number 1, and in refusing to give appellant's instruction number 2. Rawle on Covenants [5 Ed.], secs. 258, 264, 265; *Ib.*, secs. 179, 182, and notes; *Ib.*, secs. 184, 185, and notes; *Nichol v. Alexander*, 28 Wis. 130; *McInis v. Lyman*, 62 Wis.

191; *Tucker v. Clark*, 2 Sandifer Ch. (N. Y.) 96; *Burton v. Reed*, 20 Ind. 93; *Noonan v. Isley*, 21 Wis. 146; 2 Story's Equity Jurisprudence, sec. 717*a*. Where there is a partial failure of title or a partial breach of the covenants, the covenantee is entitled to recover in proportion to the loss sustained. Rawle on Covenants [5 Ed.], sec. 186 and notes; *Ib.* sec. 187, and notes; *Lawless v. Collins Exr.*, 19 Mo. 480, Op. 483; *Guthrie v. Pagsley*, 12 Johns (N. Y.) 126; *Tanner v. Livingston*, 12 Wend. (N. Y.) 83; *Lockwood v. Sturdevant*, 6 Conn. 373; *Morris v. Phillips*, 4 Amer. Dec. 323.

J. H. Shankltn, and *Harber & Knight*, for respondent.

(1) The "principal error" of which appellant complains is the action of the court in sustaining respondent's demurrer to the first count of the petition. There was no error in the action of the court in this respect because: *First.* The lease previously made to the Grundy County Coal Company was a breach of the covenant against incumbrances, broken as soon as made, and did not run with the land, and the "right of substantial recovery accrued" to the said John G. Hemley, at once, upon the delivery of the deed by respondent to him, and was not designable. *Kellogg v. Malin*, 50 Mo. 496; *Kellogg v. Malin*, 62 Mo. 429; *Taylor v. Heitz*, 87 Mo. 660; *Blondeau et al. v. Sheridan*, 81 Mo. 545–552; Rowle on Covenants, secs. 202 and 212, inclusive [5 Ed.]; Tiedeman on Real Property, sec. 853; Rawle on Covenants, 251; *Huyck v. Andrews*, 10 Am. St. 432. *Second.* There was no assignment of the cause of action by said John G. Hemley, to plaintiff, or those under whom she claims. Authorities, *supra.* The measure of damages was the value of the incumbrance at the date of the Hemley deed,

without reference to the value of the land or purchase money. *Henderson v. Henderson*, 13 Mo. 152, 153; *City of St. Louis v. Bissell*, 46 Mo. 157; *Kellogg v. Malin*, *supra*. (2) The defendant having secured a deed from the Grundy County Coal Company to plaintiff, of all rights under the lease of April 16, 1873, and thereby perfected plaintiff's title to the lands described in the second count of plaintiff's petition, defendant had the equitable right to compel plaintiff to accept said title and to recover only nominal damages on the second count of her petition, and the court did not err in refusing instruction numbered 2, asked by appellant, and in giving instruction number 1, asked by respondent. *Reese v. Smith, Ex. of Smith*, 12 Mo. 344.

SMITH, P. J.—This is a petition with three counts, the first of which alleges, in substance, that on the fifteenth of March, 1880, the defendant by deed conveyed to John G. Hemley certain real estate containing five and one-half acres, and in the granting clause thereof were the words "grant, bargain and sell;" the deed also contained an express covenant that the defendant was lawfully seized of an indefeasible estate in fee in said premises, and that he had good right to convey the same; that the said premises were free and clear of any incumbrances done or suffered by him or those under whom he claimed, and also the further covenant that the defendant, his heirs and assigns would forever, by said deed, warrant and defend the title to said premises unto the said Hemley, his heirs and assigns, against the lawful claims and demands of all persons whomsoever; that afterwards, on the fourteeth day of May, 1881, the said John G. Hemley by like deed conveyed said real estate to one Samuel H. Bagley; that afterwards on the seventeenth day of

May, 1881, the said Bagley by like deed conveyed said real estate to the plaintiff. For a breach of the covenant contained in the said deed, from defendant to the said John G. Hemley, it is further alleged in said first count that on the fourteenth day of April, 1873, the defendant made, executed and delivered to the Grundy County Coal Company, a corporation, a deed by which he sold and conveyed to said coal company "all the coal and other mineral lying and being under the surface of said real estate so conveyed with the right and privilege to enter said real estate beneath the surface thereof and to mine, utilize and bring to the surface and keep and dispose of absolutely all coal and mineral under the surface and in said real estate at any time within forty-nine years from said date; that there was a large and valuable vein of coal under the entire surface of said real estate, and that afterwards the said coal company under said written instrument, and in violation of the covenants contained in said deed from the defendant to said Hemley and to *plaintiff as assignee*, by force entered upon said real estate and removed therefrom portions of said vein of coal of the value of $1,600, in which amount plaintiff was damaged, etc.

In the second count of the petition it was alleged that the defendant on the eleventh day of May, 1883, by a deed (containing a similar granting clause and covenants to that made by the defendant to Hemley already stated in the first count) conveyed to the plaintiff a certain piece of real estate containing ten acres; that on the fourteenth day of April, 1873, the defendant executed and delivered to the Grundy County Coal Company an instrument in writing by which defendant sold all the coal lying under the surface of said real estate (this being the same lease that is set forth in the first count, and covers the real estate described in both counts, it is unnecessary to set it out again

here). It was further alleged that said coal company, under said instrument of writing so made to it by defendant, had the right at any time within forty-nine years to enter into the possession of said real estate and dispossess plaintiff of the portion containing coal, etc.; that by reason thereof said coal of the value of $3,000 had become lost to plaintiff, whereby she was damaged, etc.

In the third count it was alleged that, on the eleventh day of May, 1883, the plaintiff purchased of the defendant certain real estate—the same as is described in the second count—which defendant undertook to convey by general warranty deed, but by mistake of the scrivener a different piece was described than that intended; that the plaintiff was delivered the possession of the real estate purchased, and had so continued ever since, making lasting and valuable improvements thereon. The prayer of the count was for a decree reforming the deed according to the intention of the parties thereto, or to require defendant to execute and deliver plaintiff a sufficient deed for the real estate purchased.

The defendant interposed a demurrer to the first count on the ground that it did not state facts sufficient to constitute a cause of action, which was by the court sustained, and the plaintiff refusing to amend, judgment was given accordingly.

The defendant's answer to the second and third counts was, that the said coal company had never entered on said real estate therein described, or in any manner disturbed plaintiff in the enjoyment thereof, and that the coal therein remained undisturbed; that the defendant had secured from said coal company a good and sufficient deed of release of all rights acquired by said company to said real estate, and that the defendant tendered plaintiff a warranty deed con-

veying to plaintiff a fee simple title thereto. There was a prayer that the court compel the plaintiff to accept the deed, and that the suit abate, etc.

There was a trial on the second and third counts, which resulted in judgment in favor of plaintiff for $1, and from which she has prosecuted her appeal.

I. The plaintiff contends that the objection raised by the demurrer that the petition did not state facts sufficient to constitute a cause of action was not well taken, and ought not to have been sustained by the trial court. The defendant, prior to the time of making the deed to Hemley, executed a lease to the coal company for forty-nine years, and this constitutes the alleged breach of the covenant contained in that deed against incumbrances. It is, too, observed that the suit is not by the covenantee, Hemley, in that deed, but by the plaintiff claiming title through the former under a *mesne* conveyance by deed.

It is the well settled law in this state that a covenant against incumbrances is a covenant *in presenti* and is broken the instant it is made. If the covenant is broken at all, its breach occurs at the moment of its creation; it is that a particular state of things exists at that time, and if this be not true, the delivery of the deed which contains such covenant causes an instantaneous breach.

Where the incumbrance is of such a character that cannot be extinguished, such for example as an easement or servitude, an existing lease and the like, in such cases the entire damages are at once to be ascertained and assessed to the covenantee, according to the injury arising from its continuance. But where the incumbrance is a mortgage, judgment or tax lien, and is of a kind that does not effect the possession of the covenantee, he may pay off the same and free the premises. When, therefore, the encumbance is of the

former class, the entire damage should be at once assessed, for there is no way of removing it by purchase while it exists, but in case of an encumbrance of the latter class, the covenantee cannot have more than nominal damages until he extinguishes the incumbrance and thereby suffers substantial damages. It was ruled in *Winningham v. Pennock*, 36 Mo. App. 688, and *Barnhart v. Hughes*, 46 Mo. App. 318, that covenants against this latter class of incumbrances run with the land and remain alive in the hands of a subsequent grantee who may be compelled to extinguish a pre-existing encumbrance, for it is the substantial breach which occurs for which he may sue on the covenant for the damages he has sustained. *Dickson v. Desire's Adm'r*, 23 Mo. 151.

Where the encumbrance is of the former class, the breach extinguishes the covenant and renders it incapable of running with the land. The covenant is turned into a mere right of action which can be taken advantage of only by the covenantee or his personal representative, and neither pass to an heir, devisee, nor subsequent purchaser. *Blandeau v. Sheridan*, 81 Mo. 545; *Kellogg v. Malin*, 62 Mo. 429; *Taylor v. Hutz*, 87 Mo. 545; *Kellogg v. Malin*, 50 Mo. 496. The breach which plaintiff has in her petition alleged, extinguished the covenant, and therefore it was incapable of running with the land. It was merged into a right of action in Hemley, the covenantee, and could not be taken advantage of by a subsequent purchaser claiming by deed from him. The entry by the coal company under the lease constituted no breach of the covenant in question, for, as we have seen, there had been a breach of that covenant committed at the instant the deed was made, which breach had extinguished the covenant by converting it into a new right of action in the cove-

nantee. The right of substantial recovery in this case, which accrued at the instant the deed was made, set the statute of limitations in motion. It inevitably follows from these considerations that the trial court did not err in sustaining the defendant's demurrer to the first count of plaintiff's petition.

II. At the trial, the court, at the instance of the defendant, over the objection of the plaintiff, gave this instruction: "Even though the finding should be for plaintiff, yet if the court find from the evidence that the coal, if any there was or is under said lands at the time of the institution of this suit, and at all times prior, was and now is in its natural state, and that its value, if any it has or had, has not been affected or changed, and further finds from the evidence that on the twenty-third day of November, 1891, defendant received from the Grundy County Coal Company the deed read in evidence releasing and conveying to him the coal and mineral under said lands, and that at said time said coal company released and conveyed to defendant all its interest in said lands and that thereafter and on the twenty-third day of November, 1891, defendant made and tendered the conveyance read in evidence, to plaintiff, then the finding cannot be for plaintiff for more than nominal damages."

The trial court did not err in giving this instruction. There was evidence adduced tending to support its hypothesis. The measure of damages it announces is fully in accord with that declared in *Reese v. Smith*, 12 Mo. 345, where the facts are very much as here. The ruling in that case disposes of this branch of the plaintiff's appeal.

The judgment must be affirmed.—All concur.

ED S. MINER, Appellant, v. NATHANIEL M. TILLEY, *et al.*, Respondents.

Kansas City Court of Appeals, November 6, 1893.

1. **Construction:** COMPUTING TIME: SUNDAY: The general rule is that in computing time within which an act is to be done, the last day, if Sunday, will not be considered; but the rule is otherwise in commercial law.

2. **Mechanics' Liens:** TIME OF COMMENCING SUIT: SUNDAY. An action to enforce a mechanics' lien commenced not within ninety days, but within ninety-one days after the filing of the lien, is commenced too late, though the ninetieth day was Sunday. Following *Patrick v. Faulk*, 45 Mo. 312, against the general and apparently better rule.

Appeal from the Harrison Circuit Court.—HON. PARIS C. STEPP, Judge.

AFFIRMED.

D. J. Heaston, for appellant.

The defendants claimed that the petition was not filed in time and, therefore, the action could not be maintained. The mechanics' lien was filed in the circuit clerk's office, May 9, 1892, and the petition was filed August 8, 1892—91 days. R. S. 1889, sec. 6720: "All actions under this article shall be commenced within ninety days after filing the lien." By reference to the almanac it will be seen that August 7, 1892, was Sunday; hence, under the provisions of the statute, sec. 6570, 4th clause: "The time within which an act is to be done shall be computed by excluding the first day and including the last, if the last day be Sunday it shall be excluded." Hence, this petition was filed in time. *Hodson v. Banking House*, 9 Mo. App. 24; *Beaudeau v. The City, etc.*, 71 Mo. 392; *Reynolds v. Railroad*,

64 Mo. 70; *In re Woolridge*, 30 Mo. App. 612; *State ex rel v. Tucker*, 32 Mo. App. 620; *White v. Hayworth*, 21 Mo. App. 439; *Lewis v. Schwen*, 15 Mo. App. 342; *Spencer v. Haug* (Minn.), 47 N. W. 794 and 45 Minn. 231; *Johnson v. Merrett*, 52 N. W. 863; *Frankovitz v. Ireland*, 34 Minn. 403, and 26 N. W. 225; *Carothers v. Wheeler*, 1 Oregon, 194; *John V. Farwell Co. v. Mathies* (C. C. D. Minn.), 48 Fed. Rep. 363; *Backer v. Pyne* (Ind.), 30 N. E. 21; *Porter v. Pierce* (N. Y. App.), 24 N. E. 281; *Hicks v. Nelson* (Kan.), 25 Pac. 565; *Street v. U. S.* 133, U. S. 299; 10 Sup. Ct. R. 309; 1 R. S. 1889, sec. 737.

A. F. Woodruff, for respondent.

SMITH, P. J.—The statute, section 6720, requires that all actions under Article 1, Chapter 102, shall be commenced within ninety days after the filing of the lien.

This was a suit on a mechanics' lien, and was not commenced within ninety days, but within ninety-one days after the filing of the lien. The ninetieth day after the filing of the lien was Sunday, so the suit was not commenced on that but on the next day, which was one day beyond the statutory period of ninety days in which the suit was required to be commenced. The trial court, on the motion of the defendants, for this reason dismissed the suit.

It is contended by the plaintiff that the ruling of the court was erroneous, because the statute itself expressly provides that the time within which an act is to be done shall be computed by excluding the first day and including the last; if the last day be Sunday it shall be excluded. Sec. 6570.

In computing the time within which an act is to be done, the last day, if Sunday, shall not be considered.

It being *non dies*—no day at all at law—it does not enter into the computation, so that to give the party the benefit of the entire statutory period to which he is entitled, he necessarily must have the whole of the next succeeding day in which to perform the act required. And this view is sustained by many adjudicated cases in this and other states. *Hodson v. Banking House*, 9 Mo. App. 24; *Beaudeau v. The City, etc.*, 71 Mo. 392; *Reynolds v. Railroad*, 64 Mo. 70; *In re Woolridge*, 30 Mo. App. 612; *State ex rel. v. Tucker*, 32 Mo. App. 620; *White v. Hayworth*, 21 Mo. App. 439; *Lewis v. Schwen*, 15 Mo. App. 342; *Spencer v. Haug* (Minn.), 47 N. W. 794, and 45 Minn. 231; *Johnson v. Merett*, 52 N. W. 863; *Frankovitz v. Ireland*, 34 Minn. 403, and 26 N. W. 225; *Carothers v. Wheeler*, 1 Oregon, 194; *Farwell & Co. v. Mathies* (C. C. D. Minn.), 48 Fed. Rep. 363; *Hacker v. Pyne* (Ind.), 30 N. E. 21; *Porter v. Pierce* (N. Y. App.), 24 N. E. 281; *Hicks v. Nelson* (Kan.), 25 Pac. 565; *Street v. U. S.*, 133 U. S. 299; 10 Sup. Ct. R. 309; 1 R. S. 1889, sec. 737.

The rule is otherwise in commercial law. The statute in relation to bills of exchange and negotiable promissory notes, section 737, provides as regards the presenting for payment or acceptance and of presenting and giving notice of the dishonor of bills of exchange, bonds, promissory notes or other mercantile paper, such holidays shall be treated and considered the same as the first day of the week, commonly called Sunday, and all bills of exchange, bonds, promissory notes or other mercantile paper falling due on any such holiday or Sunday shall be considered as falling due on the next succeeding day, unless such succeeding day be a holiday or Sunday; in such case it shall be considered as falling due the day previous. This statute engrafts an exception on the general rule declared in section 6570, *supra*. It would follow from this as an inevitable corol-

lary that the plaintiff's suit was commenced in time, as it is not taken out of the operation of the general statutory rule by the exception in relation to mercantile paper.

But the supreme court, in *Patrick v. Faulk*, 45 Mo. 312, which is a case quite analagous to this, strangely enough it seems to us, has construed the statutory rule declared in said section 6570 to be restrictive in its effect, so that the first and the last day, when Sunday, must be excluded. According to the ruling there made, the plaintiff's suit was not begun within the statutory time. The correctness of the reasoning and conclusion reached by the learned court in the case may well be questioned. In the light of the authorities already cited, it seems to us that the meaning of the general rule of the statute has been perverted and misconstrued, and that relating to the presenting and giving of notice of the dishonor of merchantile paper misapplied. The latter rule can have no sort of application to the filing of mechanics' liens or the commencement of suits thereon. But since it has been decided to the contrary by the supreme court in the case just cited, it is our bounden duty, under the constitution of the state, to yield our convictions and follow the last rulings of that court wheresoever it may lead.

As the ruling that we are obliged to make on the only question in the case so far presented, is decisive, we need not notice the other questions discussed in the briefs of counsel. It follows that the judgment must be affirmed. All concur.

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S. A. WALKER, Appellent, v. ALEXANDER GOODSILL, Respondent.

Kansas City Court of Appeals, November 6, 1893.

1. **Vendor and Vendee:** MORTGAGE. Purchasing land "subject to" incumbrances without further words of an intention to create a personal obligation will not have the effect to make a personal charge against the vendee: and the land in his hands remains a fund out of which the incumbrances should be discharged in the order of their priorities.

2. ———: ———: VENDEE'S PURCHASE OF JUDGMENT. A mortgagee took the equity of redemption in the mortgaged land subject to incumbrances, which, without the judgment mentioned below, equaled the fair market value of the land, and subsequently bought a judgment against the mortgagor, which was a lien on a part of the land; *held*, the mortgagee as vendee, stood to the payment of the judgment as a stranger, and the mortgagor must answer personally for the judgment to the mortgagee, since the latter assumed no personal relation to it and the primary fund for its payment proved insufficient.

3. **Mortgages:** CONVEYANCE TO MORTGAGEE: MERGER. Where the mortgagor, in recognition of the mortgage, conveys to the mortgagee, and the interest and situation of the parties clearly indicate that there is no intention to let subsequent liens in ahead of the mortgage, no merger will take place, even though the satisfaction of the mortgage be entered and the secured notes be surrendered. The mortgage does not die in every instance of the discharge of the debton

Appeal from the Nodaway Circuit Court.—HON. CYRUS A. ANTHONY, Judge.

REVERSED AND REMANDED.

William C. Ellison, for appellant.

(1) Appellant contends that the expression in his deed: "Subject to prior mortgages, liens, judgments and taxes," refers to such incumbrances as were prior to appellant's mortgage. The respondent was simply conveying his lands to appellant, which appellant held

a mortgage on, subject to prior incumbrances. And the real consideration may be inquired into. *Holt v. Morgan*, 79 Mo. 47; 89 Mo. 617, exact page 622; 22 Mo. App. 448; 49 Mo. 212. (2) Appellant contends that as he in no way assumed the payment of the judgment, the money received on a sale of the land should not be applied on the judgment until the amount of his prior mortgage had been paid. The holder of the judgment, at the time of the deed being made to appellant, could not have enforced the same prior to appellant's claim. In fact, the holder of the judgment, being present when the release of appellant's mortgage was given, expressly announced, so he and respondent both say, that his judgment should in no manner be effected. *Holt v. Morgan, supra;* 2 Washburn Real Property, 113; Devlin on Deeds, sec. 1323; Devlin on Deeds, secs. 1047 and 1051.

T. J. Johnson, for respondent.

The effect of the settlement of December 28, 1891, between Goodsill and Walker, was, that Walker, for the consideration of $17,000, represented in the notes and mortgages, real and chattel, held by him and the firm he represented, purchased Goodsill's chattel property, and his equity of redemption in the real estate conveyed by the deed of that date. He delivered back to Goodsill his notes and mortgages and entered their satisfaction of record, which represented $17,000 paid Goodsill for his chattels and real estate, "subject to all the liens, mortgages and judgments" then subsisting against said real estate as expressed in the deed. He is therefore estopped by the terms of the deed from claiming that any liability remained on Goodsill to pay off or discharge any of the liens then existing against the land in the shape of mortgages, judgments, or taxes, pro-

vided the land was sufficient to pay them, not counting the $17,000 which he paid Goodsill in his (Goodsill's) paper. He stands in this respect just as though he had paid Goodsill $17,000 for the chattel property, and in purchase of this land subject to these debts. *McLeod v. Skiles*, 81 Mo. 595, *loc. cit.* 603–4; *Miles v. Miles*, 6 Oregon, 267; s. c. 25 Am. Rep. 522; *Braman v. Bingham*, 26 N. Y. 483, 489, 494–5; *Freeman v. Auld*, 44 N. Y. 54, 55, 56; *Johnson v. Zink*, 51 N. Y. 333; *Tice v. Annan*, 2 John Ch. 125; *Hartshorn v. Hartshorn*, 2 Green N. J. Ch. 349–356–357; 1 Jones on Mortgs. [2 Ed.], sec. 737; *Cleaveland v. Southard*. 25 Wis. 479; *Brewer v. Staples, et al.*, 3 Sandf. Ch. 579, side p. It is not pretended that by the transaction Walker assumed any liability beyond what the property sold would satisfy, but it is contended that by the transaction the mortgages and this judgment, then being ni force as liens on the land, were *charged upon the land*, and made payable out of it, even if it took it all to do it. It is also the law that where the vendor, in like circumstances, is compelled to pay off an incumbrance, he is entitled to an assignment of it so that he can enforce it against the land on which it was an incumbrance. *Johnson v. Zink*, 51 N. Y. 334–5, opinion 336–7; *Freeman v. Auld*, 44 N. Y. 50; *Hartshorn v. Hartshorn*, 2 N. J. Ch. 349 *loc. cit.* 356–7; *Cox v. Wheeler*, 7 Paige ch. 248 *loc. cit.* 257–8.

ELLISON, J.—Plaintiff bought and had assigned to him a judgment against defendant for a sum amounting to near $2,000. He had an execution issued on this judgment; whereupon defendant filed his motion to set aside and recall said execution. The motion was sustained and plaintiff has brought the case here.

It is sufficient for an understanding of the case as concerns the vital question presented, to say that

defendant was largely indebted to plaintiff and several other persons in sums of various amounts. That he had secured plaintiff by giving him a second mortgage on his real estate and a first mortgage on a lot of personal property. Among defendant's debts was the judgment on which the execution in question was issued. This judgment was *subsequent* to all the mortgages referred to. As the result of some "parleying" and conversations between plaintiff and defendant, the defendant made him a warranty deed to the lands (which were in two counties) covered by the mortgages; those in one county being covered by the lien of this judgment. This deed recited that it was made "subject to prior mortgages, liens, taxes and judgments."

Plaintiff purchased this judgment some time after accepting the deed just referred to. He was probably moved to purchase it by reason of his inability to make a clear title to the lands, which he was selling from time to time. It may be stated from the record with a degree of certainty, that the lands so deeded to plaintiff are not sufficient to pay the amount of his mortgage, and the debts secured by the other mortgages. Excluding the amount represented by plaintiff's mortgage, the lands will satisfy the other incumbrances, including this judgment. The question is, what is the legal effect of the transaction between plaintiff and defendant?

It is quite clear that plaintiff did not take upon himself a personal obligation to pay the prior incumbrances mentioned in the deed by accepting it with the words above quoted incorporated therein. Purchasing land "subject to" incumbrances without further words showing an intention to create a personal obligation will not have the effect to make a personal charge against the vendee. *Hall v. Morgan*, 79 Mo. 47;

Lawrence v. Towle, 59 N. H. 28. A deed with such words of qualification amounts to a sale of the vendor's interest as affected by the incumbrances mentioned. And when those incumbrances are prior conveyances such as mortgages, such deed does no more than convey the vendor's equity of redemption. And the lands conveyed remain the primary fund out of which the incumbrances should be paid. The debts secured by the incumbrances are a charge upon the lands. 1 Jones Mort. sec. 736; *Hancock v. Fleming*, 103 Ind. 533; *Manwaring v. Powell*, 40 Mich. 371. In other words, the lands in the hands of the vendee remain a fund out of which (as between the vendor and vendee) the incumbrances should be discharged or liquidated *in the order in which their priorities may be.* This plaintiff then, as vendee, not having assumed any personal obligation as to this judgment, stands in relation to it as a stranger would, except in so far as it may be affected by its being a charge primarily upon the lands he has purchased. If therefore the lands, at a fair valuation, or sale, are exhausted in discharging the incumbrances which stand prior or ahead of the judgment, defendant, as the judgment debtor, must answer personally. And, as before stated, he can be made to answer to this plaintiff, his vendee, the same as if plaintiff were a third party, since plaintiff has assumed no personal relation to it and the primary fund for its payment proves insufficient.

It is true that plaintiff, holding a mortgage on these lands, took a deed of conveyance, but such deed was made in recognition of his mortgage, the interest and situation of the parties clearly indicating that there was no intention to let subsequent liens in ahead of plaintiff's mortgage. When such is the case a merger will not take place. 2 Devlin's Deeds, sec. 1051; 1 Jones Mortgages, secs. 355, 856, 857, 869. Even though

for some reason there may have been a satisfaction of the mortgage entered. *Ib.* 869. It is however one of the facts appearing in this case that plaintiff not only entered of record satisfaction of this mortgage, but delivered to defendant the notes he held against him. This is not conclusive as to the discharge or annihilation of the mortgage itself. It was necessary to sell the lands and the release of the mortgage was for the plaintiff's benefit to remove an apparent cloud on his title. The release does not overcome the evident intention of the parties as disclosed by the whole transaction, together with the evident vital interest to plaintiff to preserve the integrity of the mortgage as such. The debt represented in the mortgage was satisfied as to this defendant, "But it by no means follows that in all instances of discharge of the debtor the mortgage dies." *Bartlett v. Eddy*, 49 Mo. App. 41, and authorities cited. Also 1 Jones Mortg. 869; *Bowen v. Kurtz*, 37 Iowa 239.

The face of the whole case shows that there was no intention to permit the subsequent judgment in controversy to become a prior lien. In the view we have taken of the case, the authorities cited by defendant are not considered applicable.

The result is that the judgment should be reversed and the cause remanded. All concur.

GEORGE W. JACKSON, Respondent, v. THE CHICAGO, ST. PAUL & KANSAS CITY RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, November 6, 1893.

1. **Evidence:** CONSIDERATION OF DEED, EXPLAINABLE. It was once the view of the courts that the consideration of a deed could not be shown to be different in amount from that stated, and later it was

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held, that while a different amount might be shown, yet a different character of consideration could not be shown; but now it is the holding of nearly all the American courts, that not only the amount of the consideration may be questioned by oral testimony, but the parties are not estopped from showing the character of the consideration to be different from that stated.

2. ———: ———: RECITAL. The considerations of a deed are held to be explainable by parol evidence on the ground that they are to be regarded as mere *recital* and forming *no part of the contract*, and binds the grantor by way of estoppel only that he may not prevent the operation of the deed as a conveyance.

3. ———: ———: CONTRACT. Where the consideration is not a mere inattentive recital of a certain amount of money, common in conveyancing, and the parties will and intended to make the consideration a part of the contract, and affect it with special terms, details and conditions, it binds the parties within the rules of evidence applicable to contracts generally, and, if complete upon its face, it can no more be altered or varied than any other contract.

Appeal from the Nodaway Circuit Court.—HON. CYRUS A. ANTHONY, Judge.

REVERSED.

W. W. Ramsay, *W. A. Blagg*, for appellant.

(1) The trial court should have sustained the objection interposed by the defendant to the introduction of any evidence to sustain the issues presented by the pleadings. It appearing that the petition neither charged fraud, accident or mistake; it further appearing that the written terms of the contract between the parties, were set up in the answer and were admitted, as there plead, by counsel for plaintiff in his statement of the case to the jury, a pure question of law was thereby presented to the court. *Harrison v. McCormick*, 89 Cal. 327; s. c., 23 Am. St. Rep. *loc. cit.* 472. Where parties have reduced their contract to writing, it is conclusively presumed, in the absence of fraud, accident or mistake, that such writing includes the

whole engagement of the parties and the extent and manner of the undertaking. And oral testimony is incompetent to extend, limit or vary such written agreement. 1 Greenleaf on Evidence, sec. 275; *Thompson v. Libby*, 34 Minn. 377; *Gilbert v. Stockman*, 76 Wis. 62; *Hills v. Rix*, 43 Minn. 543; *Burch v. Railroad*, 80 Ga. 297; *Martin v. Taylor*, 52 Ark. 389; *Stanhope v. Swafford*, 80 Iowa, 45; *Bowe v. Dotterer*, 80 Ga. 51; *Johnson v. Flanner*, 42 La. Ann. 522; *Miller v. Dunlap*, 22 Mo. App. 101; *Murdock v. Ganahl*, 47 Mo. 135; *Tracy v. Union Iron Works*, 104 Mo. 193; *Jones v. Shepley*, 90 Mo. 307; *Pearson v. Carson*, 69 Mo. 556; *State v. Hoshaw*, 98 Mo. 358; *Wood v. Murphy*, 47 Mo. App. 539; *Morgan v. Porter*, 103 Mo. 135. (2) It was contended at trial and will be claimed here that, as the consideration clause of a deed has but the force and effect of a receipt which is but *prima facie* evidence of its recital, it is always open to extension, limitation, contradiction or variation by parol evidence. In case of a simple deed, whose sole office is to transfer title, and not to state the terms of a written contract between parties, as in *Laudman v. Ingram*, 49 Mo. 212; *Hollocher v. Hollocher*, 62 Mo. 267; *Fontaine v. Sav. Inst.*, 57 Mo. 552; *McConnell v. Brayner*, 63 Mo. 461. There may be some force in such contention. But these and all similar cases cited and relied upon by plaintiff, it is believed, are instances where the deeds in question did not pretend to set forth the terms and conditions of the contract between the parties. *Hall v. Soloman*, 61 Conn. 476; s. c., 29 Am. St. Rep. *loc. cit.* 219. (3) I call attention to the distinction between a simple deed, whose sole office is to convey title and the written contract in case at bar where these parties expressed in plain, written terms the character, extent and manner of their mutual undertakings. Study this distinction in connection with sections 920, 921, vol. 2, Wharton's Evidence

[2 Ed.] and cases cited. See especially, the case of *Purinton v. Railroad*, 46 Ill. 297; *Morgan v. Porter*, 103 Mo. 135; *Tracy v. Iron Works, supra;* Wharton's Evidence, vol. 2, sec. 1040. (4) I submit that, as these parties aimed and attempted to reduce all of the terms and conditions of their contract to writing, and did prepare and execute such writing, and, in absence of fraud, accident or mistake, which is not even charged in this action, such writing is the only repository of the truth, and that all oral evidence of an entirely different contract should have been rejected. This is surely the law; 1 Greenleaf on Evidence, sec. 275; *Pearson v. Carson*, 69 Mo. 550; *Bast v. Bank*, 101 U. S. 93; *State v. Hoshaw*, 98 Mo. 358; *Wood v. Murphy*, 47 Mo. App. 539.

T. J. Johnston, for respondent.

(1) The suit is not founded on the deed, nor for the enforcement of any provision or stipulation in the deed, but upon the contract made between the parties, the execution of which on plaintiff's part was simply by the execution of the deed. This was the only object and office of the deed, not to contain the terms of the contract, though defendant's agent, who prepared the deed, saw fit to insert part of the terms of such contract in it. (2) The statement of the consideration in a deed is only *prima facie* evidence of the real consideration. "That statement does not preclude other proof, or even parol evidence of the actual consideration, although it may establish a different one in kind or amount from that mentioned in the deed." *Wood v. Bradley*, 76 Mo. 23, 33; 2 *Louther on Dam.* [1 Ed.], 260, 261 and note 2; *Raub v. Barbour*, 11 Cent. Rep. 717; s. c. 6 Mackey, 245; *Wood v. Moriarty*, 4 N. E. Rep. 269; s. c. 15 R. I. 518; *Kirkland v. Woodware Co.* 68

Wis. 34; *Landrum v. Ingram*, 49 Mo. 212; *McConnell v. Brayner, et al.* 63 Mo. 461-5; *Hollicher v. Hollicher, et al.* 62 Mo. 267, 273-4; *Liebke v. Knapp*, 79 Mo. 26-7; *Goodspeed v. Fuller*, 71 Am. Dec. 572-576; Buckley's Appeal, 88 Am. Dec. 468; *Nedvidek v. Meyer*, 46 Mo. 600-602; *Schemerhorn v. Vanderhaden*, 3 Am. Dec. note 306; *McCrea v. Purmort*, 16 Wend 460 *loc. cit.* 471 *et seq*; *Halliday v. Hart*, 30 N. Y. 474 *loc. cit.* 494-5; *Bullard v. Briggs*, 7 Pick. 533; *Villers v. Beaumont*, 2 Dyer, 146; *Thompson v. Thompson*, 68 Am. Dec. 638, 644; 9 Ind. 323; *Dobyns v. Rice*, 22 Mo. App. 448. (3) A deed is not conclusive of everything contained in it. It is not the only evidence of the consideration upon which it is founded; nor is its recital of a particular consideration a bar to proof of another and entirely different consideration. The only limit set by the best authorities is that a party will not be allowed to prove no consideration in order to defeat the grant, or perhaps to prove a consideration of a different quality, as a valuable consideration where a good one is expressed. *Peck v. Vanderberg*, 30 Cal. 23-4-5 and 26; *Rhine v. Ellen*, 36 Cal. 369; *Goodspeed v. Fuller, supra*; *McCrea v. Purmort, supra*; *Garrett v. Steward*, 1 McCord 514; *Rockhill v. Spraggs*, 9 Ind. 30; s. c. 68 Am. Dec. 607; *Miller v. McCoy*, 50 Mo. 214; *Robinius v. Lister* 30 Ind. 142; s. c. 95 Am. Dec. 674; Buckley's Appeal, 48 Pa. St. 491; s. c. 88 Am. Dec. 468 *loc. cit.*; *McConnell v. Brayner, supra.* (4) The purpose of a deed is to pass the title, not to describe the terms upon which the land was sold, or the mode in which payment was, or was to be, made; and whatever he may insert in such deed as to what he received or was to receive for the land according to the prior agreement, may be in accordance with such prior agreement or not; whatever he declares in this regard is not conclusive upon him; but the other part of the agreement may be

proved, as between the parties, by parol, what it was in fact—what the grantee was in fact to give or to do as consideration for the conveyance. *Collins v. Tillon*, 68 Am. Dec. 398-400; s. c. 26 Conn. 368; *Murray v. Smith*, 1 Duer N. Y. 412, affirmed in *Halliday v. Hart*, 30 N. Y. 494; *Beach v. Packard*, 33 Am. Dec. 185; s. c. 10 Vt. 96. (5) There is no question from the authorities, that an additional consideration or an entirely different one than that expressed in the deed may be proved by parol, when not contrary to that which is expressed. *Betts v. Bank*, 1 Har. & Gill, 175; s. c. 18 Am. Dec. 283 *loc. cit.* 286-7; *Dobyns v. Rice*, *supra*; *Nedvidek v. Meyer*, 46 Mo. 600 *loc. cit.* 602; 1 Greenleaf on Evidence [13 Ed.], sec. 285.

ELLISON, J.—This action is for damages caused by the overflow of plaintiff's lands. The cause of the overflow, as alleged, was the failure of defendant to dig and maintain a ditch on the west side of its railway through plaintiff's lands as alleged it agreed to do as a part of the consideration for a deed for right of way which plaintiff executed and delivered to it; such part of the consideration not being mentioned in the deed, and not charged to have been omitted by fraud, accident or mistake. The consideration mentioned in the deed is two hundred and fifty dollars and that "the said railway company is to provide and maintain for the said grantors, one grade farm crossing, and also one underground cattle pass, and to haul and dump thereat all the stone desired by the said George W. Jackson to pave the approaches to said cattle pass, not exceeding four car loads. The grantors are to do the paving, railway company to haul said stone within six months after its railway is regularly running." It was conceded that defendant had complied with the terms thus

expressed in the deed and that unless plaintiff was permitted to prove the agreement to dig and maintain the ditch as additional consideration to that mentioned in the deed, he could not recover. Defendant's counsel thereupon objected to the introduction of testimony, on the ground that the consideration, as thus expressed in the deed, was made a matter of contract complete on its face and could not be altered or added to, in the absence of accident, fraud or mistake. The court overruled the objection, and the trial having resulted in a verdict and judgment for plaintiff, defendant appealed to this court.

The question for decision is whether the consideration as it appears in this deed can be altered, added to, or varied. Ordinarily, the rule undoubtedly is that the consideration in a written instrument may be varied or added to by oral testimony not inconsistent with the terms of the instrument. But a proper disposition of the question here calls for an investigation of the reason for this rule.

It was once the view of the courts that the consideration in a deed could not be shown to be different in amount from that stated. This position was receded from. It was then held by many that while a different amount from that stated might be shown as the real consideration, yet the character of the consideration could not be shown to be different. This position was also overthrown; so that now it may be stated as the holding of nearly all the American courts, that not only the amount of the consideration may be questioned by oral testimony, but the parties are not estopped from showing the character of the consideration to be different from that stated. *Hollocher v. Hollocher*, 62 Mo. 267; *Landman v. Ingram*, 49 Mo. 212. As in the case of *McCrea v. Piermont*, 16 Wend. 460, where the consideration was money it was permitted to be shown to

have been iron. I will remark, parenthetically, that I make no reference here to the fundamental divisions of consideration. As whether when one kind of consideration is stated, as for instance a *valuable* consideration you would be permitted to show a *good* consideration, as natural love and affection.

The reason assigned by these adjudications was that the consideration in a deed is to be regarded as merely *recital* and forming *no part of the contract.* Its binding force upon the grantor is by way of estoppel only that he may not prevent the operation of the deed as a conveyance of the property. As was said by COLLAMER, J., in *Beach v. Packard*, 10 Vermont 96, he must abide by his deed though he never actually receives the consideration. A statement of consideration is not a necessary requisite to the validity of a deed. If it omits to state a consideration it is not evidence that none passed; and does not prevent testimony showing that there was a consideration and, if necessary, what it was. The statement of the amount of the consideration in a deed and the acknowledgment of its payment is no more than a receipt. It is but the statement of a fact, which as before said, is not necessary to the operative effect or validity of the deed as a conveyance of the title. And like a receipt is *prima facie* evidence of what it states, but by no means conclusive; except that there was *some* consideration. *Gulley v. Grubbs*, 1 Marsh. J. J., 387; *McCrea v. Piermont, supra*; 1 Herman on Estoppel, 761.

It works no estoppel as to amount or character, for, as before stated, it is mere recital and is not *intended to be contractual*, or to be relied upon as between the parties. And the same principle applies to ordinary written contracts. Bishop on Contracts, sec. 75. In order that estoppel may be applied to a recital "it must be shown that the object of the parties was to make

the matter recited a fixed fact, as the basis of their action." *Hays v. Askew*, 6 Jones (N. C.) 63; Bigelow on Estoppel, 382, 383. An *intention* should appear that the statement was not to be questioned. Bigelow on Estoppel, 382.

This then being the reason of the rule, can it be successfully maintained that the parties, *if they so will and intend*, cannot make the consideration a part of the contract and affect it with special terms, details and conditions so as to bind the parties within the rules of evidence applicable to contracts generally? I think it cannot be so maintained. All written contracts, complete and definite, speak for themselves and they cannot be altered, added to or subtracted from by oral testimony. This is an absolute rule of evidence adopted from motives of policy and founded upon the experience of mankind in dealing with the "slippery memory" of men. So that it must follow that if parties express their contracts, as to the consideration, in terms which show that it is a contract, then, if complete upon its face, it can no more be altered or varied than any other contract. Whenever the statement of the consideration leaves the field of mere recital and enters into that of contract, as shown by the intention of the parties to be gathered from the instrument, it is no longer open to contradiction. This may be illustrated: Suppose the consideration in a deed should be: "In consideration of the sum of one thousand dollars to be paid to me in beef cattle weighing not less than one thousand two hundred pounds each, at five cents per pound." Would it be contended that a consideration thus expressed contractually could be orally shown to be other than as expressed? So in the case of *McCrea v. Piermont*, *supra*, where, though the consideration was expressed to be in money, it was held that it could be shown to be iron of certain quality; if the fact had been the

reverse of this and the consideration had been stated to be of a certain quality and quantity of iron, would it have been competent to show, in contradiction of this, that it was to be a given sum of money? I think not. For the reason that the mere statement of a certain amount of money, without more, as the consideration, is inattentive recital, common in conveyancing, of a consideration in most general use. It is thus spoken of in the books and adjudications. But when this common form of expression, thus reciting a sum of money, the medium of exchange which is generally used as the consideration, is departed from and an unusual provision inserted, thereby evidencing a contractual intention, it is as binding as any other contract.

But money may also be contracted for as the consideration in a written contract. And when the intention to so contract is disclosed by the written instrument, no other or additional consideration can be shown. Thus, suppose that the consideration was stated in the written contract to be "one thousand dollars to be paid as follows: Two hundred dollars in six months from date without interest; four hundred dollars in twelve months from date with three per cent. interest; and four hundred dollars in eighteen months from date with ten per cent. interest from maturity; all to be secured by a mortgage" on certain described property. Could it be shown in contradiction to this that the consideration agreed upon was fifty head of cattle or an additional sum of money? Clearly not. The reason is that it has been contracted otherwise by the parties and that contract has been reduced to writing. Bigelow in his work on Estoppel 471, says (italics mine) that "parties may by *apt terms of contract* bind themselves not to question an acknowledgment of receipt of money. * * * And that an acknowledgment of receipt of money or commodities, *not clearly agreed in the writing to be*

binding as a contract, or as the basis of a contract, is not generally conclusive evidence between the parties of the facts stated, is well settled." If the rule of law was not as I have herein endeavored to show it to be, one would be utterly unable to protect himself against faulty memory, misunderstanding, or intentional perjury.

What I have said is amply supported by standard authority. Thus it is said that "Where the recital involves a contract, it estops; if it does not involve a contract, it operates only as a unilateral general admission, and is open to explanation." 2 Wharton Ev., sec. 1040. Again that author says, in speaking of the right to vary a written document by parol evidence, that the question depends upon whether the terms therein are uttered dispositively, *i. e., for the purpose of disposing of rights*, or non-dispositively, not for the purpose of disposing of rights. In the former case, "new ingredients cannot be by parol added to such documents." Sec. 920, 921. So in *Puriton v. Railroad*, 46 Ill. 297, where the right of way for a railroad company was contracted for by an instrument reciting, "that in consideration of the company having undertaken to build their road, and in consideration of one dollar, and building a side-track on some portion of the tract," the land owner was to convey the right of way. It was held that parol evidence was not admissible to add to this consideration the further stipulation that the company should fill up a sluice on the land west of the line of road.

It is clear that the deed in this case shows a contract between the parties as to the consideration, and that therefore, in keeping with the foregoing views, such consideration cannot be varied, altered, or added to by oral testimony. Defendant's objection should have been sustained. The judgment is reversed. All concur.

JOHN W. DEAN, Respondent, v. THE OMAHA & ST. LOUIS RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, November 6, 1893.

Railroads: KILLING STOCK: ADJOINING PROPRIETOR. A railroad cannot, in an action for killing stock, avail itself of the fact that the stock came upon its right of way, over the premises of an adjoining proprietor, unless such premises were enclosed by a lawful fence.

Appeal from the Nodaway Circuit Court.—HON. CYRUS A. ANTHONY, Judge.

AFFIRMED.

Theodore Sheldon, for appellant.

(1) Plaintiff, being not an adjoining nor next adjoining land owner, and his cattle being in Campbell's corn-field without license, is not within the class of persons protected by the double damage act. *Ells v. Railroad*, 55 Mo. 278; *Ferris v. Railroad*, 30 Mo. App. 122; *Berry v. Railroad*, 65 Mo. 172; *Harrington v. Railroad*, 71 Mo. 384; *Johnson v. Railroad*, 80 Mo. 620; *Peddicord v. Railroad*, 85 Mo. 160; *Carpenter v. Railroad*, 25 Mo. App. 110; *Smith v. Railroad*, 25 Mo. App. 113. (2) Campbell, not plaintiff, was the adjoining proprietor. *Johnson v. Hoffman*, 53 Mo. 504; *Donnell v. Harshe*, 67 Mo. 170; *Linderbower v. Bently*, 86 Mo. 515; *Hamerick v. Castleman*, 23 Mo. App. 481.

E. A. Vinsonhaler for respondent.

The second point is without merit, as shown by the authorities cited to sustain it. The adjoining field from which the cattle came upon the defendant's road, although cultivated, *was not enclosed.* The cattle

escaped from plaintiff's pasture over a fence that Campbell says was poor. It was not a lawful fence. From that point there was no fence, no obstruction, until they reached the railroad. Even conceding that Campbell was in exclusive possession of the corn field, yet it was not enclosed. There was no fence around it. The Ferris case has no application here. *Board v. Railroad*, 36 Mo. App. 151, 153; *Jackson v. Railroad*, 43 Mo. App. 324; *Young v. Railroad*, 39 Mo. App. 52–56; *Duke v. Railroad*, 39 Mo. App. 105–109; *Emerson v. Railroad*, 35 Mo. App. 622–629; *Peddicord v. Railroad*, 85 Mo. 160.

This, I think, disposes of the second and third points.

GILL, J.—This is a suit for double damages under Section 2611, Revised Statutes, 1889, wherein it is charged that defendant railway company failed to maintain a lawful fence along its tracks where the same passed through plaintiff's farm, and by reason thereof, twelve head of cattle owned by him escaped on to the defendant's right of way and were run over and killed by its engine and cars. Plaintiff recovered below in the sum of $768.00, double the value of the stock killed, and the defendant has appealed.

I. Defendant's main contention here is, that plaintiff ought not to recover on the evidence because he is not shown to be such an adjoining proprietor as was intended to be protected by the statute. The facts, as disclosed by the evidence, are these: Plaintiff's farm lies along the line of defendant's road and on both sides thereof. The course of the railroad is from south to north, leaving about fifteen acres east of the railroad and some one hundred and fifty acres on the west side of defendant's right of way. That lying on the west was used as a pasture, while

the fifteen acres east of the railroad was cultivated in corn by one Campbell as Dean's tenant. Along the northern boundary of Dean's farm, bordering the fifteen acres as well as the pasture, there was a public road running east and west. The cattle escaped in the night-time from the pasture; went upon the public road, thence east across the railroad until they got to the fifteen acre tract; here they left the wagon road and passed through the said fifteen acres and on to the defendant's right of way where they were run over and killed by a passing train. The evidence satisfactorily shows that Campbell's corn field through which the cattle passed on to the railroad was unfenced; and it was quite as clearly proved that defendant's fence next to said corn field was badly out of repair and wholly unfit to turn stock. The cattle passed on to the right of way over an old broken-down gate, or over the dilapidated inferior fence—which, it is not certain, nor is it material.

Now the point is made, as already suggested, that as Dean had rented the land east of the railroad to Campbell he was as to it a stranger, was not its proprietor; and, invoking the rule announced in some of the cases that the statute is intended for the protection of the adjoining proprietor, it is claimed that Dean cannot recover. But the position of the learned counsel is not maintainable under the facts of this case. Assuming that Campbell and not Dean was the adjoining proprietor of the land from which the cattle went upon the track and yet there is no defence to this action. If the land east of the railroad and over which the cattle passed had been enclosed by a lawful fence, then as to outside third parties it would be immaterial whether or not the railroad had fenced its right of way, for under such circumstances the fence of the adjoining proprietor would as to outside parties stand in lieu of a

fence by the railroad company. If however the company failed to maintain a proper fence along its right of way where it passes through the lands of an adjoining proprietor, "they omit so to do at their peril, if the field be not enclosed with a lawful fence and cattle get into the field and from the field go upon the road and are killed by a passing train." *Berry v. Railroad*, 65 Mo. 175, 176. The above distinction is clearly made by numerous decisions in this state. *Emmerson v. Railroad*, 35 Mo. App. 629; *Duke v. Railroad*, 39 Mo. App. 107; *Board v. Railroad*, 36 Mo. App. 153; *Jackson v. Railroad*, 43 Mo. App. 325.

Other points in counsel's brief have been considered but we find in none of them any substantial reason for reversing this judgment. The instructions properly declared the law of the case, and under the facts as they were found by the jury, the judgment was clearly for the right party and will be affirmed. All concur.

H. MARKS, Appellant, v. DAVID A. TURNER, *et al.*, Respondents.

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Kansas City Court of Appeals, November 6, 1893.

1. **Appellate Practice:** WHEN JUDGMENT AFFIRMED. When an answer contains a valid defense, the preponderance of the evidence sustains its allegations, the instructions are a clear declaration of the law and the verdict is for the defendant, the duty of the appellate court is to affirm the judgment.

2. **Evidence:** PAROL TO SHOW WHO WAS LESSOR. Where a written lease left it doubtful whether a corporation or its directors were the lessee and obligor to pay rent, it was proper to admit parol evidence to show that the writing was understood to be the obligation of the corporation and not that of the directors as individuals.

Appeal from the Buchanan Circuit Court.—HON. HENRY M. RAMEY, Judge.

AFFIRMED.

Eugene C. Zimmerman, Samuel S. Shulll, John T. Michau for appellant.

(1) The lease was executed by the defendants personally and they alone were bound. A corporation cannot execute a lease or bond except by its seal and countersigned by its president or secretary. *Land Co. v. Jeffries*, 40 Mo. 360. (2) If a lease, as in this case, be not executed by the principal, still the sureties who signed may be held liable. *Land Co. v. Jeffries, supra.* If the pretended agent fails to get his principal bound by the lease, himself will be liable therefor. *Lapsley v. McKinstry*, 38 Mo. 245 and *Einstein v. Holt*, 52 Mo. 340, in which WAGNER, J., says, "I find no authority holding anybody bound who does not sign." (4) Where nothing in instrument shows the character in which one signs, it will be presumed he is a principal, and to remove such presumption or to justify parol evidence to remove it, there must be something in connection with the signer's name or in the instrument to indicate the position of the signer with reference to the capacity in which he signed. All the cases where parol evidence has been introduced are where in connection with his name the signer has added the words, agent, superintendent, manager or an equivalent. (5) This lease is not good as an obligation of the corporation, hence even if the signers did not intend to bind themselves they are bound. Somebody must be bound. Defendant's refused instructions should have been given. *Land Co. v. Jeffries, supra; Lapsley v. McKinstry, supra.*

Vories & Vories for respondent.

(1) "Where the contract is so drawn that it is doubtful on its face whether the parties really intended that the agent or his principal should be personally bound, parol evidence is now let in to show what their intention really was." *Smith v. Alexander*, 31 Mo. 193; *Klosteman v. Loos*, 58 Mo. 190-294; *Ins. Co. v. St. Mary's Sem.*, 52 Mo. 480; *McClellan v. Reynolds*, 49 Mo. 312; *Musser v. Johnson*, 42 Mo. 74; *Shutz v. Bailey*, 40 Mo. 69; *Turner v. Thomas*, 10 Mo. App. 352; *Siegler v. Fallon*, 28 Mo. App. 299; *Hartzel v. Crumb*, 90 Mo. 629. (2) "When the matter is uncertain on the face of the instrument, parol evidence is admissable to explain ambiguity." Authorities cited above. (3) No express authority is necessary to authorize lease so as to bind a corporation. *Ins. Co. v. St. Mary Sem.*, *supra*; *Bank v. Gilstrap*, 45 Mo. 419; *Preston v. The M. & P. L. Co.*, 51 Mo. 43; *Musser v. Johnson*, 42 Mo. 74.

GILL, J.—Plaintiff sued the defendants, Turner, Wilcox, Maxwell, Bigham and Mider, for rent of a store-room, basing the action on a certain written lease alleged to have been executed by said defendants. Defendants interposed the following answer: "The defendants come now and answering the complaint of the plaintiff say, that at the time of the execution of the lease sued on, the St. Joseph Fruit and Produce Exchange was a corporation duly organized under the laws of the state of Missouri; that the defendants consitituted the first board of directors thereof; that the defendants executed said lease sued on, as said board of directors and in behalf of said corporation and not in their individual capacity; that the plaintiff well knew at the time said lease was executed, that said lease was the obligation of said corporation and not of these defend-

ants; that the defendants never as individuals occupied said premises so leased, nor received any benefits under the terms thereof, as individuals. That said lease sued on is not and never was the obligation of these defendants."

On a trial by jury there was a verdict and judgment for defendants, and plaintiff appealed.

There is little to be said on this appeal. The answer contains a valid defence, the evidence by a decided preponderance sustains the allegations of the answer, the court's instruction is a clear declaration of the law on the facts, and upon this the jury rendered a verdict in defendants' favor. Our duty then is clearly to affirm the judgment.

To put the case most strongly for plaintiff, here was a written instrument which left it in doubt as to who was the lessee and obliger to pay rent, whether it was the corporation, "The St. Joseph Fruit and Produce Exchange," or these defendants in their individual capacity. Under such circumstances, the trial court permitted defendants to prove by parol evidence that when the writing was made it was understood to be the obligation of the corporation and not that of the defendants as individuals; that though their names appeared signed to the contract of lease, they yet signed for an on behalf of the corporation of which they were the managing directors, and that all parties interested so understood it at the time.

The face of the lease, indeed, was almost convicing proof that the contracting parties were understood to be Marks on the one side and the corporation on the other. The lease reads: "That H. Marks has this day rented to the *St. Joseph Fruit and Produce Exchange* the store room, etc., and * * * * * * for the use and rent thereof the *said company* hereby agrees to pay the said Marks," etc.

The authorities cited in brief of counsel for defendants fully sustain the admissibility of the parol evidence to show what was the intention of the parties when the lease was signed.

Finding no error in the record, the judgment is affirmed. All concur.

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RICHARD E. TURNER, Appellant, v. BERNARD PATTON, Respondent.

Kansas City Court of Appeals, November 6, 1893.

Pleading: SPECIAL TAX BILL: SUFFICIENCY OF PETITION.—A petition on a special tax bill, which alleges the making of the bill, its contents with dates thereof, its assignment, its filing and that defendant owns the lot described therein is sufficient.

Appeal from the Buchanan Circuit Court.

REVERSED AND REMANDED.

Huston & Parrish, for appellant.

The statute provides what the petition shall contain. Revised Statutes, 1879, sec. 4784, p. 955. The petition and each count thereof states—(1) The making and delivery of the tax bill. (2) The tax bill is copied in full in each count, giving date and contents thereof. (3) Assignment. (4) Filing of the same with the petition. (5) That defendant owns the lot described and against which the lien is sought to be enforced. This was sufficient, and stated a cause of action, and the court erred in sustaining the demurrer, and in rendering judgment thereon against the plaintiff, and the cause should be reversed. *Adkins v. Railroad*, 35 Mo. 632–651; *Hunt v. Hopkins*, 66 Mo. 98–102.

Joseph P. Grubb, for respondent.

SMITH, P. J.—This is a suit founded on two separate tax bills—one for grading a street under the provisions of section 1406, Revised Statutes, and the other for grading sidewalks under the provisions of section 1405, Revised Statutes.

The petition contained two counts, in each of which is alleged: (1) the making of the tax bill, (2) the contents in the tax bill with the dates thereof, (3) the assignment, (4) the filing of the same, and (5) that the defendant owns the lot described and against which the lien is sought to be enforced.

The defendant in the circuit court interposed a demurrer to the petition on the ground that neither count thereof stated facts sufficient to constitute a cause of action, which was by the court sustained and judgment given accordingly, and from which the plaintiff has appealed.

The defendant has not favored us with a brief. Our attention has not been called to any specifie objection to the petition. It seems to us that under the provisions of section 1407, Revised Statutes, it is sufficient. As far as we can discover, it meets every requirement of that section. *Hunt v. Hopkins*, 66 Mo. 98.

It results that the judgment of the circuit court must be reversed and the cause remanded. All concur.

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JAMES DUNCAN, Respondent, v. GEO. W. KIRTLEY, Appellant.

Kansas City Court of Appeals, November 6, 1893.

1. **Evidence**: MAKER OF PROMISSORY NOTE. The maker of a promissory note, which is free from ambiguity, cannot be permitted by oral testimony to shift the responsibility of his positive promise to a corporation, of which he is the agent.

2. **Bills and Notes**: CORPORATION OR AGENT, MAKER. *Arguendo*, as the corporation could not be held on the note, its name not being thereon disclosed, the agent is liable.

Appeal from the Buchanan Circuit Court.—HON. A. M. WOODSON, Judge.

AFFIRMED.

Casteel & Haynes, for appellant.

(1) If there is any ambiguity in a contract in writing or a promissory note, in the description of the person upon whom the responsibility of the note should rest, and for whose benefit the contract was made, parol evidence is admissible to afford an explanation thereof. *Bank v. Bank*, 5 Wheat. 327; *Metcalf v. Williams*, 104 U. S. 665; *Smith v. Alexandria*, 31 Mo. 103; *Schultze v. Bailey*, 40 Mo. 69; *Musser v. Johnson*, 42 Mo. 74; *Ins. Co. v. St. Mary's Seminary*, *supra*; *Ferris v. Thom*, 72 Mo. 446. (2) Between the immediate parties to a bill or note, parol evidence is admissible to show that the instrument was, to the knowledge of the parties, intended to be the obligation of the principal and not of the agent, and that it was given and accepted as such. Meachem on Agency, page 287, sec. 443; *Brockway v. Allen*, 17 Wend. 40; *Metcalf v. Williams*, *supra*; *Haile v. Peirce*, 32 Md. 327; *Kean v. Davis*, 21 N. J. L. 683; *Means v. Swormstead*, 32 Ind. 87; *McClellan v. Reynolds*, 49 Mo. 312.

Samuel S. Shull and *John T. Michau*, for respondent.

(1) If an agent sign a negotiable note with his own name and disclose on face of note no principal, he is personally bound. The party so signing must have intended to bind somebody, and no promisor but himself

appearing, it must be construed as his note. Daniel on Negotiable Instruments [3 Ed.] sec. 305. (2) Parol evidence can never be admitted to exonerate an agent who has entered into a written contract in which he appears as principal, even though he should propose to show that he disclosed his agency and mentioned the name of his principal at the time of executing the contract. Same section cited above, and cases cited in note 2. (3) A negotiable note is a courier without luggage whose countenance is its passport. No evidence is admissible to charge any person thereon unless his name is disclosed on the instrument itself. Daniel on Negotiable Instruments, sec. 303; *Sparks v. Transfer Co.*, 104 Mo. 531.

GILL, J.—This is a suit on a negotiable promissory note, in the usual form, wherein defendant Kirtley promised one day after date to pay to plaintiff, Duncan, or order, the sum of $247.95, with eight per cent. interest, etc. Defendant filed his answer, which was in effect an admission that he signed the note, but claimed that he did so for and on behalf of the "Dearhorn Milling Company," a corporation, whose authorized agent he was and to whom the plaintiff sold some wheat; that plaintiff took the note fully understanding that the same was the obligation of the Milling Company and not that of the defendant, etc.

The court on motion of the plaintiff struck out the defendant's answer and entered judgment for the plaintiff for the reason that the matter set out in said answer constituted no defense. Defendant appealed.

The question to be decided is this: Will the maker of a negotiable promissory note be allowed to defeat an action thereon by showing *aliunde*, the note, that although the instrument appears on its face to be his individual promise, yet with the knowledge of the

payee he executed the paper as the agent of another and was not therefore bound. We think this cannot be permitted, and therefore approve the action of the lower court in striking out defendant's answer and entering judgment for plaintiff.

While many authorities can be found holding it proper to solve an ambiguity appearing on the face of a written instrument, by letting in extraneous evidence to prove who in fact was intended to be held, I have yet to discover a case where the maker was allowed to shift the responibility of his positive promise in the manner here attempted. The case of *Marks v. Turner* (*ante*, 650) was one of those where outside evidence was deemed proper to clear up such an ambiguity. That was a suit on a written lease which on its face purported to be made by the "St. Joseph Produce Exchange," a corporation, and the said corporation on the face of the paper agreed to pay the rent to Marks, etc. In that case the defendants were permitted to show that although their names appeared signed to the lease they were the directors and managing officers of the principal corporation and it was on its account they signed the instrument. But in the case at bar there is no ambiguity. The note in suit is an ordinary negotiable instrument carrying on its face an absolute promise by defendant Kirtley to pay. There is nothing, within the four corners of the instrument, even to suggest that it was not the positive promise of Kirtley, individually. This is a clear case where it is attempted by parol evidence to set aside one instrument and create in its stead another.

It must be conceded that the "Milling Company" (for whom the defendant claims in his answer to have made the note) could not be charged by the instrument sued on. *Sparks v. Dispatch, etc., Co.*, 104 Mo. 531; *Keck v. Sedalia Brewing Co.*, 22 Mo. App. 187. The

rule is "that no party can be charged as principal upon a negotiable instrument unless his name is thereon disclosed." 1 Daniel on Negotiable Instruments, sec. 303 [4 Ed.] In *Sparks v. Dispatch, etc. Co. (supra)* the plaintiff sought to hold the defendant on three negotiable notes made to Sparks and signed by the individual name of Jackson, defendant's president. The trial court permitted the plaintiff to show by parol evidence that the notes signed by Jackson in his individual name were intended as the obligations of the defendant company. But the supreme court, in an exhaustive opinion by GANTT, P. J., held this error, and decided that no recovery could be had on such notes in a suit against the Transfer Co., that the evidence which tended to take from the notes the name of one maker and substitute another and different person was improperly admitted. By reference to the court's opinion in that case, beginning at page 541, there will be found a full discussion of the authorities and legal principles involved, and to save space here we shall content ourselves with this simple citation. It furnishes a complete answer to the brief of defendant's counsel in this case.

Reasoning then from the base of the law as declared in the foregoing, it must be clear that as the Milling Company cannot be held on the note that was executed by defendant Kirtley in his own name, then defendant himself must be liable; for the principle is well understood, that if the agent sign a note with his own name and discloses no principal which can be bound, then the agent is himself liable thereon. 1 Daniel Negotiable Instruments [4 Ed.], sec. 305.

Judgment affirmed. All concur.

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THE STATE OF MISSOURI, Respondent, v. MERRITT S. ARNOLD, Appellant.

Kansas City Court of Appeals, November, 1893.

Appellate Practice: FILING MOTION FOR NEW TRIAL. The motion for a new trial must be filed within four days after the rendering of the judgment, or the appellate court will not consider it, or any errors or exceptions committed or taken during the trial.

Appeal from the Clay Circuit Court.—HON. JAMES M. SANDUSKY, JUDGE.

AFFIRMED.

W. J. Courtney and W. H. Woodson, for appellant.

R. F. Walker, Morton Jourdan, for respondent.

(1) The record in this case discloses the fact that the motion for new trial was not filed within the statutory period of four days. The defendant having failed to file his motion in time, neither it, nor any errors alleged to have occurred during the trial, nor any exceptions to the same, can be considered here. Revised Statutes, 1889, sec. 2243; *State v. Brooks*, 92 Mo. 542; *State ex rel. v. Mason*, 31 Mo. App. 211. (2) This being true, the case must be determined upon the record. The information, following the language of the statute, clearly charges the offense of which the defendant stands convicted. The judgment should, therefore, be affirmed and the law permitted to take its course.

SMITH, P. J.—The defendant was tried and convicted by the circuit court of Clay county for the crime

of petty larceny. From the judgment against him he has appealed.

The record in this case discloses the fact that the motion for new trial was not filed within the statutory period of four days. The verdict was returned and the judgment rendered against defendant in this case on the twenty-ninth day of October, 1891, and the motion for new trial was filed on the fourth day of November, of the same year. It is absolutely necessary that the motion be filed within four days after the rendering of the judgment. The defendant having failed to file his motion in time, neither it, nor any errors alleged to have occurred during the trial, nor any exceptions to the same, can be considered here. Revised Statutes, 1889, sec. 2243; *State v. Brooks*, 92 Mo. 542; *State ex rel. v. Mason*, 31 Mo. App. 211.

And since there appears no errors upon the face of the record the judgment of the circuit court must be affirmed. All concur.

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JAMES WILKINSON, Respondent v. METROPOLITAN INSURANCE COMPANY, Appellant.

St. Louis Court of Appeals, November 7, 1893.

1. **Justice's Courts:** SUFFICIENCY OF CAUSE OF ACTION. A statement of the cause of action, filed before a justice of the peace, must be held to be good, if it is sufficiently specific to advise the defendant of the nature of the claim, and to bar another action thereon.

2. **Practice, Appellate:** NON PREJUDICIAL ERROR. The plaintiff was permitted to testify to a material matter which was also proven by another witness, and there was no contrary evidence. *Held*, that error in the admission of the plaintiff's testimony, owing to his being an incompetent witness, should not be held prejudicial under these circumstances.

Appeal from the St. Louis City Circuit Court.—Hon. Daniel D. Fisher, Judge.

Affirmed.

James M. Lewis, for appellant.

(1) A statement filed in a justice's court, to be sufficient, must advise the defendant of the nature of the claim, and be sufficiently specific to be a bar to another action. The statement will be insufficient if it does not state the facts upon which the demands against the defendant is founded. *Brashears v. Stock*, 46 Mo. 221; *Swartz v. Nicholson*, 65 Mo. 508; *Iba v. Railroad*, 45 Mo. 469; *Razor v. Railroad*, 73 Mo. 471; *Butts v. Phelps*, 79 Mo. 302; *Hill v. St. Louis Ore and Steel Co.*, 90 Mo. 103. (2) Where one of the original parties to a cause of action in issue and on trial is dead, the other party to such contract or cause of action will not be permitted to testify to any fact which he would not have been permitted to testify to at common law. Revised Statutes, 1889, sec. 8918; *Stanton v. Ryan*, 41 Mo. 510; *Ring v. Jamison*, 66 Mo. 424; *Chapman v. Dougherty*, 87 Mo. 617; *Butts v. Phelps*, 79 Mo. 303; *Williams v. Edwards*, 94 Mo. 447; *Ashbrook v. Letcher*, 41 Mo. 369; *Lafayette Building Association v. Kleinhoffer*, 40 Mo. App. 388; *Soeding v. Bonner & Zollner Iron Co.*, 35 Mo. App. 349. (3) The disability, as a witness, of one of the original parties to a contract or cause of action in issue and on trial, where the other party is dead, and the survivor is a party to the suit, is co-extensive with every occasion where such instrument or cause of action may be called in question. *Chapman v. Dougherty*, 87 Mo. 617; *Meier v. Thieman*, 90 Mo. 433; *Berry v. Hartzell*, 91 Mo. 132.

Wm. C. and *Jas. C. Jones*, for respondent.

(1) The statement filed before the justice was sufficient. Revised Statutes, 1889, sec. 6138; *Iba v. Railroad*, 45 Mo. 469; *Razor v. Railroad*, 73 Mo. 471; *Węese v. Brown*, 102 Mo. 300; *Butts v. Phelps*, 90 Mo. 670; 13 American and English Encyclopedia of Law, pp. 648, 649; 11 American and English Encyclopedia of Law, pp. 319, 320; Bacon on Benefit Societies, 250; Cooke on Life Insurance, ch. 4., secs. 58, 63, 64. (2) The evidence of Wilkinson was properly admitted. Revised Statutes 1889, sec. 8918; *Moore v. Lowe*, 44 Vt. 561; *Cole v. Shurtleff*, 41 Vt. 311; *Bank v. Scofield*, 39 Vt. 590; May on Insurance, sec. 117; *Bank v. Eccleston*, 48 Md. 145; *Titus v. O'Connor*, 18 Hun. 373; *Cheney v. Pierce*, 38 Vt. 527; *Woodrow v. Mansfield*, 106 Mass. 112; *Fulkerson v. Thornton*, 68 Mo. 468. (3) Even though there was error in the admission of Wilkinson's testimony, the other evidence in the case being wholly uncontradicted, is amply sufficient to sustain the verdict. May on Insurance, sec. 117; also other authorities cited under first point.

BIGGS, J.—This action originated before a justice of the peace. The plaintiff filed the following statement: "Plaintiff states that on or about the ninth day of December, 1889, he, as the employer of one Ashley Roberts, did insure the said Ashley Roberts with the said company defendant in the sum of $196, which is evidenced by their policy number 5,362,931, which is herewith filed and made part of this petition, for which insurance he, the said Wilkinson, plaintiff herein, did pay all premiums due on the life of said Roberts up to the time of his death, which occurred in the month of July, 1891. That said company, defendant herein, is indebted to the said Wilkinson for and

on account of the insurance on the life of said Roberts in the sum of $196, for which amount the plaintiff prays judgment and his costs herein."

There was a judgment for the amount of the policy before the justice, and also in the circuit court. The defendant by successive appeals has brought the case here for review, and it seeks to have the judgment reversed for the reasons: (1) that the statement is insufficient, in that it fails to allege that plaintiff had an insurable interest in the life of the assured; (2) that the court erred in permitting plaintiff to give testimony in his own behalf touching a material issue.

It is alleged in the statement that, at the time the insurance was procured, Roberts was the servant of the plaintiff. Whether the master has an insurable interest in the life of his servant we need not decide, for the statement is good without an averment of an insurable interest. The rule is that a statement filed before a justice of the peace must be held to be good, if it is sufficiently specific to advise the defendant of the nature of the claim, and to bar another action thereon. *Iba v. Railroad*, 45 Mo. 469; *Weese v. Brown*, 102 Mo. 300. Here the statement shows that the cause of action is based on an insurance policy issued by the defendant; the policy is filed with the statement; the name of the assured is given, likewise the date of the policy and its number. These averments were sufficient to advise the defendant of the nature of the claim, and they would bar another action on the same policy by the plaintiff.

Against the objections of the defendant the court permitted the plaintiff to testify that the policy was issued for his benefit; that he paid the premiums; and that at the time the insurance was procured, and also at the time of the death of Roberts, the latter owed to him a sum in excess of the amount of the insurance.

Whether the plaintiff was a competent witness to prove the facts stated by him, the members of the court are not agreed. The terms of the policy are very unusual. The contract of insurance does not purport on its face to have been made with any particular person, and no one is named as the beneficiary. By the fifth clause in the policy the beneficiaries are confined to the personal representatives, wife or blood relatives of the assured, or to any other *lawful* beneficiary. This makes the question presented a very close one, which we prefer not to pass on, as the judgment ought to be affirmed regardless of the correctness or incorrectness of the ruling of the circuit court. The plaintiff introduced another witness who testified to a conversation between the plaintiff and Roberts about the time the policy was issued, in which Roberts admitted that he owed the plaintiff, and he said that the only chance the latter had of getting his money was to insure his (Roberts) life for the amount of the indebtedness.

Assuming that the court committed error in permitting the plaintiff to testify, we ought to affirm the judgment on the testimony of the other witness, as there was no countervailing evidence. Section 2303 of the Revised Statutes of 1889 provides that "The supreme court or courts of appeals shall not reverse the judgment of any court, unless it shall believe that error was committed by such court against the appellant or plaintiff in error, and materially affecting the merits of the action."

Therefore, the judgment of the circuit court will be affirmed. All the judges concur.

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WILLIAM J. GRAY, Appellant, v. ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Respondent.

St. Louis Court of Appeals, November 7, 1893.

1. **Practice, Appellate:** APPEAL FROM ORDER GRANTING NEW TRIAL. When an appeal is taken from an order granting a new trial, this court is not restricted to the reason assigned by the trial court for the order, but will affirm the ruling of that court, if it finds any of the grounds assigned in the motion for new trial sufficient.

2. **Common Carriers:** MEASURE OF DAMAGES. Before a common carrier can be held for special damages accruing from loss or injury to goods in transit, it must be shown that such special damages were contemplated by him and the consignor at the time of the shipment, and that he, the carrier, had notice of the special circumstances leading to such damages when the goods were received for transportation. And *held*, that the information communicated to the carrier in this case was too general and vague to constitute such notice.

3. ———: ———. *Held*, in the course of discussion, that, in the absence of stipulations limiting his liability, a carrier who delivers goods injured during transit is responsible for their market value at the point of destination in the condition in which they were received, less their market value in the condition in which they were delivered and the freight rates earned for their carriage; or, in cases of reparable injuries, for all the reasonable costs and expenses incurred in repairing the injured article, so as to put it in as good condition as when it was received for shipment, and its rental value during the delay in its use caused by such repairs.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL DILLON, Judge.

AFFIRMED.

Ira C. Terry and *Willis H. Clark*, for appellant.

No error prejudicial to defendant was committed in the giving or refusal of instructions. *McPherson v. Railroad*, 97 Mo. 253; *Taylor v. Penquite*, 35 Mo.

App. 389; Redfield on Railways [6 Ed.], sec. 167 and note 1; *Davis v. Railroad*, 89 Mo. 340; *Doan v. Railroad*, 38 Mo. App. 408; *Nave v. Pac. Ex. Co.*, 19 Mo. App. 563; *Witting v. Railroad*, 101 Mo. 631; Sedgwick on Damages, sections 195, 856; Hutchison on Carriers, sec. 773; Schouler on Bailments [2 Ed.], secs. 426, 427; *Railroad v. Ragsdale*, 46 Miss. 458; *Railroad v. Hale*, 83 Ill. 360; *Railroad v. Cobb*, 64 Ill. 128; *Priestley v. Railroad*, 26 Ill. 205; *Railroad v. Railroad*, 71 Pa. St. 350; *Foard v. Railroad*, 78 Am. Dec. 277; *Benton v. Fay*, 64 Ill. 417; *Hydraulic, etc., Co. v. M'Haffie*, 4 Q. B. Div. 670.

H. S. Priest and *H. G. Herbel*, for respondent.

BOND, J.—This action is for damages for injury to a steam shovel carried by respondent from St. Louis to Delta, Mo.

The damages prayed for are: (1) For the delay in the prosecution of certain work contracted to be done by appellant, of which it is alleged respondent had knowledge; (2) Loss of the use of said steam shovel and expenses of repair thereof, and expenses of hire of laborers while it was undergoing repairs, and general loss of profits.

The answer of respondent contains a general denial, and a special defense that the injury to the steam shovel was caused by appellant's conduct in loading same at too great a height to clear a tunnel on respondent's line of railway through which it must pass, and misrepresenting this fact to respondent.

The evidence was conflicting as to the height of the Glenn Allen tunnel, where the shipment was injured. Appellant's evidence tending to show that he was informed by the engineer of the respondent that the height of this tunnel was 16 feet and 7 inches above the

rails, and that he informed respondent's freight agent that the shovel, after being loaded, was only 16 feet and 4 inches above the rail. Respondent's evidence tended to show that the appellant had been told by its engineer that the tunnel was only 16 feet and 5 inches above the rail in height, and that he (appellant) thereafter reported that his shovel, when loaded on the cars, was only 16 feet and 1 inch above the rails.

The evidence of the appellant was that he had an agreement with the general freight agent of the respondent for the shipment of the shovel, and received a bill of lading therefor. In reply to a question as to what information he gave the freight agent the appellant replied: "I told him I had got a contract with the Houck road, and wanted to ship it down, and wanted a special rate, and he gave it to me."

There was no dispute that the shovel was injured by colliding with the upper walls of Glenn Allen tunnel, and that it was delivered in a damaged state. The evidence tended to show that the appellant took his shovel to Cape Girardeau, and, having repaired it, then brought it back to Puxeco cut, where it was employed by him in excavating earth for several months; that it became disabled on October 7th, necessitating its being sent to St. Louis, and, after having been there repaired, it was returned and used by appellant until the completion of his work in January, 1890. The work in which the shovel was used was begun under a contract between appellant and the Cape Girardeau & Northwestern Railway Company, made on April 14, 1890, which provided for the payment to the appellant of seven cents per cubic yard for all "dirt" loaded on cars by him and removed by the company. After operating under this contract more than two months, the appellant made a supplemental contract (under which he completed his work) with

the Cape Girardeau & Southwestern Railway Company, whereby said road became bound to remove four hundred yards of dirt per day on such cars as the appellant should place it. Concerning the making of this contract, the appellant states in re-examination: "It came about in this way; I noticed the first contract didn't bind Mr. Houck to take away four hundred yards per day. I was there some days and didn't handle more than forty or fifty yards, or may be a hundred yards or such a matter. I saw I was out of pocket, and I had either to quit work or else they had to put on more cars to take care of and handle the earth."

The time occupied in the first repairs of the shovel at Cape Girardeau on June 21, 1890, was about two or three days. When it was finally repaired in St. Louis on October 7, 1890, a delay of eighteen and one-half days supervened before it was returned. There was evidence tending to show the costs of these repairs and of the prices paid certain laborers, who were idle during these repairs, by appellant; also the profits which he could have earned during these delays, if his shovel had been employed under the two contracts with the Cape Girardeau & Southwestern Railway Company.

Upon the evidence and instructions, the jury found for plaintiff in the sum of $460. A motion for new trial made by the respondent was sustained by the court, which assigned the following reasons for granting the new trial:

"I am of opinion that the instruction given for plaintiff as to the measure of damages is erroneous. It was the purpose of that instruction to tell the jury to award plaintiff, among other things, the value of the use of the machine while undergoing repairs. But the language used, when carefully considered, does not

confine the jury to the value of the use of the machine, but tells the jury to award plaintiff the damages he suffered by being deprived of the use. This left the jury at liberty to adopt their own view of what constituted plaintiff's loss arising from not being able to use the machine—in fact it gave them no rule at all to guide them in determining what were the elements constituting his legal damages."

The part of the instruction thus referred to stated the rule as to the damages as follows, to-wit:

"*First.* In such sum as they find from the evidence it reasonably cost plaintiff to put said shovel in as good condition as it was at the time defendant received it, and,

"*Second.* If they find that plaintiff had entered upon a contract to do work, and was shipping said shovel to Delta for that purpose, and that defendant's agents knew that plaintiff was shipping said shovel to Delta to be used upon such work, then they will find, as additional damage, the sum plaintiff lost by being deprived of the use of said shovel for the time it was idle while being repaired."

From this action of the court, appellant brings the case to this court under the act of 1891, authorizing an appeal from an order granting a new trial. Session Acts, 1891, page 70.

While the only error now assigned is the action of the trial court in granting the new trial for the reason stated by him in making that order, yet we are not confined to a consideration of that ground alone, but have the right to examine all the grounds stated in respondent's motion for new trial in the light of the record before us; and, if we find that the trial judge should have granted the new trial for any of these reasons other than that given by him, it is our duty to affirm his ruling.

Lovell v. Davis, 52 Mo. App. 342. We think, however, in this case that the reason given by the trial judge was sufficient to authorize the order for new trial. It is obvious from the language of the learned circuit judge in awarding the new trial in this case that, upon further advisement, he had become convinced that the loss of profits averred in plaintiff's petition are not recoverable in this action under the undisputed facts. The evidence of the appellant was uncontradicted that he never gave the agent of the carrier the essential particulars of the contract which he claimed to have with the Cape Girardeau & Southwestern Railway Company, nor any other special circumstances connected therewith; on the contrary he merely stated he "had got a contract," and wanted to ship his shovel, and wanted a reduced freight rate, which was allowed him. Before a carrier can be held for special damages accruing from loss or injury to the goods, it must be shown that such special damages were contemplated by the consignor and carrier at the time of the shipment, and that the carrier had notice of the "special circumstances" leading to such damages when the goods were received for transportation. Whittaker's Smith on Negligence, 288; Beach on Railways, section 948; Deering on Negligence, section 122; *Prewitt v. Railroad*, 62 Mo. 543. In the case at bar there was no information to the carrier of the terms, nature or extent of an existing contract had by the shipper, to which the shovel was to be applied after its delivery, except a vague and general statement made by the consignor that he "had got a contract" and wanted to send his shovel to Delta, Mo. This gave no basis of calculation as to the profits or losses that might arise. Again, the evidence shows that the contract under which the shovel was used was one that yielded no profit, and that the appellant on that account made a

new one about August 14th, 1890, under which he completed his work. There are, therefore, two reasons of fact why the appellant is not entitled to recover for loss of profits in this case: (1) The first contract was abandoned as unprofitable. (2) The succeeding contract (of which the carrier had no notice) was completed and appellant presumably enjoyed its profits. What appellant is entitled to recover in the present action is dependent on the rules governing the general liability of a carrier for goods. In the absence of stipulations limiting their liability, carriers who deliver goods injured during transit are responsible for their market value (in the condition they were received for shipment) at the point of destination, less their market value (in the condition in which they were delivered) and the freight rates earned for their carriage; or, in cases of reparable injuries, for all the reasonable costs and expenses necessarily incurred in repairing the injured article so as to put it in as good condition as when it was received for shipment, including also its rental value during the delay in its use caused by such repairs. Hutchinson on Carriers, section 776; *Priestly v. Railroad*, 26 Ill. 205. On the next trial of this cause, the evidence as to damages should be confined to these limits. As this cause must be retried, we think it is proper to notice the point made by the respondent as to the refusal of its instruction, predicated on the alleged misrepresentation of the appellant as to the clearance height of the shovel after being loaded on the car. The fact as to such misrepresentations was one of the *issues* in the case, and there was some evidence relevant to this issue in the testimony of witness Herring. The court, therefore, erred in refusing the instruction in question; in other respects the case seems to have been correctly tried.

The result is that the ruling of the trial court was proper in awarding a new trial for error in the instructions given, whereby the jury were told to consider other elements of damage than those herein held proper. The judgment of the trial court in awarding a new trial is therefore affirmed, and the cause remanded for such new trial. All the judges concur.

INDEX.

BY BEN ELI GUTHRIE.

2. PRESENTATION OF DEBTS—NOTICE—STATUTE.—The statute contemplates a presentation of claims to the guardian, and when necessary it is the probable duty of the guardian to give notice to creditors to present their demands for adjustment and payment. *Ib.*

3. PREFERENCE AMONG CREDITORS—PAYMENT—MEASURE OF DAMAGES.—The guardian of an insane person cannot prefer the creditors of his wards as his ward could; and his payment of a per cent. on all demands excepts that of plaintiff of which he had notice was a breach of his duty; and the measure of his liability is the per cent. he should have paid plaintiff had he paid all equally and equitabiy. GILL, J., *dissenting*. *Ib.*

4. REMEDY OF PRETERMITTED CREDITOR AGAINST GUARDIAN—MONEY HAD AND RECEIVED—ACCOUNTING.—An action against a trustee for money had and received will lie if the trust is closed, but it is otherwise if there has been no final accounting. But where the estate is exhausted,—practically closed,—equity has a general jurisdiction of the guardian of an insane person whose position and obligation are wholly fiduciary and will direct an accounting and final settlement to determine the amount of his liability. *Ib.*

5. SAME—COMMON LAW—STATUTE—ALLOWANCE FOR SUPPORT—EQUITY—PREFERENCE—EXECUTION—SETTLEMENT—RES ADJUDICATA.

Per Ellison, J., Concurring.

(1) At common law the king as *parens patriæ* had the protection in a peculiar manner of all those who by reason of their inability and want of understanding are incapable of taking care of themselves, and this protection was administered through the chancellor and a committee of the person and estate of the insane person. The first and paramount duty of this protection was to provide for the personal ease and comfort of the lunatic to the exclusion of the payment of his debts.

(2) Under the Missouri statute, the guardian can use his ward's estate for the payment of his debts to the exhaustion of the estate except as it is protected by homestead and exemption laws, and the ultimate maintenance of the ward may fall upon the county.

(3) An allowance cannot, if timely objection be made, be regularly set apart for the support of the lunatic, but if said allowance is made it will protect the guardian.

(4) Such guardian in paying the debts and administering the estate of a lunatic is governed by principles of equity and cannot prefer a creditor, and equity means equality.

RULES GOVERNING PRACTICE

IN THE

KANSAS CITY COURT OF APPEALS.

It is ordered by the Court that the following Rules of Practice in the Kansas City Court of Appeals shall be in force and observed from and after the first day of April, 1885:

RULE 1.—PRESIDING JUDGE. The Presiding Judge shall superintend all matters of order in the Court room and entertain and dispose of all oral motions.

RULE 2.—All motions in a cause shall be in writing, signed by the counsel and filed of record, and no motion shall be argued orally, unless the Court so directs.

RULE 3.—HEARING OF CAUSES. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits, showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—TAKING RECORDS FROM CLERK'S OFFICE. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the library room of the Court, and to no other place, and then they must leave a written receipt therefor, but shall not be retained from the Clerk's office over night.

RULE 5.—DIMINUTION OF RECORDS. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

RULE 6.—CERTIORARI TO PERFECT RECORD. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to the making of the application.

RULE 7.—NOTICES OF WRITS OF ERROR. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—REVIEW OF INSTRUCTIONS ON GENERAL STATEMENT OF EVIDENCE. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the Court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—BILL OF EXCEPTIONS WHEN GENERAL STATEMENT OF EVIDENCE IS ALLOWED BY TRIAL COURT. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the Court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed by him to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—EVIDENCE—BILL OF EXCEPTIONS TO BE ALLOWED, WHEN. If the Court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the Court by which the cause is tried.

RULE 11.—EXCEPTIONS—QUESTIONS TO BE EMBODIED IN BILL. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—DUTY OF CIRCUIT COURT CLERKS IN MAKING TRANSCRIPTS. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause*), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof, but in lieu thereof shall say (*e. g.*): "*Summons issued on the —— day of ——, 188–, executed on the —— day of ——, 188–;*" and if any pleading be

amended the Clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no Clerk shall insert in the transcript any matter touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called by for bill of exceptions.

RULE 13.—PRESUMPTION THAT BILL OF EXCEPTIONS CONTAINS ALL THE EVIDENCE. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in the cause, being that this Court may have before it the same matter which was decided by the court of first instance, it shall be presumed, as matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14.—BILL OF EXCEPTIONS IN EQUITY CASES. In all cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

RULE 15.—ABSTRACT AND BRIEFS TO BE FILED AND SERVED. In all cases the appellant or plaintiff in error shall file with the Clerk of this Court, on or before the day next preceding the day on which the cause is docketed for hearing, five copies of a printed abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision, together with a brief containing, in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent, or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent, or defendant in error, shall, at least eight days before the day the cause is docketed for hearing, deliver to the counsel for appellant, or plaintiff in error, one copy of his brief, points and authorities cited, and such further abstract of the record as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the Clerk of this Court five copies of the same; and the counsel for appellant, or plaintiff in error, may, if he desires, within five days after the service on him of the respondent's, or defendant in error's, abstract and brief of aforesaid, prepare, file and serve a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the Clerk.

RULE 16.—CITING AUTHORITIES IN BRIEFS. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases as well as the number of the volume and the page where

the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and sidepaging shall be set forth.

RULE 17.—APPELLANT'S BRIEF TO ALLEGE ERRORS COMPLAINED OF. The brief on behalf of appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

RULE 18.—PENALTY FOR FAILURE TO COMPLY WITH RULE 15. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15, the court, when the cause is called for hearing, will dismiss the appeal or writ of error, or, at the option of respondent or defendant in error, continue the cause, at the costs of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

RULE 19.—AGREED STATEMENT OF THE CAUSE OF ACTION. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligently present to this Court the matters intended to be reviewed, and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 20.—MOTION FOR REHEARING. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of a cause, and must be founded on papers showing clearly that some question decisive of the cause, and duly presented by counsel in their brief, had been overlooked by the Court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the Court was not called. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite counsel; but no motion for a rehearing shall be filed after the final adjournment of the Court.

RULE 21.—MOTION FOR AFFIRMANCE. On motion for affirmance, under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said law.

RULE 22.—EXTENDING TIME FOR FILING STATEMENTS, ABSTRACTS, ETC. In no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

RULE 23.—ORAL ARGUMENTS. When a cause is called for argument, the appellant, or plaintiff in error, will read the statement of the cause prepared by him; the defendant in error, or respondent, will thereupon read his statement, in each case without comment of any kind. The plaintiff in error, or appellant, will then proceed to argue for a reversal or modification of the judgment of the court below; the defendant in error, or respondent, will answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in this statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

RULE 24.—NOTICE ON MOTION TO DISMISS OR AFFIRM. A party in any cause filing a motion, either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegraph, by letter, or by written notice, and shall, on filing such motion, satisfy the Court that such notice has been given.

Attest:

L. F. McCOY, *Clerk.*

RULES OF PRACTICE

OF THE

ST. LOUIS COURT OF APPEALS.

REVISED OCTOBER 17, 1888.

TO BE IN FORCE NOVEMBER 1, 1888.

RULE 1.—PRESIDING JUDGE. The Presiding Judge shall superintend all matters of order in the Court room.

RULE 2.—MOTIONS. All motions in a cause shall be in writing signed by counsel and filed for record, and no motion shall be argued orally, unless the court so directs.

RULE 3.—HEARING OF CAUSES. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—TAKING RECORDS FROM CLERK'S OFFICE.—Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the law library, and to no other place, and then they must leave a written receipt therefor, but shall return such record to the Clerk's office within five days after taking the same.

RULE 5.—DIMINUTION OF RECORD. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error except by consent of parties.

RULE 6.—CERTIORARI TO PERFECT RECORD. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to the making of the application. The Court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript, when the transcript of the record is formally insufficient.

RULE 7.—NOTICES OF WRITS OF ERROR. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—REVIEW OF INSTRUCTIONS ON GENERAL STATEMENT OF EVIDENCE. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—BILL OF EXCEPTIONS—WHEN GENERAL STATEMENT OF EVIDENCE IS ALLOWED BY TRIAL COURT. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—BILL OF EXCEPTIONS—WHEN GENERAL STATEMENT OF EVIDENCE IS DISALLOWED BY TRIAL COURT. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue or fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given, and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the trial court.

RULE 11.—EXCEPTIONS TO ADMISSION OR EXCLUSION OF EVIDENCE. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—BILL OF EXCEPTIONS IN EQUITY CASES. In causes of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree on an abbreviated statement thereof.

RULE 13.—DUTY OF CLERK IN MAKING OUT TRANSCRIPTS. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken or writ of error is sued out, shall not *(unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the Court of jurisdiction in the cause)*, in making out transcripts of the record for this Court, set out

the original or any subsequent writ, or the return thereof; but in lieu thereof shall say *(e. g.): "Summons issued on the —— day of ——, 188–, executed on the —— day of ——, 188–;"* and if any pleading be amended, the clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no clerk shall insert in the transcript any matter, touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 14.—PRESUMPTION THAT BILL OF EXCEPTIONS CONTAINS ALL THE EVIDENCE. The only purpose of a statement in a bill of exceptions that it sets out all the evidence in a cause being that this Court may have before it the same matter which was decided by the court of first instance, it shall be presumed as matter of fact in all bills of exceptions that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14*a*.—ABSTRACTS IN LIEU OF TRANSCRIPTS WHEN FILED AND SERVED. In those cases where the appellant shall, under the provisions of section 2253, Revised Statutes of 1889, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing, and shall in like time file four copies thereof with the Clerk of this Court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least fifteen days before the cause is set for hearing, and within like time file four copies thereof with the Clerk of this Court. Objections to such complete or additional abstract shall be filed with the Clerk of this Court within five days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the appellant in like time. [*To be in force from and after October 20, 1891.*]

RULE 14*b*.—COSTS FOR PRINTING ABSTRACTS AND RECORD. Costs will not be allowed either party for any abstract filed in lieu of a full transcript under section 2253, Revised Statutes, 1889, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. But in those cases brought to this court by a copy of the judgment, order or decree instead of a full transcript, and in which the appellant shall file in this court a printed copy of the entire record as and for an abstract, costs will be allowed for printing the same. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and, if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. [*To be in force from and after October 20, 1891.*]

RULE 15.—BRIEFS, WHEN TO BE FILED. In all civil cases the appellant, or plaintiff in error, shall file with the Clerk of the Court, at least one day before the cause is called for trial, four copies of a brief, containing: *First.* A clear and concise statement of the pleadings and facts

shown by the record. *Second.* An enumeration in numerical order of the points or legal propositions made or relied on, accompanied by the citation of authorities supporting each proposition. *Third.* If he so elects, an argument supporting each proposition made or relied on.

The appellant, or plaintiff in error, shall also deliver a copy of said brief to the attorney of respondent, or defendant in error, at least ten days before before the day on which the cause is called for hearing, and the respondent, or defendant in error, shall at least five days before the cause is called for hearing, deliver to counsel for appellant, or plaintiff in error, one copy of his brief, points and authorities cited, and such further statement as he may deem necessary, and shall file four copies thereof with the Clerk, at least one day before the case is called for hearing. Counsel for appellant, or plaintiff in error, if he so elects, may reply to such brief, by delivering a copy of his reply to counsel for respondent, or defendant in error, at least one day before the cause is called for hearing. The evidence of the service of such briefs and statements shall be filed with the Clerk before the day of hearing.

RULE 16.—BRIEFS AFTER SUBMISSION. After a cause has been submitted, or has been taken as submitted, no leave to file briefs will be granted, except upon good cause shown. Counsel obtaining such leave will be required to serve a copy of his brief on counsel on the other side, who shall have five days' time after such service to reply to the same. Evidence of such service shall be furnished, as required by the preceding rule.

RULE 17.—CITING AUTHORITIES IN BRIEFS. In citing authorities in support of any proposition it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise the number of the edition, the volume, the chapter, the section, the paging and sidepaging shall be set forth.

RULE 18.—APPELLANT'S BRIEF TO ALLEGE ERROR COMPLAINED OF. The brief filed on behalf of appellant, or plaintiff in error, shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

RULE 19.—PENALTY FOR FAILURE TO COMPLY WITH RULE 15. If any appellant, or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15 the Court, when the cause is called for hearing, will dismiss the appeal or writ of error, or at its discretion continue or reset the cause on proper terms. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

RULE 20.—AGREED STATEMENT OF CAUSE OF ACTION. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the

court thereupon, and the exceptions saved to any rulings, which may intelligibly present to this Court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 21.—MOTIONS FOR REHEARING. Motions for rehearing must be founded upon statements showing clearly that some fact or question decisive of the cause, and duly presented by counsel in their brief, has been overlooked by the Court, or that the decision rendered is in conflict with an express statute or with a controlling decision to which the attention of the Court has not been directed. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite party.

RULE 22.—MOTION FOR AFFIRMANCE. On motion for affirmance, under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said laws.

RULE 23.—ORAL ARGUMENTS. When a cause is called for argument the appellant, or plaintiff in error, will read the statement of the cause prepared by him; the defendant in error, or respondent, will thereupon read his statement; in each case, without comment of any kind. The plaintiff in error, or appellant, will then proceed to argue for a reversal or modification of the judgment of the court below; the defendant in error, or respondent, will answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in the statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

RULE 24.—NOTICE ON MOTION TO DISMISS OR AFFIRM. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party or his attorney of record, by telegram, by letter or by written notice of his proposed proceeding. When said adverse party or his attorney of record resides in the city of St. Louis, such notice shall be given at least twenty-four hours before the time appointed for the hearing of the motion; when the adverse party or his attorney of record resides outside the city of St. Louis, twenty-four hours' additional notice for each one hundred miles shall be given; and in all cases the court will require satisfactory proof that proper notice has been given.

RULE 25.—APPEARANCE OF COUNSEL. The Counsel who represented the parties in the trial court, in any cause coming to this Court, will be held to represent the same parties, respectively, in this Court; but, should other counsel be engaged, they must enter their appearance in writing, the counsel for the appellant, or the plaintiff in error, ten days, and the counsel for the respondent, or the defendant in error, five days, before the first day of the term to which the appeal or writ of error is returnable; and, if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party, to such appearance, be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the Clerk of this Court giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.