CASES DETERMINED

IN THE

ST. LOUIS AND THE KANSAS CITY

COURTS OF APPEALS,

OF THE

STATE OF MISSOURI,

FROM APRIL 29, 1890, TO OCTOBER 28, 1890.

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

VOL. XLI.

COLUMBIA, MO.:
E. W. STEPHENS, PUBLISHER,
1891.

Rec. Feb. 26, 1891.

Printed, Stereotyped and Bound at the
HERALD PUBLISHING HOUSE,
E. W. STEPHENS, PROPRIETOR,
Columbia, Mo.

JUDGES OF THE

ST. LOUIS COURT OF APPEALS.

HON. RODERICK E. ROMBAUER, *Presiding Judge.*
HON. SEYMOUR D. THOMPSON,
HON. WILLIAM H. BIGGS, } *Judges.*

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

JUDGES OF THE

KANSAS CITY COURT OF APPEALS.

HON. J. L. SMITH, *Presiding Judge.*
HON. JAMES ELLISON,
HON. T. A. GILL, } *Judges.*

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

TABLE OF CASES DETERMINED.

TABLE OF CASES CITED.

[NOTE—Every case in which a railway company is a party is indexed in this table under the name "Railroad," and cases in which an insurance company or a bank is a party are frequently indexed under the names "Ins. Co." or "Bank," as the case may be.]

B

C

C

D

E

F

F

G

H

H

I

J

K

K

L

M

R

S

S

T

U

V

W

Y

Z

TABLE OF STATUTES OF MISSOURI CITED.

CASES DETERMINED

IN THE

ST. LOUIS AND THE KANSAS CITY

COURTS OF APPEALS.

MARCH TERM, 1890.

M. D. WELLS *et al.*, Respondents, v. J. W. P. JONES *et al.*, Appellants.

St. Louis Court of Appeals, April 29, 1890.

1. **Bills and Notes:** TRANSFER AS COLLATERAL SECURITY FOR ANTECEDENT INDEBTEDNESS. The transfer of a promissory note as collateral security for antecedent indebtedness does not, without more, constitute the transferee a holder for value.

2. **Corporations:** SUBSCRIPTION OF STOCK PROCURED THROUGH FRAUDULENT MISREPRESENTATION. If one be induced to take capital stock of a corporation by fraudulent misrepresentations by a corporate officer that the entire capital stock had been subscribed and paid for, when in fact but little of it had been thus paid or subscribed for, he can, in the absence of an estoppel, set up the misrepresentation as a defense to an action on a note given by him to the corporation in payment of the subscription, if the holder be not a *bona fide* purchaser for value.

3. ——— : ——— : EFFECT OF INSOLVENCY OF CORPORATION. In an action upon such note by a creditor of the corporation, who is not a purchaser for value, the right of the stockholder to set up such fraud by way of defense is not affected by the insolvency of the corporation; but whether the stockholder could set up the fraud in a direct proceeding against him by creditors of the corporation after such insolvency is left undecided.

Appeal from the Greene Circuit Court.—HON. JOS. CRAVENS, Judge.

REVERSED AND REMANDED.

Thrasher, White & McCammon, for appellants.

(1) The evidence in this case shows such fraud and misrepresentation on the part of the said Thompson Manufacturing Company, in obtaining notes from defendants, as to defeat a recovery on said note by said corporation. The rule, that whatever fraud creates justice will destroy, applies to subscription for capital stock in a corporation. Morawetz on Private Corp. [2 Ed.] secs. 105, 106, 839; Thompson on Liabilities of Stockholders, secs. 142, 143; *Upton v. Tribilcock*, 91 U. S. 45; *Vreeland v. Stone Co.*, 29 N. J. Eq. 190. (2) The notes sued on, having been given in pursuance of a contract for a subscription to the capital stock of the Thompson Manufacturing Company, and the conditions of said contract never having been performed on the part of said corporation, works such a failure of the consideration for said note, as would defeat a recovery on said note by said Thompson Manufacturing Company, the original payee. The corporation would have to show the performance of the condition before it could recover. Thompson on Liability of Stockholders, secs. 186, 190, and cases cited; Morawetz on Private Corp. [2 Ed.] sec. 79; *Haskell v. Worthington*, 94 Mo. 560; Wait on Insolvent Corporations, sec. 608; *Chase v. Railroad*, 38 Ill. 215; *Railroad v. Dunn*, 39 Maine,

595; *Jewett v. Railroad*, 10 Ind. 539; *Railroad v. Croswell*, 5 Hill, 383. (3) The note sued on having been given to said Thompson Manufacturing Company, in part payment for capital stock of said corporation, and no other consideration, was wholly without consideration, under section 933, Revised Statutes of Missouri, 1879, as between the makers and original payee. R. S. 1879, sec. 933, p. 170; 1 Dan. Neg. Inst., secs. 198, 808; *Pelts v. Long*, 41 Mo. 533; *Parsons v. Randolph*, 21 Mo. App. 353; *Downing v. Ringer*, 7 Mo. 585; *Hunt v. Nickerbocker*, 5 Johns. 327. (4) The note having been transferred by the Thompson Manufacturing Company to respondents, as collateral security for a pre-existing debt, without any new consideration to support the transfer, respondents are not innocent purchasers, or holders of said note, for value, and hold the same subject to all the equities and defenses, existing against the original payees of said note. *Goodman v. Simonds*, 19 Mo. 106–117; *Brainard v. Reavis*, 2 Mo. App. 490; *Feder v. Abrahams*, 28 Mo. App. 457; *Ryan v. Chew*, 13 Iowa, 589; *Bank v. Barber*, 56 Iowa, 550; *Bone v. Tharp*, 63 Iowa, 223; *Stalker v. McDonald*, 6 Hill (N. Y.) 93; *Bank v. Franklin*, 55 N. Y. 235; *Ins. Co. v. Church*, 81 N. Y. 218. (5) This proceeding is an action at law, commenced before a justice of the peace, to recover against the maker on a promissory note, and is not in any sense, in form or legal effect, a proceeding by a creditor of a corporation against a stockholder, for his unpaid subscription for stock of said corporation. And respondents' only right to recover in this cause, if they have any, is as assignees of the note sued on.

Frank S. Heffernan and *James R. Vaughan*, for respondents.

The plaintiffs can recover on the note sued on as given for unpaid subscription to the capital stock.

Beck v. Henderson, 76 Ga. 368; *Winston v. Brooks*, 4 Lawyers' Rep., annotated, 507. The note sued on was given for the stock of the Thompson Manufacturing Company. If as between the company and the subscribers for the stock, appellants in this case, there was any fraud which entitled them to rescind the contract of subscription, this should have been done by them before the insolvency of the corporation and the intervention of the rights of the creditors. After debts have been created and the corporation has become insolvent the right of rescission is barred. Cook on Stock and Stockholders, secs. 163, 164. The general rule is, that fraud or mismanagement of the directors as regards corporate affairs, will not constitute a defense to an action founded upon a subscription. Wait on Insolvent Corp., sec. 540; *Chetlain v. Ins. Co.*, 86 Ill. 220; *Honady v. Railroad*, 9 Ind. 263; *Merrill v. Reaver*, 50 Iowa, 404; *Dorris v. French*, 4 H. N. Y. 292; *People v. Logan County*, 63 Ill. 374. The fraudulent representations of the projectors of the company could not affect the subscription or release the subscribers. *Oglevie v. Ins. Co.*, 22 How. (U. S.) 380; *Railroad v. Dudley*, 14 N. Y. 336; *Kelsry v. Oil Co.*, 45 N. Y. 505; *Litchfield v. Church*, 29 Conn. 137; *Graff v. Railroad*, 31 Pa. 489; *Ins. Co. v. Floyd*, 74 Mo. 286-291.

THOMPSON, J.—This action was commenced before a justice of the peace, upon a promissory note of the following tenor:

"$10.00. SPRINGFIELD, MISSOURI, May 19, 1888.

"Four months after date we promise to pay to Thompson Manufacturing Company, or order, ten dollars, for value received, negotiable and payable without defalcation or discount, at the Central National Bank, Springfield, Missouri, with interest at the rate of eight per cent. per annum from date until paid.

"JONES BROS.

"By J. W. P. JONES."

On the back of which note is the following indorsement:

"Pay to the order of M. D. Wells & Co.

"THOMPSON MANUFACTURING CO.

"Per G. A. FRIZZELL, Treasurer."

The circuit court, sitting as a jury, made a finding and rendered a judgment for the plaintiff, and the defendant appeals to this court.

There were no written pleadings. At the trial, one of the defendants, J. W. P. Jones, by whom the note was executed, testified that the only consideration for the note was capital stock of the Thompson Manufacturing Company; that Mr. Frizzell, the secretary and treasurer of that corporation, came to the defendants and wanted them to sign ten notes of ten dollars each for two shares of the capital stock of the corporation; that Mr. Frizzell had the notes all made out, and the certificate of the stock executed and signed and ready to deliver. The witness also testified that Mr. Frizzell, at the time, stated to the defendants that the Thompson Manufacturing Company had then fifty thousand dollars' paid up capital; that said corporation had purchased the Cotton Mill building, so called, in Springfield, Missouri, and was going to use it as a factory for the manufacture of willowware; that the machinery for that purpose had been bought by the company and shipped, and would soon arrive and be put up, and the factory in operation; that the corporation was desirous of closing up all matters concerning its stock; that he, Frizzell, wanted to deliver the certificates, and would take the notes for the same; that it was all right; that others were taking stock in the same way and giving notes for it, and that the factory of the company would soon be running. The witness further stated that, relying upon these representations, he signed the ten notes, each for ten dollars, and all of the same date, payable to the Thompson Manufacturing Company, one

of which was the note in suit. "We signed the notes as Mr. Frizzell requested, and gave them to him, and he gave us the certificate for the two shares of stock of the Thompson Manufacturing Company. I am acquainted with the Cotton Mill building in Springfield, Missouri, before spoken of. Said Thompson Manufacturing Company never did buy the said Cotton Mill building, nor put any machinery in it, nor have any machinery here in Springfield. Said corporation never put up any machinery, nor manufactured anything whatever in Springfield, Missouri, at any time. But, afterwards, said corporation did engage in the mercantile business, and opened, and run for a time, a store or two in Springfield, here, where they sold toys and notions. This mercantile business is the only business ever done here in Springfield by said corporation. They never owned any real estate or machinery here. We, the defendants, never attended any of the meetings of the stockholders or directors of said corporation, and never voted at any such meetings, and never had anything to do with the management of said company, and never knew anything about its business or property, except the statements made to us by Mr. Frizzell, until long after the notes had been signed and delivered to Mr. Frizzell, and until one of the notes had become due and we had paid it. We paid the note before we learned that the statements made by Mr. Frizzell about the corporation owning said Cotton Mill building and machinery, and that it was soon to start a factory, were not true." The witness also testified that he did not examine the public records to see how much of the stock of the corporation was paid up; that, when he found that the stock was not paid up, he sued the company for the cancellation of his notes, and offered to give up his stock. The record, introduced in evidence, showed that that action was commenced October 19, 1888.

The articles of association of the corporation, which were put in evidence, recited: "The capital stock is fifty thousand dollars, to be fully paid, divided into one thousand shares of the par value of fifty dollars each. The entire stock has been actually and *bona fide* subscribed, and fifty per cent. thereof paid up in lawful money of the United States, and is in the custody of the persons named as the first board of directors." Then followed a list of shareholders, seven in number, with the number of shares purporting so have been subscribed by each, aggregating one thousand shares. The articles were signed and sealed by the same persons, who affixed the same number of shares, aggregating one thousand, opposite their respective names. These articles were filed in the office of the secretary of state on the nineteenth of May, 1888.

It appeared by the testimony of Mr. Frizzell, one of the incorporators and secretary and treasurer of the company, in consequence of whose representations the defendants were induced to purchase the shares and give the notes in question, that, notwithstanding the above recitals in the articles of association, he had never paid anything on his eighty shares, of the aggregate par value of four thousand dollars, except in services. It was understood that he was to hold but five hundred dollars' worth of the stock. The reason why the additional thirty-five hundred dollars' worth was issued to him was to complete the organization of the company and to place the stock, so that it could be assigned to other parties; and it was transferred back to the company for that purpose. For this five hundred dollars' worth of stock, a certificate was issued to him and remained in his name. This was all he was to pay for. He had not paid for all of it. He was to pay for it out of his salary every three months. He had paid about one hundred dollars in that way. The remaining thirty-five hundred dollars' worth of stock remained as it was

transferred to the company. Mr. Frizzell further testified: "Mr. Pomeroy holds two hundred shares, Mr. Thompson two hundred, Mr. Kirst one hundred shares, Mr. Phillips twenty shares. Mr. Abbott and Mr. Atwood are shown by the incorporation papers to hold one hundred shares each, but this stock was never received by them; the certificates are still in my possession. In the same way, Mr. Pomeroy and Mr. Thompson are shown by the incorporation papers to have received one hundred shares, in addition to what they actually did receive. The certificates for these are issued, but are, also, in my possession as secretary. There are one hundred shares to Mr. Pomeroy, one hundred to Mr. Thompson, one hundred to Mr. Atwood, one hundred to Mr. Abbott, and seventy to myself—making a total of four hundred and seventy shares—that were never delivered to anybody, except that taken by parties around town, for which they gave their notes.

"*Q.* How much was taken by parties in this way? *A.* Between seven and eight thousand dollars.

"*Q.* How much money altogether has been paid into your hands, as treasurer of the company for stock? *A.* To estimate it, I would say in the neighborhood of *eight hundred dollars.*

"*Q.* By whom was this paid? *A.* That was paid by parties around town here, who took stock.

"*Q.* Has other property, other than money and the notes of parties around town, come into your hands, as treasurer of the company, in payment for stock? *A.* Mr. Ramsey gave a lot, valued at three hundred dollars, for six shares; that is all that has come into my hands as treasurer.

"*Q.* Has any money or other property been paid to you as treasurer of the company in payment for stock, by Mr. Pomeroy, or Mr. Thompson, or Mr. Kirst? *A.* No, sir.

"*Q.* Has any been paid by Mr. Phillips? *A.* He was to pay for his out of his salary.

"*Q.* Did the Thompson Manufacturing Company, as a company, ever have any money, except this you have mentioned? *A.* Nothing from the sale of stock, but it has had from the sale of goods, and money borrowed by the company.

"*Q.* How much money has the company borrowed? *A.* In the neighborhood of thirty-eight hundred dollars.

"*Q.* How did the company pay for goods they have purchased from time to time? *A.* What has been paid was paid by the sale of goods, the money borrowed, and also some of the eight hundred dollars, mentioned, may have been applied in that way. The money borrowed was secured by F. S. Heffernan, as security on the notes at the Bank of Springfield. * * *

"*Q.* Where, now, are all the notes given by parties about town for their stock? *A.* They are given *as collateral security* to parties to whom we owe bills, not as security for money borrowed."

It also appeared that the certificate for two shares of the capital stock of the corporation, which was issued to the defendants as the consideration of their ten notes above spoken of, recited: "Capital stock, fifty thousand dollars, fully paid." It certified that Jones Bros. were the owners of two shares of the capital stock of the Thompson Manufacturing Company, "fully paid up and of the par value of fifty dollars each," etc.

The plaintiffs gave evidence tending to show that the Thompson Manufacturing Company purchased a bill of boots and shoes from the plaintiffs, who were merchants doing business at Chicago, aggregating fifteen hundred and ninety-five dollars and thirty-five cents; that this bill was placed in the hands of Mr. Heffernan, an attorney at Springfield, for collection, about the twenty-fifth or twenty-sixth of August, 1888; that Mr. Heffernan presented the bill to the manufacturing company; that they declined to pay it, claiming that it was not due, and for the further reason that they had no money. Mr. Heffernan testifies: "I found that said

corporation had no money except notes taken by it from stockholders for stock of said corporation. It could not pay this claim, and had no other property on which to secure it, except the notes taken for stock, and the merchandise, as I have mentioned; and so I took these notes sued on, and many others of the same kind, as *collateral security* for the payment of this debt of M. D. Wells (meaning M. D. Wells & Co.), against the Thompson Manufacturing Company, which I was trying to collect. These notes, given to the corporation in payment of its stock, was all I could get *as security* for the debt; and so I took them, and the notes against the defendants were assigned to plaintiff by said Thompson Manufacturing Company, *as collateral security*, for the payment of the debt of said company to plaintiff. When I took the notes sued on, I knew it was given for part of the purchase price of capital stock of said Thompson Manufacturing Company." The plaintiffs also introduced evidence showing that on February 14, 1889, they had recovered a judgment in the circuit court of Greene county against the Thompson Manufacturing Company for sixteen hundred and sixty-seven dollars and fifteen cents; that on May 6, an execution had been issued on this judgment, which had been, on May 9, returned unsatisfied.

There was other evidence which we do not deem it material to recite. Much of the above evidence was objected to, and exceptions were duly saved to the admission of it; but we do not deem it material to consider these exceptions in detail. It seems to us sufficient to state our views as to the theory on which the case should have been tried.

This is not a proceeding by a creditor of a corporation to collect from a stockholder what is due upon his subscription to the capital stock of the corporation, or what remains unpaid upon shares of such capital stock, of which he is the holder. It is not a direct action

against the stockholder of a dissolved corporation for that purpose under section 745 of the Revised Statutes of 1879; nor is it a motion for execution against a stockholder of an insolvent corporation by a judgment creditor of such corporation under section 736 of the same statutes. It is not a proceeding against a stockholder as such, in any form known to our law. It is merely an ordinary action at law upon a promissory note, against the makers thereof, by the indorsees and holders thereof. In such actions the law allows the maker to set up the fraud of the original payee, whereby he was induced to execute the note, or the want of consideration for the promise embodied in the note.

Whether he can set up such defense against one who has acquired the note before maturity as *collateral security* for a pre-existing debt due him from the payee, is a question which rests in a very unsatisfactory shape upon the judicial decisions in this state. Those decisions were reviewed in the opinion of this court delivered in the case of *Conrad v. Fisher*, 37 Mo. App. 352, at pages 414 to 418. It was there shown that the initial case of *Goodman v. Simonds*, 19 Mo. 106, in which our supreme court held that one who thus acquires a negotiable note is not a purchaser for value, and does not get it discharged of equities, has been *twice* overruled in this state upon cases in judgment, *once* thereafter reaffirmed and applied, and *nine times* thereafter expressly or impliedly recognized as the law. It was there said, after reviewing the cases in this state: "If the doctrine of *stare decisis* were strictly adhered to, it would unavoidably result in the conclusion that one, who takes negotiable paper as collateral security for an antecedent indebtedness, takes it as purchaser for value; for such was ruled in our supreme court in *Boatmen's Savings Institution v. Holland*, 38 Mo. 49, where the question was before the court in judgment, which is the

last controlling decision upon the subject. But, in view of the manner in which our supreme court has subsequently dealt with the question, I do not think that we are at liberty to hold that it is concluded by that decision. We should rather regard it as still an open question."

Regarding it as an open question, we find that the decisions in other jurisdictions on the question are conflicting, as pointed out in that opinion. We also find that in *Railroad v. National Bank*, 102 U. S. 14, 25, the question has, in the highest federal court, been finally resolved in favor of the *dictum* of Mr. Justice STORY in *Swift v. Tyson*, 16 Pet. (U. S.) 1, and contrary to the doctrine of our supreme court in *Goodman v. Simonds*, *supra*, and in conformity with the later holding in *Boatmen's Savings Institution v. Holland*, *supra*.

But this holding seems to be contrary to most of the analogies of the law which bear upon the question. Take, for instance, the analogy of conveyances of lands or goods in fraud of the creditors of the transferor. All the decisions of which we have knowledge are to the general effect, that, to entitle the transferee to be treated as a purchaser for a valuable consideration, it must appear that he actually paid the purchase money before he had any notice of the fraud; it is not sufficient that he had agreed to pay it, or even that he had given his check in payment, unless the check had also been paid. *Arnolt v. Hartwig*, 73 Mo. 485; *Dougherty v. Cooper*, 77 Mo. 528; *Young v. Kellar*, 94 Mo. 581; *McNichols v. Rubleman*, 13 Mo. App. 515, 522. Another well-known analogy is that of conveyances of land, subject, in the hands of the grantor, to prior unrecorded conveyances, vendor's liens, resulting trusts or other secret equities. In modern times land has entered into the operations of commerce almost to the same extent as personal property. And yet, upon this

question, the decisions in this and in all other jurisdictions, so far as we know, speak only in one way. In order to entitle the innocent grantee to protection against a prior unrecorded conveyance, vendor's lien or other equity, he must have parted with something of value as a consideration, before receiving notice of the prior conveyance or equity. See 2 Pomeroy's Equity Jurisprudence, sec. 749, and numerous cases there cited. In view of the numerous decisions and *dicta* in our supreme court, and in this court, supporting the doctrine of *Goodman v. Simonds*, *supra*, we feel bound to hold, until otherwise instructed by our supreme court, that one who takes a negotiable promissory note, merely as collateral security for an antecedent indebtedness, takes it subject to any equities subsisting in favor of the maker against the original payee; though, where the note is taken in payment, we concede that the rule is different.

We conclude, then, that the plaintiffs, when they acquired the note which is the subject of this suit, acquired the same rights against the defendants, as the holders of it, which the manufacturing company had. What those rights were, upon the undisputed evidence in the case, appears to be fully settled by two decisions in this state, one of them rendered by this court, and the other by the supreme court. The case of the *Occidental Ins. Co. v. Ganzhorn*, 2 Mo. App. 205, shows that no action can be maintained against one who, acting in good faith, has been induced by fraudulent representations to give his note as a stock subscriber to a sham corporation set on foot without authority of law. We need not enlarge upon this decision. Many of the facts were strikingly like those in the case before us. So far as we know, it has not been trenched upon or overruled by any subsequent decision in this state. The case arose between the sham corporation and the subscriber, and of course it was not decided with reference

to the rights of creditors, as against stockholders who have been induced to become such by fraud.

The other decision, to which we allude, is that of our supreme court in the somewhat recent case of *Haskell v. Worthington*, 94 Mo. 560, *loc. cit.* 572, 573. That was an action by the assignee of a corporation, upon a subscription to its capital stock, to recover the par value of the shares for which the defendant had subscribed. The court held, that, as the assignee stood in the shoes of the corporation, it was a good defense to show that the corporation had entered into active business with less capital stock subscribed than the amount stated in its articles of incorporation,—the defendant not having by his conduct estopped himself from setting up the defense. The statute, under which this present corporation purported to have been authorized, provided that the articles of agreement should contain "the amount of the capital stock of the corporation; the number of shares into which it is divided, and the par value thereof; that the same has been *bona fide* subscribed, and one-half thereof actually paid up in lawful money of the United States, and is in the custody of the persons named as the first board of directors or managers." Revised Statutes, 1879, sec. 926. The undisputed evidence in this case showed that articles of incorporation were filed containing this recital, and that it was grossly and shamefully false; and while the defendants admit that they were not misled by this, not having examined the public record, their undisputed evidence shows that they were induced to subscribe for the shares by fraudulent representations made by the financial officer of the corporation in respect of existing facts of the most important character. With this evidence before him, the learned judge gave an instruction, declaring the law to be that the plaintiffs were entitled to recover. In other words, he held that, conceding the truth of the defendant's evidence, it did not state a defense, as matter of law. Judging from the theory on

which the case has been argued in this court, this must have been upon the view that the case is to be governed by the law in respect of the liability of stockholders of a corporation. That law, as held in England and in several courts in this country, is to the effect that, after the insolvency of the corporation, a stockholder proceeded against by creditors or by their representatives, cannot set up that he was induced to become a stockholder by the fraud of the corporation or its authorized agent. 2 Morawetz on Private Corporations, sec. 840, and cases cited; Cook's Stock, etc., sec. 163, and cases cited. We are not prepared to dispute this principle; but, as we do not find that it has been distinctly decided in this state one way or the other, we do not wish to be understood as expressing an opinion upon it. But we are of opinion, for reasons already stated, that it has no application to the present case.

The judgment will be reversed and the cause remanded. It is so ordered. All the judges concur.

J. R. CHASE, Appellant, v. MONT. HALL, Respondent.

St. Louis Court of Appeals, April 29, 1890.

1. **Practice, Trial:** INJUNCTIONS: FINAL JUDGMENT. An order merely dissolving a temporary injunction is not a final judgment, but a judgment, dissolving the temporary injunction, and further dismissing the plaintiff's bill and discharging the defendant, is a final judgment; and a motion for new trial may properly be filed after such judgment and before the assessment of damages on the injunction bond.

2. **Conveyances:** IMPLIED EASEMENT. If one grants a close, which is inaccessible, except over his own land, he impliedly grants with it a right of way over his land. And in a case wherein the implied grant resulted from a conveyance, which was recorded, *held* that the assigns of the grantor were affected with notice and bound by it, and that it inured to the benefit of the assigns of the grantee.

8. ——— : ——— : CONSIDERATION OF INTEREST OF SERVIENT ESTATE. In a case wherein a lease was made of the second story of a building, to which the only means of access were by a temporary stairway which was partially built over a stranger's property, *held* that, on the removal of this stairway, the assignee of the lessee was entitled to construct another stairway over the premises of the landlord to said second story, though his so doing would necessarily be detrimental to the occupancy of the first story of said building; but *held*, further, that the landlord was entitled to have his interest and convenience considered in the selection of the place for the new stairway and the manner of its construction.

Appeal from the Newton Circuit Court.—HON. JOS. CRAVENS, Judge.

REVERSED AND REMANDED.

James H. Pratt, for appellant.

J. T. Sturgis, *N. C. Gallemore* and *A. J. Harbison*, for respondent.

BIGGS, J.—This is an injunction proceeding to restrain the defendant from erecting a stairway on the outside of a building to the second or upper story. After a hearing of the evidence, the court dissolved the injunction and dismissed the suit. Afterwards, at the same term, there was, on motion of the defendant, an assessment of damages, by reason of the injunction, and final judgment was entered against the plaintiff for the amount of damages found by the jury. The plaintiff has appealed.

The facts in the case may be briefly stated as follows: In 1884, Jonathan Norris was the owner of a lot in the town of Seneca, in Newton county, Missouri. The lot fronted twenty-five feet on a street and extended back in an eastward direction one hundred and fifty feet. The adjoining lots were owned by other parties. Norris erected on the front part of his lot a two-story building, twenty-five feet wide and fifty feet long, and

the Masonic lodge of the town paid the cost of the construction of the upper story under an agreement for a lease for a term of ninety-nine years. The lease was properly executed, acknowledged and recorded, and, after the completion of the building, the lower story was occupied by Norris as a dry goods and grocery store, and the upper story was occupied by the Masonic lodge. The plaintiff, at the institution of this suit, was the owner of the Norris title. The only way to or from the upper story was a stairway erected on the south side of the building from the sidewalk in front. This staircase rested on and extended over the lot of the adjoining owner. In 1889, the owner of this lot commenced a building thereon, and the lodge was compelled to remove the stairway. The lodge then sold and transferred its interest in the lease to the defendant, and he proceeded to construct a stairway to the upper story at the rear end of the building.

This action by the defendant brought about this litigation in which the plaintiff sought to enjoin the defendant from building the stairway upon the grounds that his action amounted to a direct trespass upon plaintiff's property, and that the construction of the stairway in the place and in the manner proposed cut off the light to the storeroom from the rear window, and thereby rendered the room almost valueless for business purposes. The defendant's answer was to the effect that the upper story of the building was worthless in its then condition; that, as the owner of the lease, he had the right to erect the stairway; that the place where he contemplated putting it was the most suitable, and that the structure at this place would do the plaintiff less damage, than if erected at any other place available to the defendant.

Before we pass to the discussion of the merits, it will be better to notice an alleged irregularity in the proceedings, to which our attention has been called by

the defendant's counsel. Immediately after the dissolution of the injunction and the dismissal of the bill, the plaintiff filed his motion for a new trial, in which the attention of the court was properly called to the alleged errors now complained of. A few days afterwards, but during the same term, there was an inquiry of damages; final judgment was entered for the damages assessed by the jury, and, on the same day, the plaintiff filed a second motion for a new trial, in which only the errors complained of in the last proceeding were mentioned. Both motions were then overruled by the court, and the plaintiff duly excepted. It is now insisted by the defendant's counsel that the first motion was inoperative, by reason of the fact that it was filed before the final judgment in the case. It has been held in this state and elsewhere that the *mere dissolution* of a temporary injunction is not such a final judgment as will authorize an appeal; but this rule is not applicable to this case, because the entire proceeding was dismissed and the defendant finally discharged. If the defendant's theory of the law should be adopted, then a plaintiff's right of appeal in such a case would be made to depend upon the defendant's action in moving for an assessment of damages on account of the injunction. The authorities relied on by defendant's counsel merely hold that the dissolution of a temporary injunction, without more, does not amount to a final judgment. *Tanner v. Irwin*, 1 Mo. 65; *Johnson v. Board of Ed.*, 65 Mo. 47; *Witthaus v. Bank*, 18 Mo. App. 181.

The first position taken by the plaintiff is that the defendant, as the owner of the lease, had no right to construct another stairway, and that, therefore, his entrance upon the plaintiff's premises for that purpose was a trespass. We cannot yield our assent to this proposition. The lease, under which the defendant claims, was of record at the time when the plaintiff purchased, and the latter was bound to take notice of its provisions. When Norris made the lease he impliedly

granted to the Masonic lodge, or its assigns, the right to pass over his lot for the purpose of gaining access to that part of the building conveyed by the lease. The rule is that, if one grants a close which is inaccessible except over his own land, he impliedly grants with it the right of passing over that land. Otherwise the grantee would derive no benefit from the grant. *Nicholas v. Luce*, 24 Pick. 102; s. c., 35 Am. Dec. 302; *Snyder v. Worford*, 11 Mo. 513; Goddard, Easements, p. 94. It is reasonable to conclude that the stairway constructed on the adjoining lot was regarded by both parties to the lease as a temporary arrangement, and that it was liable to be removed at any time by the owner of the lot. It must have been within the contemplation of the parties that, whenever the adjoining owner required the stairway to be removed, the lessee would have the right to construct a stairway at some other place. The value of the lease, under a different construction of the contract, would be made to depend entirely on the action of the owner of the adjoining lot. But the defendant, in making the selection for a new site for a stairway, would have to regard the interest and convenience of the plaintiff as the owner of the lot and the lower portions of the building, and the law will compel him to erect the structure in such a manner and in such place as will result in the least damage to the plaintiff's property. *Nicholas v. Luce, supra.*

The evidence shows that the only light to the back portion of the plaintiff's storeroom comes from a window located at the east end, near the south side of the building; that the place selected by the defendant for the stairway was immediately in front of this window, and that the stairway was to extend up to a landing just above the top of the window; that the stairway, if built in this manner, would exclude the greater portion of the light from the back part of the storeroom, and greatly damage it for business purposes. And the evidence also tended to show that the superstructure of

the staircase would obstruct and prevent the use of a small shed room, located and attached to the east end and on a line with the north side of the building. This shed room was ten or twelve feet long and one story high. Notwithstanding these facts, if the place selected by the defendant was the only one available to him, or if the proposed location would result in the least possible damage to the plaintiff's storeroom, then the judgment is right; but on the other hand, if it was possible for the defendant to build the stairway at a reasonable cost at a different place and with materially less injury to the plaintiff, then the decree is wrong and must be reversed.

In equity cases it is the practice of appellate courts to defer to a great extent to the findings of the trial judge on questions of fact, but, when it is manifest that there has been a misapplication of the law to the facts, then it is our duty to interfere and correct the wrong. The undisputed evidence of both parties shows that it was practicable for the defendant to construct a staircase at the east end of the shed room, and the main building could then be reached by a platform extending over the shed room; that, in this way, the window would in no way be obstructed, and the superstructure of such a stairway would in no manner interfere with the use of the shed room by the plaintiff for the storage of goods. We extract the following from the testimony of the various witnesses bearing directly on this question.

The plaintiff said: "*Q.* There is a shed here? *A.* Yes, sir.

"*Q.* How far does it extend from the other building? *A.* Twelve or fourteen feet.

"*Q.* Does the shed extend clear across the building? *A.* Little over half of the building.

"*Q.* The stairway is on the south half? Would it be practicable to build a stairway up over the shed? *A.* I suppose it could be done.

"*Q.* By running back and climbing over the shed? *A.* Yes, sir; that is the only way you could do it.

"*Q.* It extends back fourteen feet? *A.* Yes, sir. * * *

"*Q.* Is there any place else, but the back part of the building, where a stairway could be built up reaching the upper story, whereby it would be any less damage to you than the way it was built? *A.* It would be less damage to have it built over the shed, but it would still be a great incumbrance to the property."

S. R. Havens testified: "*Q.* To build the stairway to the upper story, is there any way you know of by which a stairway could be built so as to go into the door and room back, so it would be less of an obstruction to the property than the way it was? *A.* The only way would be to build over the shed; that would be less damage to me, if I had to stay there."

John Norris testified: "*Q.* Is there any other way to get up to the upper story than the way it was built? *A.* None that I know of; not unless you would build it up over the shed, and erect a platform or something of the kind; it might be arranged."

George Morrow, one of defendant's witnesses, testified as follows: "*Q.* From your knowledge of the premises is there any other way you could build a stairway leading up to the hall, to be able to build it by a less damaging method than the way it was built? *A.* There is no other way to get at it, unless it might be built over the shed room, at the end, but there is no other way that I know of.

"*Q.* Any objection to building a stairway over that old shed room? *A.* Possibly the same objection as the other?

"*Q.* Would that be convenient to a person using the upper story? *A.* Yes, just as convenient I suppose, would perhaps be more expensive to build it that way; no other way without buying a lot or renting a lot.

"*Q.* Could a lot be rented or bought from Mr. Ball? *A.* No, he would not sell them any ground."

In this state of the evidence we cannot consent to the decree in this case. We are of opinion that the defendant has a right to build a stairway, but that he ought to construct it over the shed, and that he ought to be enjoined from building it in front of the window, as he was about to do when this temporary injunction was granted.

The decree in this case is wrong and ought to be reversed, but, as the plaintiff has appealed to a court of equity for redress, he ought and must do what a court of equity would require of him in the premises. The defendant, as we have shown, is entitled to the privilege of erecting a stairway, provided it is constructed in such a way as to do the plaintiff's property the least damage, and the obligation rests on the plaintiff to grant him this privilege. The judgment will, therefore, be reversed and the cause remanded with directions to dismiss the bill, unless the plaintiff will at the next term of the circuit court file his written consent, giving the defendant permission to construct a stairway over the shed. If this requirement is complied with, then the court will make the injunction perpetual. It is so ordered. All the judges concur.

41 22
44 374

THE STATE OF MISSOURI, Appellant, v. JOHN DINNISSE, Respondent.

St. Louis Court of Appeals, April 29, 1890.

Jurisdiction: APPEALS. When, on the appeal of a cause, a constitutional question is fairly raised by the record, this court is, under the decision of the supreme court, precluded from exercising jurisdiction, unless the question is a mere sham; and whether the constitutional question raised is a sham or not, must be determined by the supreme court.

The State v. Dinnisse.

Appeal from St. Louis Court of Criminal Correction.
HON. R. A. CAMPBELL, Judge.

TRANSFERRED TO THE SUPREME COURT.

BIGGS, J.—The defendant was prosecuted in the St. Louis Court of Criminal Correction, for violating the provisions of an act of the legislature adopted in 1885. The title to the act reads as follows: "An act to protect the property of manufacturers, bottlers and dealers in mineral waters, soda water and other beverages from the loss of their syphons, bottles and boxes." Laws, 1885, p. 151.

The trial court quashed the information, and the state has appealed.

The defendant in his brief challenges the constitutionality of the law under which he was prosecuted.

The supreme court in the case of *State ex rel. Campbell v. The St. Louis Court of Appeals*, 97 Mo. 276, decided that this court could not inquire into the merits of constitutional questions. Previous to this decision, we had uniformly ruled that a constitutional question, in order to deprive us of jurisdiction, must be at least fairly debatable. The supreme court, in the case cited, refused to concur in this view, and held that, when a constitutional question was fairly raised by the record, this court would be precluded from exercising jurisdiction, unless it appeared that the question was a mere "sham." We also gather from the opinion in that case, that whether the constitutional question is a sham or not, must be determined by the supreme court, and not by this court.

This case will, therefore, be transferred to the supreme court. It is so ordered. All the judges concur.

41 24
52 375
41 24
54 427
41 24
60 287
41 24
62 111
41 24
63 656
41 24
158s 73

THE STATE OF MISSOURI, Appellant, v. FANNIE CRENSHAW, Respondent.

St. Louis Court of Appeals, April 29, 1890.

Criminal Law: INJURY TO DWELLINGS, ETC.: INDICTMENT. When an exception is contained in the language of the statute defining an offense, and constitutes part of the description of the offense sought to be charged, an indictment for that offense must negative the exception. *Held*, accordingly, that an indictment for malicious injury to a dwelling house, contrary to the provisions of Revised Statutes, 1879, section 1358, is fatally defective, if it fails to charge that the person indicted had no interest in the property.

Appeal from the Greene Criminal Court.—HON. M. OLIVER, Judge.

AFFIRMED.

J. J. Gideon, Prosecuting Attorney for Greene County, and *F. S. Heffernan*, for appellant.

The information states that the property destroyed belonged to the heirs of L. A. D. Crenshaw, deceased; and it is not necessary to say that the defendant had no interest in the same. *State v. Guernsey*, 9 Mo. App. 312; *State v. West*, 21 Mo. App. 309; *State ex rel. v. Thayer*, 15 Mo. App. 391–396; *State v. James*, 63 Mo. 570; *State v. Meek*, 70 Mo. 355; *State v. Burr*, 81 Mo. 110.

Goode & Cravens, for respondent.

The offense attempted to be charged is purely statutory. The statute denounces the acts therein named as criminal only when they are done to the property of another, in which the person charged has

no interest, and this want of interest in the property is the very *gravamen* of the offense. This qualification of the offense as to the interest of the party charged, in the property alleged to have been injured, is in the same section of the law which creates the offense, and there is no better settled principle in criminal pleading, where such is the case, than that the exception or qualification named in the statute must be expressly negatived—otherwise no offense is charged. *State v. Shiflett*, 20 Mo. 415; *State v. Sutton*, 24 Mo. 377; *State v. Meek*, 70 Mo. 355; *State v. Jaques*, 68 Mo. 260.

ROMBAUER, P. J.—The point for decision arises upon the legal sufficiency of an information purporting to charge an offense under section 1358 of the Revised Statutes of 1879, which reads as follows:

"Sec. 1358. *Injuring dwelling houses.*—Every person who shall wilfully and maliciously break, destroy or injure the door or window of any dwelling house, shop, store or other house or building, or sever therefrom, or from the gate, fence or inclosure, or any part thereof, any material of which it is formed, or sever from the freehold any produce or thing attached thereto, or pull down, injure or destroy any gate, post, railing or fence, or any part thereof, or throw down or open any gate, bars or fence, and leave the same down or open, being the property of another, or of any railroad company, or inclosing the lands of another, *in which such person has no interest*, shall be deemed guilty of a misdemeanor."

The information, omitting the formal part, is as follows:

"Comes John A. Patterson, prosecuting attorney within, and for, the county of Greene, state of Missouri, and, under his oath of office, informs the court that Fannie Crenshaw, on the ninth day of September, 1887, at the county of Greene, did then and there maliciously

injure the windows of a certain dwelling house there situate, the property of the heirs of Lewis A. D. Crenshaw, deceased, and in the rightful possession of N. Banks, done against the peace and dignity of the state. And the said Fannie Crenshaw did then and there unlawfully, wilfully and maliciously destroy thirty-eight panes of glass in the windows of a certain dwelling house there situate, and in the rightful possession of N. Banks, by then and there striking and beating said windows with a large piece of plank,—done against the peace and dignity of the state."

The defendant moved to quash the information on the ground that it omits the averment, placed in italics above, namely, that the defendant had no interest in the property alleged to have been injured. The court sustained the defendant's motion and quashed the information, and the state, appealing, assigns for error that this ruling was erroneous.

Whenever an exception is contained in the section defining an offense, and constitutes part of the description of the offense sought to be charged, the indictment must negative the exception; otherwise no offense is charged. *State v. Meeks*, 70 Mo. 357. Or, as said in *State v. Sutton*, 24 Mo. 377, where there is an exception in the enacting clause, the indictment must show that the defendant is not within the exemption; but, if there be an exception in a subsequent clause, that is matter of defense, and the accused must show it to exempt himself. See, also, *State v. Cox*, 32 Mo. 566, and *State v. O'Brien*, 74 Mo. 549.

Here the offense condemned by the statute is the wilful and malicious destruction of property by *one who has no interest therein.* The fact that the alleged offender has no interest in the property is an essential averment, and without it the information is fatally defective. The information need not charge this fact in the identical words of the statute, provided it uses

words negativing completely the existence of any interest. This, however, the information in this case fails to do, because, although the property was that of Crenshaw's heirs, and in the rightful possession of Banks, yet the defendant might have had an interest therein.

Judgment affirmed. All the judges concur.

---

41 27
64 110

MICHAEL KEMPF, Respondent, v. THE FARMERS MUTUAL FIRE INSURANCE COMPANY, Appellant.

St. Louis Court of Appeals, April 29, 1890.

Insurance: ASSIGNMENT TO MORTGAGEE: ADDITIONAL INSURANCE BY ASSIGNOR. A policy of fire insurance, which provides that it shall be avoided by the procurement of additional insurance by the insured or his assigns without the consent of the insurer, will become void on the procurement of additional insurance by the insured without such consent, though prior thereto the first insurance was with the consent of the insurer assigned by the insured to a mortgagee of the property, such assignment being absolute in form but in reality as security for the mortgage debt.

Appeal from the St. Louis County Circuit Court.
HON. W. W. EDWARDS, Judge.

REVERSED AND REMANDED.

Geo. W. Royse, for appellant.

M. F. Taylor and *R. L. McLaran*, for respondent,

THOMPSON, J.—This was an action upon a policy of fire insurance issued to one George Baier and assigned by him to the plaintiff. The case was tried by the court sitting as a jury, and there was a finding and

judgment for the plaintiff, from which the defendant prosecutes this appeal.

The only defense, which the defendant attempted to maintain at the trial, was shown by the following undisputed state of facts: On the sixth day of September, 1886, George Baier applied to the defendant for, and obtained, a policy of insurance against loss or damage by fire, in the sum of eleven hundred and sixteen dollars, upon certain buildings located upon land owned by him, in Carondelet township, St. Louis county, Missouri. The buildings were of the value of about fifteen hundred dollars. Baier paid a cash premium of twenty-two dollars and thirty-two cents, and gave his premium note, subject to assessment, to the defendant for two hundred and twenty-three dollars and twenty cents. This plaintiff, at the date of such insurance, had a deed of trust for fifteen hundred dollars upon the property of Baier, including the buildings thus insured by the defendant. On the thirtieth day of October, 1886, Baier transferred his policy of insurance to the plaintiff, the transfer being in writing, indorsed on the policy, with the consent of the defendant,—said transfer and consent being as follows:

"ST. LOUIS COUNTY, October 30, 1886.

"The Farmers Mutual Fire Insurance Company hereby consent that the interest of George Baier in the within policy, subject to all the terms and conditions therein mentioned and referred to, be assigned to Michael Kempf. THOMAS J. SAPPINGTON,

"C. B. WOLFF, President.

"Secretary."

"For value received, I hereby transfer, assign and set over unto Michael Kempf, and his assigns, all my title and interest in this policy, and all advantages derived therefrom. Witness my hand and seal this thirtieth day of October, 1886.

"[Seal.] GEORGE BAIER."

The plaintiff continued to hold this policy until the property was totally destroyed by fire on the twenty-fourth day of September, 1888. He, after the fire, made demand upon the defendant for the amount of the loss, under the policy, payment of which was by the defendant refused.

On the first day of August, 1888, and before the destruction of the buildings by fire, as above stated, Baier, without the knowledge or consent of the defendant, insured the same buildings, described in the defendant's policy to him, in the Oakland Home Insurance Company for two thousand dollars against loss or damage by fire, and received a policy from said company therefor, which policy was in full force and effect at the date of the loss of the buildings by fire on September 24, 1888. Baier was paid his loss under the second policy by the Oakland Home Insurance Company, on November 12, 1888, after making his proofs of loss, etc., in due form. Baier never gave any notice, in writing or otherwise, to this defendant of this second insurance on the property, nor did he ever have the same indorsed on the policy held by his assignee in the defendant company. The defendant had no notice or knowledge of the second insurance, until long after the loss. The policy issued by the defendant to Baier, and sued upon herein by the plaintiff, contained the following provision: "And if the assured, or his assigns, shall hereafter make any other insurance upon the same property, and shall not immediately thereafter give notice to this company, and have the same indorsed on this policy, the same shall cease and be of no effect."

Upon this state of facts the learned judge gave the following declaration of law:

"The court, sitting as a jury, declares the law to be that, although Baier, to whom this policy was issued, may have taken out other insurance on this property after the assignment to plaintiff, without having

notified defendant, yet this will not defeat plaintiff's right to recover in this case, unless plaintiff had knowledge of the same, or unless the same was taken out with plaintiff's consent."

The precise question thus presented does not seem ever to have been passed upon in this state. The question of the rights of the parties in the case of an assignment of an insurance policy, or of an interest therein, has arisen in three classes of cases:

I. Where the policy is not assigned in form, but where the loss is merely made payable to some person other than the insured. In such a case the person to whom the loss is made payable does not become the assignee of the policy. The relation of insurer and insured continues to exist between the original parties to it. The effect of the memorandum is merely to make the person designated the payee of the loss, if any happens; and, according to a *dictum* of Judge GANTT, in giving the opinion of this court, any act done by the insured to vitiate the insurance will defeat the right of the designated beneficiary to recover the loss. *Griswold v. Ins. Co.*, 1 Mo. App. 97, 100; s. c., affirmed on the opinion of this court in 70 Mo. 654. While the *dictum* of Judge GANTT was not necessary for the decision of the case before the court, it is supported by the best judicial opinion in other jurisdictions. *Hale v. Ins. Co.*, 6 Gray, 169; s. c., 66 Am. Dec. 410; *Loring v. Ins. Co.*, 8 Gray, 30; *Edes v. Ins. Co.*, 3 Allen, 362; *Franklin Savings Inst. v. Ins. Co.*, 119 Mass. 240; *Van Buren v. Ins. Co.*, 28 Mich. 405; *Bates v. Ins. Co.*, 10 Wall. 33. A distinction has been taken, in respect of the question under consideration, between the case of a clause in a policy, assented to by the insurer, that the loss, if any, shall be payable to a third party, and an absolute assignment of a policy. See May on Insurance, sec. 379. But we apprehend that this distinction has no influence upon the question

which we are considering, where the assignment is made to a mortgagee as additional security; because, under our law, a mortgage or a deed of trust in the nature of a mortgage, is regarded as a mere security for a debt in such a sense that, on the satisfaction of the debt, the title or interest conveyed by the mortgage or deed of trust reverts to the mortgagor or grantor, or his assigns, by mere operation of law. *McNair v. Picotte*, 33 Mo. 57; *Pease v. Iron Co.*, 49 Mo. 124. In the latter case, then, equally with the former, on the satisfaction of the mortgage or deed of trust, the beneficial right of the assignee, or person designated in the indorsement on the policy, to the insurance money would cease; and thereafter, if he could collect it at all, it would only be as trustee, and for the benefit of the assignor.

II. The second case is that now before us, where there is a formal assignment, consented to by the insurer, of all the interest of the person originally insured in the policy, to the mortgagee or to the trustee or beneficiary in the mortgage deed of trust, as additional collateral security. In such a case the question whether the policy can be avoided by any act in violation of its terms, done by the person originally insured while the assignment is in force, is, as already stated, an open question in this state.

III. The third case is where the property which is the subject of the insurance is sold outright, and the policy is assigned to the vendee by the vendor, with the consent of the insurer. Here, by the fact of the sale, the person originally insured parts with all interest in the subject of the insurance, and hence loses all insurable interest in it. The assignment of the policy, with the assent of the insurer, becomes a complete novation, and, thereafter, the person originally insured can do no act, without the consent or privity of the assignee of the policy, which will have the effect of vitiating,

except such acts as any other stranger might do. This was distinctly ruled by our supreme court in *Breckinridge v. Ins. Co.*, 87 Mo. 62, 72, and we suppose there is no conflict of authority anywhere on this point.

But this does not touch the question which falls in the second subdivision above stated. Upon this question we find that the authorities in other jurisdictions are not in harmony; but the weight of authority and of reason seems to be opposed to the view taken by the trial court in this case.

In early decisions in New York it was held that no act of the insured, after an assignment of the policy, can impair the rights of the assignee. *Traders Ins. Co. v. Robert*, 9 Wend. 404; *Tillon v. Ins. Co.*, 5 N. Y. 406. But the difficulty of sustaining this doctrine became too great. It was perceived that, if this were the rule, a mortgagor remaining in possession, with the policy of insurance assigned to his mortgagee, might prejudice the rights of the insurer, by changing the risk from an ordinary, to an extraordinary, risk. He might convert a dwelling house into a manufactory of pyrotechnics or of gunpowder; or he might even, as was charged in one case, hereafter cited, set the house on fire with intent to defraud the insurer. The court of appeals of New York accordingly deliberately overruled their former decisions on this question, by holding that, where the loss is merely made payable to the mortgagee (*Grosvenor v. Ins. Co.*, 17 N. Y. 391), and also where the policy is assigned, as in the case now before us (*Buffalo Steam Works v. Ins. Co.*, 17 N. Y. 401), the policy may be avoided by the acts of the assignor, done contrary to its terms, after the assignment has taken place.

The supreme court of Pennsylvania has adopted the rule of these last cases, in a well-considered opinion. *State Mut. Fire Ins. Co. v. Roberts*, 31 Pa. St. 438. The supreme court of Wisconsin followed in *Pupke v. Ins.*

Co., 17 Wis. 378; s. c., 84 Am. Dec. 754; and the supreme court of Illinois followed in *Illinois Mut. Fire Ins. Co. v. Fix*, 53 Ill. 151; s. c., 5 Am. Rep. 38. The gross injustice of the opposing rule was illustrated by the history of the case of *Traders Ins. Co. v. Roberts*, 9 Wend. 404, and 17 Wend. 637, where the person originally insured received the full benefits of the policy, in consequence of the equities of his assignee, although he himself had parted with all rights under it. See the observations on that case by Mr. Justice LAWRENCE in *Illinois, etc., Ins. Co. v. Fix, supra.* The impolicy of the rule is also quite well illustrated by the fact of a case now before us. Here there has been a second insurance, by the mortgagor remaining in possession, contrary to the terms of the first policy, which is the policy in suit. The mortgagor has collected the full amount of his loss under that policy. If the mortgagee is also allowed to recover under this policy, in defiance of the provision above quoted from it, it would result that there has been a *double insurance* contrary to its terms; that the policy has been wrested from its true function, as intended and stipulated by the parties, which was that of a contract of indemnity, into a means of speculation,—a mere wagering contract, whereby an excessive insurance has been placed on property, in favor of different persons having different interests therein,—a fact which holds out direct temptations to the fraudulent destruction of insured property.

There is, it is true, a hardship in making an honest mortgagee suffer for the act of his mortgagor, for which he is in no way responsible. But he can easily protect himself by insuring his own interest; for, as was held in *Dick v. Franklin Fire Ins. Co.*, 10 Mo. App. 376, the mortgagor and the mortgagee may each maintain a separate insurance on *his interest* in the property, to the extent of the value of such interest, and this is not a

double insurance. But, in the case before us, the insurance created by the second policy *was* a double insurance. For the insurance created by the policy in suit was an insurance *of the interest of the mortgagor*, and not of the mortgagee. *Carpenter v. Ins. Co.*, 16 Pet. 495; *Bates v. Ins. Co.*, 10 Wall. 33; *Michael v. Ins. Co.*, 17 Mo. App. 23. And the second policy, forbidden by the terms of the first policy, was likewise an insurance on the interest of the mortgagor. There was, therefore, a double insurance on the same interest, contrary to the terms of the first policy, and, it may be added, contrary to the policy of the law.

The judgment will be reversed, and, as there can be no recovery upon the undisputed facts, the cause will not be remanded. It is so ordered. All the judges concur.

ROMBAUER, P. J., delivered the opinion of the court on the motion of the respondent for a modification of the judgment of this court.

The respondent has filed a motion asking that we so modify our judgment, as to remand the cause for further proceedings. He states in support of his motion that he will be able to show on a retrial of the cause that he made application for the insurance of his interest in the property only, and that the policy issued to him was represented to him by the defendant as a policy on his interest alone. His allegation in substance is that he has a cause of action in equity for the reformation of the policy and for recovery upon the policy thus reformed, which is not disclosed by the evidence as preserved in the bill of exceptions.

We will sustain the motion and remand the cause for further proceedings to give the plaintiff an opportunity to proceed either by dismissing the present proceedings, and proceeding in equity on the theory indicated, or of seeking the same result by amendment.

In so doing, however, we do not desire to be understood as adjudging that the result can properly be reached by amendment.

With the concurrence of all the judges the judgment will be so modified as to remand the cause.

THE WABASH WESTERN RAILWAY COMPANY, Respondent, v. F. A. SIEFERT, Appellant.

St. Louis Court of Appeals, April 29, 1890.

1. **Practice, Appellate:** JURISDICTION. A cause will not be transferred from this court to the supreme court on motion of the appellant, on the ground that it involves the construction of the federal constitution, if it appears from the record that the appeal was granted to this court by the trial court upon motion of the appellant, and if it nowhere appears from the record that a question involving the construction of the federal constitution was raised in the trial court.

2. **Injunctions:** RESTRAINT OF THE EVASION OF DOMESTIC EXEMPTION LAWS THROUGH FOREIGN PROCEEDINGS. A citizen of this state has no right to purchase claims against resident employes of a domestic corporation and to sue thereon and garnish the corporation in a foreign state, when his sole purpose is thereby to evade our exemption laws, by subjecting to the payment of these claims indebtedness from the corporation to such employes which is exempted from process by the statutes of the state; and a citizen who engages in this practice may be restrained here by injunction from further prosecuting or instituting such foreign garnishment proceedings.

3. ——: ——: RIGHT OF GARNISHEE TO ENJOIN FOREIGN GARNISHMENT. Such injunction may be awarded at the suit of the corporation alone,—at all events in the absence of a demurrer in the trial court for a defect of parties, when the corporation is threatened with a multiplicity of vexatious garnishment proceedings of this kind.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL D. FISHER, Judge.

AFFIRMED.

H. A. Loevy, for appellant.

The courts of Illinois have jurisdiction of the subject-matter, and their judgments against the respondent, when it is summoned as garnishee, are valid, and will protect it if sued for the same money by its employes. Stat. Ill. 1874, ch. 33, sec. 26; *Railroad v. Crane*, 102 Ill. 249; *Roche v. County*, 2 Bradwell, 360; *Fielder v. Jessup*, 24 Mo. App. 95; *Allenn v. Watt*, 79 Ill. 288. The exemption of property is a personal privilege which the defendant in the attachment suit may claim or waive, as he sees fit. The garnishee cannot make the claim for him. Thompson, Homestead & Ex., sec. 23; *Osborne v. Schutt*, 67 Mo. 712; *Abernathy v. Whitehead*, 69 Mo. 30; *Broadstreet v. Clark*, 65 Iowa, 670. Laws creating exemptions have no extra-territorial effect. Thompson, Homestead & Ex., sec. 20; Freeman, Ex. [2 Ed.] p. 607; Drake, Attach., secs. 597, 244*a*; Waples on Rem., p. 528; Story, Conflict Laws [8 Ed.] sec. 572; Rorer, Inter-State Law, p. 53; *Lieber v. Railroad*, 49 Iowa, 688; *Broadstreet v. Clark*, 65 Iowa, 670; *Stevens v. Brown*, 20 W. Va. 450; *Railroad v. Barron*, 83 Ill. 450; *Railroad v. Thompson*, 31 Kan. 180; *Morgan v. Neville*, 74 Pa. St. 52. In this state attachment of wages or other property of a non-resident is expressly authorized. R. S. 1889, sec. 539; *Steele v. Leonori*, 28 Mo. App. 684. But in Illinois, Ohio and Kansas non-residents of those states are entitled to the same exemption as residents. *Railroad v. Barron*, 83 Ill. 365; *Railroad v. Maltby*, 34 Kan. 125; *State to use v. Knott*, 19 Mo. App. 152-3. For the expense and annoyance of answering, the law provides that the respondent shall

receive compensation. In Illinois its fee must be paid at time of service. Starr & Curtiss, Ill. Stat. 1885, sec. 4, p. 1221. The injunction is in contravention of Constitution U. S., art. 4, sec. 2; Thompson, Home. & Ex., sec. 867; Cooley, Const. Lim. [5 Ed.] p. 21, n. 4; p. 492; *Ward v. Maryland*, 12 Wall. (U. S.) 418 (430); *Morgan v. Neville*, 74 Pa. St. 52 (57). A non-resident of a state may sue another non-resident of that state in its courts. *Posey v. Buckner*, 3 Mo. 281; Drake, Attach., sec. 11; Const. U. S., art. 4, sec. 2; Thompson, Home. & Ex., sec. 20.

George B. Burnett and *George S. Grover*, for respondent.

The court below had complete and original jurisdiction of this cause, at the instance of respondent, in order to prevent a multiplicity of suits, and to suppress undue and vexatious litigation. R. S. 1879, sec. 2519, p. 423; Session Acts, 1885, p. 169; High on Injunctions, sec. 12, p. 9; 1 Story on Eq. Jur. [13 Ed.] pp. 70, 71; 2 Story on Eq. Jur. [13 Ed.] p. 211; *Wilson v. Joseph*, 107 Ind. 490; *Cunningham v. Butler*, 142 Mass. 47; *Snook v. Snetzer*, 25 Ohio St. 516; *Fielder v. Jessup*, 24 Mo. App. 91; *Teager v. Landsley*, 27 N. W. Rep. 739; *Hager v. Adams*, 30 N. W. Rep. 37; *Carsen v. Dunham*, 20 N. W. Rep. 312; *Keating v. A. R. T. Co.*, 32 Mo. App. 293; *Todd v. Railroad*, 33 Mo. App. 110; *Frazer v. Rice*, 47 Md. 205; *Dehon v. Foster*, 4 Allen (Mass.) 575; *Railroad v. Maltby*, 34 Kan. 125; *State ex rel. v. Railroad*, 90 Mo. 166.

ROMBAUER, P. J.—The plaintiff filed its petition for an injunction stating in substance the following facts: It is a railroad corporation operating a line of railroads in the state of Missouri and other states, and as such employs a very large number of men in its business. It is provided by the laws of the state of Missouri

that the plaintiff cannot be charged as garnishee for wages due from it to its employes for the last thirty days' service. The defendant, who is a resident of the city of St. Louis, conspired and confederated with others, *for the purpose of harassing and annoying the plaintiff, and of depriving said employes of the benefit of said exemptions*, by purchasing claims against said employes, instituting proceedings in the states of Indiana and Illinois, and other states outside the state of Missouri, upon said claims against said employes, causing said plaintiff to be summoned as garnishee, and charging plaintiff as such garnishee *on account of the wages due from it to said employes for the last thirty days' service.*

The petition then proceeds to charge that, in pursuance of such conspiracy, the defendant and others have bought up a number of claims against the defendant's employes, and among others, against one Sparrow, a resident of the state of Missouri, and head of a family, and caused suits to be instituted thereon against said Sparrow in the state of Illinois, and caused the plaintiff to be garnished therein to appear and answer touching the amount due said Sparrow for wages earned by him *for the last thirty days' service as such employe of the plaintiff*, for the purpose and with the view of depriving said Sparrow of the exemptions given to him by the state of Missouri.

The petition also charges that this defense of exemption cannot be interposed in any other state, except the state of Missouri; that the proceedings of the defendant are in fraud of the exemption laws of this state; that, unless the defendant is restrained, it will subject the plaintiff to a *multiplicity of suits*, and to annoyance and expense, and that the plaintiff has no adequate protection at law. The petition prays that the defendant may be enjoined from further prosecuting the suits above mentioned, and from instituting *in any*

state, other than the state of Missouri, any proceeding or proceedings to charge the plaintiff as garnishee *on account of wages due from it, for the last thirty days' service, to any of its employes residing in the state of Missouri, who are heads of families.* Upon this petition a preliminary restraining order was granted.

The defendant filed an answer denying the allegations of the petition, and moved for a dissolution of the injunction. The court, upon a full hearing, made the injunction, as prayed for in the petition, perpetual.

The defendant filed a motion in arrest of judgment, stating among other grounds that the petition did not state a cause of action, and that the court has no jurisdiction of the subject-matter of the action, which motion was overruled, and thereupon the court, *upon the defendant's motion*, granted to him an appeal to this court.

After the return of the appeal to this court, the defendant moved for a transfer of the cause to the supreme court on the ground that it involved the construction of the constitution of the United States, which motion we overruled. As the defendant still insists that this cause is one of which the supreme court alone has appellate jurisdiction, we shall first proceed to state our reasons for overruling this motion for the transfer.

In *Nall v. Railroad*, 97 Mo. 68, which was transferred by the Kansas City Court of Appeals to the supreme court on the ground that it involved the construction of the constitution of the United States, and where one of the reasons assigned in the motion for new trial was that the statute on which the court based its finding was unconstitutional, the supreme court said: "A question, not passed upon by the lower court at the trial, cannot afterwards be injected into the cause by motion for new trial in the lower court, or by assignment or brief in the appellate court, much less by a motion to transfer the cause from one court to another,"

and ordered a re-transfer of the cause to the Kansas City Court of Appeals. The reason for such a ruling is very obvious. Constitutional objections, where they affect the rights of parties to the suit only, may be waived by them, as any other objections. Cooley's Const. Lim., p. 181; *Baker v. Braman*, 6 Hill. 47; *Lee v. Tillotson*, 24 Wend. 339; *People v. Murray*, 5 Hill. 468. Nothing shown by the record in this case makes it appear that, if such an objection ever existed (on which we need express no opinion), it was not fully waived. The objection is not made in the defendant's answer, nor in his motion in arrest, nor in his motion for new trial, and the appeal *to this court* was granted upon the defendant's own motion, although he must be presumed to have been aware that this court has no appellate jurisdiction of causes involving the construction of the constitution of the United States. Any different ruling would lead to the result that any appellant, who comes to this court upon his own motion, may deprive it of its appellate jurisdiction in any cause by simply asserting in a motion for transfer that the cause involves the construction of the constitution.

We premise our observations on the merits of the case by stating that no objection was made by the defendant in the trial court to the petition for defect of parties plaintiff. As the testimony is not before us, we must assume that it was sufficient to establish all the facts stated in plaintiff's petition, and such other facts, whereof evidence was admissible under the statements made in plaintiff's petition. The petition states several grounds of unquestioned equity jurisdiction, to-wit, the prevention of a multiplicity of suits, the prevention of vexatious litigation, oppression and fraud. We do not hesitate to say that the purchase of claims, which originate in this state and are not enforceable under its laws, *with the sole purpose* of enforcing them in a foreign jurisdiction, and thereby evade the exemption laws of our own state, is an attempt to defraud the laws of the

state, and an attempt at oppression which justifies the interference of courts of equity. Here the petition charges, and we must presume the proof established, that these claims were bought *with the sole purpose of having them collected in foreign jurisdictions out of the employes' wages for the last thirty days' service*, and thus evade our own statute, which provides: "Nor shall any person be charged as garnishee on account of wages due from him to a defendant in his employ for the last thirty days' service; provided such employe is the head of a family and resident of this state." R. S. 1889, sec. 5220.

The jurisdiction of a court of equity in this state to prevent a fraud of that character is unquestioned. It is not an attempt on part of the court to interfere with courts in other jurisdictions, but to restrain a defendant, who is within its own jurisdiction, from committing a wrong. 3 Pomeroy's Eq. Jur., sec. 1318; *Cunningham v. Butler*, 142 Mass. 47; *Snook v. Snetzer*, 25 Oh. St. 516; *Keyser v. Rice*, 47 Md. 203; *Missouri Pacific Ry. Co. v. Maltby*, 34 Kan. 125; *Engel v. Sheuerman*, 40 Ga. 206. Such jurisdiction has been frequently exercised in cases involving the identical question which is involved in this case, where the aid of the court was invoked by the defendant himself and not by the garnishee (*Teager v. Landsley*, 27 N. W. Rep. 739; *Wilson v. Joseph*, 107 Ind. 490); and we have indicated repeatedly our views in approval of such holding. *Fielder v. Jessup*, 24 Mo. App. 91; *Todd v. Railroad*, 33 Mo. App. 110.

The only new question, which has not hitherto been directly passed upon, is whether the railroad corporation itself may invoke the aid of a court of equity for the protection of its employes, and for its own protection in cases of this character.

The defendant maintains that none of the plaintiff's rights are involved in this proceeding, that the judgment of a court of foreign jurisdiction is a complete

protection to it, and that, as garnishee, it is presumably awarded costs for the expenses it may incur in answering such suits. The proper answer to that argument is this: The plaintiff is threatened with a multiplicity of suits, each of which it is entitled to have enjoined by joining as a coplaintiff with the individual employe proceeded against. There is no demurrer for defect of parties in this case, and the suit is presumably prosecuted with the consent of the defendant in the attachment, as it is prosecuted for his benefit. The petition charges that the very object of these suits in other states is the vexation and harassing of the plaintiff. Equity deals with the substance of things and not their form, and to turn the plaintiff out of court, in order to compel it under these circumstances to institute a number of proceedings to enjoin each individual suit, which the defendant may see fit to bring, when the result of the proceedings would, under the views hereinabove stated, be the same as that reached in this proceeding, would, it seems to us, be losing sight of the substance, in order to give effect to the form.

All the judges concurring, the judgment will be affirmed.

JOSIAH SUTTON *et al.*, Respondents, v. H. C. STEVENS, Defendant, AND ALFRED KELLEY *et al.*, Appellants.

St. Louis Court of Appeals, April 29, 1890.

1. **Attachment: DETERMINATION OF PRIORITY: JURISDICTION.** If two attachment suits be instituted in different courts against the same defendant, and both be levied upon the same property, the court having jurisdiction of the cause in which the writ was first issued cannot determine the order of the priority of the attachments under section 447, Revised Statutes, 1879, unless the other attachment proceeding be transferred to it.

2. ——: ——: ——. If the second attachment suit is transferred to the court having jurisdiction of the first, but subsequently the first suit is transferred, by change of venue, to another court, the latter transfer does not affect the jurisdiction over the other, or second, suit, and, if no further transfer of the second suit be made, the priority of the attachments cannot be adjudicated under said section on motion made after such transfer of the first.

3. ——: APPEALS. If the order of the priority of the conflicting attachments be adjudicated under said section, an attaching creditor is not entitled to an appeal from such adjudication, if no final judgment has been rendered in his attachment suit.

Appeal from the Wayne Circuit Court.—HON. JOHN L. THOMAS, Judge.

APPEAL DISMISSED.

Frank Hicks, for appellants.

(1) Unless aided by statute, neither the first nor second petition states a cause of action, and no attachment will lie. *Hearne v. Keith*, 63 Mo. 84; *Burckhardt v. Helfrich*, 77 Mo. 382; *Bauer v. Gray*, 18 Mo. App. 170. (2) The first attachment bond was void, because approved by the clerk, who, himself, was a surety thereon, and who was, as well, one of the sureties on the collector's bond, for whom the suit was brought. *Owens v. John*, 59 Mo. 89. (3) The attachment, affidavit and bond of respondents being thus defective, the lien of appellants' writ became superior to that of respondent, and cannot be affected by the filing, subsequent to appellants' levy, of a new affidavit and bond. So far as appellants are concerned, the filing of a new affidavit, bond and petition by respondents amounted to an abandonment of their priority in point of time. Waples on Attach., pp. 105, 106; Wade on Attach., sec. 72, p. 150; *Jacobs v. Hogan*, 85 N. Y. 244; *Peck v. Hill*, 3 Conn. 431; *Fairfield v. Baldwin*, 12 Pick. 388; *Putnam v. Hall*, 3 Pick. 445; *Witte v. Meyer*, 11 Wis. 300; *Whitney v. Brunette*, 15 Wis. 69. The sufficiency of the

affidavit, bond, etc., and other proceedings may properly be attacked by appellants. *Metzner v. Graham*, 57 Mo. 406; *Gilbert v. Gilbert*, 33 Mo. App. 259; Drake on Attach., secs. 84, 85, 124; 1 Wade on Attach., sec. 2.

Dinning & Byrns, for respondents.

Section 6741 of the Revised Statutes of 1879, now section 7595, Revised Statutes, 1889, is constitutional. This section furnishes the sureties on a collector's bond a right of action by attachment, upon the happening of the contingencies therein named. The original petition and affidavit were not void, hence the amended petition and affidavit relate back and protect the levy made under the writ herein. R. S. 1889, sec. 568; *Musgrove v. Mott*, 90 Mo. 107; *Henderson v. Drace*, 30 Mo. 362; *Claflin v. Homer*, 20 Mo. App. 314; *Burnett v. McCluey*, 92 Mo. 230. Judicial proceedings which are amendable are not void. The amended petition and affidavit are unquestionably good under section 7595, Revised Statutes, 1889, and under the general attachment law. The clerk's approval of the original bond was not a void act. *Huff v. Shepherd*, 58 Mo. 242; R. S. 1889, sec. 3244; *Webster v. Smith*, 78 Mo. 163. The attorney for the plaintiff had a right to swear plaintiff to the affidavit. *Smith v. Ponath*, 17 Mo. App. 262, and cases cited. When Kelley *et al.* prosecuted their cause against Stevens to a judgment, establishing their attachment, they waived their right to have their cause transferred to Reynolds county under section 570, Revised Statutes, 1889, and the circuit court of Wayne county did right in overruling the motion of the appellants to postpone the attachment of the plaintiffs, because the appellants had no legal right to file said motion.

ROMBAUER, P. J.—This is a contest for priority of lien, between attaching creditors. The plaintiffs filed their petition in the circuit court of Reynolds county,

in which they stated, in substance, that they are securities on the defendant's official bond, as the collector of revenue for said county, and that defendant has misused and embezzled public moneys coming to his hands, as such collector, and owes the state six thousand dollars, for which amount the plaintiffs, as his securities, are responsible to the state. This petition was verified by the affidavit of one of the plaintiffs, stating that they had a just demand against the defendant, as securities on his official bond, which was now due, and that affiant had good reason to believe, and did believe, that the defendant was making improper use of the funds belonging to the state of Missouri, collected by him, as collector of the revenue of Reynolds county. The affidavit was sworn to before one of the plaintiff's attorneys, who was a notary.

The plaintiffs thereupon gave bond in the form usual in attachment cases, the clerk of the circuit court of Reynolds county, who approved the bond, being one of their sureties on said bond. Upon these papers a writ of attachment was issued on March 21, 1889, and levied on the same day on certain personalty of the defendant, which the sheriff subsequently sold under this writ, and the writ issued in favor of appellants, hereinafter mentioned, realizing the sum of three thousand and eight dollars upon such sale. The appellants, who were then residents of the city of St. Louis, brought an attachment suit in due form against the defendant in the circuit court of the city of St. Louis, on April 1, 1889, and caused the defendant to be served with summons in the city of St. Louis, where he was found, although he was at the time a resident of Reynolds county, and had no attachable property in St. Louis. They then caused a writ of attachment to be issued in said suit to the sheriff of Reynolds county, who levied it on the same property which had been attached by him on plaintiffs' writ.

No property was ever attached in the city of St. Louis. At the return term of the writ of summons, issued in behalf of the appellants, they appeared in the circuit court of the city of St. Louis, and obtained a judgment by default sustaining their attachment. They then moved the circuit court of the city of St. Louis to transfer the cause to the circuit court of Reynolds county, under the provisions of section 447, Revised Statutes of 1879, in reference to proceedings where the same property has been attached by writs from different courts. This motion was sustained and the cause transferred to Reynolds county. They subsequently obtained an order from the circuit court of Reynolds county to be permitted to file their transcript from the city of St. Louis in that court.

In the meantime, the defendant in the attachment filed his motion to quash the writ of attachment issued in the first suit on the ground that it had been improvidently issued. The circuit court of Reynolds county overruled this motion and gave the plaintiffs in the original suit leave to file an amended petition, affidavit and bond. The appellants objected to the filing of these amended papers, and, their objection being overruled, saved their exceptions. The defendant in the attachment thereupon prayed for a change of venue in the suit of these plaintiffs, which the court sustained, changing the venue to Wayne county, but no order transferring the action of the appellants against the defendant was ever made, and that action, as far as the record shows, is still in Reynolds county. All the parties appeared in Wayne county. The appellants filed a motion to postpone the plaintiffs' attachment to theirs, which the court overruled and they saved their exception. The plaintiffs and the defendant in the attachment went to trial in their cause, and the plaintiffs' attachment was sustained. The appellants thereupon renewed their motion to postpone the plaintiffs'

attachment to theirs, and, such motion being again overruled, they filed their bill of exceptions in the Wayne county circuit court, by which the facts hereinabove stated appear, and appealed to this court. No final judgment against the defendant was ever rendered in any court, either in the suit of the plaintiffs or in that of the appellants.

We have thus recited the facts shown by this extraordinary record in full, because we are at a loss to understand on what theory this appeal has been brought to this court. It comes from Wayne county without any showing that the appellants were ever properly before that court. Section 447, *supra*, provides that controversies of this character "shall be determined by that court out of which the first writ of attachment was issued; in order whereto, the cases originating in the other court shall be transferred to it, and shall thenceforth be there heard, tried and determined *in all their parts*, as if they had been instituted therein." That section does not contemplate that part of a case shall be determined in one court and part in another. Notwithstanding the transfer, the two cases, that of plaintiffs and that of appellants, were independent records, and were in no sense consolidated. The mere transfer of plaintiffs' action from Reynolds to Wayne county did not have the effect of transferring appellants' action likewise, and unless appellants' action was in the Wayne county court, they had no standing whatever in that court, and all the proceedings of that court, as far as they are concerned, are *coram non judice*.

There is another proposition which is equally fatal to the appeal. The record fails to show that the appellants ever obtained any final judgment in their cause. Appeals in this state lie from final judgments only. Before the change made in the attachment law by section 439, Revised Statutes, 1879, which provides for appeals from judgments on plea in abatements, it had

been repeatedly decided that no appeal could be prosecuted from such a judgment. *Davis v. Perry*, 46 Mo. 449; *Jones v. Snodgrass*, 54 Mo. 597; *Walser v. Haley*, 61 Mo. 445. In this case the defendant in the attachment appeared personally, so that the provisions of section 453 of the Revised Statutes of 1879 do not apply, even if the appeal could by any possibility be construed as one taken by the appellants from the judgment against the defendant in the suit of the plaintiffs. As we held in *State ex rel. v. Finn*, 23 Mo. App. 293 (such holding being approved by the supreme court in *State ex rel. v. Finn*, 98 Mo. 541), "the interest of parties to an attachment suit is contingent upon the termination of the controversy." How could the appellants claim that they were aggrieved by the action of the court in refusing to postpone the plaintiff's attachment to theirs without showing by final judgment against the defendant that they had a valid claim against him? In *Gilbert v. Gilbert*, 33 Mo. App. 259, both parties had prosecuted their claim to final judgment, before the appellants sought to test their right of priority by appeal.

It results from the foregoing considerations that the only disposition that can be made now of this proceeding is to dismiss the appeal.

Appeal dismissed. All the judges concur.

A. P. HARWOOD *et al.*, Respondents, v. J. O. DIEMER, Appellant.

St. Louis Court of Appeals, April 29, 1890.

41 48
48 458
41 48
55 25
41 48
66 324
41 48
92 271
41 48
94 *389
41 48
97 *448

1. **Real-Estate Broker:** RIGHT TO COMPENSATION. When a real-estate broker, employed to sell or exchange lands by the owner thereof, finds a purchaser for the property, and does everything which he agreed to do, and the trade fails, not on account of any default on his part or on that of the purchaser, but because it is repudiated by the land-owner, the broker is entitled to compensation.

2. **Tender: WAIVER.** After a party to a contract has repudiated it, he is not entitled to a tender of performance by the other contracting party. Proof of a tender is not necessary, when it is shown that it would not have been of any avail, if made.

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

AFFIRMED.

O. H. Travers, for appellant.

Goode & Cravens, for respondents.

ROMBAUER, P. J.—This is an action by plaintiffs, who are real-estate agents, to recover from the defendants a compensation agreed upon for effecting an exchange of his property. It was agreed upon the trial that the plaintiffs were entitled to recover the sum of one hundred and fifty dollars, the amount actually recovered, provided that they were entitled to any compensation under the facts shown. There is very little controversy touching the facts, which the trial court, sitting as a jury, as appears by its declarations of law, found to be as follows:

The defendant placed his farm in the hands of plaintiffs for sale or exchange. The plaintiffs found a customer named Maus, who was willing to exchange some town property, owned by him, for defendant's farm, on terms satisfactory to both parties. Owing to the facts hereinafter stated, the title papers could not be at once exchanged, and the parties executed a preliminary agreement. This agreement bore date August 18, 1886, and contained the following provisions: Each party was to make a perfect title to the other of the property given in exchange, subject to certain incumbrances mentioned in the agreement, and each party was to furnish an abstract of title to the other. Possession was

to be exchanged November 1, 1886. The agreement contained the following stipulation: "If it be impossible to make absolute title, because of existing disability on the part of said Diemer, then in that case Maus and Diemer may exchange title bonds, giving Diemer ample time to perfect his title to said farm." This clause was put into the agreement on account of the fact, which was known to all parties, that the defendant's wife refused to relinquish her dower in the farm, and had instituted a suit for divorce against the defendant, which was then pending, but which the defendant was in hopes of adjusting prior to November 1, 1886. Before the time fixed for exchange of possession, the defendant repudiated the agreement, and told both the plaintiff and Maus that he would not carry out his contract touching the exchange of the lands. The divorce suit was pending November 1, 1886, but was subsequently adjusted, and the defendant upon the trial declared his willingness to consummate the trade then. On and prior to November 1, 1886, Maus told the defendant that he was prepared to carry out his part of the agreement, but he made no tender to him of an abstract of title or a bond for a deed. Subsequent to November 1, Maus traded his property to other parties.

These being the facts established by the evidence, the judgment of the court is now challenged by the defendant on two grounds: The defendant claims that, as his inability to make perfect title was known to the plaintiffs at the date of the agreement, and as such inability was not removed prior to November 1, 1886, the trade fell through, for causes within the contemplation of all parties. He also claims that, as no abstract of title or bond for a deed was ever tendered to him by Maus, he was under no obligation to consummate the trade, even if otherwise bound to do so, by executing a bond for a deed.

Neither of these propositions is tenable. It is true that all parties knew, at the date of the agreement, that

the defendant was not then in a condition to make perfect title. For that purpose they postponed the final consummation of the agreement to November 1, and, in view of the fact that the defendant might not even at that date be able to make a perfect deed, they gave him an option of making his bond for a deed at the latter date, giving him ample time to make title by deed, which it appears the defendant could have subsequently done. The case of *Budd v. Zoller*, 52 Mo. 243, relied on by the defendant, which was decided by a divided court and against a strong dissenting opinion by Judges EWING and WAGNER, has no bearing on this case. There the agents agreed to procure a loan and failed to procure it, owing to a defect in the defendant's title, which they agreed to examine themselves; but here the plaintiffs did all that they agreed to do, found a purchaser who was ready and willing to carry out his part of the agreement, and the trade failed, not owing to their default, or the default of the purchaser, but simply because the defendant himself repudiated it. That, under such circumstances, the broker is entitled to compensation has always been the law of this state. *Bailey v. Chapman*, 41 Mo. 536; *Tyler v. Parr*, 52 Mo. 249; *Timbermann v. Craddock*, 70 Mo. 638.

The second proposition contended for by the defendant is equally without merit. Conceding, for the sake of argument only, that the plaintiffs, besides securing a purchaser, rested under the further obligation of getting the purchaser to carry out his agreement, yet they were not bound to show a tender on the part of Maus of the abstract of title or bond contemplated by the agreement. Proof that a tender, if made, would have been unavailing, dispenses with the necessity of a proof of tender, even in those actions where a tender is essential to a recovery. *Deichmann v. Deichmann*, 49 Mo. 109; *McManus v. Gregory*, 16 Mo. App. 375.

All the judges concurring, the judgment is affirmed.

GERHARD BECKER, Respondent, v. JAMES P. FAIRLEY, Administrator of MARY HAGGERTY, Appellant.

St. Louis Court of Appeals, April 29, 1890.

Practice, Appellate: AFFIRMANCE FOR FAILURE TO FILE TRANSCRIPT. The fact that an administrator *de bonis non* is without funds belonging to the estate, and, therefore, without means for the payment of the cost of a transcript of a cause appealed by his predecessor, is no reason why the judgment appealed from should not be affirmed for failure to file such transcript.

Appeal from the St. Louis City Circuit Court.—HON. GEO. W. LUBKE, Judge.

AFFIRMED.

ROMBAUER, P. J.—The plaintiff recovered judgment against Fairley as administrator in the circuit court, from which Fairley took an appeal to this court September 6, 1888. In January, 1889, Fairley's letters of administration were revoked, and in January, 1890, Ten Broek was appointed administrator *de bonis non*. No transcript of the record was ever filed in this court by the appellant. The plaintiff now produces such transcript and moves for an affirmance of the judgment.

The only cause shown by Ten Broek, administrator, why the judgment should not be affirmed, is that his predecessor Fairley converted the assets of the estate to his own use, and there are no means of the estate whatever wherewith he could have paid for a transcript.

This statement is not even accompanied by an affidavit.

An administrator in this state may appeal without bond, and the appeal of itself operates as a *supersedeas*. This fact furnishes another reason why he, above all others, should be held to a diligent prosecution of his appeal. The statement shows no good cause against the affirmance of the judgment.

Judgment affirmed. All concur.

---

41 53
42 651

41 53
92 348

41 53
94 622

41 53
97 156

CHARLES CHRISTENSEN, Appellant, v. G. A. C. WOOLEY *et al.*, Respondents.

St. Louis Court of Appeals. April 29, 1890.

1. **Estoppel:** FACTOR AND BROKER. If one, who has contracted to purchase land, refuses to carry out his contract after he has paid a part of the purchase money as earnest money to the owner's broker, and suit is instituted by the land-owner against the broker for such earnest money, it is not material to the determination therein of the broker's right to deduct his commissions from the earnest money, whether the contract of sale effected by the broker was binding on the purchaser under the statute of frauds, or not. The land-owner cannot in such suit assert the validity of the contract for the purpose of entitling himself to the earnest money, and deny its validity in order to defeat the broker's right to commissions.

Per Biggs, J.:

2. **Statute of Frauds:** MEMORANDUM IN WRITING. The memorandum in writing for the sale of land, which will satisfy the statute of frauds, need not be contained in one paper. The contract may be made up of several papers, which may be read together as one contract, provided that the paper signed by the party to be bound refers to the others so as to enable the court to gather the terms of the contract from all, when read as a whole. And, if the reference made in the paper signed by said party to the other documents be ambiguous, parol evidence is admissible to explain the ambiguity and identify the document referred to. Rule applied in case at bar, and the memorandum *held* sufficient.

3. **Real-Estate Broker**: RIGHT TO COMMISSIONS. A real-estate broker, otherwise entitled to his commissions, is not deprived of his right thereto by reason of the refusal of the purchaser to carry out the contract of sale on account of an alleged defect in the title of the vendor to the property.

4. ——: RIGHT TO COMPENSATION. If a real-estate broker, through whom a sale of land is effected, makes representations to the vendee as to the title, such representations, however, being merely made as expressions of opinion, and being neither made nor understood to have been made on the strength of the personal knowledge of the broker, this fact will not defeat such broker's right to commissions on a resale of the land effected by him for the vendee under the first sale, though the vendee under the second sale refused to carry out his contract of purchase on the ground of an alleged defect in the title.

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

AFFIRMED.

Benjamin U. Massey and *Ethelbert Ward*, for appellant.

Thrasher, White & McCammon, for respondents.

BIGGS, J.—This is an action to recover the sum of two hundred and twenty-five dollars, which the plaintiff alleged had been received by the defendants as his agents, and they had refused to pay to him on demand. The defendants denied the indebtedness, and averred that they were real-estate agents, and that the money retained by them was the amount of their commissions on a sale of plaintiff's property to one O. R. Symmes; that they had been employed by the plaintiff to sell certain real estate, and that, through their efforts, a valid contract for the sale thereof, upon the terms agreed on, was made with Symmes; that Symmes paid in cash five hundred dollars, but afterwards refused to complete the sale on account of alleged defects in the

plaintiff's title; that the plaintiff declined to enforce the specific performance of the contract with Symmes, and, prior to the bringing of this suit, sold the real estate to other parties; that, under the contract with the plaintiff, the defendants' commissions on the sale amounted to two hundred and twenty-five dollars, and that the defendants retained (as they lawfully might do) that amount of the cash paid by Symmes, and the remainder, to-wit, two hundred and seventy-five dollars, they paid to the plaintiff.

The plaintiff's replication put in issue the averments of the answer, and, upon the issues as thus made up, the cause was submitted to the court sitting as a jury. The finding and judgment were for the defendants, and the plaintiff has brought the case to this court for review.

The plaintiff only complains of the instructions given and refused. It will not be necessary for us to set out the instructions in this opinion, as our discussion of the propositions hereinafter stated will dispose of all legal questions necessary to a complete determination of the action.

We will treat of two questions only in this opinion: *First.* Did the defendants in the sale of the property bind the purchaser to a contract, which the plaintiff could have enforced, if his title to the property had been unobjectionable? *Second.* If there was such a contract, what effect did the refusal of Symmes to comply with it have upon the defendants' right to commissions?

I. The plaintiff's counsel insist that, while the defendants bound their client by a valid contract, they failed to secure from Symmes a sufficient written memorandum of the contract so as to enable the plaintiff to specifically enforce it; that, therefore, the five hundred dollars paid on the purchase by Symmes must be regarded as a forfeit or option, and that, when Symmes failed to complete the purchase, this money became the absolute

property of the plaintiff. Whether this position can be sustained as a legal proposition or not, we need not stop to inquire, because the statement is not borne out by the facts. We are of the opinion that the defendants did secure from Symmes a valid contract, and that consequently they were entitled to full commissions.

In every contract for the sale of land, or any interest therein, there must be a memorandum in writing, signed by the party sought to be charged; and the writing must show within itself, or by reference to some other paper or papers, all the material conditions of the contract. The contract may be made up of several papers signed by the different parties to it respectively, and, if necessary to satisfy the statute, and bind the parties, the various papers will be read as constituting one contract, provided that the paper, signed by the party attempted to be held, makes reference to the other papers so as to enable the court to gather from the papers, when read as a whole, the terms of the contract. *O'Donnell v. Leeman*, 43 Me. 160; Benjamin on Sales, sec. 222; Waterman, Spec. Perf., sec. 232, p. 311; Browne on the Statute of Frauds [4 Ed.] sec. 346 *b*. But, if it be necessary to introduce extrinsic evidence for the purpose of connecting the papers, then they cannot be read together. If the reference made to other documents in the signed paper is ambiguous, parol evidence *may* be admissible to explain the ambiguity or to identify the documents referred to. Benjamin on Sales, *supra*.

Now let us apply the foregoing legal principles to the facts in this case. It is admitted that the plaintiff put his property into the defendants' hands for sale, and that the attempted sale to Symmes was in compliance with the terms agreed on between them. It is also conceded that Symmes bargained for the land for himself, J. B. Montgomery and C. M. Condon, although the negotiations were conducted in Symmes' name. At the time of the purchase Symmes paid to the defendants

on account thereof the sum of five hundred dollars, and the defendants executed and delivered to him the following receipt:

"$500.00. SPRINGFIELD, MO., March 18, 1887.

"Received of O. R. Symmes five hundred dollars, part purchase money for sixteen acres of land known as the Murray tract, adjoining the city limits on the south and east of D. C. Kennedy's land. Sold him on the following terms: Price, eight thousand dollars for the entire tract, two thousand dollars' cash when abstract and deed is furnished, of which the five hundred dollars is a part. The balance of purchase to be paid: Two thousand dollars in six months, two thousand dollars in twelve months, two thousand dollars in eighteen months from date of transfer. All unpaid balance to bear interest at the rate of ten per cent. and secured by deed of trust on the land.

"[Signed.] WOOLEY, PORTER & HUBBELL."

This receipt was the only written evidence of the sale at the time the trade was made, and it is not claimed by the defendants that the receipt within itself would bind Symmes; but they do claim that the subsequent letters of Symmes and Montgomery, when read in connection with the receipt, were sufficient to take the case out of the operation of the statute of frauds.

Symmes lived in Oswego, Kansas, and he left Springfield before the abstract of title to the land was completed. The defendants on the night of the eighteenth of March mailed the abstract to him at Oswego, and on the following day it was returned by Montgomery to their Springfield agent, and he also addressed to the defendants the following letter:

"OSWEGO, KANSAS, March 19, 1887.

"I return the abstract to C. B. Sperry. You ought to get an attorney to pass upon your papers, or do it yourself. The one sent and returned is absolutely the

worst thing I ever saw, and I am surprised at your sending it out in shape it is in. I have directed Mr. Sperry to see you, and, if the abstract of title is as represented, I cannot take the property. You can see for yourselves the inconsistency of the title. Yours,

"J. B. MONTGOMERY."

After this there was a great deal of correspondence between the defendants and Symmes and Montgomery concerning the purchase. We deem it unnecessary to incumber this opinion with the entire correspondence, and we will only embody herein extracts referring to the receipt signed by the defendants. Under date of March 19, Symmes wrote from Oswego to the defendants as follows:

"DEAR SIRS:—Make us a warranty deed, and in drawing up notes can't you make them payable on or before, and instead of taking a trust deed let us sign the notes and have the following names thereon, viz.: O. R. Symmes, J. B. Montgomery and C. M. Condon? If you can arrange it thus for us we would be very glad, as we might want to put the land on the market and sell by the block or lot. I will either come or send a man over shortly to clear off the land and get it in good shape for the surveyors."

On April 17, Symmes wrote the following letter to the defendants:

"DEAR SIRS:—I herewith return to you the papers sent me some time since. The abstract is faulty, and I don't care to parley any longer about this matter. The time for our being able to dispose of it as we wished to has about passed, and I have other use for my money, as I have waited for a long time for you to perfect this abstract, and now we prefer you should return the five hundred dollars you hold of ours, and by so doing you will oblige a friend. O. R. SYMMES."

On the twenty-fifth of April, Symmes again wrote:

"*Wooley, Porter & Hubbell, Springfield, Mo.*

"DEAR SIRS:—I return herewith abstract to the *Murray land*, and as I told you some days since, Mr. Montgomery and myself are not now in a position to take this land, as Mr. Christensen was entirely too long in perfecting the title, and as for the taking of the W. T. deed from anybody till title is perfected, we here in Kansas never think of such a thing. We take no deed till title is perfected.

"I have just been talking to Mr. Montgomery, and he says we don't want the land, and I say the same.

"I fully understand the position you occupy in this matter, and I have no fault to find with you, but if Mr. C. had of perfected his title when he purchased he would have avoided all his trouble. I take the liberty to draw on you for the amount you have of ours, viz., five hundred dollars. Please protect and oblige.

"I hope that you will comply with this request as I do not want any trouble in regard to the matter and a speedy settlement will avoid the same, as the amount we had up was not an option."

The following is an extract from a letter written by Montgomery to the defendants under date April 28:

"GENTS:—In the purchase Mr. Symmes made of you to the *sixteen-acre* tract of land near Springfield, I was interested one-fourth, another party here one-fourth, and Mr. Symmes the half. Owing to the defective title, and the procrastination of same, we feel that we are no longer a party to the trade. You have failed to make good a clear title, and we must have the money which we have paid out."

On the fifth day of July following, Symmes wrote the following letter:

"*Messrs. Wooley, Porter & Hubbell, Springfield, Mo.*

"SIRS:—Referring to our deal and with a view of getting things adjusted, we will say that we don't like

trouble and would like to avoid litigation if possible about this matter, and would like to say this to you for your kind consideration, viz.: That you remit to us two hundred and fifty dollars ($250), and you retain a like amount, and we will send you your *receipt* for the five hundred dollars and discharge this matter in that way. To accept a faulty title is something that Mr. Montgomery and myself don't want to do, as we never could give a good warranty deed for the same, as that might involve ourselves and heirs in litigation in the future. Trusting, gentlemen, that this proposition will meet your approbation, I await your reply.

"Yours,

"O. R. SYMMES."

This correspondence refers directly to the receipt delivered by the defendants to Symmes; hence we are justified, in determining the validity of the contract of purchase, to read the receipt and correspondence together. When this is done we have undoubtedly a complete contract binding on all parties, in which the property is definitely described and the exact terms of sale are given. This satisfies the statute, and we are compelled to rule this point against the plaintiff.

II. Plaintiff's counsel make the argument that, although a valid contract of sale was made by the defendants with Symmes, yet, if Symmes failed without any fault on the part of the plaintiff to perform the contract, the defendants were not entitled to their commissions. This position is at war with the Missouri law on the subject. The whole tenor of the decisions of both courts of appeals, and the supreme court, is to the effect that the real-estate agent has performed his whole duty under the law, and is, therefore, entitled to his commissions, whenever he finds and produces a purchaser ready and willing to buy according to the terms agreed on; or when he procures a valid contract of purchase from a solvent buyer. *Carpenter v. Rynders*, 52 Mo. 278; *Bailey v. Chapman*, 41 Mo. 536; *Love v.*

Owens, 31 Mo. App. 501; *Gaty v. Foster*, 18 Mo. App. 639; *Nesbit v. Hesler*, 49 Mo. 383; *Hayden v. Grillo*, 35 Mo. App. 653. The agent in such a case is entitled to his commissions, though the trade was afterwards broken off on account of a defect in the seller's title. *Collins v. Fowler*, 8 Mo. App. 588; *Love v. Owens*, *supra*. But the plaintiff insists that, even though the law is as stated above, the case at bar ought to form an exception to the rule, and be governed by the doctrine announced in the case of *Budd v. Zoller*, 52 Mo. 238. In the case last referred to, Budd had agreed with Zoller to procure for him a loan on the credit of certain real estate. Definite arrangements were made by Budd for the loan, but, Zoller's title to the land proving unsatisfactory, the lender declined to complete the loan; Budd then sued for his commissions, and the majority of the court, in passing on his right of recovery, said: "Now it will be seen by this contract that the defendant had employed the plaintiffs not only to procure the loan, but to examine the title to the property, and see if it was good and whether a loan could be procured upon it. It seems to me that the plaintiffs in such a case ought to have first ascertained whether the title was good, and then procured the loan, if the title proved good and sufficient. They were defendant's agents for both purposes, and in fact, they having agreed to have the title examined, and having the title papers in their hands for that purpose, they are to be charged with notice of the defect in the title before they procured the money, and it would be bad faith in them to charge the defendant commissions for procuring money, when it was their duty to have known at the time that it would be unavailing." In the present case it is not claimed that the defendants agreed to have the title examined before offering the property for sale, but that the plaintiff only a few days before the sale to Symmes had bought the land from Murray and Grabill through defendants' agency, and that in this purchase the

defendants represented that the title was good, and, therefore, it is argued, that it would be inequitable and unjust to compel the plaintiff to allow the defendants to deduct their commissions from the cash payment, when the sale was defeated through the defective condition of the title, and from no other fault of plaintiff. The evidence on this subject shows that whatever representations the defendants may have made concerning the title were merely expressions of opinion, and were neither made nor understood as made on their personal knowledge, but were based merely on the supposition that Murray and Grabill, who owned the land, would not convey by warranty deed, if the title was defective.

We can see nothing in this case to take it out of the general rule. The defendants found a purchaser who was admitted to be solvent; they secured a valid contract of sale; and the failure of the purchaser to consummate the purchase was through no fault of theirs, but was solely attributable to an alleged defective condition of plaintiff's title. If the plaintiff's title was good, he could have compelled Symmes to specifically perform the contract; if the title was in fact defective, this would afford the plaintiff no excuse for withholding from the defendants the agreed compensation. It was the duty of the plaintiff, before putting his land on the market for sale, to look to his title, and, under the facts of this case, it was no part of the duty of the defendants to do this for him. Under this state of the evidence there is no rule of law, with which we are acquainted, that would relieve the plaintiff from his legal obligation to compensate the defendants for making the sale.

The judgment of the circuit court will be affirmed. The other judges concur in the result.

ROMBAUER, P. J. (*concurring*).—In the opinion of Judge THOMPSON and myself, the question whether the proof shows a valid sale within the provisions of the

statute of frauds is immaterial. The plaintiff, by instituting this suit to recover part of the purchase money of the lands in the hands of his agents, is estopped from asserting that the agents failed to make a valid sale. The plaintiff cannot take the inconsistent position of treating the sale as both valid and invalid, valid for the purpose of entitling him to recover part of the purchase money, and yet invalid for the purpose of entitling his agents to commissions.

THE CHARLES H. HEER DRY-GOODS COMPANY *et al.*, Respondents, v. CITIZENS RAILWAY COMPANY, Appellants.

St. Louis Court of Appeals, April 29, 1890.

1. **Obstruction of Public Highway: RIGHT OF ACTION BY PRIVATE PERSONS.** A private person has a right of action for the illegal obstruction of a public highway by another, if he is damaged differently than the public at large, not merely in degree but in kind.

2. **——: ——: INJUNCTION.** It appearing that a retail dry-goods store fronted on one of the streets of a city leading to the public square, and being but seventy-five feet from the square; that the street was narrow after it left the public square; that it had upon it one street railroad track; that the street railroad company was about to lay upon it another track, and to operate its road therein, without legal warrant; that the obstruction of the street which would thus ensue would block up the street, and, by impeding and preventing the access of vehicles to the store from the public square, would divert business from said store, *held* that, although the additional track would go only up to the store and would not be in front of any part of it, both the occupant and the owner of the premises would be especially injured by it, the former by the diversion of trade, and the latter by the consequent diminution in value of his premises; and, *held*, further, that an injunction to restrain the laying of the track was a proper remedy.

Per Thompson, J.:

8. **Under Revised Statutes, 1889,** section 2303 a decree enjoining a threatened illegal obstruction of a public highway, though made at the suit of a private individual, should not be reversed, if it be doubtful whether the plaintiff will suffer damages different in kind from those of the public generally, or whether his damages can be adequately redressed in an action at law.

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

AFFIRMED.

C. B. McAfee, for appellant.

(1) The petition shows that defendant was already lawfully upon Boonville street, and for a long time had been operating its railroad, and its complaint simply means that defendant threatens to repair its existing track, or put a switch by its side. It is not a new or additional track, for it is only one hundred feet long, and is to be operated with the existing track, as the petition concedes. The construction of it is, therefore, not within section 1576 of the Revised Statutes of 1889. The conceded right of the defendant to use the street for its railroad involves the right to make passing switches. *Hovelman v. Railroad*, 79 Mo. 632. (2) Plaintiffs are not specially damaged above others having property on Boonville street. They do not aver that they are the only persons dealing with ladies who ride in chaises on Boonville street, and, if they are, the special damages they plead are not such as the law contemplates and which would entitle them to an injunction. Will not all other property-owners on Boonville street be damaged by this threatened switch and standing cars at its intersection with the public square if plaintiffs are? Will the injury to plaintiffs be different in character to that which others on that street will suffer? It is not enough that they may be damaged to a greater degree.

Crowly v. Davis, 63 Cal. 460; *Dwenger v. Railroad*, 98 Ind. 153; *Bigley v. Nunan*, 53 Cal. 403; *Payne v. McKinley*, 54 Cal. 532; *Rude v. City of St. Louis*, 93 Mo. 408; *Bailey v. Culver*, 12 Mo. App. 184, affirmed in 84 Mo. 531. The petition not only fails to show that plaintiffs are abutting property-owners, but shows by their averments that they are not. They are not, therefore, in a condition to invoke the inhibitions of section 1576. Besides there is no power in an individual, whose property is not actually taken or disturbed, to restrain acts alleged to be *ultra vires*. *Chambers v. City of St. Louis*, 29 Mo. 443; *Kennedy v. Railroad*, 69 Mo. 663; *Martindale v. Railroad*, 60 Mo. 510; *Land v. Coffman*, 50 Mo. 243; *Shewalter v. Riner*, 55 Mo. 218; *Bank v. Hunt*, 76 Mo. 439; *Hovelman v. Railroad*, 79 Mo. 632; *Patterson v. Railroad*, 75 Ill. 588. This last case is decisive of this point.

Goode & Cravens, for respondents.

(1) The statute would seem to be decisive of the present case. By its terms three conditions must be performed before a railway can be lawfully constructed on a city street, or any part of one: *First.* The permission of the council must be obtained. *Second.* Before it is located, a majority of the residents, or owners, of abutting property on the street, or part to be occupied, must assent to the location, in writing. *Third.* Before construction, damages to the abutting lands must be ascertained and paid. R. S. 1889, sec. 1576; Laws of 1887, p. 64, sec. 107. (2) The right to occupy the streets of a city with street railway tracks can only be granted by the legislature, or by the municipality acting pursuant to statutory powers. Dillon on Munic. Corp. [3 Ed.] sec. 715; *State ex rel. v. Railroad*, 85 Mo. 262. Permission to lay one track of a horse railway along a street is not sufficient to warrant the laying of another track along a part of the street.

Roberts v. Easton, 19 Ohio St. 78, a case identical in principle with the one at bar; *Railroad v. Reed*, 41 Cal. 256; *Railroad v. Denver City Co.*, 2 Col. 678. A railway laid over or on a highway or street so as to obstruct it, without express statutory authority or necessary implication, is liable to indictment as a nuisance. Dillon Mun. Corp. [3 Ed.] sec. 708; *Commonwealth v. Railroad*, 14 Gray, 93. And the company may be enjoined from laying down their track by the public authorities, or by lot-owners specially injured. Dillon Mun. Corp. [3 Ed.] secs. 708, 660, and note; *Railroad v. Shields*, 33 Ga. 601. Any continuous obstruction of a public highway not authorized by competent legal authority is a public nuisance. Dillon, *supra*, note to sec. 660; *Davis v. Mayor of New York*, 14 N. Y. 506; *Barney v. Keokuk*, 94 U. S. 324. (3) A public nuisance will be restrained at the suit of a private person who suffers therefrom especial and particular injury, distinct from that suffered by him in common with the public at large. 3 Pomeroy's Eq. Jur., sec. 1349; Wood on Nuisances, sec. 645; *Grimes v. Van Studdiford*, 4 Mo. App. 503; *Gay v. Tel. Co.*, 12 Mo. App. 493; *Soltan v. De Held*, 2 Sim. N. S. 133; *Burrows v. Pixley*, 1 Root, 362; *Lansing v. Smith*, 4 Wend. 89; *Mills v. Hall*, 9 Wend. 316; *Myers v. Malcom*, 6 Hill, 296; Wood on Nuisance, sec. 647, p. 720; *Hart v. Bassett*, 7 Jones, 156; *Ross v. Butler*, 19 N. J. Eq. 294; *Haskell v. New Bedford*, 108 Mass. 216. And whether the injury be to person or property is immaterial. Wood on Nuisances, sec. 648; *Robert Morry's Case*, 9 Coke, 112; *Hobson v. Todd*, 4 T. R. 73; *Greene v. Nunemacher*, 36 Wis. 50. Public nuisance occasioned by obstruction of highway by unauthorized railway track may be enjoined by individual specially damaged. Dillon on Mun. Corp. [3 Ed.] sec. 708; *Railroad v. Denver City Co.*, 2 Col. 678; *Davis v. Mayor*, 14 N. Y. 506; *Milhau v. Sharp*, 27 N. Y. 611; *Railroad v. Shields*, 33 Ga. 601, *Roberts v. Easton*, 19 Ohio St. 78.

THOMPSON, J.—This is an action by private parties against a street railway company to enjoin it from laying a sidetrack upon a street in the city of Springfield, already occupied by its main line. The defendant demurred to the petition; the demurrer was overruled; the defendant elected to stand on its demurrer, and the court thereupon entered final judgment as follows:

"And it is by the court ordered and adjudged that the injunction heretofore granted in this action be, and is hereby made, perpetual until the defendant shall obtain lawful authority to lay said additional track, and the defendant is hereby enjoined from laying an additional track from a point on the public square in the city of Springfield, Missouri, twenty-five feet south of where Boonville street enters said square, to a point on said Boonville street seventy-five feet north of said square, until the right to lay such additional track has been by defendant obtained by a compliance with the law regulating such cases; and it is further considered and adjudged that the said plaintiffs recover against the said defendant the costs in this suit expended."

The petition which the court thus sustained is as follows:

"The plaintiffs state that the defendant is a corporation organized under the laws of the state of Missouri, and is engaged in the business of operating a street railroad in the city of Springfield.

"That the plaintiff Charles H. Heer owns a large, three-story brick storehouse on the west side of Boonville street in said city, in which the plaintiff, the Charles H. Heer Dry-Goods Company, is engaged in carrying on a large retail dry-goods store. That said storehouse is about seventy-five feet north of the public square of said city, and on said street in front of the said storehouse the defendant has now, and for a long time past has had, a street-car track laid, along which, and over which, the cars are drawn by horses and mules.

"That said Boonville street is a narrow street, being only about forty (40) feet from the curbstone on one side of it to the curbstone on the other side.

"That, in the course of the business of said Charles H. Heer Dry-Goods Company, many carriages, buggies and other vehicles conveying its customers and patrons have to pass onto said Boonville street from said public square, and there is at present not room to accommodate them, and to allow them to pass freely, on account of the narrowness of said street, and the fact that defendant's cars stand on said track very often during the day at the place where said street enters the square.

"That defendant is now about to lay another track, parallel to its present one, from a point on said square about twenty-five (25) feet south of said street to a point in said street about seventy-five (75) feet north of the square.

"That the avowed object and purpose of the defendant in laying said additional track is to arrange to have two cars at once stand in said street, side by side, at a place where said street enters the square.

"That said additional track is not necessary to the business of said company, and will (together with the running and standing of the cars thereon) greatly impede travel and the passage and running of carriages and other vehicles on said street, and will greatly and irreparably obstruct and damage it as a business street, and will tend to, and will, drive business away from and off said street onto other streets of said city.

"That the business of said Charles H. Heer Dry-Goods Company largely consists of selling goods at retail to ladies, who go to stores to do their shopping in carriages and other vehicles.

"That these customers of said plaintiff will, by the obstruction of said street by said contemplated additional track of defendant, and by the standing and passing of its cars thereon, and by the diminished room for

entering said street from the square, and for hitching and standing their carriages thereon, and for driving thereon, be prevented from buying goods, as they heretofore have done, from said plaintiff, so that plaintiff will be specially damaged by the laying of said additional track.

"That the said storehouse of the plaintiff Charles H. Heer will be rendered less useful and desirable as a place of business by said additional track, and the obstruction to said street which it will cause, and will not yield to said plaintiff as much rental as it now does, whereby he will be specially damaged by said track.

"That said defendant has no authority or permission by resolution or ordinance of the city aforesaid to lay said track, nor have a majority of the citizens, owning property on the portion of said street along which said track is to be laid, assented to the laying of it in writing.

"That said defendant, furthermore, proposes to construct and lay said track without first ascertaining and paying, as the law requires, to the owners of abutting property such damage as they will sustain by said additional track.

"Wherefore plaintiffs pray that, inasmuch as they are without adequate remedy ——— law, a writ of injunction may be issued, prohibiting said railway company, its officers, agents and servants from laying said track and for other proper relief."

The chief objections taken to the petition by the demurrer, and renewed in argument in this court, are: *First.* That it does not state facts which show that the additional track, if laid, will subject the plaintiffs to damages different in *kind* from that sustained by the general public. *Second.* That, even if it does state facts which show this, it does not state facts which show that the damages will be of such a nature that they cannot be redressed in an action at law.

It is perceived that the petition does not charge, in terms which exclude the possibility of exceptions, that the defendant is proceeding to lay the additional track without any lawful authority whatever. It does charge that "said defendant has no authority or permission, by resolution or ordinance of the city aforesaid, to lay said track; nor have a majority of the citizens, owning property on the portion of said street on which said track is to be laid, assented to the laying of it in writing." This paragraph of the petition was evidently drawn to meet a provision of the Revised Statutes of 1889, applicable to cities of the third class, which is as follows: "The council shall have sole authority, by ordinance, to grant the right to any person or persons, corporations or company, to make and construct railroads or street railroads in any street in said city, and to regulate and control the use thereof: *Provided*, that no such railroad shall be located on any street or alley in said city, or any portion of said street or alley, until a majority of the residents, owners of land abutting on said street or alley, or such portion thereof, shall first assent thereto in writing; *and provided, further*, that no such railroad shall be constructed or operated until all damages to such abutting lands shall have been first ascertained and paid to the owners thereof by the person, company or corporation constructing said railroad; and the city council shall pass suitable ordinances providing the manner and way of ascertaining said damages." R. S. 1889, sec. 1576. It is not averred in the petition that the city of Springfield is organized as a city of the third class; and while we cannot take judicial notice that such is the fact (*City of Springfield v. Whitlock*, 34 Mo. App. 646), we apprehend that we ought not to make our decision turn on this defect in the petition, because the printed arguments, which have been filed, seem to assume that such is the fact.

We must, therefore, conclude from the averments of the petition that the defendant is proceeding to lay the additional track without authority of law. Against this conclusion it is argued, on behalf of the defendant, that the petition impliedly shows that the defendant is lawfully engaged in operating its main track on Boonville street, and that the right to lay additional sidetracks for switching purposes is to be regarded as a mere incident to the right to lay and operate a main-street railway track. This conclusion is inconsistent with another averment of the petition, "that said additional track is not necessary to the business of said company." If the position of counsel for the defendant is correct, the implication would extend no further than to give the street railway company, having the franchise of operating a street railway upon a given street, the right to lay such additional sidetracks for switching purposes as might be necessary to the transaction of its business and the service of the public.

We infer from the petition that Boonville street enters the public square from the north, in such a manner that the prolongation of the street extends along one of the margins of the square; that the building owned by the plaintiff Heer, and occupied by the plaintiff the Charles H. Heer Dry-Goods Company, abuts on Boonville street about seventy-five feet north of the public square; that the additional track which the defendant threatens to lay commences twenty-five feet south of the intersection of Boonville street with the public square, and extends one hundred feet north, twenty-five feet of its extent being along the margin of the public square, and the remaining seventy-five feet extending into Boonville street as far as the south line of the building owned by the plaintiff Heer, and occupied by the other plaintiff the dry-goods company. The building in question does not, therefore, abut against any portion of the street upon which the

defendant threatens to lay the additional track, but the track will terminate at its north end at a point, so to speak, opposite the southern line of the plaintiff Heer's building.

We direct attention to these portions of the petition for the purpose of making it appear that we regard the petition as stating that the defendant is threatening, without authority of law, to lay an additional street railway track upon Boonville street and to stand its cars thereon; that the effect of such track, if laid, and of the standing of cars thereon, will be so to obstruct the street (which is a narrow street at its entrance to the public square), as to impede and prevent vehicles from being driven into the street, whereby the rental value of the building of the plaintiff. Heer, which is a brick storehouse three stories high, will be diminished, and whereby the business of the dry-goods company which occupies the building will also be diminished. The two questions above stated seem, therefore, to be fairly presented by the record.

I. If the plaintiffs were abutting owners, the question would seem to be clear of doubt on the authority of *Dubach v. Railroad*, 89 Mo. 483, where it was held that, if a railroad company attempts to lay its track upon the street of a city in such a manner as to deprive the public of the use of the street, an abutting owner, sustaining special damages thereby, can have an injunction to restrain such a use of the street. See also *Belcher Sugar Refining Co. v. Elevator Co.*, 82 Mo. 124. But the question with which we have to deal is, whether any other owner, save one whose property abuts on the portion of the street affected, can have such a remedy.

We should not have much doubt upon the question, but for the language employed by the judges in some of the decisions in this state,—language which, as we shall show, was not necessary to the decision of the

questions before the court. In *Bailey v. Culver*, 12 Mo. App. 175, 184, the following language appears in the opinion of this court, written by Judge LEWIS: "The owner of a lot abutting on a public street or alley has a vested right in the easement, coextensive with his boundary line, as a means of egress into the outer world from any part of his lot contiguous therewith. This right is as fully protected against invasion by legislative or municipal agencies, as the right to his house or his farm. But, beyond the limits of contiguity with his lot, his rights in the easement are only those of a member of the public at large. If he could claim more than these at a longitudinal distance of fifty feet from his lot, he could claim the same at the distance of a mile, or of ten miles. The plaintiffs in this case have the same rights on St. Charles street that they have on the alley. If they are entitled as individuals to object to the vacating of the alley by municipal authority at a distance of two hundred feet from their property, other egress being still provided for them, they would be equally entitled to interfere against any undertaking by the same authority to alter the direction of St. Charles street at a point five miles away. Their rights in the highway are simply those of egress and approach. It is true that these rights may be unlawfully prejudiced by an obstruction at a distance from the plaintiff's property, if the effect be to deprive them of communication with the outer world, or to exclude them from the general system of public highways."

This decision was affirmed by the supreme court. *Bailey v. Culver*, 84 Mo. 531. That court in its opinion restated the general doctrine that, "the plaintiffs, in order to obtain the extraordinary relief for which they pray, must show a special injury other than, and different from, that which they suffer in common with the general public; for it is settled law that, where a highway is altered, obstructed or altogether vacated, no

action will lie except by him, who 'has greater trust or incommodity than every other man has;'" citing *Kinealy v. Railroad*, 69 Mo. 658, 663, where the same expression is used.

The question again came before the supreme court in *Rude v. St. Louis*, 93 Mo. 408, and in the opinion of the court, given by BLACK, J., the following language occurs: "Generally, where damages have been awarded to a property-owner for an obstruction in the street, the obstruction has been in that part of the street upon which the property fronted; yet it cannot be said that this is always essential to a recovery. The property may not be on the street, yet may communicate with it by means of a private way, in which event it would seem that an obstruction at the private way would be an infringement of a private right."

The observations of Judge LEWIS in *Bailey v. Culver*, 12 Mo. App. 175, 184, were entirely unnecessary to the decision of that case. The plaintiffs sought to enjoin, not the obstruction, but the *deflection* of an alley, their property being situated two hundred feet from the point of deflection. If their injunction had been granted, it would have resulted in tearing down an extensive building erected by the defendant, and in doing him infinitely more injury than any benefit, which could possibly have accrued to them. This will be quite apparent from the map of the property exhibited in the report of the case in 84 Mo. at page 533. What they complained of not only did not cut off the use of the alley in that direction, but, as was pointed out by the opinion of SHERWOOD, J., in the supreme court, it did not obstruct it to their damage. "The evidence," said he, "abundantly establishes that the deflected alley is equally, if not more, convenient for ingress and egress than the old one, and that the increase in distance to the point where the old alley opened on Eighth street, in consequence of the closure, is not a matter of any

considerable importance." The court placed its decision largely upon the great injury which would accrue to the defendant from granting the prayer of the petition, and the slight damage, if any, which would accrue to the plaintiff from withholding it. But, if the language of Judge LEWIS could have been accepted as a correct statement of the law at the time when his opinion was written, it appears from the opinion of BLACK, J., in the later case of *Rude v. St. Louis*, as above quoted, that it can no longer be accepted to be such; for there it is conceded that it is not always essential to a recovery of damages that the obstruction in the street should have been in that part of the street along which the plaintiff's property fronted. The illustration given by Judge BLACK, that "the property may not be on the street, yet may communicate with it by means of a private way, in which event it would seem that an obstruction at the private way would be an infringement of a private right," must, we take it, be regarded as only one illustration which then occurred to his mind, or which he thought it necessary to give, of the conclusion, that property-owners, whose property does not abut upon the street, may have a private action for damages for an obstruction of the street.

The case of *Rude v. St. Louis*, *supra*, did not present facts which necessarily called for any observations on the question, because in that case the obstruction complained of was situated five hundred feet from the plaintiff's property, and two intervening cross streets existed between his property and the obstruction.

The facts of that case were essentially different from the facts of the case before us, in this, that the obstruction of the street in that case did not leave the plaintiff's property in a *cul de sac*, so to speak, but it left him with abundant means of ingress and egress in both directions. "The plaintiff," said BLACK, J., "has perfect access to his property. It is only when he goes south, passing

Scott avenue and another street, that he comes in contact with the obstruction, the nuisance. His inconvenience, and that of persons going to and from the grocery, is precisely the same in kind as that of all other persons who desire to use High street. His may be greater in degree, but not different in kind. The nuisance is a public one, and the physical facts show that the damages to the property are due to a public, and not to a private, wrong." These observations have but an imperfect application to the facts of the case before us.

The supreme court reaffirmed the case of *Rude v. St. Louis*, *supra*, and applied it in a case involving the same obstruction, where the facts were so far analogous that the plaintiff's property was three hundred and fifty feet from the obstruction. The report does not show whether there were any intervening cross streets or not; but it is to be inferred that there were. *Fairchild v. St. Louis*, 97 Mo. 85. The court reaffirmed the same doctrine, in respect to the same obstruction, in another case where the plaintiff's property was situated only one hundred and twenty-five or one hundred and thirty feet from the obstruction (*Canman v. St. Louis*, 97 Mo. 92); but the report of the case is so brief, that it does not appear that the obstruction left the plaintiff's property, or the business carried on therein, in the situation in which the present obstruction would place the property and business of these plaintiffs.

There is no difficulty in understanding the general principle upon which these cases proceed,—that, in order to entitle a property-owner or occupier to maintain an action for damages, and for stronger reasons to maintain an action for an injunction, it must appear that the damages, which have accrued or will accrue to him, are different in kind, and not merely in degree, from those which have accrued, or will accrue, to other members of the community. Courts have frequently remarked upon the difficulty of applying the rule to

facts, and in its application a great contrariety of decisions is found. I take occasion to state here that my examination of this question leads me to believe that the rule, as formulated by our supreme court, that the damages must be different, not merely in degree but also in kind, from those sustained by the general public, is not supported by the weight of authority; and I am of opinion that it is unsound in principle. It furnishes, nevertheless, the rule for our guidance in this case. English decisions upon the right of private action in such a case go back to year-book times, and support the conclusion that such an action may be maintained, where, by reason of the peculiar situation of the plaintiff, the obstruction cuts off his access to and egress from his premises or place of business (*Greasly v. Codling*, 2 Bing. Rep. 263; *Iveson v. Moore*, 1 Ld. Raym. 486; s. c., Willes, 74, note *a*); or renders it more tedious (*Blagrave v. Water Works Co.*, 1 Hurl. & N. 367; s. c., 26 L. J. Exch. 57; *Wiggins v. Boddington*, 3 Carr. & P. 544); or more circuitous (*Hart v. Bassett*, Sir. T. Jones, 156; *Rose v. Miles*, 4 Maule & S. 101); and hence more expensive. In the opinion of this court in *Gay v. Tel. Co.*, 12 Mo. App. 485, 493, citing these authorities, we assume the rule to be that an obstruction of such a nature as to turn the tide of travel away from the door of a building, so much as to injure the plaintiff's trade, if a tenant, or his rents, if a landlord, would be such an obstruction of the highway as, if otherwise unlawful, would be enjoined in equity. But we did not regard that case as one presenting such a state of facts.

Since the decision of the supreme court in *Rude v. St. Louis*, *supra*, and in the other cases above cited which have followed it, it must be concluded that the mere fact that the obstruction of a highway is so situated with reference to the property of the plaintiff, that it will oblige him to take a more circuitous route to get to a particular place beyond the obstruction, will

not give him a private action for damages. But it does not follow from this that cases may not exist where the obstruction, by reason of its nearness to the plaintiff's property, or other circumstances, will inflict upon him such serious and special damage as must be regarded as damage differing not only in degree, but also in kind, from that sustained by the general public; and such in our opinion is this case. This is shown by two cases, one decided in England, and one in this country, both of which appear to have acquired the standing of leading authorities.

In *Wilkes v. Hungerford Market Co.*, 2 Bing. N. C. 281, the plaintiff was a bookseller, occupying a shop by the side of a public thoroughfare. He suffered in his business in consequence of passengers having been diverted from the thoroughfare by an unauthorized obstruction placed across it by the defendant for an unreasonable time. In an action at law for the damages he alleged that, by means of the obstruction, he was prevented from carrying on his trade and business in as large, ample and beneficial a manner as he otherwise might and would have done, and that, during the time that the obstruction existed, he had lost and been deprived of divers great gains and profits which might, and otherwise would, have arisen and accrued to him from carrying on the trade and business of a bookseller in his messuage and premises. At the trial he established by evidence these allegations, and obtained a verdict. On the hearing of a motion for a nonsuit, notwithstanding the verdict, it was argued that the facts constituted merely a public nuisance, to be redressed by an indictment, but for which a private action would not lie. The whole court decided otherwise. The cases from the time of the year books were examined. The effect of the case was to overrule the doubtful decision of Lord KENYON in *Hubert v. Groves*, 1 Esp. 148, and to establish the doctrine that, where a tradesman, occupying a shop on a street in a city, is situated so near an

obstruction in the street that his trade and business are diverted from him by reason of it, he may maintain an action for damages against the author of the nuisance.

The other leading case to which we refer is the decision of the supreme judicial court of Massachusetts in *Stetson v. Faxon*, 19 Pick. 147; s. c., 31 Am. Dec. 123. In that case the plaintiff owned a warehouse facing southerly on a way, which had been used and recognized by the city of Boston as a street for more than sixty years, although no record was in evidence of the laying out of such way. The city laid out a new street to the south of this ancient one, running in front of the plaintiff's warehouse, and thereafter sold to the defendant, who also had a warehouse to the east of the plaintiff's, and separated therefrom by a narrow alley and facing the ancient way, the fee in this ancient way in front of his warehouse to the north line of the new street. The defendant then proceeded to erect a new warehouse on his original lot, covering it and the portion of the ancient way bought by him. This new structure extended beyond the plaintiff's building thirty-six feet, and the special injury alleged to be thereby occasioned was the obscuring and darkening of the plaintiff's warehouse, the obstructing the free communication therewith which formerly existed, the blocking of the alley with building materials, so as to deprive the plaintiff wholly of the use thereof, the loss of tenants, expenses of repairs and alterations to induce tenants to continue in the occupancy thereof, and the reduction of rent occasioned by impairing the value of the warehouse. The plaintiff, in an action for the damages thus occasioned, had a verdict for four thousand and ten dollars and twelve cents. On a motion for new trial, the verdict was sustained by the whole court in a learned opinion by PUTNAM, J. The decision of the court was placed, not only upon the case of *Wilkes v. Hungerford Market Co.*, *supra*, but upon several other

English adjudications of recognized authority. A reading of the opinion shows that the court proceeded upon the view that the plaintiff had suffered an actual and particular injury to his trade and estate from a public nuisance, for which a public action would not afford him redress.

Numerous other American decisions could be collected, where, upon facts more or less analogous, the same conclusion has been reached; but it is thought unnecessary to go into them, for it is to be confessed that many can be found where the courts have taken the opposite view. We take it that, where the portion of the street to be obstructed lies but seventy-five feet from the public square of the city, a place which is presumptively the most public place in the city; that where the street is so narrow that there are but forty feet between the sidewalks; that where the obstruction is of such a nature that it will probably prevent a considerable portion of the public travel in vehicles from entering the street from the public square,—it is easy to conclude that the occupier of a retail business house so situated will be particularly injured by customers being turned away from him to competitors, and that his injury is not merely the injury which the general public sustains by the partial obstruction of the street in finding its passage more difficult, or in being perhaps obliged to take a circuitous route to reach a given point, but that it is an injury which is peculiar to him by reason of the peculiar situation of his property. We may, moreover, justly conclude that an obstruction to the street, which will thus work an injury to the trade carried on in the building by its tenants, will diminish its rental value and thus work an injury to its owner.

Some argument in favor of this conclusion is to be derived from the fact that the statute above quoted (Revised Statutes, 1889, sec. 1576) recognizes the interest of abutting lot-owners in so far as to prohibit the

location of street railroads on streets without the consent of a majority of them. Nor does the statute, as counsel for the defense argue, restrict the necessity of obtaining such consent to those lot-owners whose lots front on that portion of the street intended to be occupied by the railway,—although it may be conceded, that, in the case of a long street, remote lot-owners would have no interest in the matter. It should seem that abutting owners within the particular block, a portion of the street in which is sought to be occupied by the railway, are within the intent of the statute, although their lots may not be immediately in front of any portion of the street intended to be occupied.

II. It remains to consider whether the damages which will probably accrue to the plaintiffs from the threatened injury are of such a nature that "an adequate remedy cannot be afforded by an action for damages," within the meaning of section 5510, of the Revised Statutes of 1889. Revised Statutes, 1879, sec. 2722. The policy of this statute seems to be to enlarge the preventive remedy by injunction, where the plaintiff's right is clear; where the threatened injury is plain, serious and likely to be continuous; where the benefit to the plaintiff would not be slight as compared with the injury which would accrue to the defendant from an injunction; and where the damages, though serious, are of such a nature as not to be capable of measurement by any exact standard which the law can furnish. All these elements seem to concur in the present case, if the facts stated in the petition are true, and the demurrer admits them to be true. The right of the plaintiffs to have the street remain as it debouches into the public square, without further obstruction, seems to be clear. The injury which will accrue from a deprivation of that right will probably be serious, continuous and incapable of estimation in damages by any exact legal standard. The defendant threatens to subject the street to

an additional servitude, which will constitute a partial obstruction of it at its entrance into the public square, without authority of law. It is not necessary to the defendant's business that it should impose this additional servitude upon the street and place this additional obstruction therein. This seems to entitle the plaintiffs to injunctive relief. As to the form of the injunctive order no objection is made. In so far as it is a conditional injunction, restraining the defendant from thus occupying the street, until it acquires lawful authority so to do, it has been framed with careful regard to the defendant's rights.

It also deserves consideration that the reason, on which the courts proceed in denying an action for damages to a single individual who is not specially damaged as distinguished from the rest of the public, within the rule above stated, is that, to allow such a private action would operate to subject the defendant to a multiplicity of suits to redress a public injury, which is against public policy. This reason has been reiterated in most of the cases since the decision in *Williams' case*, 5 Co. Rep. 73, where the reason for the rule was thus formulated: "For by the same reason every one might have an action, and then he would be punished a hundred times for one and the same cause." Where, as in the case before us, the defendant is a naked wrongdoer, such a reason is entitled to no great respect; for, as was said by Chancellor WALWORTH in *Lansing v. Smith*, 4 Wend. 9; s. c., 21 Am. Dec. 9, it seems poor defense for him "to say that he has injured many others in the same way, and that now he will be ruined, if he is compelled to make compensation to all." But it is to be observed that this reason, whatever may be its merits, has no application whatever to such a case as that before us, where one or more members of the public, who think themselves specially and particularly damaged, proceed by injunction to prevent the threatened injury before it

is done. If they succeed in obtaining an injunction, they bring about the very result which the old cases intended to accomplish by withholding a private action for damages; they, by stopping the wrong altogether, prevent any possibility of a multiplicity of actions by private persons who may be damnified.

III. I wish to add for myself a further observation in which I regret to say that my associates do not concur with me. We have a statute which prohibits us from reversing judgments for causes which do not affect the merits of the controversy. R. S. 1879, sec. 3775; R. S. 1889, sec. 2303. This statute was framed to prevent the evil of the multiplication of new trials for merely technical reasons,—through what I may be permitted to term the abuse of technicality. Lawyers, who are habituated to reasoning on technical lines, have been slow to give such statutes their full beneficial application. I do not hesitate to say that, in my judgment, this statute has been much too narrowly construed, and too little applied by appellate judges in this state. I am of opinion that it applies to the case now before us, so as to prohibit us from reversing this judgment, even if we are in doubt as to the proposition, whether the plaintiffs have such a relation to the subject-matter of the controversy as entitled them to maintain a private action for injunctive relief, or as to the proposition whether their damages, if any, are capable of being adequately redressed by law. If we reverse this judgment on the former ground, we reverse a judgment which prevents a public wrong, and we thereby reinstate the wrong, merely because the persons who proceed to prevent the wrong were not the right persons so to proceed. If, moreover, we reverse it for the reason that they have an action for damages at law, we stand in the position of reversing a judgment which prevents a wrong, merely because the plaintiffs have not taken the right road to the right result. Our reversal would

leave the law in respect of this question in this incongruous shape, that, while a private party thus damnified by the unlawful purpresture of a highway may remove the nuisance by main strength without incurring liability for damages, on the theory that in so doing he represents the public (Cooley on Torts, star p. 46; Wood on Nuisances, sec. 733), yet, if he accomplishes this result without a risk of a breach of the peace, and through the more appropriate method of a judicial proceeding, we will reverse the judgment which he has obtained, turn him out of court, saddle him with the costs and leave him to the remedy, which the common law gives him, of abating the nuisance by force of arms, or of suing for damages.

For the reasons above stated, the judgment will be affirmed. It is so ordered. All the judges concur, except as above stated.

WILLIAM H. PINDELL *et al.*, Appellants, v. THE ST. LOUIS AND HANNIBAL RAILWAY COMPANY, Respondent.

St. Louis Court of Appeals, April 29, 1890.

1. **Common Carriers:** DELIVERY TO CONSIGNEE. A common carrier ceases to be liable as such, and assumes only the liability of a warehouseman, if, after the arrival of the goods carried at their destination, he notifies the consignee of their arrival and places them in a reasonably safe place, regard being had to their character, to await the action of the consignee in taking actual possession of them. It is not necessary that the carrier should in such case notify the consignee of the place of the storage of the goods, but only that there should be such notice of the arrival of the goods, and that the carrier should hold itself ready to inform the consignee of the place of storage upon application therefor.

2. ———: ———. But if, at the time of the arrival of such goods, there was in force a prior understanding between the consignee and the carrier that all consignments to the consignee, of the kind of the one in question, should upon their arrival be placed upon a certain car track for the consignee by the carrier, then it will be sufficient for the carrier to so place the same and notify the consignee thereof, whether such place be a reasonably safe one or not.

3. **Practice, Appellate:** ERROR IN FAVOR OF THE APPELLANT. An appellant is not in a position to complain of a ruling which is erroneous, because too favorable to him.

Appeal from the Hannibal Court of Common Pleas.
HON. THOS. H. BACON, Judge.

AFFIRMED.

Harrison & Mahan, for appellants.

Theodore G. Case and *J. H. Orr*, for respondents.

THOMPSON, J.—This case was before this court on a former appeal, and the decision of this court is reported in 34 Mo. App. 675. On its being remanded to the circuit court in pursuance of the mandate of this court, the defendant filed an amended answer in that court, setting up the special defense upon which it has chiefly relied. So much of this amended answer as it is material to recite is as follows: "That, on the twenty-fifth day of February, A. D. 1887, the plaintiffs delivered to the defendant at Frankford, a station on defendant's railway, in the state of Missouri, the said carload of wheat consigned to the plaintiffs, to be transferred over its railway to the city of Hannibal, in the state of Missouri; that the defendant forwarded the carload of wheat to, and it was received in, the said city of Hannibal, on the morning of February 25, A. D. 1887; that there was no delay in the shipment, and that the said carload of wheat arrived at its destination on time; that defendant's line terminated at the limits

of the city of Hannibal, and that defendant's trains were brought into the city of Hannibal over the tracks of the Missouri Pacific Railway Company, and that full carloads of freight, such as that referred to in plaintiffs' complaint herein, were carried and distributed in the city of Hannibal by the Missouri Pacific Railway Company. That in the month of February, A. D. 1887, and for some time previous thereto, plaintiffs were engaged in the milling business in Hannibal, and were in the habit of shipping grain from various points on defendant's road to themselves at Hannibal, and instructed the defendant to place all carloads of grain consigned to plaintiffs on what was known as the "Badger State" sidetrack, belonging to the Missouri Pacific Railway Company, in the city of Hannibal. That this sidetrack extended through a lumber yard, and was a short distance from the plaintiff's mill, and that the car in question, on its arrival, was by the Missouri Pacific Railway Company, acting for and on behalf of the said defendant, placed on said sidetrack, and remained there until the afternoon of February 27, A. D. 1887, when it, together with its contents, was destroyed by fire. That defendant did not usually notify plaintiffs of the arrival of carloads of wheat consigned to them over its road. That the defendant did forthwith, upon the arrival of said carload of wheat, notify the plaintiffs of the arrival of said carload of wheat, and that it would be at once placed on the said sidetrack. Defendant further says that the plaintiffs were not present to receive the said carload of wheat at the time of its arrival in the said city of Hannibal, and, within a reasonable time after the arrival of said carload of wheat in the said city of Hannibal, the defendant caused the said carload of wheat to be placed in reasonably safe place, to-wit, upon said sidetrack, in charge of its servants; and defendant avers that by reason of these facts it thereafter held the said carload of wheat in the capacity of a warehouseman."

At the trial the evidence adduced by the plaintiffs was substantially the same as on the former trial, and the defendant gave evidence tending to support the allegations above quoted from its amended answer. The case was submitted to the jury on sufficiently full instructions, and, as on the former trial, they returned a verdict for the defendant. The plaintiffs again appeal, and submit the cause on three assignments of error.

I. The first assignment of error is that the court erred in permitting the alleged testimony of a deceased witness, M. P. Gregg, preserved in the bill of exceptions taken at the former trial, to be read in evidence, against the objection of the plaintiffs. Notwithstanding the statement to the contrary in the appellant's abstract, we find, on an inspection of the record, that no exception was saved to this ruling.

II. The next assignment of error is that there was no evidence that the plaintiffs received actual notice that the carload of wheat had been placed by the Missouri Pacific Railway Company, which acted as the agent of the defendant, on the sidetrack known as the "Badger State" sidetrack; or that, if there was any evidence of this fact, the preponderance against it is so great that the verdict must be regarded as a manifest mistake on the part of the jury, under the rule in *Rosecrans v. Railroad*, 83 Mo. 678. It may be worth a passing observation that this is the second jury that has returned a verdict for the defendant in this case. In all the litigation in which railway companies have been parties, which has been before this court during the more than nine years that I have been a judge of it, this, so far as I can now recall, is the *fourth* verdict which a jury has freely given in favor of a railway company. If the jury has given this verdict on a state of evidence which clearly shows that it was the result of prejudice or partiality, within the doctrine of the case just referred to, it is a remarkable circumstance. We

find, on examining the record, that the conclusion of the jury upon this point is well supported by the evidence. The testimony of the deceased witness, Gregg, who was auditor of the defendant railway company, is to the effect that the carload of wheat in question arrived at Hannibal at 10:20 o'clock in the morning; that, about five minutes after the train came in, the witness was called up though the telephone by Mr. Pindell, one of the plaintiffs, who inquired whether the witness had seen anything of a car of wheat; that the witness told him that they had but one that morning. The witness thought he mentioned the number of the car, number 42. The witness told him that the car would be sent over right away to his place of receiving freight. Further on, the witness states that he thinks the words which he used were that he would have it set over on the plaintiff's track. The witness did not know where that track was, nor that the car was so set over. Other witnesses, however, testified that the car was so set over. Three other witnesses for the defendant testified, in distinct and positive terms, that an arrangement had been made with the plaintiffs a considerable time prior to the accident—one of them states about three months, another places the commencement of it in the previous month of January,—whereby carloads of grain consigned to plaintiffs should be placed on the "Badger State" track. The testimony of these witnesses goes into the matter in detail, and states the reasons given by Mr. William H. Pindell, one of the plaintiffs, who made the request, for fixing the place of delivery on that track. The "Badger State" track ran through a lumber yard, and the evidence tends to show that, about fifty-two hours after the carload of wheat in question had been thus placed on that track, it was consumed, in consequence of a fire in the lumber yard, for which the defendant was in nowise responsible. It is quite clear, from this statement, that there is no principle on

which an appellate court can interfere with the verdict on the ground that it fails to show notice to the plaintiffs by the defendant that the car would be placed there. The mere fact that Mr. Gregg, the defendant's auditor, did not know what was the usual place of depositing the carloads of wheat which came consigned to the plaintiffs is immaterial, since the evidence shows that the plaintiffs did know what the place was, and that the agents and servants of the defendant and of the Missouri Pacific Railway Company, which had charge of the matter, also knew it.

We do not, however, regard the finding of the jury, in favor of the defendant, of the fact that the defendant gave notice to the plaintiffs that the car had been placed on the "Badger State" track, as the finding of a fact *necessary* to the defense, for reasons which we shall state in speaking of the instructions.

III. Complaint is made of the rulings of the trial court in giving and refusing instructions. In order to understand this assignment of error, we shall set out the principal instructions which were given and refused.

The following instruction, number 1, was requested by the plaintiffs, and refused by the court in the form in which it was requested:

"The court instructs the jury that it is admitted by the pleadings in this case that the defendant, the St. Louis and Hannibal Railway Company, was, on the twenty-fourth day of February, a common carrier of goods, wares and merchandise; and it is also admitted by the pleadings that defendant, as such common carrier, accepted and received of plaintiffs at Frankford, Missouri, on the twenty-fifth day of February, 1887, six hundred bushels of wheat, to be by said defendant carried on the line of its railway, in its cars, as such common carrier, to Hannibal, Missouri, and delivered to plaintiffs. Now, the court instructs the jury that the law then imposed on the defendant the duty of safely

carrying the said wheat to Hannibal, Missouri, and there delivering the same to plaintiffs, and if the jury find from its evidence that the defendant did carry said wheat to Hannibal, Missouri, but did not deliver the same to plaintiffs, but the said wheat was lost to plaintiffs, the jury will find a verdict for plaintiffs, and assess their damages at the reasonable market value of said wheat, as shown by the evidence, not exceeding the sum of six hundred dollars."

In lieu of this instruction the court, of its own motion, gave the following:

"The court, in lieu of instructions asked by plaintiff, of its own motion, instructs the jury that it is admitted by the pleadings in this case that the defendant, the St. Louis and Hannibal Railway Company, was, on the twenty-fourth day of February, 1887, a common carrier of goods, wares and merchandise; and it is also admitted by the pleadings that the defendant, as such common carrier, accepted and received of plaintiffs, at Frankford, Missouri, on the twenty-fifth day of February, 1887, six hundred bushels of wheat, to be by said defendant carried on the line of its railway in its cars, as such common carrier, to Hannibal, Missouri, and delivered to plaintiffs. Now, the court instructs the jury that the law then imposed on the defendant the duty of safely carrying the said wheat to Hannibal, Missouri, and there delivering the same to the plaintiffs; and if, under the instructions herein, the jury find from the evidence that there was no delivery, and no state of facts dispensing with delivery of said wheat, the jury will find for the plaintiffs, and assess their damages at the then reasonable market value of said wheat, not exceeding the sum of six hundred dollars."

What state of facts would not dispense with delivery, the court explained to the jury in the following instruction, given of its own motion:

"In lieu of instructions asked by plaintiffs, the court of its own motion instructs the jury that, although

from the evidence they may find that the wheat in question arrived on time in good order at its destination in defendant's hands, yet, unless from the evidence they further find that, twenty-four hours before the burning of said wheat, the defendant gave plaintiffs, or one of plaintiffs, actual notice of said arrival of the said wheat, the jury will find that there was neither a delivery, nor any state of facts dispensing with a delivery, of said wheat to plaintiffs."

The court also gave the two following instructions requested by the plaintiffs:

"2. The courts instructs the jury that, if they find from the evidence that the freight in question received by defendant at Frankford, Missouri, for transportation to Hannibal, Missouri, was grain in bulk, to-wit, wheat, consigned to plaintiffs at Hannibal, Missouri, then it was the duty of defendant to transport and deliver the same to said consignee, to-wit, plaintiffs, at Hannibal, Missouri; and it was the duty of defendant to give plaintiffs twenty-four hours' actual notice of the arrival and placing of said bulk wheat, so contained in said car number 42, on the "Badger State" sidetrack, said twenty-four hours to embrace such time as the car number 42, containing such bulk wheat, was placed and kept on said sidetrack by defendant; and unless the jury find from the evidence that defendant did give plaintiffs said actual notice twenty-four hours before the burning of said car and wheat, they will find a verdict for plaintiffs.

"3. Although the jury may find from the evidence that the defendant, after receiving said carload of bulk wheat, safely transported it to Hannibal, Missouri, and there placed the car containing said wheat on the "Badger State" sidetrack, and although they may further find from the evidence that said carload of wheat was afterwards burned on said sidetrack, and that said defendant was not chargeable with such burning, yet, unless the jury further find from the evidence that

defendant notified plaintiffs of the placing of said carload of wheat on said "Badger State" sidetrack twenty-four hours before said carload of wheat was so burned, then the jury will find a verdict for plaintiffs."

The court gave several cautionary or admonitory instructions requested by the defendant, which are not complained of; and it also gave of its own motion the following instruction, in lieu of other instructions requested by the defendant:

"1. In lieu of instructions prayed by defendant, the court of its own motion instructs the jury that, if from the evidence they find that, upon the arrival of the wheat in question, it was deposited and kept in good order, in a reasonably convenient and proper place for unloading, and thereafter and twenty-four hours before the loss or destruction of said wheat, the defendant gave to plaintiffs or to one of plaintiffs actual notice of said arrival, then said arrival, deposit, safekeeping and expiration of said notice, if any, terminated defendant's liability as a common carrier; and if from the evidence the jury further find that thereafter the defendant had said wheat in a reasonably safe place and exercised such care in the preservation of said wheat as a person of ordinary prudence would administer in charge of his own affairs in behalf of the owner under the same circumstances, the jury will find for the defendant, although the said wheat in car on track was lost or destroyed.

"2. The court, of its own motion, instructs the jury that the burden of proof rests upon the defendant, to show, by a preponderance of the evidence, to the reasonable satisfaction of the jury, either a delivery of the wheat to plaintiffs, or a state of facts dispensing with the said delivery."

"The burden of proof to establish the measure of damages, if any, is on the plaintiffs."

In considering the propriety of these rulings upon the instructions, it is to be borne in mind that the issue

on the present trial was not merely delivery or no delivery, as was the issue on the previous trial, as stated by this court in its previous opinion. 34 Mo. App. 675. An analysis of that portion of the amended answer above quoted shows that it tendered two hypotheses, in addition to the general denial: *First.* That, when the carload of wheat arrived, the defendant placed it on the "Badger State" track, where, by a previous agreement with the plaintiff, it was its duty to place it, and notified plaintiffs that it had arrived, and that it had been placed on said track. *Second.* That when it arrived they notified the plaintiffs of its arrival, and placed it in a reasonably safe place, by reason of which fact their liability was changed from that of a common carrier to that of a warehouseman, so that they were not answerable for the accidental destruction of the wheat by the fire.

The first complaint of the plaintiffs in respect of the instructions is that the court refused the plaintiff's instruction number 1, as requested, and gave in lieu of it, of its own motion, the instruction above quoted. There was plainly no error in refusing the plaintiff's instruction number 1, as tendered, because the issue on the present trial was not, as on the former trial, the mere issue of delivery or no delivery; but the defendant had pleaded a state of facts, which, if true, might be regarded as dispensing with a delivery, or which might be regarded as being in themselves a delivery,—the difference being a mere matter of legal phraseology. Under this state of the issues, it would plainly have been misleading to submit the case to the jury on an instruction, requiring them to find for the plaintiffs if there had not been a delivery, without explaining to them what facts would constitute a delivery, or what facts would dispense with, or be tantamount to, actual delivery. The first instruction, which the court gave in lieu of this, rightly told the jury that they must find for the plaintiffs, if there was no delivery and no state

of facts dispensing with a delivery. The second instruction, drawn and given by the court of its own motion, if it was intended to explain to the jury what state of facts would dispense with a delivery, failed of that object and to that extent was defective. It was, however, good and favorable to the plaintiffs, as far as it went; for it told the jury that, unless the defendant gave the plaintiffs actual notice of the arrival of the wheat, they should find that there was neither a delivery nor any state of facts dispensing with a delivery. This is in accordance with the opinion of this court on the former appeal, so far as it goes. But it is not true as matter of law, nor does the instruction say that it is, that the carrying of goods to their destination, and the notifying the consignee of their arrival, is tantamount to an actual delivery, or will dispense with a delivery. As shown by the opinion of this court on the former appeal, the carrier must do more; he must place the goods in a reasonably safe place. regard being had to their character, to await the action of the consignee in taking actual possession of them, in which case his liability ceases to be that of a carrier and becomes that of a warehouseman or of an ordinary bailee for hire. If the instructions on this point had stopped here, it may be that they would have required a reversal of the judgment. But this duty of the carrier was fully explained to the jury in the first instruction (also quoted above), given by the court in lieu of instructions asked by the defendant. So far as this question goes, then, the incompleteness of the instruction under consideration was fully supplemented by the one last referred to, which was the very next instruction in the series, though not the next as above copied. It is not the law, as is argued by the counsel for the plaintiff, that, in order to exonerate itself from this liability as a common carrier, it was the duty of the defendant, not merely to give the plaintiffs notice of the arrival of the wheat, but also to give them notice of its arrival and of

the place where it had been deposited. No such rule of law was declared by this court. If, when the wheat arrived, the defendant notified the plaintiffs of its arrival, and thereupon placed it in a reasonably safe place to await the action of the plaintiffs in taking possession of it, holding itself ready to inform the plaintiffs, upon application, of the place where it was, they thereafter held it as warehousemen, and were not liable for its accidental destruction by fire, without negligence on their part. If, on the other hand, in pursuance of a previous arrangement with the plaintiffs, the defendant had engaged that all carload consignments of wheat for the plaintiffs should, on their arrival at Hannibal, be placed on the "Badger State" track, and when this carload arrived it was placed on that track, and the defendant notified the plaintiffs that it had so arrived *and had so been placed*, then it was exonerated in respect of its liability as a *common carrier*, irrespective of the fact whether the "Badger State" track was a reasonably safe place or not. In other words, if the plaintiffs had directed the defendant to put it there, it makes no difference whether it was a reasonably safe place or not, so far as the liability of the defendant was concerned, provided it gave the plaintiffs notice of the facts that it had been put there.

On this point the instructions were more favorable to the plaintiffs than they were entitled to ask. The second and third instructions requested by the plaintiffs and given by the court (above set out) informed the jury that they must find for the plaintiffs, unless the defendant gave the plaintiffs notice of the arrival of the wheat, and of its being placed on the "Badger State" track twenty-four hours before it was burned. It is argued that these instructions are contradictory of the instructions given by the court in lieu of instructions requested by the defendant. This is true; but the error was an error in favor of the plaintiffs, and they are, therefore, not in a position to complain of it. They

ignored entirely the second hypothesis contained in the defendant's amended answer, and required the jury to find for the plaintiffs, although it might be a fact that, when the carload of wheat arrived, the defendant notified the plaintiffs of its arrival, and then placed it on the "Badger State" track, which track may have been a reasonably safe place for its deposit. Whether it was so or not was, of course, a question for the jury. The only substantial error, which we see in the frame of these instructions, consisted in the giving of the second and third instructions requested by the plaintiffs without the qualification above named. If the plaintiffs had recovered, instead of the defendant, their judgment must for this reason have been reversed.

The judgment will be affirmed. It is so ordered. All the judges concur.

SAMUEL W. CRAWFORD, Appellant, v. CORWIN H. SPENCER *et al.*, D. R. FRANCIS AND BROTHER, Respondents.

St. Louis Court of Appeals, April 29, 1890.

Appeals: RETRIAL OF CAUSE. The decision of the supreme court, or of this court, on the appeal of a cause, furnishes the law of the cause, if it is remanded and retried.

Appeal from the Jefferson Circuit Court.—HON. JOHN L. THOMAS, Judge.

AFFIRMED.

Dinning & Byrns, for appellant.

Judson & Reyburn, for respondents.

THOMPSON, J.—This is the same case which was before the supreme court on a former appeal, and which is reported in 92 Mo. 498. It was before this court on a

second appeal, and is reported in 36 Mo. App. 78. It is now before us on a third appeal, and we are glad that the evidence is in such a state that we are able to end the litigation. It does not seem necessary to restate the case, further than to take it up where we left it off on the last previous appeal. Recurring to our opinion (36 Mo. App. 86), it is seen that we regarded the evidence on that appeal as unsatisfactory, in that it failed to give an intelligent explanation of what became of the other notes which were left with D. R. Francis & Brother by Harlow, Spencer & Co., together with this note, in the transaction of February 21. That explanation has now been fully given, and from it it appears that three of those notes were delivered back by D. R. Francis & Brother to Harlow, Spencer & Co., because they could not be collected. An effort was made on the part of the plaintiff to prove that one of these notes, that of a party named Ditch, since deceased, *might* have been collected at the time when it was redelivered by D. R. Francis & Brother to Harlow, Spencer & Co.; but this attempt was not successful.

The difficulty, which we had in dealing with the evidence on the former appeal, was to determine whether the notes which were delivered by Harlow, Spencer & Co. to D. R. Francis & Brother, on the ninth or tenth of February, in payment, as the supreme court on the previous appeal had found from the evidence, had been *redelivered* by D. R. Francis & Brother to Harlow, Spencer & Co., in the transaction of February 21, in such a sense as to reinvest Harlow, Spencer & Co. with the right of absolute disposition. We held that, if such were the fact, a retransfer of the notes by Harlow, Spencer & Co. to D. R. Francis & Brother, as pledgees, taking place on the last-named date, and hence after the maturity of the note in controversy, fixed their title to it as holders of it subject to any defense which would have been good as against Harlow, Spencer & Co. We

also said: "If, on the other hand, the arrangement between the parties was such that the holding and control of the note by D. R. Francis & Brother were never discontinued, but the character of the holding simply was changed by the second transaction, that is to say, if, from the date of the first delivery to them of said note, they never parted with the control thereof or some title therein, then their equities are governed by the date of the first transfer." 36 Mo. App. 87, 88.

It now appears from the evidence of Mr. Spencer, who was a member of the firm of Harlow, Spencer & Co., and of Mr. Sidney R. Francis, who was a member of the firm of D. R. Francis & Brother, and who chiefly had charge of the settlement between that firm and Harlow, Spencer & Co., that the note in controversy and the other notes which were delivered by Harlow, Spencer & Co. to D. R. Francis & Brother, in payment on the ninth or tenth of February, as before stated, were never redelivered by D. R. Francis & Brother to Harlow, Spencer & Co. on the twenty-first of February, or at any other date, except as already stated above in respect of three of them which could not be collected; and that no interest in the note in controversy ever reinvested in Harlow, Spencer & Co. after its first delivery by them to D. R. Francis & Brother. It also appeared, from a detailed statement exhibited with the deposition of Sidney R. Francis, and testified by him to be true, that there was, at the date of the trial, due the firm of D. R. Francis & Brother by Harlow, Spencer & Co. the sum of twelve hundred and eighty dollars and twenty-two cents, for which indebtedness they held the note in controversy as collateral security.

The circuit court found the facts accordingly, and entered a decree perpetually enjoining and restraining the defendants D. R. Francis & Brother from collecting the said five-thousand-dollar note of the plaintiff, with interest thereon, except twelve hundred and eighty dollars and twenty-two cents thereof; and ordering that,

if the plaintiff should pay to D. R. Francis & Brother the said sum of twelve hundred and eighty dollars and twenty-two cents, with interest thereon at the rate of eight per cent. per annum, on or before the first day of January, 1890, then this injunction should apply to the whole of said note and interest; but that, if he should fail to pay them said sum within the time specified, then they might proceed to collect the same with interest at the rate of eight per cent. per annum, either by a sale of the land under the deed of trust mentioned in the petition, or by other legal methods. The decree further awarded costs to the defendants, D. R. Francis & Brother.

It is seen, from the foregoing statement, that there is nothing to review on this appeal. There is no question here as to the weight of evidence. The learned judge of the circuit court made a detailed finding of fact, and it was the only finding which could have been made consistently with the evidence in the record. The decision of the supreme court on the first appeal, and of this court on the second appeal, constitute the law of the case; and it thus appears that the case has been finally disposed of in accordance with the law. The judgment is accordingly affirmed. All the judges concur.

STATE OF MISSOURI, Respondent, v. BARNEY MACKIN, Appellant.

Kansas City Court of Appeals, March 31, 1890.

Rehearing denied, May 12, 1890.

1. **Local Option:** ADOPTION: JUDICIAL NOTICE. **Courts will not take judicial notice of the local adoption of the local-option law, but it must be established by evidence as any other fact is proved.**

41 99
41 456
41 99
42 116
41 99
44 221
41 99
46 428
41 99
48 114
41 99
111m 237
51 304
41 99
72 431

2. ——: ELECTION: BOARD OF CANVASSERS. Where the county clerk takes the *three* judges of the county court to assist in examining and casting up the votes given at any election to adopt the local-option law, such board of canvassers has not been selected as the law requires (and, therefore, not selected at all), and hence the result of said election is not legally ascertained, and, on *rehearing*, the vote has not yet been counted.

Appeal from the Ray Circuit Court.—HON. JAMES M. SANDUSKY, Judge.

REVERSED.

J. L. Farris and *Ball & Hamilton*, for appellant.

(1) It is a well-settled principle of law in this state that courts cannot take judicial notice of a fact that a county has adopted by a majority of the votes of the citizens thereof any special law, and an indictment must contain allegations of every fact which is legally essential to the punishment to be inflicted. 76 Mo. 600; 79 Mo. 98; *State v. Cleveland*, 80 Mo. 108, 287; 81 Mo. 171; *State v. Buster*, 90 Mo. 514. It is a question of fact that requires proof in this cause as to when said alleged local-option law took effect in said Ray county and whether or not it was in force at the time said offense is alleged to have been committed by appellant. These facts should have been alleged in the indictment herein. (2) The records of the court not only show omission to comply with the law in this state governing general elections, but show, affirmatively, a palpable violation of such law. 2 R. S. 1879, secs. 5506, 5507, p. 1082.

T. N. Lavelock, *J. W. Shotwell* and *C. J. Hughes*, for respondent.

(1) The court will take judicial notice of the passage of the local-option law, and the conditions under which it may become operative. It is a general and public act, made for the entire state, and every county may avail itself of the privileges offered, and

by a majority vote become subject to its provisions. *State ex rel. v. Wilcox*, 45 Mo. 458; 55 Mo. 297; *State ex rel. v. Pond*, 93 Mo. 624-8. (2) The court takes judicial cognizance of all such laws; though local, they are public, not private, laws. It was not necessary, therefore, for the indictment to contain a detailed statement of all the formalities required to precede the law becoming operative. *State v. Bench*, 68 Mo. 79; *State v. Emery*, 3 S. E. Rep. (N. C.) 810; *Jones v. State*, 10 Atl. Rep. (Md.) 216. (3) The poll books of every precinct were transmitted to the county clerk within two days after the election, and thereupon the clerk took to his assistance Judges THOMAS MCGINNIS, S. A. WOLLARD and ADRIAN GORDON, whom the record in evidence shows to have been judges of the county court of said county, and, in their presence, cast up the votes polled at the various voting precincts in the county at the said election. The clerk afterwards filed his report of the results of said election, as ascertained by him with the court, in compliance with section 5 of the local-option law. The court was not in session when the result of said election was ascertained, for the report says: The clerk took to his assistance the judges, not the court. But after the votes were cast up, and the result ascertained by the clerk, the court met pursuant to adjournment, and the clerk's report was then filed and spread upon the record, from which it appeared to the satisfaction of the court that a majority of the votes cast at said election were against the sale of intoxicating liquors. The counsel for appellant confound the record of what the clerk did, in the presence of the judges, with the action of the court itself, and fail to distinguish the record of the clerk's report, from the proceedings of the court.

GILL, J.—At the last October term of the Ray circuit court the defendant, Mackin, was tried and found guilty of selling intoxicating liquors in said Ray

county, contrary to the provisions of what is known as the "local-option" law, alleged to have been legally adopted at an election held in said county, August, 1887. The indictment charged the selling to have occurred in December, 1888, of which the jury found the defendant guilty, and assessed his punishment at three hundred dollars, and from the judgment thereon defendant has appealed to this court.

I. Of all the questions presented in this record, and discussed at the hearing, we shall here notice but one, since our view thereon effectually disposes of this case. In the effort to prove the adoption of the provisions of the "local-option" law, by which the sale of intoxicating liquors should be prohibited in Ray county, among other matters introduced by the state's attorney, was the following, spread upon the record of the county court of Ray county, to-wit:

"Thursday, August 11, 1887.

"Court met pursuant to adjournment; present, Judges Thos. McGinnis, S. A. Wollard and Adrian Gordon, John C. Morris, sheriff, and W. E. Ringo, clerk.

"Now, at this day, comes William E. Ringo, clerk of the county court, and takes to his assistance Judges Thos. McGinnis, S. A. Wollard and Adrian Gordon, and in the presence of said judges casts up the votes polled at the various voting precincts in said county, at the special election held Tuesday, August 9, 1887, under the provisions of the 'local-option' law, and finds from said poll books that seventeen hundred and seventy votes were cast 'for the sale of intoxicating liquors' and nineteen hundred and seventy-seven votes were cast 'against the sale of intoxicating liquors,' as shown from the certified returns made by the judges and clerks of the following election precincts in said county:" * * *

The foregoing purports to show a canvass of the returns from the various election precincts, and the

question is, does it show such an ascertainment and determination of the result of said election as the law directs. It is well understood that the courts will not take judicial notice of the local adoption of this law of local prohibition, but that it must be established by evidence as any other fact is proved. *City of Hopkins v. Railroad*, 79 Mo. 98; *State v. Hays*, 78 Mo. 600; *State v. Cleveland*, 80 Mo. 108. Hence the necessity of proof that Ray county had, by force of an election for that purpose, determined against the sale of intoxicating liquors within the limits as provided in said "local-option" law. By that act (section 1) provision is made for an election (ordered by the county court upon the requisite petition of qualified voters) and that "such election shall be conducted, the returns thereof made, and *the result thereof ascertained and determined* in accordance in all respects with the laws of this state governing general elections for county officers, and the result thereof shall be entered upon the records of such county court." Laws of 1887, sec. 1, p. 180. And, thereupon, section 5 of the said act provides that if a majority of the votes cast at such election shall be "against the sale of intoxicating liquors" the county court shall publish the result of said election (so ascertained by said board of canvassers) for four weeks, and said act shall therefrom take effect in said county.

The law for ascertaining and determining the result of general elections for county officers is found in sections 5505, 5506 and 5507. Section 5505 directs the judges of election at each precinct to transmit to the county clerk one of the poll books kept at such precinct, and, thereupon, section 5506 provides as follows: "The clerk of each county court shall, within five days after the close of each election, take to his assistance two justices of the peace of his county, or two judges of the county court and examine and cast up the votes given to each candidate, and give to those having the highest number of votes certificates of election."

Insert, now, the foregoing section into the "local-option" law, and we have, on determining the result of the election there provided for: *First, a board of canvassers*, composed of the county clerk and *two* judges of the county court (or two justices of the peace), in all three persons (and no more, no less) with duties devolving on all alike, and jointly to examine these poll books, or returns, from the various precincts and cast up the votes given on the propositions "for" or "against" selling intoxicating liquors, and declare the result, which "result shall be entered upon the records of such county court." And, *second*, a publication of such result, so certified to, for four weeks.

But it appears, from the evidence in this cause, that the board of canvassers, provided by law for ascertaining and determining the result of this election in Ray county, was not selected or organized, but *another* and *different* body. The law requires the board to be composed of the county clerk and *two* judges of the county court, or two justices of the peace. Here it was composed of the clerk and *three* judges—four persons instead of *three* as fixed by the statute. It follows, therefore, that the result of this election has never been legally determined, since the returns have not been canvassed, nor the votes cast up, and result declared, as required by law. It will not answer this objection to say, that the two judges, or justices, are mere *witnesses* to the counting by the clerk, and, therefore, that having *three* instead of *two witnesses*, to the duty there performed by the clerk, will not invalidate the canvass. The two judges are not *mere spectators*, but are two of three members of a committee, board or body, with power and duties coextensive with the clerk, in the matter of determining the result of the election. The section before quoted provides, that the clerk "shall take to his *assistance* two justices of the peace," or judges, not that he shall call in such officers as *witnesses* merely to the performance. These judges or

justices, when selected, become as completely a component part of this canvassing board as is the clerk. *Three* persons compose this body, and doubtless this was for the purpose of securing action by a majority, if any matters of dispute arise between the three. At all events the law-makers of the state have specifically named a definite and certain body to perform the responsible duty of casting up and declaring the result of the election, and it ill becomes this court to assert that another and different body will answer the same purpose. To admit the addition of one man, is the same, in principle, as to call in *ten* more than the statute names?

True it is, that these canvassing boards are officers whose duties are merely ministerial (65 Mo. 480; McCrary on Elections, sec. 229), still the composition of such board is provided by law, and neither the county clerk nor the courts have any power or authority to organize it differently. *Trueheart v. Addicks*, 2 Texas, 217. It was the duty of County Clerk Ringo, on receipt of the poll books from the various precincts, to call to his assistance two judges of the county court, or two justices of the peace of Ray county, and with them cast up the votes given, and certify the result thus obtained to the county court. Said clerk has not, as yet, performed that duty. The board of canvassers has not been selected as the law requires (and, therefore, not selected at all), and hence the result of said election is not legally ascertained.

It follows, therefore, that the defendant was illegally convicted, and the judgment of the circuit court is reversed. All concur.

ON MOTION FOR REHEARING.

PER CURIAM.—The motion for rehearing which has been filed in this cause and the argument in support thereof discloses a total misconception of the opinion rendered. Much argument is submitted to sustain the

position that, on account of a technical irregularity, an election should not be set aside or the will of the majority disregarded, when fairly expressed. It is urged that the result of the opinion of the court in this case is to authorize the granting of dramshop licenses in a county where a majority of the voters, as expressed at an election, were opposed to the same. The evils deprecated are not founded upon anything said in the opinion, or anything which can be deduced from it. The validity of the election was not raised in the case, nor referred to in the opinion. We have not "set aside" the election; but have merely decided that the *result* of that election has not yet been ascertained. That the vote has not yet been counted; a thing which is necessary to do, as the statute directs, before the law goes into effect. The case of the *State ex rel. Church v. Weeks*, 38 Mo. App. 566, was where the vote was not counted for a year after the election, and we held that the delay did not invalidate the law, it being finally counted as the law directs. The motion is overruled.

---

41 106
101 [2]102

LOTTIE FORSE, by next Friend, Respondent, v. THE SUPREME LODGE KNIGHTS OF HONOR, Appellant.

Kansas City Court of Appeals, April 14, 1890.

Rehearing denied, May 12, 1890.

1. **Pleading:** SUFFICIENT PETITION: CONDITIONS PRECEDENT. Where the petition states the terms of an insurance contract issued by defendant and follows with an allegation of due performance of all conditions and obligations to be by him performed, such as death notice, etc., and asks judgment for the amount stipulated, it is a sufficient pleading of the conditions precedent.

2. **Benefit Societies:** NOTICE OF ASSESSMENT: BY-LAW. The by-law of a benefit society stipulated that notice of assessment should be either delivered to the member, or "shall be deposited in the mails by the reporter directed to the member at his last or usual place of residence or business." *Held*, an instruction telling the jury: "If, therefore, you believe from the evidence that said notice was by said reporter deposited in the mails, directed to the said, etc., at," etc., should have been given, and that it was error to modify it by the condition, "if received." Parties are only entitled to the notice contracted for, and such, and none other, need be given.

3. ———: GOOD STANDING OF ASSURED. The benefit certificate is proof of the good standing of the assured at the date of its issue and its production at the trial makes a *prima facie* case for the plaintiff on that issue.

Appeal from the Buchanan Circuit Court.—HON. HENRY M. RAMEY, Judge.

REVERSED AND REMANDED.

N. M. Givan and *Stauber & Crandall*, for appellant.

(1) The petition failed to state a cause of action. It declared upon an alleged conditional contract, and the conditions precedent upon which plaintiff is entitled to recover are not set out in the petition. Therefore defendant's objection to the introduction of any evidence under the petition should have been sustained. *Bobbitt v. Ins. Co.*, 66 N. C. 70; 8 Am. Rep. 494; *Parks v. Heman*, 7 Mo. App. 18; *Brecheisen v. Coffey*, 15 Mo. App. 80; *Turner v. Mellar*, 59 Mo. 535; *Monks v. Miller*, 13 Mo. App. 368; Stephens on Pleading, 334; Bliss on Code Pleading, sec. 302; *Moore v. Mountcastle*, 72 Mo. 605; *Vaughan v. Daniels*, 98 Mo. 230. (2) The evidence of defendant, which was uncontradicted, overcame any legal presumption created by the benefit certificate that Forse was in good standing at time of his death, and, therefore, defendant's instruction number 8, directing the jury to find for defendant after all the evidence was in, should have been given. Where the facts

are undisputed, and the witnesses are unimpeached, it is the duty of the court to direct a verdict. *Hawkshaw v. Supreme Lodge*, 29 Fed. Rep. 770; 2 Thompson on Trials, p. 1603; *Lennix v. Railroad*, 76 Mo. 86; *Powell v. Railroad*, 76 Mo. 80; *O'Hare v. Railroad*, 95 Mo. 682; *Morgan v. Durfee*, 69 Mo. 476; *Landis v. Hamilton*, 77 Mo. 554; *Morris v. Barnes*, 35 Mo. 412; *Nolan v. Shickle*, 3 Mo. App. 300; *State ex rel. v. Marshall*, 4 Mo. App. 29; *Lionberger v. Pohlman*, 16 Mo. App. 392; *Commissioners v. Clark*, 94 U. S. 284; *Bank v. Bank*, 10 Wall. 637. (3) The laws, rules and regulations of defendant order enter into and become a part of the contract sued on as fully as if set out in the benefit certificate itself, and the holder of such certificate was a voluntary party to the compact, and was conclusively presumed to know what it was, and was bound by it. Bacon on Benefit Societies, secs. 91 and 161; *Coleman v. Knights of Honor*, 18 Mo. App. 189; *Hammerstein v. Parsons*, 29 Mo. App. 515; *Walsh v. Ins. Co.*, 30 Iowa, 145; *Red Men v. Schmidt*, 57 Md. 106; *Knights v. Ainsworth*, 17 C. L. J. (Ala.) 413; *Beneficial Society v. McVey*, 92 Pa. St. 510; *Robinson v. Lodge*, 86 Ill. 598; *Borgraefe v. Knights of Honor*, 22 Mo. App. 140; *Borgraefe v. Knights of Honor*, 26 Mo. App. 219; *Benefit Society v. Baldwin*, 86 Ill. 479; *Lodge v. Elsner*, 26 Mo. App. 108; *Knights of Honor v. Naim*, 22 C. L. J. (Mich.) 274; Bliss on Life Insurance, sec. 463; May on Insurance, sec. 552; *Hellenberg v. District*, 94 N. Y. 580; *Schunck v. Gegenzeiten*, 44 Wis. 375; *Benefit Society v. Burkhart*, 110 Ind. 192; *Smith v. Knights of Father M.*, 36 Mo. App. 184. (4) The instructions given by the court at the request of plaintiff are not the law, and should have been refused. Those asked by defendant properly declare the law governing the case, and should have been given. Those given by the court of its own motion, being in lieu of numbers 1, 3 and 7 asked by defendant, are not the law

as modified by the court, are in direct conflict with the laws of defendant, which are a part of the contract, are in conflict with other instructions given by the court, are inconsistent, contradictory and misleading. Bacon on Benefit Societies, secs. 81, 92, 381, 385, 398; *Borgraefe v. Knights of Honor*, 22 Mo. App. 127; *Rood v. Railroad*, 31 Fed. Rep. 92; Authorities cited under points 2, 3, 6.

Vinton Pike and *R. E. Culver*, for respondent.

(1) The petition is sufficient. The complaint is that we have stated a legal conclusion instead of the facts from which such legal conclusion follows. Such pleading is good after verdict. Bliss Code Pl., secs. 334 and 438; *Jackson v. Railroad*, 80 Mo. 150; *Stillwell v. Hamm*, 97 Mo. 585; *Bank v. Franklin County*, 65 Mo. 110. (2) Defendant's answer was a general denial, and did not allow the defense made and tried in this case. It has been held in another case against this defendant, that it is doubtful if a general denial is sufficient to put the plaintiff to prove that the assured was a member in good standing at the time of his death, "but, if required to make proof, only general proof on that subject would be required." *Lazensky v. Supreme Lodge*, 31 Fed. Rep. 594. The same case holds that the possession of the certificate is evidence that the assured was in good standing at the time of his death, citing *Knights of Honor v. Johnson*, 78 Ind. 110. The same ruling was made by the St. Louis Court of Appeals in the *Mulroy case*, 28 Mo. App. 463. *Dial v. Ins. Co.*, 8 S. E. Rep. 27; *McCorkle v. Ben. Ass'n*, 8 S. W. Rep. 516. The defense attempted is that he was not in good standing, because he had been suspended from the lodge in a proceeding against him. In other words, the rights of this plaintiff had been forfeited by the lodge on account of some act or delinquency of the insured. This fact was peculiarly within the

knowledge of the lodge, and should have been presented by answer. In the *Lazensky case* such mode of pleading was adopted. In that case the court holds that the obligation to pay mortuary assessments was not a condition precedent. The fact of the payment of assessments was not material, except as it may be involved in good standing. The answer, therefore, presented no defense to plaintiff's case. (3) The insured was a member in good standing, unless he had been legally suspended. The lodge undertook to suspend him for non-payment of assessment number 148. This suspension was admittedly illegal, if notice of the assessment had not been given the assured in the manner prescribed in defendant's laws. This question was submitted to the jury, and answered in favor of the plaintiff. (4) There is no evidence that he actually received a notice. The law requires satisfactory proof in such cases of the loss of good standing, in order that the condition be enforced by the court. *Mills v. Rebstock*, 29 Minn. 380; *Gellatly v. Benefit Society*, 27 Minn. 215. (5) In answer to appellant's third point, it is sufficient to say that the stipulations there referred to are conditions subsequent, and plaintiff was not required to plead them or aver performance, and, if there is anything in the point, it should have been shown in pleading by appellant. *McLaughlin v. McAllister*, 36 Fed. Rep. 748; *Lazensky case, supra.* (6) The appellant cannot insist upon a forfeiture without showing notice was given as required by its laws. *McCorkle v. Ben. Ass'n*, 8 S. W. Rep. 516. (7) It is not pretended that any notice was given the insured otherwise than by postal card. Section 3, article 7, provides that the members shall be notified, and that the notice shall be in proper form and official. Section 4 authorizes the subordinate lodge to notify by postal card. When this method of notice is adopted, a record thereof is required to be made, and, if made, the assured

agrees that it shall be *prima facie* evidence of its service. If the stipulated evidence is not made or produced, actual notice must be shown. Forse did not agree that the oath of the reporter, that, according to the best of his knowledge and belief, he mailed a notice, because it was his custom to notify all members, should be *prima facie* evidence of receipt of notice by him; but that the reporter's record thereof in a book kept for that purpose, and always open to the members' inspection, should be *prima facie* evidence. *Castner v. Ins. Co.*, 50 Mich, 277, and 15 N. W. Rep. 452.

GILL, J.—The Supreme Lodge Knights of Honor on May 9, 1882, issued to Charles Alvin Forse its benefit certificate number 131,889, by which it became obligated to pay upon his death, primarily to his widow, and secondarily to his heir, two thousand dollars. Said Forse had received from a subordinate lodge at St. Joseph, the Degree of Manhood and had become a contributor to the Widows and Orphans' Benefit Fund. His wife died April 5, 1885, and said Forse died May 16, 1885, intestate and without making any disposition of the benefit, and leaving as his only child and heir the plaintiff Lottie, who, by her next friend, duly appointed, has brought this action upon said benefit certificate. The petition counts upon said certificate and sets forth plaintiff's title to the fund. The answer is a general denial.

On the trial plaintiff read in evidence the certificate; proved the respective deaths of Forse, and wife and that plaintiff was the only heir of said Forse, and that said Forse had left no will, nor made any other disposition of the benefit. Plaintiff also read in evidence section 7, article 9, of defendant's constitution which reads as follows:

"Sec. 7. *Death of beneficiaries.*—In the event of the death of all of the beneficiaries designated by

the member, before the decease of such member, if he shall make no other disposition thereof, the benefit shall be paid to the heirs of the deceased member, and if no person or persons shall be entitled to receive such benefit, by the laws of this order, it shall revert to the Widows and Orphans' Benefit Fund." The defense is that said Charles A. Forse was not, at his death a member of the lodge "in good standing," and had prior to his decease been suspended by reason of his non-payment of what is termed assessment number 148 to the Widows and Orphans' Fund. At the trial before a jury, the plaintiff recovered for the amount named in the benefit certificate with interest, and defendant has appealed.

I. Although counsel have crowded this record with a great multitude of objections to the judgment of the court below, and have taxed their industry and endurance in stating "points" and citing authorities, without stint or limit, yet, upon a careful and laborious consideration of the points raised, we regard a *few* only as "materially affecting the merits of the action," and shall, in this opinion, direct attention to these only. Before passing, however, to the controlling features of the case, we will say that we can see no substantial objection to the plaintiff's petition. It states the terms of a contract entered into between the deceased Forse and this benevolent corporation, followed by an allegation of due performance of all the conditions and obligations to be by him performed; death notice, etc., is alleged; and judgment is asked for the amount of two thousand dollras, stipulated in such insurance certificate to be paid by defendant. This was a sufficient pleading of these conditions precedent. R. S. 1889, sec. 2079.

II. The defendant is a benevolent and charitable organization, with an insurance scheme attached for the benefit of its members only. The basis for this claim,

now prosecuted by Lottie, the only child and heir of Chas. A. Forse, deceased, is the following contract entered into between said Forse in his lifetime and the defendant corporation:

"Supreme Lodge of Knights of Honor. Organized January 1, 1874. Number 131,889. Two thousand dollars. Knights of Honor Benefit Certificate.

"The Supreme Lodge Knights of Honor issues this certificate to Charles Alvin Forse, a member of Phœnix Lodge, number 2220, located at St. Joseph, Missouri, upon evidence received from said lodge that he had lawfully received the Degree of Manhood and is a contributor to the Widows and Orphans' Benefit Fund of this order; and upon the condition that the statements made by said member in his petition for membership, and the statement made by him to the medical examiner be made a part of this contract, and upon condition that said member complies with the laws, rules and regulations now governing this order, or that may hereafter be enacted for its government, and is in good standing at his death, the said supreme lodge hereby agrees to pay out of the Widows and Orphans' Benefit Fund to Mrs. Sarah E. Forse the sum of two thousand dollars in accordance with and under the laws governing this order, and upon satisfactory evidence of the death of said member and the surrender of this certificate. Provided, that this certificate shall not have been surrendered by said member or canceled at his request, and another certificate has been issued in accordance with the laws of this order.

"In witness whereof the Supreme Lodge Knights of Honor has hereunto affixed its seal and caused this certificate to be signed by its Supreme Dictator and Supreme Reporter, at Wooster, Ohio, this ninth day of May, 1882.

W. B. HOKE,
Supreme Dictator.

"J. C. PLUMER,
"Supreme Reporter."

"Witnessed and delivered in the presence of George W. Belt, Dictator, and I. C. Mulkins, Reporter, of Phœnix Lodge, number 2220, Knights of Honor. I accept this certificate upon these conditions herein named. CHARLES ALVIN FORSE."

In order to provide a fund with which to meet the demands arising from the deaths of the holders of these benefit certificates, it is the policy and law of the order to keep on hand in the treasury of the mother lodge a sum sufficient to pay the amount of one insurance, so that assessments on the members are called for as often as a death may occur. These calls emanate from the supreme lodge, and are directed to the local or subordinate lodge, whose duty it is to give notice of such assessment to the individual members thereof. Following such notice the laws of the order provide:

"Sec. 5. *Payment of assessments.*—Each member shall pay the amount due within thirty days from date of such notice, failing which he shall stand suspended, and shall not thereafter be entitled to the benefits of the Widows and Orphans' Benefit Fund, until he has been duly reinstated in his subordinate lodge, in accordance with the laws of the order."

Now, in the defense of this action to recover on the Forse certificate, it is claimed that on November 7, 1884, Forse was notified to pay in an assessment of one dollar (called assessment number 148), and failing therein for thirty days he was suspended, and thereby forfeited all claim on account of such benefit certificate. It is undisputed that the supreme lodge made the call on the subordinate lodge at St. Joseph, and unquestioned, too, that Forse did not pay anything on account of such assessment number 148; but the issue of facts made is, was he *notified* thereof in the manner provided by the laws of the order? If *duly notified*, then, since he failed to pay the assessment, he was subject to suspension, and was not a member of the order in good standing at his death, and therefore the defense to this action

was fully made out. The manner of service of such notice to the members is provided for by section 4, article 7, of defendant's by-laws, as follows:

"Sec. 4. *Notice of assessment.*—Subordinate lodges may, at their option, notify members of assessments by postal cards, provided no statement of amount of indebtedness be specified thereon. The reporter of each lodge shall keep a record of assessment notices given to each member, in a record book provided therefor. Such notices shall bear date of the notice of the supreme reporter directing call of same, and shall be promptly delivered to each member, or deposited in the mails by the reporter, directed to the member at his last or usual place of residence or business. Such records shall be *prima facie* evidence of the fact therein contained, and that such notices were duly given, in all actions of law and equity between any member, his heirs, executors, administrators or beneficiaries, and the supreme lodge."

At the trial, on this issue of notice as to assessment number 148, testimony *pro* and *con.* was introduced, that of the defendant tending to show that the requisite notice was posted in the mail at St. Joseph, Missouri, and directed to said Chas. A. Forse at his then place of residence, as well as evidence *tending* to prove that the same was *received* by said Forse, while on the part of the plaintiff there was likewise testimony tending to prove the contrary. Upon this evidence defendant requested the court to instruct the jury as follows: "The court instructs the jury that it is not necessary, in order to show that Charles A. Forse was not in good standing at the time of his death, to prove that he actually received the notice of assessment; it is only necessary to prove that the same was deposited in the mails by the reporter of his lodge, directed to him at St. Joseph, Missouri. If, therefore, you believe from the evidence that the said notice was by the said reporter deposited in the mails, directed to the said

Forse at St. Joseph, Missouri, and he failed to pay said assessment within thirty days from the date of said notice, then by the terms of the contract entered into by him he stood suspended, and was not in good standing as a member of defendant at the time of his death, and you will find for defendant."

The court refused to instruct as requested, but did offer to give said instruction modified by inserting words to the effect that such notice would be sufficient "*if received*" by said Forse. In this the trial court erred. The defendant's instruction, as asked, was practically correct. This provision in the law of the order, relating to notice, was a part and parcel of the contract, and notice given in pursuance thereof, and in compliance therewith, was all that could be required. *Borgraefe v. Knights of Honor*, 22 Mo. App. 141; *Seibert v. Chosen Friends*, 23 Mo. App. 272. The text quoted from Bacon on Benefit Societies well states the rule in this character of cases: "Notice may be given in any way the by-laws may prescribe, for the parties may agree what shall or what shall not be notice. If the by-laws provide that notice may be given by mail it is sufficient to prove the mailing, and the failure of the notice to reach the assured by reason of its miscarriage in the mails will not excuse the non-payment of the assessment within the prescribed time. It is competent for the parties to agree what shall be notice, and it is enough to conform to the agreement as contained in the by-laws, as for example, that publication in a newspaper shall be notice." The contract between Forse and the Knights of Honor has stipulated that such notice of assessment shall either be delivered to the member, *or "shall be deposited in the mails by the reporter*, directed to the member at his last or usual place of residence or business." It is admitted that St. Joseph, Missouri, was the then residence and place of business of said Forse, and hence if the reporter of said subordinate lodge made out the notice and deposited the same in

the mail directed to Forse at St. Joseph, it was all the notice he was entitled to under his contract, whether it was in fact received or not.

It may be that parties do not always receive mail notices, and that by reason thereof rights of property may be affected without their knowledge of such demands; still the courts cannot, in such cases, give relief when the parties have themselves stipulated for the manner of notice, and the forfeiture resulting from non-compliance therewith. We have been unable to find any case wherein a different doctrine is announced. The cases cited by plaintiff's counsel (50 Mich. 273, and 8 S. W. Rep. 516) do not, in spirit, controvert the holding of the foregoing cases. Indeed, it is there admitted that the notice required by the contract between the parties must be given. In these cases from Michigan and Texas the courts held that the contracts there under consideration provided a notice to be served by *delivery to the assured.* The courts only concern themselves in determining what manner of notice the parties *have contracted for*, and they then uniformly hold that such, and *none other*, need be given. As for example, in *Seibert v. Chosen Friends*, *supra*, it was sought to be shown at the trial that the assured *had actual knowledge* of the assessment, and yet the St. Louis Court of Appeals decided this knowledge was not sufficient, that the notice agreed upon by the contracting parties was the notice, and the only notice, that could place the assured in default.

III. Since then this cause must be remanded for a new trial we will remark, in answer to the earnest contention of defendant's counsel, that we regard the rule laid down by the St. Louis Court of Appeals (*Mulroy v. Knights of Honor*, 28 Mo. App. 467), to the effect that the benefit certificate is proof of good standing of the assured at the date of its issue, and that the production of such certificate by the plaintiff at the trial makes a *prima facie* case for the plaintiff on that issue, as the

settled law of the land, and we have no disposition whatever to question its correctness. It has its support in the elementary doctrine that a status once established is presumed to continue until the contrary is made to appear.

The judgment of the circuit court will be reversed and the cause remanded for a new trial. All concur.

---

41 118
46 456
41 118
60 564

JOHN L. ZEIDLER *et al.*, Appellants, v. JAMES W. WALKER, Respondent.

Kansas City Court of Appeals, April 14, 1890.

Rehearing denied, May 12, 1890.

1. **Principal and Agent:** CONTRACT TO FIND PURCHASER: COMMISSIONS. An agent to sell real estate will not be allowed his commissions until he produces a buyer who shall be ready, willing and financially able to make the purchase absolutely on the terms fixed by his principal, and securing a party who makes certain payments, on condition that they shall be forfeited to the principal if said party fails to complete the purchase, does not amount to a sale, but is a mere option, and does not entitle the agent to recover his commissions.

2. ———: ———. Plaintiff in this case must fail because he offered no evidence of the financial ability of the secured purchaser to make the purchase.

Appeal from the Buchanan Circuit Court.—HON. OLIVER M. SPENCER, Judge.

AFFIRMED.

Stephen S. Brown, for appellants.

(1) *First.* The contract in evidence constituted an absolute sale, so that the defendant could have

recovered from Holloway any installment of the purchase price named in it, notwithstanding the clause about liquidated damages. *Ayers v. Pease*, 12 Wend. 393; *Cartwright v. Gardner*, 5 Cush. 273; *Dooley v. Watson*, 1 Gray, 414; *Graham v. Bickham*, 4 Dallas, 149. *Second.* In all cases where a party relies on the payment of liquidated damages as a discharge, it must clearly appear from the contract that they were to be paid and received absolutely in lieu of performance. *Gray v. Crosby*, 18 Johns. 219, 225. (2) The plaintiffs having found and produced a purchaser ready and willing to enter into a contract to take the property, and the defendant having accepted such purchaser, and made a valid contract in writing with him for the sale of the property, the performance of their contract by plaintiffs, and the acceptance of that performance by defendant, was complete, and plaintiffs were entitled to their commission. *Love v. Owens*, 31 Mo. App. 501; *Lute v. Norton*, 43 Conn. 219; *Potvin v. Curran*, 13 Neb. 302; *Knapp v. Wallace*, 41 N. Y. 477; *Rice v. Mayo*, 107 Mass. 550; *Little v. Rees*, 26 N. W. Rep. 7; *Koch v. Emmerling*, 22 How. (U. S.) 69; *Wood v. Stephens*, 46 Mo. 555; *Nesbit v. Helser*, 49 Mo. 383; *Tyler v. Parr*, 52 Mo. 249; *Timberman v. Craddock*, 70 Mo. 639.

H. K. White and *Thos. J. Porter*, for respondent.

(1) A real-estate broker does not earn his commission under a contract to sell the real estate of his principal until he produces a purchaser, ready, able and willing to buy, unconditionally, for the price demanded; and the burden of proof is on the broker to show not only that he produced a purchaser who offered to buy on the terms agreed upon, but that he produced one who was both ready and able to purchase on such terms. *Hayden v. Grillo*, 26 Mo. App. 289, 293–4; *McGavock v. Woodlief*, 20 How. (U. S.) 225–227; *Coleman v. Mead*,

13 Bush. 358–363; *Kimberly v. Henderson*, 29 Md. 512–515; *Kenner v. Harrod*, 2 Md. 63; *Iselin v. Griffith*, 62 Iowa, 668–670; *Beninger v. Iron Co.*, 41 Mich. 305; *Ingals v. Eaton*, 25 Mich. 32. (2) The undertaking of a real-estate broker to sell the real estate of his principal is not performed by producing one who is willing only to enter into a conditional or optional contract for the purchase. *Kimberly v. Henderson*, 29 Md. 515; *Reiger v. Bigger*, 29 Mo. App. 421.

GILL, J.—Plaintiffs, composing a firm of real-estate agents at St. Joseph, Missouri, sued defendant for commissions, which it is alleged said defendant agreed to pay plaintiffs for securing a purchaser for a tract of land, at or near the city of St. Joseph, the price of the land being fixed at fifty thousand dollars. After some effort, plaintiffs induced one James M. Holloway of Kansas to come to St. Joseph, to examine the property, and there said Holloway was by the plaintiffs introduced to defendant Walker. After a few days negotiations Holloway and Walker entered into a written contract, to the effect that said Holloway was to take the real estate at fifty thousand dollars, paying five hundred dollars' cash on March 9, 1887, the date of signing the contract, and agreeing to pay one thousand dollars on March 15, and eleven thousand dollars on March 25, 1887; and then, after said payments of five hundred, one thousand and eleven thousand dollars were made, the agreement was that defendant should deed the land to Holloway, who was to execute four notes for the balance of purchase price, said notes due respectively in six, twelve, eighteen and twenty-four months, and secured by a deed of trust on the said real estate. The contract further provided "that in case the said party of the second part shall fail to make either of the said payments of one thousand or eleven thousand dollars aforesaid on the days on which they respectively fall due, time being the essence of this

contract, all previous payments shall be forfeited to said party of the first part as agreed and liquidated damages." Holloway complied with this contract in so far only as to pay the five hundred dollars at the signing thereof, and the payment of the one thousand dollars on March 15; but thereafter failed and refused to comply with the terms thereof—refused to complete the purchase, and defendant held the fifteen hundred dollars so paid as a forfeiture or as liquidated damages for such non-performance. Plaintiffs demanded payment for commissions, which they claimed for having secured a purchaser for the property; and upon being refused by defendant, this suit was brought; and upon a trial before the court judgment was rendered for defendant, and plaintiffs appeal.

I. Plaintiffs' suit is upon a contract, charging that defendant engaged them as real-estate agents to find a purchaser, or to sell his property, for the sum of fifty thousand dollars. Before they can recover then, plaintiffs must show that they have performed, on their part, the extent of their engagement. It is well settled that an agent to sell real estate will not be allowed his commissions until he produces a buyer who shall be *ready, willing and financially able* to make the purchase absolutely on the terms fixed by his principal. Plaintiffs have failed to show that they secured such a purchaser for defendant's property. In the absence of evidence to the contrary, we shall assume that Holloway (the person secured) was only willing to enter into the manner of contract he did enter into with defendant. That was not a contract to purchase the real estate, unconditionally or absolutely, but was a mere option, as was held in a similar case decided by this court. *Reiger v. Bigger*, 29 Mo. App. 421. As was said in case just cited, the provision contained in the contract, hereinbefore quoted, was clearly intended to give Holloway an option to relieve himself of an

engagement to purchase by forfeiting to Walker the fifteen hundred dollars theretofore paid.

II. Plaintiffs, too, are denied the right to recover on their contract of employment, because they introduce no evidence even *tending* to show that Holloway was financially able to make the purchase of this property. As already said the agent must produce a purchaser, not only *willing* but *able* to buy the property. The burden of this proof, too, rests upon the plaintiffs. *Hayden v. Grillo*, 26 Mo. App. 293. The only scintilla of testimony, *relating* even to Holloway's financial standing at the time of this transaction, is found in plaintiff Andrews' statement, that he heard defendant Walker remark to Holloway (while the negotiations were pending) in these words: "I don't know your financial standing," in answer to which Holloway said, "Mr. Walker, you can write, telephone or telegraph to Willis of Kansas City and find out about my financial standing." This lends no possible light to the question as to whether or not Holloway was then of sufficient financial ability to make purchase of Walker's property. We see no reason, therefore, to disturb the judgment of the circuit court, and the same will then be affirmed. All concur.

STATE OF MISSOURI *ex rel.* THOMAS J. TILLEY, Relator, v. HARRY K. FORD, Respondent.

Kansas City Court of Appeals, April 14, 1890.

Rehearing denied, May 12, 1890.

1. **Stenographers: APPOINTMENT OF: CONSTRUCTION OF ACT OF APRIL 2, 1883.** The act of April 2, 1883, in reference to the appointment of official stenographers of the circuit court in counties of not less than forty-five thousand nor more than one hundred and fifty thousand population, designed to have as many of such

officers as there were, or should be, circuit courts, or divisions thereof, and that each of such stenographers should be commissioned by the individual judge who, at the time, presided over such court or the division thereof where the stenographer served; and the act is a general law applicable not only to the counties *then* having the requisite population, but also those *thereafter* acquiring such population. Said act, too, obviously intended that where the circuit court of one of these counties should be subsequently divided, then each division should have a stenographer appointed by the judge thereof. So where, in 1889, the circuit court of Buchanan county was divided, the new judge of division number two had the power to appoint the stenographer of said division, and this, notwithstanding the fact, that, prior to the division, the judge of the circuit court had duly appointed an official stenographer of said court.

2 ——— : LEGISLATIVE OFFICE. The office of official stenographer is legislative, not constitutional, and may be modified, controlled or even abolished by the power that created it.

3. ——— : DUTIES : DEPUTY. The duties of official stenographer are to be entered upon under oath for their faithful and impartial performance, and may not be performed by an unsworn deputy. The deputy who may be called in to assist the court stenographer, under the terms of the act, was not intended to be an officer to take charge of the business in another court or division, but rather an assistant for duties to be done in the court or division for which his principal is appointed.

Original Action by Quo Warranto.

JUDGMENT FOR RESPONDENT.

Stephen S. Brown, J. F. Pitt and *B. R. Vineyard*, for relator.

Cited in a lengthy printed argument the following authorities: Laws of Mo. 1883, p. 59; *State v. Stonestreet*, 12 S. W. Rep. 895; R. S. 1879, sec. 5838; And. Dict. Law. 1023; *People v. Brundage*, 78 N. Y. 403, 407; R. S., sec. 3126; *Baker v. Kirk*, 33 Ind. 517; *Haight v. Love*, 39 N. J. Law, 476; *State v. St. Louis*, 90 Mo. 19; *Marbury v. Madison*, 1 Cranch, 162; Const., art. 2, sec. 22; art. 6, sec. 22; *Ex Parte Slater*, 72

Mo. 102; *In re McDonald*, 19 Mo. App. 370; Const., art 6, sec. 28; Laws of 1879, p. 80; *In re Tuller*, 79 Ill. 99, 107; *State v. Ferguson*, 62 Mo. 77, 78; *Farrell v. Pingree*, 20 Am. and Eng. Corp. Cases (Utah) 168; Broom Leg. Max. 34; Cooley Const. Lim., 456; Potter's Dwar. St. 164; *Ely v. Holton*, 15 N. Y. 595; *State v. Newark*, 40 N. J. Law, 558; *People v. Haskell*, 5 Cal. 357; *State v. Ferguson*, 62 Mo. 77; *Kelsey v. Kendall*, 48 Vt. 24; *Smith v. Auditor-General*, 20 Mich. 398; *Peters v. Marsey*, 33 Gratt. 368; *Rutherford v. Green's Heirs*, 2 Wheat. 203; *In re Tuller*, 79 Ill. 99; 22 Am. Rep. 170; *United States v. Arredondo*, 6 Pet. 733; *Dash v. Van Kleeck*, 7 Johns. 477; 5 Am. Dec. 291; *Peters v. The Auditor*, 33 Gratt. 368; Potter's Dwar. 162, 166; Sedgwick, 161, 172; see, also, Judge BURK'S opinion in *Price's Ex'r v. Harrison's Ex'r*, 31 Gratt. 114, 119-120; and Judge STAPLES' opinion in *Town of Danville v. Pace*, 25 Gratt. 1, 19; Cooley Const. Lim. 370 (marg.) and cases cited.

Lathrop, Smith & Morrow, also, for relator.

In an extended printed argument used the following citations: Const., art. 6, secs. 24, 26, 28; R. S. 1879, sec. 1126; Laws, 1889, pp. 73, 74; R. S., sec. 3342, p. 1889; Const., sec. 28; R. S. 1879, sec. 1126; Laws of 1889, p. 73; R. S. 1889, sec. 3342; Laws, 1883, sec. 1, p. 59; *State ex rel. v. Laughlin*, 75 Mo. 147, 161; R. S. 1879, sec. 3537; Const., art. 6, sec. 39; R. S. 1879, sec. 614; R. S. 1879, sec. 616; Const., art. 6, sec. 25; Laws, 1889, pp. 73, 74; Acts, 1883, sec. 1, p. 59; Laws, 1883, sec. 5, p. 59; *People ex rel. v. Leask*, 67 N. Y. 521, 525; R. S. 1889, sec. 6570, par. 8; *Field v. Hill*, 2 Scam. (Ill.) 79; *Hake v. Henderson*, 25 Am. Dec. 677; *State v. Chadburn*, 63 Iowa, 659; *Thomas v. Burrus*, 23 Miss. (550) 556; *Johnston v. Wilson*, 2 N. H. (202) 203; *State ex rel. v. McNeeley*, 24 La. Ann. 19; *Marbury v. Madison*, 1 Cranch, 162; *State ex rel. v.*

Bankson, 23 La. Ann. (375) 377; *State ex rel. v. Harrison*, 113 Ind. (434) 438; *State v. Seay*, 64 Mo. 89; *Collins v. Macy*, 36 Texas (546) 547; Const., art. 14, secs. 5 and 9; R. S. 1889, sec. 7121; *Jeter v. State*, 1 McCord, 243; *Peters v. Auditor*, 33 Gratt. (Va.) 368, 375; *Gaslight Co. v. Gas Co.*, 12 Am. & Eng. Corp. 334.

Lancaster, Hall & Pike, for respondent.

In long printed argument, cited: R. S. of 1889, secs. 8240-8244; Laws of 1889, pp. 73, 74; Const., art. 6, sec. 24; R. S. 1889, sec. 8245; Laws of 1879, p. 80; Laws of 1881, p. 105; *Peters v. The Auditor*, 33 Gratt. 368; *People ex rel. v. Flynn*, 62 N. Y. 377; *People ex rel. v. Leask*, 67 N. Y. 521, *loc cit.* 526; *State ex rel. v. Davis*, 44 Mo. 131; *Wilcox v. Rodman*, 46 Mo. 325; *Preum v. Carondelet*, 23 Mo. 32, and *Westberg v. Kansas City*, 64 Mo. 503.

GILL, J.—This is a proceeding by *quo warranto* to test the title of the defendant to the office of official stenographer of Buchanan county circuit court, division number 2. The defendant, by a general demurrer to the information, has put in issue the merits of his claim to that office. It seems to be conceded that the relator's case is well stated in the information. The facts, so far as necessary to the determination of the questions raised by the demurrer, are as follows: At the general election in 1886, O. M. SPENCER was elected judge of the twelfth judicial circuit of Missouri, which, at that time, consisted of the counties of Buchanan and DeKalb, for the term ending January 1, 1893, and in due time entered upon the discharge of his duties. Buchanan county then had more than forty-five thousand inhabitants, and DeKalb county less than that number. On the third day of January, 1887, the relator was duly appointed official stenographer of the circuit court for Buchanan county by the judge of said court, and qualified and

entered upon the performance of the duties of that office. On the thirteenth day of April, 1889, DeKalb county was, by an act of the general assembly, detached from the twelfth circuit and attached to the twenty-eighth, and by another act, approved the same day, two judges were provided for the twelfth circuit, consisting of Buchanan county; and it was further provided, that the court should be composed of two divisions, and that "circuit court, division number one," should be presided over by the then judge, and "circuit court, division number two," should be presided over by the newly created judge. HENRY M. RAMEY was made the additional judge under that act, and on April 26, 1889, made an order appointing defendant official stenographer of circuit court, division number two, under which order he is now performing the duties of the office of stenographer with respect to all the business of that division. The defendant claims that the act of the general assembly providing two judges for the twelfth circuit had the effect of making the relator, who was then holding the office of official stenographer for the circuit court of Buchanan county, the official stenographer of division number one of said court, or that it legislated him out of office altogether. The relator claims that his tenure of office, as official stenographer of the Buchanan circuit court, was in no way affected by that act. These respective claims constitute the whole controversy.

I. Since this case was submitted, at our last call of the docket, we have read and considered the learned and very elaborate briefs and arguments of counsel on both sides; and give it as our opinion that respondent Ford was legally appointed, and is entitled, on the facts stated by relator Tilley, to hold the office of official stenographer of division number two, of the Buchanan county circuit court. We propose now to give expression, briefly as we can, to the reasons which have

brought us to this conclusion. And, in so doing, counsel must pardon us for failing to follow the various ramifications of the arguments so liberally, and yet so ably, indulged in by them; for, as we view the case, a proper construction of the statute law relating to court stenographers settles this controvery in respondent's favor. The authority for the appointment of Mr. Tilley as court stenographer of the Buchanan circuit court, in January, 1887, is found in the act of the general assembly of the state of Missouri, approved April 2, 1883. Laws, 1883, p. 59. For the purpose of expediting the business of the courts it is there provided, in section 1 of the act, that, "The judges of the circuit courts of the state of Missouri, for counties having a population of more than forty-five thousand and less than one hundred and fifty thousand inhabitants, shall appoint an official stenographer for each court, *or each division* of said circuit court, who shall be well skilled in the art of stenography, and shall have had at least three years' actual practice in court reporting. Such stenographer shall be a sworn official of the court and shall hold his office *during the term of the judge appointing him.*" From the reading of this section it seems clearly the intention of the legislature: *First*, to create the office of court stenographer, and, *secondly*, to limit the occasion proper for his appointment to counties, where circuit courts are held, having a population of not less than forty-five thousand or more than one hundred and fifty thousand. It is equally clear that the design was to have as many of these officers as there were, or should be, circuit courts, *or divisions thereof*, in said counties, and, further, in each case that such court stenographer be commissioned by the individual judge who may at the time preside over such court, or over such division thereof. This, too, was enacted as a general law, applicable not only to counties *then* having the requisite population, but applicable, as well, to those which might grow into, or

up to, the necessary population. It was, too, obviously intended that, where the circuit court of one of these counties should be subsequently divided, then each division should have a separate stenographer. In other words, this law was intended to supply the needs of the future as well as the wants of the present. So, then, when Judge SPENCER entered upon the duties of circuit judge in the twelfth judicial circuit on January 1, 1887, and found Buchanan county possessed of the requisite population of more than forty-five thousand and less than one hundred and fifty thousand, he was authorized to appoint a court stenographer for his said court in that county. And this he did by selecting and commissioning relator Tilley, who took the office for a tenure or term coextensive with that of Judge SPENCER.

But Tilley, in accepting the appointment of stenographer for the then united (one) court of Buchanan county, conceded the power and right of the state to divide that court into two or more divisions; and, when so divided, he conceded the duty of the judge of the new division to appoint his own stenographer. The law then existing by force of the statute of 1883, to which we have above referred, had already directed, that in case the Buchanan court was (for the purpose of the transaction of its business) separated into two divisions that the judge of each division should have the selection of its stenographer. That contingency happening by force of the act of the general assembly approved April 13, 1889, whereby a new division of the court was created and Judge RAMEY appointed, there existed an office under the law with no occupant thereof. Hence a *vacancy* existed in the office of official stenographer of division number two of said court, to which respondent Ford was legally appointed. The practical result was, that (for the purpose merely, it is true, of facilitating the transaction of the business of an overcrowded docket) there was "carved out" a portion of

the work belonging to the Buchanan court, and the same was set off to the new judge and such portion was called "division number two." Judge SPENCER continued as judge of said court, and along with him continued in office his stenographer. But for said "division number two" the act of 1883 provided the judge thereof should select a separate court stenographer which was done, and here rests the title of respondent Ford, which we think is unhurt by this assault.

It may be that thus creating a new court or rather *division* (division number two) relator's duties may be curtailed, and the money-earning power of the office lessened, as to him. Still this is nothing against our position. Court stenographer is a mere *legislative office*, as distinguished from a constitutional office. The legislature created it, and it may be modified, controlled or even *abolished* by the power that created it. *State ex rel. v. Davis*, 44 Mo. 129. The legislative office, such as this, is taken subject to the risk of modification, or even repeal. *Wilcox v. Rodman*, 46 Mo. 322. The contention of relator, in our opinion, stands opposed, practically, to every provision of the statute providing for such office. It was designed by the law that the selection of this court reporter (whose duties are at all times so important in preserving the evidence at the trial, and as well the rulings of the court thereon) should rest with the *circuit judge*, and that before entering upon his duties such officer should make an oath to faithfully and impartially perform the same. Laws 1883, p. 59. Whereas if relator Tilley should be permitted to act as court stenographer of the two divisions (sitting separately and at the same time, as they are required) the duties of one of these courts must, of necessity, be assumed and performed by an unsworn deputy, appointed, not by the *judge* of the division, but by the *stenographer* doing duty in another division. The deputy that may be called in to assist the court

stenographer (Acts of 1883, section 5, *supra*) was not intended to be an officer to take charge of the business in *another court or division*, but rather an *assistant* for the duties to be done, or performed, in the court or division to which such official stenographer has been by the judge thereof appointed.

Acting then on these views, the demurrer to the information and writ is sustained, and judgment herein entered for respondent. All concur.

JAMES NELSON, Appellant, v. VIRJANE NELSON *et al.*, Respondents.

Kansas City Court of Appeals, May 12, 1890.

41 130
54 371
41 130
66 177
41 130
186 81

1. **License**: REVOCABLE. A mere executory license is always revocable at the pleasure of the licenser.

2. ———: PRIVATE ROAD: PRESCRIPTION: EASEMENT. An adverse right of easement can never grow out of a mere permissive use. It is, however, otherwise, when the licensee has renounced the authority under which he began the use and has claimed it as in his own right, so that the knowledge of such renunciation and claim was brought home to the licenser or owner of the servient estate, and thereafter the licensee continued the use under such adverse claim exclusively, continuously and uninterrupted for ten years. The facts of this case (in relation to a private road) *held* not to bring it within the above rule.

3. **Private Road**: INCONVENIENCE OF WAY OVER OWN LAND. Whether one is entitled to a private road by reason of necessity, when traveling over his own land would be less inconvenient to him than his use of a road over the premises of others would be to them, *quære*.

4. **Practice**: DEFERRING TO TRIAL JUDGE. When the evidence is conflicting and contradictory, the appellate court feels authorized to defer to the finding of the trial judge.

Appeal from the Montgomery Circuit Court.—HON. W. H. BIGGS, Special Judge.

AFFIRMED.

S. S. Nowlin and *McDougal & Robinson*, for appellant.

(1) Plaintiff acquired a right to the roadway by prescription. He had had the uninterrupted use thereof for more than ten years—the statutory period. *House v. Montgomery*, 19 Mo. App. 170; *Polly v. McCall*, 30 Ala. 20, 29; *Ricord v. Williams*, 7 Wheat. 110; Wash. Easements, 27, 28; *Ward v. Warner*, 82 N. Y. 265. (2) The plaintiff's user of the exact strip of land in controversy began as early as the spring of 1877, probably 1876, and continued down to March, 1888. During this period such user was known to defendants and their ancestor, Robert Nelson; it was exercised continuously and uninterruptedly, adversely and under claim of right. Such facts vested in plaintiff an absolute right to the use of the land as a passway in the same manner and upon the same principle that ten years' open, adverse, etc., possession of land vests in the possessor the title thereto. See authorities above cited. (3) This suit being in equity, this court will examine the testimony, and where it appears that the finding of the trial court is not in accordance with the weight of the evidence the judgment will be reversed and the cause remanded, or judgment entered by this court for the proper party.

Jas. D. Barnett, for respondents.

(1) The verbal arrangement between Robert Nelson and plaintiff for the lane was a license merely, revocable at pleasure. It was supported by no consideration. *Johnson v. Spillman*, 43 Am. Rep. 192. There was no grant or purchase. The entire evidence proves that James Nelson did nothing whatever to compensate Robert for the road. (2) The use of the roadway

beginning by license was never adverse. It began in the spring of 1877 and was interrupted in March, 1886. The interruption was complete. The fact that plaintiff was afterwards allowed to use a gateway that only partially occupied the same ground does not help him. (3) When the trespass complained of is not a nuisance *per se* an injunction will not lie until plaintiff has established his right at law. *A fortiori* where the right has been rejected at law. *Railroad v. Fitzsimmons*, 7 S. W. Rep. 609. The easement claimed by plaintiff is supported by very doubtful evidence. It would impose a grievous burden upon the lands of defendants. Defendants have a right to have the issue tried by a jury, and a perpetual injunction cannot be granted. *Eckelkamp v. Schrader*, 45 Mo. 309; *Arnda v. Klepper*, 24 Mo. 273; *Kenerly v. Etewan P. Co.*, Am. Rep. 607. (4) No necessity for the roadway existed at any time, for plaintiff always had access to the public road across his thirty-one-acre tract of timber. But, even had the necessity existed, it is a conceded fact that plaintiff purchased the lands of William Nelson, Sr., in 1883 or 1884, acquiring an ample outlet. When the necessity ceased the right of way founded upon necessity ceased also. Wash. Real. Prop. [4 Ed.] p. 306; 82 Mo. 114; *Maupin Case*, 6 Mo. 632. It is immaterial that the new way is less convenient than the old. 82 Mo. 114; 62 N. Y. 531.

SMITH, P. J.—This is an action to restrain the closing of a roadway claimed by plaintiff, across the land of defendants, by necessity and by prescription. The defendants by their answer denied that plaintiff had any right to the roadway, and claimed that its use by the plaintiff was merely by parol license revocable at will; that, if there was any necessity for a road, it closed in 1883, when plaintiff purchased land adjoining him on the south, acquiring in that free access to a public road

over his own premises. It appears from the evidence that one Thomas Nelson owned a large body of land which he conveyed by deed to his four sons, of whom plaintiff was one, who in 1865 by deeds divided the land among themselves; that, at the time of the division, there were no public roads touching the land, and that it was all open and unimproved prairie. In 1868 or 1870, a public road was located on the west of the lands of Robert Nelson, defendants' ancestor, and the same road crossed the timbered lands of the plaintiff; that, prior to 1875, the plaintiff traveled across the prairie north of his land and that of Robert Nelson, without obstruction; that a tract of one hundred and sixty acres known as the McGinnis land adjoined the land of Robert Nelson on its northern boundary along which there was a fence. In 1875 the McGinnis tract was fenced. Robert Nelson permitted this fence to be joined to his; a gateway was afterwards made therein for plaintiff's use; that in the spring of 1875 the fence was built on the south side of the McGinnis land and thus it was separately inclosed; that at this time the north fence of Robert Nelson was set back, south, about sixteen to twenty feet so that a roadway was left between the two fences from east to west; that Robert Nelson purchased the McGinnis land in 1881, and died in 1883. In 1884 plaintiff purchased the land of his brother William Nelson, which was situated south of that on which he resided and which extended west to the public road. The land between the McGinnis tract and the other tract of Robert Nelson, as has been described, remained undisturbed until 1886, when the defendants tore down the two fences and erected one fence in their stead, placing a gateway at one end and a rail fence across the other. There was also testimony, the tendence of which was to show that at the time of division of the land by the Nelson brothers there was a parol understanding, that neither of the brothers should be fenced in but should have free and convenient passway out.

William Nelson, who was a brother of the plaintiff, and Robert Nelson, deceased, testified that he had formerly lived south of the plaintiff and until he had sold his land to him; that Robert Nelson opened the roadway for the temporary benefit of the plaintiff with the understanding that it was to continue only so long as he might be willing for it to remain so, and that he reserved the right to close it at any time; that when the McGinnis land was fenced the plaintiff had no outlet; that it was closed up about a year when gates were hung there; that plaintiff wanted Robert Nelson to let him have a deeded road but he refused because he did not want to incumber his land with a road; the road was to be "optionary with Robert Nelson." There was other evidence tending to show that the use of the road was permitted as a mere accommodation to plaintiff. Also there was evidence tending to show that the roadway in question was the one he traveled to Montgomery City where he traded, and over which his children went to school. It further appears that the plaintiff could reach the public road by traveling south of defendant's land and west over his own land, though this route would not be quite so direct or convenient as the said road through defendant's land. The evidence in many essential particulars was contradictory and unsatisfactory. The court found the issues for defendants and decreed accordingly, to reverse which plaintiff has appealed.

I. The single and sole ground upon which plaintiff, by his appeal, questions the decree of the court below is that he acquired a right to the roadway by prescription, he having had the uninterrupted use thereof for more than the statutory period of ten years. Neither on the oral argument, nor in the brief of his counsel, was any other question discussed. Careful analysis and consideration of the evidence has failed to convince our minds that this ground of plaintiff's contention is

well taken. It seems quite manifest to us, from the almost undisputed facts, as they are developed by the evidence of the record before us, that the use by plaintiff of the roadway in question was under a mere executory parol license, which was, therefore, revocable at the pleasure of the licenser. *Fisher v. Dean*, 26 Mo. 116; *Deslodge v. Pearce*, 38 Mo. 589; *Baker v. Railroad*, 57 Mo. 565; *Allen v. Mansfield*, 82 Mo. 688. The agreement by which the license was conferred was unsupported by any consideration whatever, So, as far as we can discover, the license was a mere gratuity. The grant of the license was prompted by the kind feelings which Robert Nelson entertained for his brother, the plaintiff. No doubt, the mind of Robert Nelson was influenced somewhat by the conversation which took place between the four Nelson brothers when they divided the land, which their father had conveyed to them as tenants in common, and which was to the effect that neither of the brothers should be fenced in, and the wish to afford plaintiff a convenient way to the public road as long as was necessary. The testimony of one of the brothers, William Nelson, who seems to have been an intelligent and disinterested witness in the controversy between his kindred in respect to the road, is quite convincing. It shows that the grant of permission by Robert Nelson to the plaintiff was subject to countermand at his pleasure. The witness states that plaintiff was to have an outlet as long as Robert Nelson saw fit to give it to him. "It was optionary with Robert Nelson when he should close the road." The entire use of the road was permissive only. There is no fact remotely indicating an intention on the part of plaintiff to assert an adverse right to the roadway.

The relation of the parties and the circumstances detailed in the evidence all go to discountenance the notion that the plaintiff at any time during the life of Robert Nelson in any way asserted a right to the

roadway adversely to the latter. An adverse right of easement can never grow out of a mere permissive use. It is otherwise, however, when the licensee has renounced the authority under which he began the use, and has claimed it as of his own right, so that the knowledge of such renunciation and claim was brought home to the licenser, or owner, of the servient estate, and that thereafter the licensee continued the use under such adverse claim exclusively, continuously and uninterruptedly for ten years. The facts of this case do not bring it within the principle of the above-quoted rule. The evidence, on the contrary, we think, very clearly negatives any such assumption. The essential facts which would have converted the mere permissive use of said roadway into an easement are wanting. Such a permissive use of the land of the defendants by the plaintiff for roadway purposes, with nothing more, could never ripen into an easement or interest in the land. *House v. Montgomery*, 19 Mo. App. 170. The user in this case was under a parol license for that purpose, and the knowledge of such use by defendants would not have the effect to change the character of the relation of licensee and licenser, as that relation began, unless the plaintiff disclaimed and renounced the license under which he held, so as to have brought a knowledge of that fact home to the defendants. The cases cited by the plaintiff are wholly inapplicable to a case of this sort. According to the testimony of William Nelson, Sr., the roadway claimed by plaintiff was, in either 1876 or 1877, closed up for about a year. This constituted a break or interruption in the continuous use of the roadway by plaintiff, and, even if such use had been adverse, this, of itself, was sufficient to prevent the acquisition of the prescriptive rights for which he contends. "In all cases where a party is in possession of land in privity with the rightful owner, nothing short of an open and explicit disavowal and disclaimer of a holding under that title, and an assertion of title in himself, brought home to the

owner, will satisfy the law." *Estes v. Long*, 71 Mo. 605; *Bud v. Collins*, 69 Mo. 129; 3 Kent's Com. 444. The principles of this rule are applicable by analogy to a case like the one at bar. *House v. Montgomery, supra.* The conclusion, therefore, is that, while the plaintiff had a license to use said roadway, that there was not such uninterrupted adverse use and enjoyment of it as ripened into an easement.

II. The purchase by plaintiff of the land of his brother William, which was situate south and west of the land upon which he lived, gave him a way over his own lands west to the public road, and, though not in every respect so direct or convenient as that claimed over the lands of his kinsman, yet to be necessitated to travel over it would doubtless subject him to less inconvenience than it would the defendants for him to use the disputed road through their premises.

But whether the conclusions which we have deduced from the evidence are correct or not, it is evident that it is so conflicting and contradictory that we feel authorized to defer to the finding of the judge who presided at the trial.

The decree will be affirmed. All concur.

BOSLER B. FOSTER, Respondent, v. GEORGE SWOPE, Appellant.

41 137
90 23

Kansas City Court of Appeals, May 12, 1890.

1. **Judicial Notice:** ADOPTION OF HOG LAW. Courts cannot take judicial notice of the adoption of the law restraining swine from running at large in a county.

2. **Fences and Inclosures:** APPLICATION OF STATUTE: NEGLIGENCE. The statute in relation to fences and inclosures prescribes a lawful fence as it relates to trespass upon fields and inclosures, and not as to accidents to cattle passing in the highway resulting from negligent construction.

3. **Negligence**: LIABILITY FOR FENCE ALONG HIGHWAY. A proprietor who negligently constructs and maintains a fence within four feet of the public highway, by reason whereof the plaintiff's mule in passing along the road is killed, is liable therefor unless excused by plaintiff's contribution to the injury.

4. **Contributory Negligence**: TURNING MULE LOOSE WITH KNOWLEDGE OF DANGEROUS FENCE: JURY QUESTION. Plaintiff with knowledge of the dangerous condition of defendant's fence turned his mule loose to follow him along the highway. *Held*, it was not such an act as the judgment of all sensible men would condemn, and a court cannot as a matter of law declare it negligent, and it is, therefore, a question for the jury.

5. **Negligence**: USE OF HIGHWAY WITH KNOWLEDGE OF DEFECTS. No one is precluded from the highway by his knowledge of its defects, but such knowledge must be considered in passing on his care which must increase in proportion to his knowledge of the risk.

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

REVERSED AND REMANDED.

L. R. Knowles, for appellant.

(1) The court erred in refusing to give defendant's instruction in the nature of a demurrer to plaintiff's evidence for the reason that the plaintiff's testimony clearly established the fact that he was guilty of culpable and gross carelessness, which was the direct cause of the injury, and further that he acknowledged the same at the time of the accident. *Boland v. Kansas City*, 32 Mo. App. 8; *O'Donald v. Railroad*, 7 Mo. App. 190; 86 Mo. 104, and authorities cited. (2) Even if it be conceded that the fence was constructed in a negligent manner and was not a lawful, statutory fence, yet, unless such negligence in the construction of the fence was the cause of the injury, the plaintiff cannot recover. *Stoneman v. Railroad*, 58 Mo. 503; 62 Mo. 562; 65 Mo. 22; 3 Mo. 375 and 300; 63 Mo. 417. Now if plaintiff's mule

had come in contact with a lawful, statutory fence, that is, such a fence as the law declares to be a lawful barbed wire fence, would not the same result have followed? (3) The court told the jury in the first or principal instruction given for plaintiff, in effect, that if the fence was anything less than a legal fence under the law in every particular (Session Acts of 1887, p. 194) then the defendant had no right or authority to build such a fence, and he was liable, or in other words such a fence was *per se* a nuisance. The absurdity of this proposition is too plain for comment. Further, this instruction failed to tell the jury that they must find that the injury occurred from the improper erection of the fence, or careless or negligent construction of the fence, and this question was not submitted to the jury at all, which is reversible error. *Brown v. Road Co.*, 89 Mo. 152; Shearman & Redfield on Neg. [8 Ed.] sec. 421; *Mathiason v. Mayer*, 90 Mo. 585. (4) In the first instruction asked by the defendant, and refused by the court, the jury are told that the defendant had a right to erect a two-wire fence along the road at any height, provided the same was erected in a reasonable manner. This, according to our understanding, is nothing more or less than the law, and in order to guard the jury against the error of believing because the fence was composed of only two wires and was less than four feet in height, it was, therefore, an unlawful fence, and a nuisance, and the defendant must necessarily be liable.

T. C. Duncan, for respondent.

(1) The court did not err in refusing to give defendant's instruction asked, in nature of demurrer to evidence, but properly refused the same. The evidence failed to show any negligence whatever of plaintiff that in any way contributed to the injury sustained, either directly or in any manner whatever. The most that could be claimed is that the question of contributory negligence should have been submitted to the jury,

which was done. *Boland v. City of Kansas*, 32 Mo. App. 9; *Taylor v. Railroad*, 26 Mo. App. 336; *Petty v. Railroad*, 88 Mo. 306; *Leslie v. Railroad*, 88 Mo. 50; *Doss v. Railroad*, 59 Mo. 27; *Kelly v. Railroad*, 70 Mo. 607. (2) Neither of the rules invoked by appellant in his brief has any application to the case at bar. The act of turning a work mule loose to follow along the highway, under the facts and circumstances in this case, is not an act of such a character that the judgment of all men would condemn it; nor is it negligence which mingled with the negligence of defendant was the direct and efficient cause of the injury. The whole question was one for the jury. See authorities last above cited. (3) It is not contended that the erection of a barbed wire fence along the line of a public highway is in itself necessarily an actionable wrong, yet the manner in which it is constructed and maintained may be such as to make the party erecting and maintaining it guilty of negligence. And if the fence was not such as a good husbandman would construct or maintain, but was insufficient and dangerous in its character, and an animal passing along the highway accidentally strayed or ran into it and was injured, the party erecting and maintaining such fence certainly would be liable. *Beck v. Carter*, 68 N. Y. 283; *Graves v. Thomas*, 95 Ind. 362; *Lisk v. Crump*, 112 Ind. 504; *Lisk v. Crump*, 14 N. E. Rep. 381, and cases cited; *Loveland v. Gardner*, 21 Pac. Rep. 766; *Fink v. Furnace Co.*, 10 Mo. App. 69. (4) Under our statutes plaintiff had the right to turn his mule loose on the public highway and allow him to run at large; and while defendant might erect and maintain a barbed wire fence by statute, he was bound to see that it was not made a trap for straying or passing animals. If it is conceded, as claimed by defendant, that a lawful barbed wire fence is dangerous in its character, as well as one improperly constructed, then defendant had only the right to build such a barbed

wire fence as the statute prescribes, and a barbed wire fence built any other way is *per se* a tort, and the defendant liable for damages resulting therefrom. *Lisk v. Crump*, and *Loveland v. Gardner*, *supra*. (5) It is submitted, that if defendant had negligently built and maintained any kind of a fence along the public highway dangerous in its character—not authorized by law, and plaintiff's mule had become accidentally entangled in it while lawfully in, or passing along, such highway, and had been injured or killed thereby, the defendant would have been liable for damages sustained. *Young v. Harvey*, 16 Ind. 314; *Birge v. Gardner*, 19 Conn. 507; *Durham v. Musselman*, 18 Am. Dec. 133; *Railroad v. Allen*, 22 Kan. 236; *Powers v. Harlow*, 19 N. W. Rep. 259; *Railroad v. Hudson*, 62 Ga. 680; *Jones v. Nichols*, 46 Ark. 207. (6) The court did not err in refusing defendant's instructions. See authorities cited. It was not contributory negligence for plaintiff to voluntarily turn his mule loose upon the public road to go at will, for he had the legal right to do so. *Gorman v. Railroad*, 26 Mo. 441; *Busby v. Railroad*, 81 Mo. 43. (7) The court did not err, but properly submitted the question of the dangerous character of the fence, and the prudence and care, or want of care and negligence, of the plaintiff in conducting and managing his mule in and along the highway, to the jury. *Jennings v. Wayne*, 61 Me. 468; *Bennett v. Hazen*, 33 N. W. Rep. (Mich.) 876; 1 Addison on Torts [Wood's Ed.] secs. 34, 35, pp. 38-45, and notes; *Lindsey v. Danville*, 45 Vt. 72; *Walsh v. Railroad*, 52 Mo. 434; *Boland v. Kansas City*, 32 Mo. App. 8.

ELLISON, J.—This action is for damages caused by the killing of a mule which happened, according to plaintiff's evidence as a witness in his own behalf, in the following way: "I am plaintiff. Live near Fortescue, this county. Know George Swope, and where

his farm is. Public road running along his farm east and west, on north side by Walnut Grove schoolhouse. Had been to Doctor Minton's threshing. Started home—took harness off my mules, put halter on one, tied it upon his neck and turned him loose—got on other mule and rode. Dell Newland and Thomas Bush was with me. The mule followed along after us. When we got to schoolhouse he laid down and rolled in road, then got up, came in little gallop up to us, and went past us like, and went out and ran into the wire; got straddle of it, and ran up the wire about fifty or sixty feet before it got off. Then ran up road and stopped. I put my hand up between his forelegs and shoulder. I could feel joints of leg and shoulder. The meat, flesh, cords and veins were all cut and torn off. It died in fifteen or twenty minutes. Mule was worth one hundred and fifty dollars. Swope put up fence that summer of two wires on trees along road; highest wire three and one-half feet from ground, other one sixteen inches below it. Where mule got on wire, trees were over one hundred feet apart; no posts or anything between trees, and wire sagged nearly to the ground. I went there next day, and know there were no posts or stays between the trees, and both wires were on the ground for twenty-five or thirty feet or more. Were some posts on west end of fence, but none on east end. The wire was just put on trees. Did not leave bridle on mule, only a halter. Mule would sometimes jerk loose from me when I led him, and several times pulled me off; that is the reason I turned him loose; he was good to follow. No, he did not run and jump into the fields along the road. Stopped sometimes to eat grass. He stopped to roll in road, and then came up in a little gallop; went to pass me and ran into the wire. No, he was not bad to jump. Was gentle and would always follow well. I said at one time if I had not turned him loose it would not have happened. It was between sundown and dark when I started for home that night.

Dell Newland and Mr. Bush was with me. They had their team and did not turn their mules loose. I went by the road that morning and saw the fence. Often passed along that road. Live about a mile and a half west of Swope's. Knew all about the fence when I turned the mule loose." It further appeared that the fence was built four feet in on defendant's land. There was evidence in defendant's behalf contradicting the evidence for plaintiff as to the manner in which the fence was constructed, and as to its condition.

Defendant asked an instruction at the close of plaintiff's case in the nature of a demurrer to the evidence, which was refused. The court gave at plaintiff's request the following instruction: "The jury are instructed, that if they believe from the evidence that the defendant erected and maintained a barbed wire fence along the line, upon the side of the public road; and they further believe that said fence was composed of two wires only, that said wires were suspended or fastened to trees of a greater distance than sixteen feet from each other, and no posts firmly set in the ground were placed between the trees, and the wires were not tensely stretched, but sagged between the trees, and that said wire fence so erected and maintained was dangerous, or likely to kill or injure such animals as a horse or mule, and they believe, from the evidence, that the plaintiff's mule, while the plaintiff was exercising or using ordinary care, that is, such care as an ordinarily prudent man would take of his own mule of like age and character under the circumstances, accidentally got upon or entangled in said wire fence, and was injured or killed thereby, you will find for the plaintiff, and assess plaintiff's damages at such sum as you may find from the evidence such mule was worth at the time, that is, the reasonable value of such mule."

I. This instruction should not have been given. It is evidently drawn under the idea that that part of section 5652, Revised Statutes, 1879, as amended by the

Laws, 1887, page 193, relating to counties which have adopted the law in relation to swine running at large, controls as to the character of fence which defendant should have built. We are not advised by the record that Holt county has adopted such law and we cannot take judicial notice of such matter.

But, if such proof was in the record, the instruction would still be erroneous from the fact that the statute in relation to fences and inclosures prescribes a lawful fence as it relates to trespasses upon fields and inclosures, and not as to accidents of the present nature. Defendant is not liable to plaintiff arbitrarily for not having performed a statutory duty, but his liability is to be governed by the law of negligence apart from the statute. If plaintiff's mule had been injured by running into, or upon, an ordinary rail or board fence, which did not fill the requirement of the statute as to fences and inclosures, it would not be supposed from such fact that a liability ensued. Such statute has nothing to do with a case of this sort. Such was the view taken by the supreme court of California in the case of *Loveland v. Gardner*, 21 Pac. Rep. 766, cited us by plaintiff. And such was also, undoubtedly, the view of the court in plaintiff's other principal case of *Lisk v. Crump*, 112 Ind. 504. The instruction should not, therefore, have embodied the statutory requirement of posts firmly set sixteen feet apart, with tensely stretched wires.

II. The foregoing cases of *Loveland v. Gardner* and *Lisk v. Crump*, and others cited by plaintiff, announce a rule which has never been sanctioned by the supreme court of this state. By those cases, a landowner, who leaves an unprotected excavation on his open land, is liable for injury to person or property incurred thereby. Such is not the law with us: *Hughes v. Railroad*, 66 Mo. 325, quoting and adopting language of Chief Justice GIBSON, which HENRY, J.,

says, in *Turner v. Thomas*, 71 Mo. 596, is an unanswerable argument in favor of the position.

There is, however, an exception to this rule which has always been recognized; and that is where the dangerous contrivance, of whatever kind it may be, is made, or placed, so near the highway "that a person walking upon it might, by making a false step, or, being affected by giddiness, or, in case of a horse or carriage way, might, by the sudden starting of a horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences." *Hardcastle v. Railroad*, 4 Hurl. & N. 67; *Barnes v. Ward*, 9 C. B. 392; *Beck v. Carter*, 68 N. Y. 283; *Gramlich v. Wurst*, 86 Pa. St. 74. This qualification is adopted also in this state. *Fairgrieve v. City of Moberly*, 39 Mo. App. 31; *Buesching v. Gaslight Co.*, 73 Mo. 219. From the cases just cited it would appear that the evidence being undisputed as to the distance of the fence from the highway, it was a matter for the court to determine whether it was substantially adjoining the highway. And we feel that it is proper to declare, under the evidence in the case, that the fence was adjoining the public highway, and that, conceding it was negligently constructed and maintained, defendant would be liable for the loss of the mule, unless he be excused by the plaintiff's contribution to the injury.

III. Having determined that there was no duty owing to plaintiff requiring defendant to have erected a statutory fence, but that there is a liability if he has erected a fence such as that a prudent husbandman would not maintain *at such a place*, although upon his own land, we are brought to the question of contributory negligence, which was urged below, and again by counsel in oral and printed argument at this bar. The only legal reason for holding defendant liable would be upon the ground that his act of negligence was such

that it might be reasonably expected that an accident of the kind would probably occur as the result of such negligence. It would be but just for the triers of the fact to apply the same rule to plaintiff. If his act in unharnessing his mule, turning it loose and permitting it to follow without control was, in the belief of the jury, negligence directly contributing to the injury, no recovery can be had, notwithstanding defendant's negligence. "When there has been mutual negligence, and the negligence of each party was the proximate cause of the injury, no action whatever can be sustained." *Oglesby v. Smith*, 38 Mo. App. 67. Plaintiff lived near by and was familiar with the fence and its condition, when he turned the mule loose with the intention that it should pass along the bordering highway. Now, if the probable consequence of the careless and negligent construction of the fence is that animals may become entangled therein, and defendant is to be charged with a knowledge that such probable consequences may result, so plaintiff ought to be charged with a knowledge that such result may happen from his turning the mule loose to follow him along the highway. It would then be a case of mutual negligence, for which no action would lie to either party. But we cannot say, as a matter of *law*, that this act of plaintiff's was negligence. It was not such an act as the judgment of all sensible men would condemn, and, when it is such an act about which prudent men would differ, it is a question for the jury. *Boland v. City of Kansas*, 32 Mo. App. 8; *Taylor v. Railroad*, 26 Mo. App. 336.

In the foregoing remarks we have not overlooked the rule that one is not to be precluded from the use of a highway merely by his knowledge that it is defective. *Buesching v. Gaslight Co.*, 73 Mo. 219; *Smith v. St. Joseph*, 45 Mo. 449. But this must be understood with the proviso that he uses ordinary care, which is a relative term; and, when he has knowledge of the defect,

such knowledge is to be considered in passing on the question of ordinary care. Accordingly, in proportion as the risk of injury increases, of which he has knowledge, must his care and diligence, to avoid injury, be increased. Beach on Contributory Neg. 259; 2 Thompson, Neg. 1205; *Pennsylvania Ry. Co. v. McTighe*, 46 Pa. St. 316; *Crumptin v. Inhabitants of Solon*, 11 Maine, 335; *Jacobs v. Bangor*, 16 Maine, 187; *Koch v. Edgewater*, 14 Hun. 544.

The judgment will be reversed, and the cause remanded. All concur.

WILLIAM A. SHINNABARGER, Respondent, v. WILLIAM M. SHELTON AND LEMUEL M. LANE, Appellants.

Kansas City Court of Appeals, May 12, 1890.

1. **Fraud**: ELECTION AS TO REMEDY: DAMAGES: RESCISSION. An action lies against a party making a representation, which is at the time known to be false, to a person who relies upon it and is deceived thereby to his injury; and the party so defrauded in a contract may stand to the bargain even after he has discovered the fraud and recover damages on account of it, or he may rescind the contract and recover back what he has paid or sold; and, when he elects to pursue the former remedy, the defendant is not entitled to instructions setting forth the conditions necessary to the pursuit of the second remedy.

2. **Practice**: INSTRUCTION NOT MISLEADING OR PREJUDICIAL. Though an instruction is not as explicit as it might be, yet, where it is not misleading nor prejudicial and is supported by the evidence it is properly given.

3. **Fraud**: MEASURE OF DAMAGES: REPRESENTATION: EVIDENCE: INSTRUCTION: COMMON FAULT. In an action for fraud and deceit in a land trade the measure of damages is the difference between the actual value of the land at the time of the trade and what would have

been the value at that time had it been in point of quality, condition and location as represented; and where the defendant had not only represented quality, condition and location of the land, but had gone further and represented it as of a given value, evidence of such representation is sufficient to support an instruction to the above effect without further evidence of such value, especially where defendant asked and the court gave other instructions announcing identically the same rule.

4. ———: REPRESENTATION: EVIDENCE: INSTRUCTION. In such action it is proper to refuse an instruction directing the jury to disregard the defendant's representation as to the amount of loan that could be placed on the land.

5. ———: RULE AS TO DOUBT IN FRAUDULENT TRANSACTION. When the evidence in respect to a transaction charged to be fraudulent comports as well with honesty as dishonesty, and when the equilibrium is so nearly approached that the mind of the trier of the fact is in a state of doubt as to whether the scale preponderates in favor of the plaintiff or not, then, in such case, the doubt if it be a reasonable, substantial doubt, not a mere possibility, should be solved in favor of defendant.

6. ———: EVIDENCE: PARTICIPANTS IN BENEFITS OF FRAUD. If one of two defendants writes a letter for another, in reference to the land trade in issue, then the letter is evidence against the other; and if both defendants participate in the benefits of the transaction induced by the false statements of such letter, both are liable therefor.

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

AFFIRMED.

Johnson & Craig and *W. W. Ramsay*, for appellants.

(1) The court committed error in giving instruction number 1, in behalf of plaintiff. A general instruction intended to cover the whole law of the case should conform to the issues and be in harmony with the theory on which plaintiff seeks to recover, as contained in his petition, and should omit no essential element to such recovery; that is, the issues cannot be changed from those made by the pleadings, nor ignored

in such instruction. *Moffit v. Conklin*, 35 Mo. 453; *Bank v. Armstrong*, 62 Mo. 59, *loc. cit.* 65, 66; *Bank v. Murdock*, 62 Mo. 70, *et seq.; Glass v. Gelvin*, 80 Mo. 297, *loc. cit.* 302; *Wade v. Hardy*, 75 Mo. 394; *Frederick v. Kinzer*, 17 Neb. 366; *Compton v. Baker*, 34 Mo. App. 133, and cases cited; *Hoenschen v. O'Bannon*, 56 Mo. 289; *Trimble v. Stewart, Wilson & Bland*, 35 Mo. App. 537; *Gurley v. Railroad*, 93 Mo. 445. (2) Instruction number 1, given at the instance of the plaintiff, while intended to be general and to cover plaintiff's whole case, as construed in his petition, is not based on the theory presented in his petition. The petition is founded upon the theory that plaintiff has the right to recover the value of the Nodaway county land traded by him to the defendants, in excess or above the mortgages on the same which defendants assumed and paid, by proving the deceit charged in the petition, and that the "timber-claim entry" was valueless. There was no evidence whatever introduced, or pretended to be introduced, that either of the defendants represented the "right and interest of Lane" to be worth ten dollars per acre, or any sum whatever. *Holland v. Anderson*, 38 Mo. 55; *Parker v. Marquis*, 64 Mo. 38, *loc. cit.* 42; *Clark v. Edgar*, 12 Mo. App. 345, *loc. cit.* 351, 352; *Hipsley v. Railroad*, 88 Mo. 348. (3) If everything required to be found by said instruction had been supported by the evidence, what should be plaintiff's measure of damages, taking his petition as the basis? Certainly not that declared in instruction number 2 given in behalf of plaintiff. *Malone v. Harris*, 6 Mo. 451; *Compton v. Parsons*, 76 Mo. 455; *Brewster v. Burnett*, 28 Am. Rep. 203; *Camp v. Culver*, 5 Den. (N. Y.) 48; *Colville v. Besley*, 2 Den. (N. Y.) 139; *Mowatt v. Wright*, 1 Wend. (N. Y.) 355, *loc. cit.* 360; Bish. on Con. [Ed. 1887] sec. 71; *Magoffin v. Muldrow*, 12 Mo. 512; *Babcock v. Case*, 100 Am. Dec. 654; 61 Penn. 427. (4) The court committed error in giving instruction number 2 in behalf of plaintiff. *First.*

Because as a legal proposition it does not follow as a sequence, from the petition, and instruction number 1. *Glass v. Gelvin*, 80 Mo. 297; *Benson v. Railroad*, 78 Mo. 504, *loc. cit.* 513, 514; *Moffit v. Conklin*, 35 Mo. 453. *Second.* There was no evidence to support instruction number 2, as to one of its essential elements or premises. *Harrison v. Cachelin*, 27 Mo. 26; *Atkinson v. Nicholson*, 31 Mo. 488; *Winters v. Railroad*, 39 Mo. 468, 475; *Harper v. Railroad*, 44 Mo. 488, 490; *Doebling v. Loos*, 45 Mo. 150, 151; *Franz v. Hildebrand*, 45 Mo. 121; *Givens v. VanStuddiford*, 4 Mo. App. 498, *loc. cit.* 505; *Musick v. Railroad*, 57 Mo. 134; *Newell v. B. & I. Co.*, 5 Mo. App. 253, 258; *Matney v. Gregg Bros.*, 19 Mo. App. 107, *loc. cit.* 112, 113. *Third.* It furnishes the jury with a standard for the measurement of plaintiff's damages that is not in the case. *Trimble v. Stewart, Wilson & Bland*, 35 Mo. App. 537; *Gurley v. Railroad*, 93 Mo. 445; *Murphy v. Bedford*, 18 Mo. App. 279; *Clements v. Yeates*, 69 Mo. 623; *Mendock v. Brown*, 16 Mo. App. 548; *Ellis v. Railroad*, 17 Mo. App. 126; *Hancock v. Buckley*, 18 Mo. App. 459; *Phleger v. Weltner*, 21 Mo. App. 580; *Kemp v. Foster*, 22 Mo. App. 643; *Field v. Railroad*, 76 Mo. 614; *Bank v. Armstrong*, 62 Mo. 59; *Buffington v. Railroad*, 64 Mo. 246; *Price v. Railroad*, 72 Mo. 414; *Ely v. Railroad*, 77 Mo. 34. (5) Instruction number 5, asked by the defendants, should have been given. It asked the court to exclude from the jury any evidence as to a loan of any kind that could be placed on the defendant Lane's tree-claim entry, as under the laws of the United States no such claim was subject to mortgage by the claimant, he had no such interest as could be mortgaged and plaintiff was bound to know it. This proposition needs no citation of authorities. *Ordway v. Ins. Co.*, 35 Mo. App. 426, and cases cited. (6) Instruction number 7 should have been given. It affirms that fraud will not be presumed, but must be proved in this case as well as any other where plaintiff must make out his case by

establishing fraud in the defendants. And, after the jury have considered all the evidence, facts and circumstances, they find that the acts of the defendants in the transaction will comport as well with honesty of purpose, as with fraud and dishonesty, then the jury are instructed to find for the defendants; an instruction which has become stereotyped in such cases. *Page v. Dixon*, 59 Mo. 43, *loc. cit.* 47, 48; *Webb v. Darby*, 94 Mo. 621. (7) Instruction number 8 should have been given. (8) The court erred in admitting irrelevant, incompetent and hearsay evidence to go to the jury, and in permitting leading questions to be asked the witnesses, over the exceptions and objections of defendants. It appears to us that the plainest rules of evidence were set at naught by the trial court in the trial of this cause. 1. Greenl. Ev. [13 Ed.] sec. 434, p. 483; sec. 440, p. 490; *Muldowney v. Railroad*, 36 Iowa, 462; *Page v. Parker*, 40 N. H. 47; *White v. Ballou*, 8 Allen (Mass.) 408; *Glass Co. v. Lovell*, 7 Cush. (Mass.) 321; *Gourley v. Railroad*, 35 Mo. App. 87; *Railroad v. Railroad*, 3 Allen, 142; *Haynes v. Christian*, 30 Mo. App. 198; *Dunlap v. Social Club*, 25 Mo. App. 180; *Hamilton v. Railroad*, 21 Mo. App. 152; *Ahern v. Boyce*, 19 Mo. App. 552; *Stephens v. Railroad*, 96 Mo. 207, at pp. 214 and 215; *Hurt v. Railroad*, 94 Mo. 255; *Eubank v. The City of Edina*, 88 Mo. 650. This last authority we think in exact point, when we consider, among others, the following question asked Charles P. Ross in deposition taken, to-wit: "Would it not be impossible to plow and farm the rough land in controversy in your opinion?" *Ritter v. Bank*, 87 Mo. 574.

G. W. Crossan, *S. R. Beech* and *Wm. Ellison*, for respondent.

(1) Where a contract induced by fraud is rescinded, the tort is waived, and the plaintiff's remedy is on an implied agreement to restore the consideration

(*Miller v. Barber*, 66 N. Y. 558), or in *assumpsit* for money had and received (*Magoffin v. Muldrow*, 12 Mo. 512), or if goods and chattels were sold, in replevin, after demand, which is necessary to place the defendant in the wrong. *Cahn v. Reid*, 18 Mo. App. 116. Where there has been a rescission of a contract for fraud, plaintiff cannot rely upon the fraud except to justify the rescission. The petition in this case sounds in tort throughout. The fraud is not alleged by way of an inducement, followed by an allegation of an election to rescind. No return, or offer to return, or excuse for a failure to return, Lane's deed of release, appears in any of the allegations or in the evidence. According to the authorities the petition contains every allegation necessary in an action for fraud and deceit under the contract. (2) Was there error in the instructions, defining the measure of damages? Be that as it may, appellants cannot here complain of the error, because they adopted it, and asked the court to give, and the court did give in their behalf, instructions, containing exactly the same error. (3) Was the evidence sufficient to support the verdict? The next contention of appellants is, that inasmuch as the measure of damages was the difference between the actual value of the timber claim, and its value as it was represented to be, it was necessary for plaintiff (respondent) to prove not only the actual value of the timber claim, but likewise, its value, if it had been as good as it was represented to be; that there was an entire failure of testimony in respect to its value, if it had been as good as represented; and that, therefore, there was nothing upon which the verdict of the jury could rest. The price paid for it at that time is the highest kind of evidence of what it was then worth, if it had been as represented. 3 Sutherland on Damages, p. 592. Story on Sales [4 Ed.] sec. 454, note 3. Young Shinnabarger and his mother bought the timber claim, under the belief that what Lane and Shelton said of it was true. The price

paid was thus an estimate of the value, made by the parties themselves, on the theory that the land was as good as it was represented to be. *McBeth v. Craddock*, 28 Mo. App. 380, 396, 397; *Cahn v. Reid*, 18 Mo. App. 116; *Griffin v. Farrier*, 32 Minn. 474. (4) Instruction number 5, offered by appellants, was properly refused. It required the jury to entirely disregard the testimony therein referred to. The good faith of Lane and Shelton in the negotiation was in issue, and, as a part of the *res gestæ*, the evidence was admissible. Besides, a representation involving a proposition of law of a foreign state, or of the United States, is regarded as a representation of a fact. (5) It is claimed the court erred in refusing instruction number 7, offered by appellants. The court properly refused it. It is therein stated that "if the jury entertain any doubt as to the true construction, etc., those doubts should be resolved in favor of the defendants," thus requiring a greater degree of proof than is imposed on the state in a murder case. *Gay v. Gillilan*, 92 Mo. 250. (6) Irrevelant or immaterial testimony is not admissible on a trial in a court of justice, it is true; but the reason for the rule is not so much that it does any particular harm when admitted, as that the dispatch of business in due time makes it necessary for courts to limit inquiry to the issues joined. *Birney v. Sharp*, 78 Mo. 73; *Stern v. Mason*, 16 Mo. App. 473; *Siebert v. Chosen Friends*, 23 Mo. App. 268.

SMITH, P. J.—This is a suit brought by plaintiff against defendants in the circuit court of Nodaway county to recover damages for fraud. The petition alleged that plaintiff and his parents were the owners of the equity of redemption in one hundred and sixty acres of land in Nodaway county in this state of the value of two thousand dollars; that the defendant Lane had, under the act of congress to encourage the growth of timber on the western prairies, entered one

hundred and sixty acres of land in Lincoln county in the state of Nebraska, and was then in the possession thereof, perfecting his title thereto under the provisions of said act; that the said Nebraska land was a barren waste of land, surface rock and gravel, wholly unfit for any purpose, and of no value whatever, incapable of producing or sustaining the growth of any herb, plant or grain fit for man or beast, of all which defendants were fully aware; that defendants agreed with plaintiff and his parents that said Lane would relinquish to the United States all of his right in and to said land to the end that plaintiff might enter the same under the act of congress in consideration that plaintiff and his parents would execute to defendants deeds conveying their equity of redemption in the said Missouri land, the defendants agreeing to assume the payment of the mortgage debts on the said lands; that the defendant intending to defraud plaintiff and his parents, and for the purpose of inducing them to consummate said agreement and to execute said deeds, defendant falsely and fraudulently represented to plaintiff and his parents that said Nebraska land was valuable for agricultural purposes, and was located in as rich a part of the state as there was; that no part of said land was unfit for farming purposes; that the soil thereof was fertile; that the reasonable value of said land and the right of entry as then owned by said defendant Lane was ten dollars per acre and that nine dollars per acre could be borrowed from those who knew said land, upon the right-of-entry claim as then owned by said defendant Lane as a security for said loan, etc.; that the defendants well knew each and every one of said representations to be false; that plaintiff and his parents were ignorant of the value and quality of said Nebraska land, and believed to be true and relied upon the false and fraudulent representations of defendants touching the quality and value of said land, and so believing and acting in good faith

consummate said agreement and execute the said deeds conveying said Nodaway county lands to defendants, and defendant Lane did execute a proper relinquishment of his claim to said Nebraska land to the United States, and that thereupon defendants took possession of the said Nodaway county land and converted the same to their own use to the damage of plaintiff, etc. The answer contained a general denial coupled with a counter-claim. There was a trial which resulted in a judgment for the plaintiff and from which defendants have appealed.

I.. The defendants assail the judgment on the ground that the trial court erred in giving the plaintiff's first instruction. The defendants misconstrue the plain and obvious meaning of the petition. The hypothesis of the instruction is not as they suppose different from that of the petition. The theory of the petition is that the plaintiff affirms the contract and seeks to recover for fraud and deceit. A party defrauded in a contract may stand to the bargain even after he has discovered the fraud and recover damages on account of it, or he may rescind the contract and recover back what he has paid or sold. *Parker v. Marquis*, 64 Mo. 38; *Jarrett v. Morton*, 44 Mo. 275; *Finlay v. Bryson*, 84 Mo. 664; *Nauman v. Oberle*, 90 Mo. 666. The gist of an action founded on fraudulent representations, when damage results, is the fraud of the defendants, and when it appears that a representation is made which is known to be false at the time it is made, and the person to whom it is made relies upon it and is deceived thereby to his injury, an action lies against the party making it. *Dunlevy v. Rogers*, 64 Mo. 204; *Walsh v. Morse*, 80 Mo. 568; *Jones v. Railroad*, 79 Mo. 92; *Nauman v. Oberle*, *supra*. The pleader in this case recognized the above doctrine in his petition, and the instruction under consideration was framed in exact harmony therewith. There was no radical departure in this instruction from

the theory of the petition. The petition did not proceed upon the idea of rescission of the contract and for the recovery of the value of the Nodaway county land. The action stated is not to be confounded with the class of actions where the contract is induced by fraud on the discovery of which it is rescinded and the tort waived, in which the remedy may be on an implied agreement to restore the consideration (*Miller v. Barber*, 66 N. Y. 558), or in *assumpsit* for money had and received. *Magoffin v. Muldrow*, 12 Mo. 572.

The defendants further contend that this instruction required the jury to find that the reasonable value of the right and interest in the land, as then owned and held by Lane, was ten dollars per acre, while the petition alleged that the defendants represented that the reasonable value of the said land and the right of entry, as then owned by Lane, was ten dollars per acre. The instruction in this regard is not as explicit as it perhaps might have been. The value of Lane's right and interest in the Nebraska land of course was to be measured very largely by the value of the land itself. The words "timber claim," or right, were used by some of the witnesses interchangeably with words "the Nebraska land" and "Lane's interest in the Nebraska land." The material thing was the land and the words of the instruction to which exceptions are taken undoubtedly referred to the land and its value. The jury could not have been misled or the defendants prejudiced by the language of the instruction. The objection amounts to no more than a bare verbal criticism. There was no lack of evidence to support the theory of this instruction, and we think it was properly given.

It follows from these observations that the plaintiff's second instruction defining the measure of damages was not, as the defendants contend, a complete *non-sequitur*. The rule there laid down is the logical corollary to the proposition embraced in the preceding instruction.

It declared the measure of damages to be "the difference between the *actual value* of the Nebraska land at the time of the trade of it to the plaintiff and what would have been the value at that time had it been in point of quality, condition and location as represented by defendant." One of the instructions asked by the defendants, and modified by the court, both as it was originally asked and as it was modified, announced identically the same rule as that of the plaintiff's instruction just referred to. The defendants, therefore, cannot be heard to complain of a rule which they themselves sought to invoke and apply to the case.

The defendants further contend that there was no evidence adduced to show what would have been the value of the Nebraska land had it been of the quality, condition and location as represented by the defendants. On the question of value the admission of the purchaser may be considered. 2 Sutherland on Damages, 204-5; *King v. Brown*, 2 Hill, 285; *Basford v. Pearson*, 9 Allen, 387; *Knuland v. Fuller*, 51 Me. 518.

Upon this principle the plaintiff could prove, on the question of value, the worth of the Nebraska land, not as a basis of recovery but as a declaration on the subject of value. *McBeth v. Craddock*, 28 Mo. App. 380. The defendants in this case, as is shown by the evidence, did not confine their representations to the topography, quality, productiveness, location, etc., of the land, but they went further and stated its value. They stated it to be worth ten dollars per acre; that land like it could not be bought in Nebraska for sixteen hundred dollars; that from seven to nine hundred dollars could then be borrowed on it in the then state of defendants' title. The situation of the parties was quite unequal. The land for which the plaintiff was trading was situate in another state, and its inspection then would have been attended with inconvenience and expense, and for that reason the representations of the defendants constituted a proper basis for plaintiff's action of deceit.

The defendants were stating facts in respect to the quality and value of the land at the time for the purpose to have the plaintiff so understand it. The value of the land was an important fact. The defendants undertook to give this information. Why should they not be held to the valuation they fixed for themselves? They should be held responsible for the falsehood. *McBeth v. Craddock*, 28 Mo. App. 380; *Cahn v. Reid*, 18 Mo. App. 116. The instruction as to the measure of damages is substantially the same as was approved by the supreme court in *Caldwell v. Henry*, 76 Mo. 257.

II. The defendants' refused instruction number one, which declared that the plaintiff was intitled to recover, if at all, only nominal damages, proceeded upon the mistaken notion that the plaintiff had failed to prove the value of the Nebraska land, had it been as it was represented to be. There was some evidence of this value before the jury, as we have already stated, and therefore this instruction was properly refused.

The defendants' second instruction proceeded upon an entirely erroneous theory. The suit was not to recover the value of the Nodaway county land less the sum of the mortgage thereon, as the defendants seemed to suppose. For reasons already sufficiently stated, this instruction, assuming that fact, was properly refused. It misconstrued the petition.

The fifth instruction refused for defendants, which directed the jury to disregard the representations of the defendants in respect to the amount of the loan that could be placed on the Nebraska land, was properly refused. This statement was made to illustrate or verify the truth of the statements defendants had made respecting the value of the Nebraska land, and which, standing alone, might not have been sufficient to bind defendants, yet, in connection with the balance of the statement of which it was a constitutive part, it was admissible. The good faith of the defendants was in

issue as a part of the *res gestæ*, and upon that ground it was also admissible.

The defendants' sixth instruction, in relation to the counter-claim, was properly refused, as there was a total lack of evidence as to that matter.

The defendants' seventh instruction was properly refused. The concluding portion of this instruction told the jury that, "if it entertained *any doubt* as to the true construction to be given the conduct and the transactions of the defendants in the matter in controversy, these doubts should be resolved in favor of the defendant." It will be observed that the rule it lays down is more stringent than that which obtains in criminal cases. The jury were not even restricted to a "reasonable doubt," but were authorized to give defendants the benefit of "any doubt." This was a vice which stands condemned. *Gay v. Gillilan*, 92 Mo. 251. The rule is that when the evidence, in respect to the transaction which is charged to be fraudulent, comports as well with honesty as dishonesty, and when the equilibrium is so nearly approached that the mind of the triers of the fact is in a state of doubt as to whether the scale preponderates in favor of plaintiff or not, then, in such case, this doubt, if it be reasonable, substantial doubt, not a mere possibility, should be solved in favor of the defendant. This view seems to be in line with the case last cited. It is true that the qualifying word is not mentioned or alluded to in the later case of *Webb v. Darby*, 94 Mo. 621, yet we are not to understand that the two cases are necessarily inharmonious. The point in the former was not before the court in the latter, which but restates the rule which had been in existence in this state before the decision in 92 Mo., as shown by the cases there cited. We take it that the rule in respect to doubt as is explained and qualified in the case in 92 Mo. has not been in any way impaired or affected by the opinion in 94 Mo.

The eighth instruction of defendant was improper. If the letter of which it makes mention was written by one of the defendants for the other, of which there is some evidence, then the writer was the agent for such owner.

If the defendants were jointly interested in the venture, as there was also some evidence to show, then upon this ground the letter was admissible. If it contained a false statement and was the inducing cause to the trade, then, as both of defendants participated in the benefits which resulted to them from it, we cannot see why both of them are not liable. The court admitted some immaterial and irrelevant testimony, but the most searching scrutiny of it has failed to convince our minds that any particular harm resulted to defendants therefrom.

The objection to the notice to take the deposition of John Merryman is not well taken. If the entire notice is read, it will be very clearly seen by whom it was given and for what purpose. It was a sufficient compliance with the statutory requirement.

We think the case, upon the whole, was fairly tried and that the judgment is for the right party. We are unable to discover any errors upon the record that we think materially affect the merits, and we shall, therefore, affirm the judgment of the circuit court. All concur.

THE STATE OF MISSOURI, Respondent, v. WILLIAM B. PIPER, Appellant.

Kansas City Court of Appeals, May 12, 1890.

Selling Liquor: MERCHANTS' LAW V. DRUGGISTS' LAW. It is a good defense to an indictment for selling liquor as a merchant in less quantity than five gallons, to-wit, one gallon, that the sale was made by the defendant as a druggist under a pharmacist license, as it is the design of the druggists and pharmacists' statute to cover all the ground in relation to sales of liquor by druggists and pharmacists without reference to other statutes.

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

REVERSED.

L. M. Lane and *B. P. Duffy*, for appellant.

(1) The defendant is indicted for selling liquor in less quantities than five gallons under the merchant law found in 2 Revised Statutes, 1879, page 1244. By section 6313, Revised Statutes, 1879, we get the legal definition of the word merchant, and the 28 Mo., page 565, draws the distinction between a merchant proper and a druggist, who is also required to have a merchant's license, (2) The merchant act is not applicable to the defendant for the reason that the defendant is a pharmacist (see license in agreed statement of facts) operating under the pharmacy law of 1881. Laws, 1881, p. 130. This law specially applicable to pharmacists repeals the general drug law found in 2 Revised Statutes, 1879, at page 1075. *State v. Roller*, 77 Mo. 120. The pharmacy act has been amended, and states how a pharmacist may sell intoxicating liquor. Laws, 1883, pp. 89-90; Laws, 1887, p. 182. (3) It was evidently the intention of the legislature by the enactment of section 6334, Laws, 1887, page 217, to not interfere with the pharmacy act, for at the same session, page 182, section 4, of the pharmacy act was amended, and if the merchant section in the Laws of 1887, *supra*, interferes with pharmacists selling liquor, then section 2 of the pharmacy act, page 90, Laws, 1883, is repealed and wiped out, and a pharmacist cannot sell liquor in less quantity than five gallons, even though he acts and sells upon a physician's prescription. This would seem to be the broad terms of section 6334, Laws, 1887, page 217. (4) Our position then is, that the pharmacy act is in full force and unimpaired by any general law touching the same matters contained in the pharmacy act. The pharmacy

act is a special law, and cannot be repealed by implication, and as we understand the rule it is this, that a later statute which is general and affirmative does not abrogate a former which is particular, unless negative words are used, or unless the two acts are irreconcilably inconsistent. This is the well-established law in Missouri. *City of St. Louis v. Ins. Co.*, 47 Mo. 146; *State ex rel. v. Court*, 41 Mo. 453; *Vastine v. Court*, 38 Mo. 529; *Deters v. Renick*, 37 Mo. 597; *Louis v. Alexander*, 23 Mo. 483; *McVey v. McVey*, 51 Mo. 406; *Railroad v. Cass County*, 53 Mo. 17; *City of St. Louis v. Life Ass'n*, 53 Mo. 466. In other states the same rules of interpretation are applied. *Dodge v. Gridley*, 10 Ohio, 173; *McCarter v. Society*, 9 Cowen, 437; *Warren v. Crosby*, 89 Ill. 320. Applying these rules of construction let us further consider these two laws. That the druggist and pharmacist law is a particular law, applicable only to a particular class, is beyond controversy. This law, therefore, is not abrogated by section 6334, *supra*. *State v. Marchand*, 25 Mo. App. 657; *Ex Parte Swann*, 96 Mo. 44. (5) In determining the scope and meaning of statutes, certain established rules are observed. Statutes passed by the same legislature in *pari materia*, containing no express repealing clauses, are to be construed together, so that all may stand together if possible (*State v. Clark*, 54 Mo. 216; *State ex rel. v. Commissioners*, 20 Ohio St. 421; *Jones v. Carr & Co.*, 16 Ohio St. 420–428), and in construing a law the title of the act, as well as all its other provisions may be considered for the purpose of arriving at the legislative intent. Section 6334, *supra*, is leveled against merchants only. *State v. Ryan*, 30 Mo. App. 159. While it is true that all pharmacists are required to have a merchant's license, yet the merchant's license is not the necessary element for the conducting of a drugstore under the pharmacy act. It is the pharmacist's license, that protects the man who owns and operates a drugstore. 28 Mo. 265, *supra*. (6) Our

conclusion therefore is, that as the defendant had a pharmacist's license and was owning and conducting a drugstore, that he was protected in selling one gallon of lager beer as a pharmacist under section 2, Laws, 1883, page 90. *State v. Suess*, 20 Mo. App. 423 ; 64 Mo. 370; 26 Mo. 167.

No brief for respondent.

ELLISON, J.—The defendant was indicted and convicted as a merchant, under section 6334, Revised Statutes, 1879, as amended by the Laws of 1877, page 217, now section 6915, Revised Statutes, 1889, for selling liquor in less quantity than five gallons. The following is the agreed statement of facts upon which the trial court found him guilty, viz.:

"On the day mentioned in the indictment the defendant sold to the witness John Daniels (who is indorsed as a witness on the back of the indictment in this case) one gallon of lager beer; said gallon of lager beer was sold to said witness Daniels by the defendant, and in Nodaway county, Missouri, at the drugstore which the defendant owned and was conducting; said drugstore containing a general stock of drugs and medicines such as are usually and generally kept by druggists; that, at the time of said sale, the defendant had a merchant's license; that, at the time of said sale of one gallon of lager beer by defendant, at his drugstore, to the witness Daniels as aforesaid, the defendant was then and there conducting and operating his drugstore, and then and there had the license hereto attached, and made a part of this agreed statement of facts, said license hereto attached having been obtained by the defendant from the board of pharmacy of the state of Missouri, at the date mentioned in the license, hereto attached; that, at the time the defendant made said sale, he did it in good faith, believing he had a right to do so as a druggist and pharmacist, under the

license, hereto attached. Said sale of one gallon of lager beer was made on the day mentioned in the indictment."

The pharmacy license attached to and made a part of said agreed statement of facts is in words and figures following, to-wit:

"Board of Pharmacy for the State of Missouri, number 2370.

"This is to certify that Wm. B. Piper has applied to this board and approved his qualification to be a registered pharmacist, as provided for by an act of the general assembly entitled 'An act to regulate the sale of medicines and poisons by druggists and pharmacists in the state of Missouri,' approved the twenty-sixth day of March, A. D. 1881. Issued by James F. Hurt, Ph. G., Registrar for the Northern District of ———. Columbia, Missouri, August 3, 1881.

"J. A. HOWARD,
"J. F. HURT,
"M. W. ALEXANDER,
"Board of Pharmacy."

The question here presented is difficult to determine on account of the incongruity of the statutes which apparently, at least, would appear to relate to it. But our conclusion is that defendant ought not to have been convicted. It is true that section 6334, Revised Statutes, 1879 (as amended and as it is now made to read by the Laws of 1887, page 217), declares, broadly, without proviso or exception, that the merchant's license (which a druggist must have) shall not authorize the sale of intoxicating liquors in any quantity less than five gallons, for any purposes whatever. And that section 6338 defines the term, merchant, to include dealers in drugs and medicines. Yet, we have a druggists and pharmacists' statute prescribing different penalties and conditions which we think is designed to cover all the ground in relation to sales by druggists and pharmacists without reference to other statutes. Otherwise we

would be compelled to say that a druggist, under sections 6334 and 6338, cannot sell liquor, for any purpose, in any quantity less than five gallons.

The law regulating the sale of intoxicating liquors by druggists is found in the druggists and pharmacists' statute. Laws, 1881, p. 130; Laws, 1883, p. 89; Laws, 1887, p. 182. By section 2, Laws, 1883, page 90, the only inhibition against a druggist selling liquor is that he shall not sell *less than one gallon*, except upon certain conditions therein set out. The druggist, in this respect, is only amenable to this statute, and he does not violate it when he sells more than one gallon.

Whatever weight can be attached to the revision of 1889, recently promulgated, is to strengthen the foregoing view; for, by sections 6915 and 6919, the merchant's statute of 1879, as amended by the Laws of 1887, is re-enacted, and, by section 4621 of the pharmacist law, the druggist cannot sell, except upon prescription, any quantity less than *four* gallons; thus keeping up the distinction between the merchant and the druggist as to the quantity which may be sold by them in their respective capacities.

The judgment will be reversed and the defendant discharged. All concur.

PETER LAINIGER, Respondent, v. THE KANSAS CITY, ST. JOSEPH AND COUNCIL BLUFFS RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, May 12, 1890.

1. **Railroads:** KILLING STOCK: SUFFICIENT PETITION: LIMITS OF INCORPORATED TOWN. A plaintiff suing to recover double damages for killing stock is required, somewhat strictly, to allege and prove all the facts prescribed by the statute, yet if such fact appear by express averment, or necessary implication from such express averments, the petition will be *held* sufficient; and the

allegation that the cattle came upon the railroad where it passes along inclosed and cultivated fields, and not at any road crossing, sufficiently negatives the idea that the point of entry was within the limits of an incorporated town.

2. ——: ——: INSTRUCTION ASSUMING FACT: EVIDENCE. An instruction examined, and found not subject to the objection of assuming as true an issue of fact in the case, to-wit: "That defendant's road passed along, and adjoining, the inclosed field of plaintiff;" but, if it does assume such fact, the appellate court may rightfully presume that such fact is undisputed, since the evidence adduced at the trial is not furnished it.

3. ——: ——: INSTRUCTION DEPARTING FROM PETITION. Said instruction is found not to be a substantial departure from the allegations of the petition.

4. ——: ——: MEASURE OF DAMAGES: HARMLESS ERROR. Said instruction, while open to some technical criticism, does not appear to have injured appellant, and is not reversible error.

5. ——: ——: INSTRUCTIONS GIVEN AND REFUSED AS TO CHARACTER OF FENCE. The action of the court in giving and refusing other instructions as to the character of the fence, set out in the opinion, is examined and approved.

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

AFFIRMED.

Huston & Parrish and *Strong & Mosman*, for appellant.

(1) The court erred in admitting any testimony in the case, and in refusing defendant's demurrer to the evidence. It is not charged in the petition, either directly or by necessary implication, that the cattle did not enter upon the railroad track within the limits of an incorporated town. *Manze v. Railroad*, 87 Mo. 278–81; *Roland v. Railroad*, 73 Mo. 619; *Shulte v. Railroad*, 76 Mo. 324; *Williams v. Railroad*, 80 Mo. 597; *Ringo v. Railroad*, 91 Mo. 668. The statute upon which the plaintiff seeks a recovery is a penal one, and greater strictness of construction is required, both as to averments and proof, than in ordinary cases. *Manze v.*

Railroad, 87 Mo. 278–81; *Fusz v. Spaunhorst*, 67 Mo. 256; *Kreitzer v. Woodson*, 19 Mo. 327; *Howell v. Stewart*, 54 Mo. 400; Sedgwick's Stat. and Const. Law, 281. (2) The first instruction given for the plaintiff is erroneous, and should have been refused by the court. *First.* Because it assumes absolutely that the railroad passed along, and adjoining, the inclosed fields of plaintiff, and did not require the jury to find that fact. *Bank v. Crandall*, 87 Mo. 208–13; *Stone v. Hunt*, 94 Mo. 475–80, and authorities cited; *Stoher v. Railroad*, 91 Mo. 509–17–18; *State to use v. Mason*, 96 Mo. 559–66; *Liggett v. Morgan*, 98 Mo. 39–42. *Second.* Because the instruction told the jury that the defendant was liable if the fence where the cattle got through was defective, insecure and insufficient to turn stock. The allegations in the petition are that the defendant allowed the fence to remain insecure, rotted down and out of repair. The court enlarged the issues by the instruction, by injecting into them the defective condition of the fence, and the insufficiency thereof to turn stock. *Pearce v. Railroad*, 72 Mo. 414; *Dahlstrom v. Railroad*, 96 Mo. 99–103; *Merrett v. Poulter*, 96 Mo. 237; *Hartz v. Railroad*, 95 Mo. 368; *Glass v. Gelvin*, 80 Mo. 297, and authorities cited. *Third.* Because no rule of damage was laid down for the cattle injured. The jury was instructed that they might find such sum as the "evidence might show" would compensate the plaintiff for the injury received by the cattle not killed. But the court did not tell the jury what this compensation was to consist of, what the measure of damages was, but left it for the jury, without limitation or direction, to ascertain those facts. *Cathcart v. Railroad*, 19 Mo. App. 107–12; *Williams v. Iron Co.*, 30 Mo. App. 662–7; *Belch v. Railroad*, 18 Mo. App. 80–85; *Kenneday v. Holladay*, 25 Mo. App. 514, and authorities cited. The measure of damages would be the difference in the value of the cattle before they were injured and immediately afterwards, "and a reasonable expense incurred,

or value of time spent, in reasonable endeavor to preserve or restore the property injured." *Harrison v. Railroad*, 88 Mo. 625-28-30; *Railroad v. Finnigan*, 21 Ill. 649; *Jackson v. Railroad*, 74 Mo. 526; *Case v. Railroad*, 75 Mo. 668-71; *Rankin v. Railroad*, 55 Mo. 167; *Sturgeon v. Railroad*, 65 Mo. 569. (3) Instruction number 2, given by the court on behalf of the plaintiff, is erroneous. The instruction told the jury that it was the duty of the defendant to "keep its fence in good repair, and so as to turn stock or cattle and keep them off the track." This is not the law. It was the duty of the defendant to erect and maintain lawful fences on the sides of its road—nothing more. R. S. 1879, sec. 809. It was the duty of the court to tell the jury what a lawful fence was, and the fact that the court may have defined what a lawful fence was, in defendant's instructions, did not cure the error. *Mfg. Co. v. Hudson*, 4 Mo. App. 145; *State v. Laune*, 1 Mo. App. 371; *Goetz v. Railroad*, 50 Mo. 472. This instruction and the defendant's instruction 3 are inconsistent. *Hoenschen v. O'Bannon*, 56 Mo. 289; *Frederick v. Allgaier*, 88 Mo. 598, and authorities cited; *Price v. Railroad*, 77 Mo. 508; *Stevenson v. Hancock*, 72 Mo. 612. (4) The court erred in refusing instruction number 4, asked by the defendant. The manner of the construction of the fence, or the defectiveness of its material, were not in issue. The only issue was whether the defendant suffered the fence on the west side of its road "to be and remain down, rotten and out of repair." The word, insecure, of itself, would not sustain proof of an unlawful fence.

William C. Ellison and *Booker & Williams*, for respondent.

(1) The court did not commit error in overruling defendant's objection to the introduction of evidence.

The petition is sufficient. It need not contain the direct averment that the point at which the animals entered upon defendant's railroad track "was not within the limits of an incorporated city or town." It is sufficiently negatived by an allegation that the animals "got upon the track at a point where said railroad passes along, through and adjoining inclosed or cultivated fields," etc. *Manze v. Railroad*, 87 Mo. 278-281; *McIntosh v. Railroad*, 26 Mo. 381; *Williams v. Railroad*, 80 Mo. 597; *Johnson v. Railroad*, 80 Mo. 620; *Moore v. Railroad*, 80 Mo. 499; *Ringo v. Railroad*, 91 Mo. 669; *Mayfield v. Railroad*, 91 Mo. 298; *Edwards v. Railroad*, 74 Mo. 117. (2) The statement in the petition that the defendant failed and neglected to keep and maintain a lawful fence where the cattle came upon the railroad, and were killed, injured and crippled, and the reference to section 809 of the Revised Statutes, imply that it was the duty of the defendant to erect and maintain fences at said place, and that the cattle got upon the track in consequence of such failure. *Fields v. Railroad*, 80 Mo. 203; *Jackson v. Railroad*, 80 Mo. 150; *Summers v. Railroad*, 29 Mo. App. 41. (3) *First.* The first instruction given on the part of plaintiff is not erroneous. It does not assume that the railroad passed along and adjoining the inclosed fields of plaintiff. On the contrary, that issue was fairly presented to the jury. The evidence is not preserved in the bill of exceptions, and the presumption is that the trial court did not err in giving instructions. When the testimony is clear and conclusive, then an instruction may assume the truth of the facts sworn to, and it will not be reversible error. For all the appellate court knows, that fact may have been admitted in the trial court. *Fields v. Railroad*, 80 Mo. 230; *Barr v. Armstrong*, 56 Mo. 577; *Caldwell v. Stephens*, 57 Mo. 589. *Second.* The instruction does not change the issue. Revised Statutes, 1879, section 809, requires the erection and maintenance of a

lawful fence. A fence defective and insecure is an unlawful fence. The authorities cited by appellant do not apply. *Third.* The failure to embrace all the issues of the cause in one instruction is not error. If they are included in the instructions given, and taken as a whole, they are correct. *Muehlhausen v. Railroad*, 91 Mo. 332; *Terry v. Railroad*, 77 Mo. 254; *Vaughn v. Railroad*, 34 Mo. App. 141. *Fourth.* The evidence is not preserved as to damages sustained by plaintiff. The petition charges the value of cattle killed to be four hundred and twenty-five dollars, and those crippled to be damaged forty dollars. This would make an aggregate damage of four hundred and sixty-five dollars. The verdict of the jury gave plaintiff four hundred and thirty-six dollars. It is manifest from the record that the defendant has not been injured thereby. *Morris v. Railroad*, 79 Mo. 367. The instruction as to damages is correct. Plaintiff was entitled to compensation "for the injuries (if any) received by other cattle referred to, and not killed." How is this court to know that there was any conflict in the evidence as to the injured cattle? *Harrison v. Railroad*, 88 Mo. 625; *Jackson v. Railroad*, 74 Mo. 526. (4) No error was committed in giving instruction number 2 on behalf of the plaintiff. After a good and substantial fence has been built by a railroad company, it must use proper diligence in keeping the fence in suitable repair, and so the jury were told by this instruction. *Clardy v. Railroad*, 73 Mo. 576; *Case v. Railroad*, 75 Mo. 668; *Rutledge v. Railroad*, 78 Mo. 286-293; Session Acts, 1887, p. 194. The court did not commit error in refusing instruction number 3, asked by defendant. The statute requires that the fence shall be constructed in a certain way, "the posts shall be set firmly in the ground, not more than eight feet apart, and the boards securely fastened thereto and placed at proper distances apart, so as to resist cattle," etc. Sess. Acts, 1887, 194.

GILL, J.—Plaintiff brought his action under section 809, Revised Statutes, 1879, for the killing and crippling of certain cattle described in the petition, the property of the plaintiff. It is alleged in the petition that the cattle actually killed were of the value of four hundred and twenty-five dollars, and that the others were crippled and injured and thereby damaged in the sum of forty dollars, the aggregate damages claimed being four hundred and sixty-five dollars. It is alleged in the petition "that the said cattle came upon the track of said railroad, in said township where the same passed along, and adjoining, plaintiff's inclosed and cultivated field, and where there was not any crossing of said railroad by a public or private crossing; that the defendant, on said fourteenth day of August, 1888 (the date the cattle were killed and injured), and for a long time prior thereto, failed and neglected to keep and maintain a lawful fence on the sides of its said railroad, but suffered the fence on the west side of said railroad, at the point where said cattle got upon the track and were killed, injured and crippled, as aforesaid, to be and remain insecure, rotted down and out of repair, and that by reason thereof said cattle got upon said railroad track, and the killing, crippling and injuring of said cattle was occasioned then and there by the neglect and failure of the defendant to keep and maintain lawful fences on the west side of its railroad, as aforesaid," etc. The answer of the defendant was a general denial.

On the trial the defendant objected to the introduction of any evidence, for the reason that no cause of action was stated in the petition—because it does not appear from the petition but what the animals got upon the track within the limits of an incorporated town, etc., and were killed in the limits of an incorporated town; because the petition charges the defendant permitted its fences to remain out of repair on the west

side of the road, but does not charge that the cattle injured came onto the road over said fence on the west side of the road. The court overruled the objections and admitted the testimony.

At the close of the case, the court gave the following instructions on behalf of the plaintiff: "1. The court instructs the jury that if they believe from the evidence that in Grant township, in Nodaway county, on or about the fourteenth day of August, 1887, at a point on the west side of the defendant's railroad track, where the same passes along by and adjoining an inclosed field of the plaintiff's, the cattle of plaintiff, described in the petition, escaped from said field and got upon the railroad right of way then and there through defendant's fence serving to inclose said right of way; that at the place where said cattle got through said fence was defective and insecure, and insufficient to turn stock, by reason thereof said cattle got through; that defendant, through its agents or servants, before and at the time the cattle got through, either knew, or by the exercise of ordinary care or caution might have known, of the defective condition of said fence at said place, and failed and neglected to keep the same in repair, and the jury further believe the cattle, while upon said right of way, got upon the railroad track and were then struck by a passing train of cars over said road, and that some of them were thereby killed or fatally injured, and others were wounded and bruised, the jury will find for the plaintiff, and assess his damage at the value of the cattle killed and fatally injured as aforesaid, less the value of their carcasses, then and there when discovered by plaintiff, and such further sum, if any, as the evidence may show will compensate the plaintiff for the injuries (if any) received by the other cattle referred to and not killed, not exceeding in the aggregate four hundred and sixty-five dollars.

"2. The court instructs the jury that a railroad company is not an insurer of its fences along the line of

its right of way. It is the duty of the company, however, to keep its fences in good repair, so as to constitute a good substantial fence, and so as to turn stock or cattle, and keep them off the right of way and out of the way of passing trains. If such fences become out of repair the company is allowed a reasonable time under the circumstances to discover the defect and repair it. But if the company by the exercise of such caution and vigilance as a prudent man would use, considering all the surroundings, might know of the defective condition of the fence, it cannot escape liability because it has no actual knowledge of their condition."

The court in behalf of the defendant gave the following instruction: "The court instructs the jury that if they believe from the evidence that the fence, where the cattle in suit broke through onto the defendant's right of way, was composed of posts and planks four and a half feet high, and that the same was not down, rotten or out of repair, but was up and composed of reasonably sound, strong material, and that plaintiff's cattle jumped upon or ran against it and broke it down and went onto defendant's railroad, then the plaintiff cannot recover, and the jury must return a verdict for the defendant, and in that case it can make no difference what the condition of the fence on either side of the place where it was broken may have been."

"The court instructs the jury that the burden of the proof is upon the plaintiff, and it devolves upon him to make out his case by a preponderance of the testimony, and unless he has so done the jury must find for the defendant."

The defendant also asked the following instruction: "4. The court instructs the jury that the material of which the fence was built, the manner of its construction and the width of the space between the boards is not in issue, and the jury will not consider it, but will disregard the evidence on that point."

This instruction was refused by the court, and the defendant excepted. There was a verdict for the plaintiff for four hundred and thirty-six dollars. A judgment for double the amount was entered as said section 809 requires; and from said judgment defendant appeals.

I. The first alleged error is that the petition states no cause of action, for the reason, it is said, that it is not therein shown that the cattle got upon the track of the railroad at the point where the defendant is required by law to fence, since it is not alleged "that the cattle did not enter upon the railroad track within the limits of a corporated town." This point must be ruled against the defendant. The law in this state is well settled, that while a plaintiff suing to recover double damages, under said section 809, Revised Statutes, 1879, is required, somewhat strictly, to allege and prove all the facts prescribed by the statute for such recovery, yet, if such facts appear by express averment, *or by necessary implication* from such express averments, then the petition will be held sufficient. *Williams v. Railroad*, 80 Mo. 600; *Manz v. Railroad*, 87 Mo. 281; *Ringo v. Railroad*, 91 Mo. 760; *Mayfield v. Railroad*, 91 Mo. 298. Following these cases, we hold that the allegation "that said cattle came upon the track of said railroad in said township where the same passed along, and adjoining, plaintiff's inclosed and cultivated field, and where there was not any crossing of said railroad by a public or private crossing," etc., sufficiently negatived the idea that the point of entry was within the limits of an incorporated town, and the petition is not on that account defective.

II. Defendant's counsel finds fault with plaintiff's first instruction. It is claimed that said instruction *assumes* as true an issue of fact in the case, to-wit: "That defendant's road passed along, and adjoining, the inclosed field of plaintiff." We hardly think the jury would so understand the instruction referred to. The words of the court are: "That, if they (the jury)

believe from the evidence, that, in Grant township, etc., at a point on the west side of defendant's railroad, where the same passes along by, and adjoining, an inclosed field of plaintiff, the cattle of plaintiff escaped," etc. But however this may be, the court may have been authorized, under the evidence, to assume that the defendant's railroad passed along by plaintiff's inclosed land, as the testimony may have *indisputably* shown that fact. If so, then the court might properly assume it as true. *Fields v. Railroad*, 80 Mo. 203. We are not furnished with any of the evidence adduced at the trial, and may rightfully presume that the undisputed fact is, that said railroad does run along by the inclosed land of the plaintiff. Neither was there any substantial departure from the allegations of the petition, when the court told the jury, in said instruction, that defendant was liable if the fence, through which the cattle escaped, was "defective, insecure and insufficient to turn stock." This complies substantially with the complaint as set out in the petition. It is there charged that defendant "suffered the fence" (at the point named) "to be, and remain, insecure, rotted down and out of repair," etc.

In determining the amount of damages the jury was told to assess the value of the stock killed, less the value of the carcasses, and add thereto "such further sum, if any, as the evidence may show will compensate the plaintiff for the injury, if any, received by other cattle referred to and not killed, not exceeding in the aggregate four hundred and sixty-five dollars." Objection is made to the portion of the instruction above quoted, on the ground that the court did not thereby inform the jury as to the measure of damages for injuries to cattle not killed; and, perhaps, the instruction of the court in this regard is open to some technical criticism. However, as it does not appear from the record to have injured the defendant, we shall not reverse the cause on that account. The petition charged

the value of the cattle killed to be four hundred and twenty-five dollars, and those crippled to be damaged at only forty dollars, and since the verdict was, in the aggregate, only four hundred and thirty-six dollars, we deem the error above alluded to unimportant and harmless. *Morris v. Railroad*, 79 Mo. 370; *Jackson v. Railroad*, 74 Mo. 527.

III. Neither do we discover any reversible error in the court's action in giving plaintiff's instruction number 2, especially when read in connection with instruction number 3, given at defendant's request. Said last instruction advised the jury correctly as to the character of fence defendant railroad was required to construct along its right of way; whilst plaintiff's number 2 was intended to, and, in substance, did, properly declare the duty of the company as to repairs. We do not think, at all events, that the conflict, if any, between these instructions was of such a nature as to prejudice the defense in this cause. The circuit court properly, too, refused defendant's instruction number 4. The kind and character of the fence as it stood when the cattle escaped onto the track was material, and it would have been error to exclude from the jury the consideration thereof. The case, then, on the whole, seems to have been fairly submitted to the jury, and the judgment of the circuit court is affirmed. All concur.

---

41 176
53 459
41 176
60 87

SUSAN E. MOORE, Appellant, v. ORIN D. MOORE, Respondent.

Kansas City Court of Appeals, May 12, 1890.

1. **Divorce: HABITUAL DRUNKENNESS: CONDONATION.** If the offense of habitual drunkenness become once distinct and complete though it then ceased, the wife could maintain her action for divorce; but, if she voluntarily continued the marital relation after the offense was thus complete, she would thereby condone it and nullify her right

to divorce. If the husband continues to be a habitual drunkard the offense is continuous and the wife may break off at any time and establish her right to divorce. And where the wife promises to return and live with her husband and he promised to give her certain means for her support, but he gave only a small portion thereof and failed as to the rest continuing his drinking which he was to stop, such matters do not amount to a condonation, though for two months after the promise the wife wrote him several affectionate letters. Such matters were not a forgiving, but merely a promise upon condition.

2. ——— : WIFE'S REFUSAL TO ACCOMPANY HUSBAND : EVIDENCE. The evidence of this case fails to make out defendant's defense that his wife refused to go to Dakota with him.

3. ——— : PLEADING : DEFENDANT CONCLUDED, THE PUBLIC NOT. In a divorce case the court need not confine itself to the allegations of the answer, there being three parties to such actions, the plaintiff, the defendant and the public. Though defendant be concluded by his pleading, the maxim applies, "That a cause is never concluded against the judge."

Appeal from the Jackson Circuit Court.—HON. JAMES GIBSON, Judge.

REVERSED AND REMANDED (*with directions*).

Botsford & Williams, for appellant.

(1) The divorce law guarantees to the wife the right to the companionship of a sober man, and gives her the right to a divorce from a habitual drunkard. As to what constitutes drunkenness see 1 Bishop on Marriage and Divorce, section 813; *Golding v. Golding*, 6 Mo. App. 602. Webster defines a drunkard to be: "One who habitually drinks to excess; one who uses intoxicating liquor immoderately." Webster's Unabridged Dictionary, title, drunkard. As to the difference between the overwhelming positive and affirmative testimony of plaintiff and the negative testimony adduced by defendant, see: 1 Whart. Ev., sec. 415; *Sullivan v. Railroad*, 72 Mo. 196; *Stitt v. Heidekoper*, 17 Wall. 384; *Richards v. Richards*, 19 Ill. 465. (2) The

proof sustaining the further ground for the divorce of indignities, consisting of a continued refusal to support plaintiff and her child, is also amply established. His intemperance was also an indignity. *Dawson v. Dawson*, 23 Mo. App. 174. And the destruction of his business and wasting of his property by his intemperance, and his direction to her to deadbeat her way at the different hotels, were gross indignities. (3) There is no condonation in this case. The case of *Guthrie v. Guthrie*, 26 Mo. App. 566, is a parallel case and is directly in point. 5 American & Eng. Encyclopedia of Law, pp. 820–823. Condonation in this case is not pleaded as a defense. Condonation is not so strict a bar against the wife as against the husband. Ency., *supra*, p. 820, note 12; p. 822, note 5; 2 Bish. Mar. & Div., secs. 45, 49, 50, 52. The patient endurance of ill-treatment by the wife is no bar to her obtaining a divorce. *Guthrie v. Guthrie*, *supra*. (4) But condonation always implies and is based upon the condition that the guilty party shall no longer mistreat the party who condones. If, therefore, the letters written by plaintiff to defendant from March, 1886, to July, 1887, be relied upon as proving condonation on her part, then that condonation is removed by the continued failure and refusal of defendant to support his family since January, 1886, to this time. Failure or refusal of an able-bodied married man to provide for the support of his family is made by section 3841, Revised Statutes, 1889, to constitute him a vagrant punishable by fine and imprisonment, and by section 4500 such vagrancy is made a ground for obtaining a divorce. 5 Am. & Eng. Ency. of Law, p. 821, note 1; cases and authorities cited above. The agreement of plaintiff and defendant made in May, 1888, is without force, and the resumption of correspondence, immediately following and growing out of it, is also without significance for the reason that defendant did not comply with any part of that agreement, by furnishing a home for his family, or by paying

plaintiff fifty dollars a month for the support of herself and child, or by reforming his habits. And he has not only failed to support them since, but in his letter to Nier in August, 1888, he said what probably was not necessary, and quite superfluous for him to say, that he would not give his wife another cent. On the whole case, this court should reverse the judgment and give a decree here, awarding plaintiff a divorce and the custody of her child. R. S. 1889, sec. 2304.

John Doniphan, for respondent.

(1) The petition being sworn to in May, 1888, must be for prior offenses, and the condition in the letters after that is full and complete. *Walker v. Walker*, 2 Phil. 153 to 155. Where the condonation is express as in the letters, the court can have no hesitation in sustaining it. *Quincy v. Quincy*, 10 New Hamp. 272. The case of *Guthrie v. Guthrie*, 26 Mo. App. 576, is not in point, and is unsatisfactory in the reasoning. The divorce seems to have been granted on account of the kindness of the wife. The lapse of time shows condonement. *Dysart v. Dysart*, 1 Robert, 470; *Stokes v. Stokes*, 1 Mo. 320. Where the injury has been fully forgiven, there can be no revival. *Beeby v. Beeby*, 1 Hogg, 789; 3 E. E. R. 338; *Dysart v. Dysart*, 1 Robert, 106. (2) Condonation need not be pleaded. Bishop says that whenever condonation comes out on a trial, it is fatal to the suit. Bishop. Mar. & Div., ch. 19, 382. Courts are so tenacious of the marital relations, in the interest of public policy and morality, that if the court believes condonation exists, it is its duty to inquire into it at any state of the case, even to set aside a default to do so. *Smith v. Smith*, 4 Paige, 432; *Backus v. Backus*, 3 Greenl. 136; *North v. North*, 5 Mass. 320. (3) Where the court has tried a divorce cause without a jury, the special findings of the court are as conclusive in the supreme court as of a jury. *Gibbs v. Gibbs*, 18

Kan. 419. The supreme court of Kansas says: "The due administration of the law demands, and in the long run the most satisfactory and the most complete justice will be secured, by leaving the settlement of questions of fact to the tribunals which see and hear the witnesses." *Railroad v. Kunkel*, 17 Kansas, 145.

ELLISON, J.—This action is founded on a petition for divorce wherein defendant is charged with habitual drunkenness for a period of more than one year, and with indignities to plaintiff rendering her condition intolerable. There was no cross-bill; the answer admitted the marriage but denied the allegations against him, and charged that plaintiff had repeatedly refused to go with defendant to Dakota and live with him, although he had been ready and willing to provide her a comfortable home there, and further charged her with having joined a conspiracy with certain other parties, not named by him, to defraud him out of certain real estate and other property. The circuit court refused the divorce, and the plaintiff has brought the case here for review.

After an examination of the record, we are satisfied that the plaintiff's charge of habitual drunkenness is sustained by the evidence. It not being necessary, we do not desire to set forth the evidence in detail as to this charge, which we consider as fully sustaining it, The testimony of employes and associates in business, as well as of others who had abundant opportunity for observation, shows that defendant gave himself up to an inordinate appetite for whiskey which incapacitated him for business and rendered him unfit for the society of his wife. Though not so specific, the evidence further shows quite as conclusively, that in consequence of this habit he failed to support his family and rested content with her dependence upon her relatives.

A great number of letters from her to him were introduced by him at the trial, and these disclose the extremity to which she was put by his inability to care

for or support her. She had not a postage stamp with which to mail her letters, save those furnished by her relatives, except in some instances where she acknowledges the receipt of a stamp inclosed by him. It is mainly upon these letters which cover a period from March 21, 1886, to July 29, 1888, that reliance is placed to establish that plaintiff condoned defendant's offense. These letters disclose that she recognized him, the child and herself as constituting an unbroken family. They are filled with expressions of love for him and interest in his welfare. They disclose that she looked upon their interests as joint and identical, nor do they contain an intimation that she ever expected their marriage to be dissolved. It is from the tender spirit and never ceasing interest, which is thus betrayed that the contention of condonation arises. But condonation is not an absolute term which can be applied alike to all circumstances which may surround the marriage relation, and it is not so recognized in the books? Its application will vary as the offense said to have been condoned may vary. If the offense be adultery, a single voluntary cohabitation, after knowledge of the offense, would constitute condonation. But if the offense be habitual drunkenness for the statutory period of one year, the continuance of the marital relation by the injured party may, or may not, amount to a condonation.

If we could state a case where the husband should be shown to have been a habitual drunkard for just one year and no more, the offense would be distinct and complete, and, though it then ceased, the wife could maintain an action for divorce; but, if she voluntarily continued the marital relation after the offense was complete, she would condone or forgive the offense and nullify her right to a divorce. If, however, the husband continues to be a habitual drunkard the offense is continuous and the wife may break off from him at any time and establish her right to a divorce. Remaining

with him as his wife, after the offense was first completed, should be attributed rather to a patient endurance with the possible hope of a reclamation, than forgiveness of what had gone before. If her patience ceases and her hopes are unfulfilled, the fact that she was patient, and was disappointed, ought not to debar her from showing the offense which he persists in committing. Now it is shown with enough clearness to satisfy us to find it as a fact, that defendant continued the excessive indulgence of his appetite for strong drink until about the time when the correspondence with his wife ended and she ceased any communication with him. We, therefore, find nothing from this to sustain the contention of condonation.

It appears that parties resided in Kansas City, until January, 1886, when, as it would seem, they separated (she going to her father's house), from an inability on his part to maintain the family. He went out to the Black Hills in Dakota. While he was there and she in Missouri, the greater part of the correspondence was had, and during this time he was informed of her necessities and embarrassments and failed to respond with means for her support or relief. He, however, charges in his answer that she refused to go out to Dakota where he was ready and willing to provide her a comfortable home. The evidence fails to sustain these allegations. Her letters, prior to 1888, show a continued appeal to send her money that she might go to him. They show her to have been, not only willing, but anxious, to put up with privation and hardship, that she might be with him to help him improve his condition. They show that she expected each letter from him would inclose her the means wherewith she might make the trip. They show, too, a patient resignation to continued disappointment in those expectations, which strongly commend her.

In May, 1888, defendant made a trip from the West and was in Kansas City where he met plaintiff at the house of a friend. She had at this time made out her application for divorce, though it was not filed till November following. At this meeting an understanding was had between them, whereby he was to furnish her fifty dollars per month for the support of herself and child and was to deed her some property, and she was to go out to Dakota. She says, "He promised to give me fifty dollars a month and to give me a deed to property before he would ask me to go out there to Dakota, as he had failed to support me before, and he promised to stop drinking. I made up my mind not to sue for a divorce, if he did as he promised he would do." He gave her twenty-five dollars at this time, but never sent any more on his return, nor did he make a deed to any property. He accounts for this by stating a failure to make sales of interest he had in mining claims in Dakota. During the two months following, she wrote him several letters which appear to be as kind and affectionate as her former correspondence. These matters are also urged as a condonation. We think they do not amount to that. She had become convinced that his continued intemperate habits and mode of life had prevented him from supporting her and the child, but on his promise she consented to delay action. Her expectations and hopes were again not realized and condonation did not take place. Condonation is conditional, and if the offense said to be forgiven is repeated, or not discontinued, there is no condonation. The alleged condonation here was not a forgiving; it was merely a promise upon condition.

II. We have considered the matter of condonation, though the suggestion was made at the argument that it was not pleaded and was, therefore, perhaps, not a proper matter for consideration. We are of the opinion that in this respect, in a case for divorce, we need not

confine ourselves to the allegations of the answer. In such case, there are, as has been said, three parties to the action—the plaintiff, the defendant and the *public*. It is to the interest of society at large to guard against sundering that relation which is its chief foundation. 2 Bishop Mar. & Div., secs. 229, 230, 231, 234, 236, 238. So far as a defendant would be concerned as a matter of right, which he may assert, he would perhaps be concluded by his pleading. But there is a maxim in these suits: "That a cause is never concluded against the judge." 2 Bish. Mar. & Div., sec. 253.

From the whole case we believe the plaintiff to be the injured party and that she is entitled to the decree granting her a divorce for the fault of the defendant and that she should have the continued custody of the infant child. We will, therefore, reverse the judgment, and remand the cause with directions that such decree be entered. The other judges concur.

---

41 184
48 64
41 184
57 296
41 184
87 240
87 242
41 184
94 1 4
41 184
98 1626
41 184
102 1446

FRANK O'RILEY, Respondent, v. JOHN DISS, Appellant.

Kansas City Court of Appeals, May 12, 1890.

1. **Fences and Inclosures**: STATUTE AND COMMON LAW: COMMON INCLOSURE. By the common law no man was bound to fence his close against an adjoining field, but every man was bound to keep his cattle in his own field at his peril; but the statute concerning fences and inclosures abrogates the common law as to outside fences, The common-law power still regulates the relations of the parties in the cases of adjoining fields which are within a common inclosure, and such owners are not bound to fence against each other unless the duty is enjoined by prescription or agreement.

2. **Contract**: MUTUAL COVENANTS TO MAINTAIN DIVISION FENCE: DEPENDENT. The covenants in an agreement of adjoining proprietors to maintain a division fence between their several holdings are mutually concurrent and dependent covenants, and neither party can maintain an action for a breach thereof without alleging and approving performance on his part. (The rules in relation to dependent and independent covenants set out and discussed in the opinion.)

3. ——— : WAIVER OF : FAILURE TO MAINTAIN FENCE : COMMON LAW : RIGHTS AND REMEDIES. Where both parties fail to maintain a division fence as they had mutually covenanted to do, such conduct amounts to a mutual waiver of the contract duty, and then the common-law right and remedies revived and are in force between them.

4. ——— : MAINTAINING DIVISION FENCE : INSTRUCTIONS. Some instructions given and refused examined, and certain ones with modifications *held* a fair presentation of the law in this case.

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

REVERSED AND REMANDED.

E. A. Vinsonhaler and *Wm. Ellison*, for appellant.

(1) To reverse the decision of the lower court, we rely principally on the proposition, that if each of two persons, owning adjoining tracts of land, makes a concurrent promise to build and maintain a certain portion of a division fence between them, so that it will turn stock (the only consideration being a promise for a promise), and neither builds his part, so as to meet the requirements of a division fence under the statute, then, before either can recover from the other, for injuries to growing crops by cattle, he must allege and prove that he built and maintained his part, as by the agreement he was bound to. (2) Did the court below err in refusing the instruction as offered? Plaintiff cannot thus declare on one cause of action and recover on another. *Lewis v. Slack*, 27 Mo. App. 119; *Bank v. Armstrong*, 62 Mo. 59; *Kneale v. Price*, 29 Mo. App. 227. On what theory did defendant owe plaintiff the duty to maintain a certain part of the fence? What was the consideration? It was a reciprocal duty which plaintiff owed to defendant. If, therefore, plaintiff disregarded his duty, will he be permitted to sue defendant because he followed his example? The law denies redress to one who has suffered from another's fault, if he, himself, is to blame in the same thing.

Studwell v. Ritch, 14 Conn. 292; *Eyerman v. Cem. Ass'n*, 61 Mo. 489; *Butler v. Manny*, 52 Mo. 497; *Lewis v. Slack*, 27 Mo. App. 119. There being some evidence tending to prove that plaintiff suffered his part of the fence to be and remain out of repair, so that cattle passed through it, the above instruction should have been given as offered. In this state, however, the common law, which requires an adjoining proprietor to keep his stock in his own field, is not in force. *Heald v. Grier*, 12 Mo. App. 556; *Fenton v. Montgomery*, 19 Mo. App. 156; *Demetz v. Benton*, 35 Mo. App. 559; *Mackler v. Cramer*, 32 Mo. App. 542. (3) Did the court err in giving the instruction as modified? The allegation is a breach of a special contract in full force; the proof is, an abandonment of the contract, and a failure or omission to perform a duty imposed by the common law,—a contract in the pleadings, a trespass in the evidence. *Lanitz v. King*, 93 Mo. 513; *Lewis v. Slack*, 27 Mo. App. 119.

Johnson & Craig, *L. M. Lane* and *B. P. Duffy*, for respondent.

(1) There is no contention in this case as to the character of the division fence. It was a fence built by contract and no pretense that it was a statutory one; hence, under it, the rights and obligations of the parties must be governed by the contract and the common law. (2) The common law has been so modified in this state, as in many others, as to permit cattle to run at large in the highways and upon uninclosed lands in this state; and no man can recover for their trespasses without showing that his premises were inclosed by a lawful fence; but no man has a right to pasture his cattle in his neighbor's field, without regard to the kind of fence he may have. *Hughes v. Railroad*, 66 Mo. 325; *Turner v. Thomas*, 71 Mo. 596, and authorities. (3) Where two adjoining owners inclose their land with a common

fence or inclosure, they need not erect or maintain any partition fences; and they, by inclosing their land with a common fence, assume their common-law duties and liabilities toward each other. In other words, when they inclose their lands they thus take them from under the modified form of the law as recognized in this state, and the common law governs without regard to division fences; they are not bound to build them. *Bronson v. Coffin*, 108 Mass. 189; *Broadwell v. Wilcox*, 22 Iowa 568; 92 Am. Dec. 404; *D'Arcy v. Miller*, 86 Ill. 102, s. c., 29 Am. Rep. 11; *McBride v. Lynd*, 55 Ill. 411; *Mulligan v. Wetsinger*, 68 Pa. St. 235; *Baker v. Robins*, 9 Kan. 303; *Winters v. Jacobs*, 29 Iowa, 115; *Daniels v. Aholtz*, 81 Ill. 440. (4) Our statutes in force at the time, sections 5651, 5652, and 5653, Revised Statutes, 1879, and acts amendatory (Laws, 1885, pp. 166, 167; Laws, 1887, p. 194), have reference to outside and not to division fences. *Reddick v. Newburn*, 76 Mo. 423; *Meyers v. Dodd*, 9 Ind. 290; s. c., 68 Am. Dec. 624; *Cook v. Morea*, 33 Ind. 697; *Johnson v. Wing*, 3 Mich. 163-70. (5) The parties in this case, by contract, built a division fence on the line dividing them, and agreed to maintain it. (6) The covenants of the contract of these parties were mutually independent, and not dependent, ones. *Cook v. Johnson*, 3 Mo. 239, 241; *Simmons v. Beauchamp*, 1 Mo. 589; *Strohmeyer v. Zeppenfeld*, 28 Mo. App. 268, 270-3; *Butler v. Manny*, 52 Mo. 497, 505, 506; *Tompkins v. Eliott*, 5 Wend. (N. Y.) 496; Rapley, Law Dic. "dependent;" *Robinson v. Harbour*, 42 Miss. 795; 97 Am. Dec. 501, 503-4; *Betts v. Perine*, 14 Wend. (N. Y.) 219.

SMITH, P. J.—The plaintiff and the defendant were the owners of adjoining farms, occupied by them in severalty and which were inclosed by a common fence. In 1882 they agreed to construct and maintain a division fence on the line dividing their farms, the plaintiff agreeing to construct the east thirty rods of the

said fence in consideration that the defendant constructed the west fifty rods thereof. The fence was to be sufficient to prevent the stock of each from trespassing upon the other. The fence was built. Thus far the facts are undisputed. There was some evidence adduced which tended to show that neither party had constructed the kind of fence that the agreement required. But, if they did, it is certain that the defendant did not maintain his part of it so that it was sufficient to prevent his stock from trespassing upon the plaintiff. The defendant turned loose upon his premises a herd of cattle, which strayed across the division line at a point within the fifty rods of fence, which defendant had agreed to erect and maintain, and destroyed the plaintiff's crops of grain. This suit was brought on the agreement.

The complaint in effect alleged that plaintiff had performed all the conditions of said contract on his part and that defendant had not, in that he had neglected to maintain his part of said fence as he had bound himself to do, whereby his cattle which he had turned loose on his premises had strayed through defendant's part of said fence where the same was defective and entered upon the plaintiff's premises and destroyed his crops. The plaintiff had judgment in the court below, to reverse which the defendant prosecutes this appeal.

I. Our statute concerning inclosures entirely abrogates the principle of the common law which exempted the proprietor of land from the obligation to fence it, and imposed upon the owner of animals the duty of confining them to his own premises. *Gorman v. Railroad*, 26 Mo. 441; *Heald v. Grier*, 12 Mo. App. 556; *Hartz v. Dolde*, 7 Mo. App. 564; *Knaus v. Railroad*, 6 Mo. App. 397. By the common law every man was bound to keep his cattle on his own lands. No man was bound to fence his close against an adjoining field, but every man was bound to keep his cattle in his own

field at his peril. *Hughes v. Railroad*, 66 Mo. 325; *Rust v. Low*, 6 Mass. 9; *D'Arcy v. Miller*, 86 Ill. 102; *McCormick v. Tate*, 20 Ill. 334.

It has been held that the inclosure statutes apply only to outside fences. *Mack v. Moon*, 33 Ind. 497. The common law regulates the relations of the parties in cases of adjoining fields which are within a common inclosure. *Baker v. Robbins*, 9 Kan. 303; *Meyers v. Dodd*, 9 Ind. 290; *Johnson v. Wing*, 3 Mich. 163; *Rust v. Low*, 6 Mass. 90; *McCormick v. Tate*, 20 Ill. 334; *Little v. Lathrop*, 5 Me. 356. When two farms are inclosed by uniting outside line fences, and the owners occupy such farms in severalty, the owners by the common law are not bound to fence against each other unless the duty is enjoined by prescription or by agreement. Without either of the obligations resting upon them they would be bound respectively to keep their cattle on their own close and to prevent their escape. *Johnson v. Wing*, 3 Mich. 160; 4 Kent. Com. 438; 3 Black. Com. 209; *Bronson v. Coffin*, 109 Mass. 173. If either party puts cattle on his own lands and they enter upon the land of the other, there being no partition fence, he will be liable therefor. *Mackler v. Cramer*, 32 Mo. App. 542; *Baker v. Robinson*, 9 Kan. 503; Shear. & Redf. on Neg., sec. 315; Chitty on Plead. 82, 83; *Johnson v. Wing*, 3 Mich., *supra*. If parties desire to avoid the common-law duty in cases of adjoining fields they may do so by establishing a division fence either under the statute or by agreement. When this is done then the obligation to keep their cattle on their own land ceases to be in force. *Daniels v. Aholtz*, 81 Ill. 440; *D'Arcy v. Miller*, 86 Ill. 102. It follows from what has been said that at the time the parties in this controversy entered into the agreement to erect and maintain the division fence between their farms, that neither party was authorized to turn his cattle loose so that they would stray upon the lands of the other. This being their legal relation then it would continue unless

set aside or abrogated by the erection and maintenance of a division between them. It seems from what was said by Judge ELLISON in *Mackler v. Cramer*, 32 Mo. App., *supra*, that when there is an agreement between the proprietors of adjoining farms, which are inclosed by a common fence, to build a partition fence, that in case such fence is not built as agreed upon and that if the cattle of the party, who has failed to comply with his agreement in that regard, escape through the part of the fence he was bound to build and injure the crop of the other party, he is liable to such other party therefor.

The question now is, were the common-law duties of the parties to each other superseded by those imposed by agreement at the time plaintiff's crop was damaged. The solution of this question necessarily requires the consideration of the further question which is, Was the obligation of each of the parties to build and maintain a specified part of the division fence dependent or independent covenants. The rule seems to be well settled that where there are several covenants which are independent of each other one party may bring an action against the other for a breach of his covenants without averring and showing performance on his part. When on the other hand the covenants are dependent it is necessary for the plaintiff to aver and prove performance and demand performance by the other party of his part of the agreement to entitle himself to an action for the breach of the covenants on the part of the defendant. *Butler v. Manny*, 52 Mo. 497; *Strohmeyer v. Zeppenfeld*, 28 Mo. App. 268. In the last-named case it is said that the "American courts as a general rule are adverse to holding that covenants in an instrument are independent unless such intention clearly appears by the terms since it is manifestly unjust that one party should refuse to be bound and yet be allowed to enforce performance against the other." In *Robinson v. Harbour*, 46 Miss. 795, it is said that covenants are to be construed to be

either dependent or independent of each other according to the intention and meaning of the parties and the good sense of the case. In order to discover that intention, and thereby learn with some degree of certainty when performance is necessary to be averred in the declaration, and when not, a number of rules are laid down by the court which we here transcribe:

"*First.* If a day be appointed for the payment of money or a part of it, or for doing any other act, and the day is to happen or may happen, before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his remedy and did not intend to make the performance a condition precedent; and so it is where no time is fixed for performance of that which is the consideration of the money or other act. *Second.* But when a day is appointed for payment of money or for doing any other act, and the day is to happen after the thing which is the consideration of the money or other act is to be performed, no action can be maintained for the money, etc., before performance. *Third.* When a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be compensated in damages, it is an independent covenant and an action may be maintained for a breach of the covenant on the part of the defendant without averring performance in the declaration. *Fourth.* When the acts or covenants of the parties are concurrent and to be done or performed at the same time, the covenants are dependent and neither party can maintain an action against the other without averring and proving performance on his part." 2 Parsons on Cont. 810. Tested by these rules we must think the covenants which we are considering are independent. There was no time fixed for the building of the fence. Neither party was bound to build his part

of the fence at or by any particular time or before the other was to build his part. But each party has performed the covenant to erect the fence so that there is no question in respect to that matter. In fact the allegation that defendant has failed to maintain the fence necessarily presupposes that the other part of the covenant, to erect it, had previously been performed by defendant.

It is only upon the covenants to maintain that any question does arise. Were these covenants mutually concurrent and dependent? Each party was bound to maintain his part of the fence. It was a concurrent and continuing duty resting on both alike. There was to be no difference in point of time when the duty of the parties to maintain the fence was to begin or to end. This duty was to be performed at exactly the same time. The very nature of the covenants sufficiently shows this. It seems quite plain that the covenants in the agreement in relation to the maintenance of said fence are mutually concurrent and dependent, and, therefore, neither party can maintain an action against the other without averring and proving performance on his part. The defendant's first instruction, which directed the jury in effect that if by mutual agreement defendant agreed with plaintiff to erect and maintain a good and sufficient fence that would turn stock along the west fifty rods of the dividing line between their lands, and that in consideration thereof plaintiff agreed with defendant to erect and maintain a like fence along the east thirty rods of said dividing line; and if plaintiff, at the time the alleged injury occurred, failed to have a good and sufficient fence that would turn stock on his east thirty rods, then plaintiff could not recover, regardless of whether defendant's portion of the fence was good or not, or whether defendant's cattle got into plaintiff's field and destroyed his corn or not, was refused. The plaintiff has elected to sue on the contract to recover the damages he has sustained, and upon that

theory the instruction just referred to should have been given. We think it was error to refuse it.

II. But we do not wish to be understood that even if the facts should be true, as are supposed in said instructions, that the plaintiff is without remedy. If the fence was allowed by the parties to decay and become insufficient to prevent the stock of each from trespassing upon the other, surely the parties were not thereby absolved from both their contract and common-law obligations as the owners of adjoining farms within a common inclosure. If both parties failed to maintain the fence, as they had mutually covenanted to do, then this amounted to a mutual waiver of the contract duty. *Mulligan v. Wetsinger*, 68 Pa. St. 235. When that duty was waived then the common-law obligations which it had superseded were revived between the parties.

Their former common-law status was restored. So that if the contract had ceased to be operative at the time the defendant turned his cattle loose, and they destroyed the plaintiff's crops, then the common law afforded the remedy. If the defendant did not violate the obligations of the contract because it has ceased to exist, he did violate his common-law duties for which he is liable.

Instruction number one (1), given by the court upon its own motion, was, in the main, correct. If the words, "or as good a fence as the defendant built and maintained," were omitted from it, we do not think it would be exceptionable. This instruction, with the third given for the plaintiff, when taken in connection with the fourth refused for defendant, it seems to us, would have been a fair presentation to the jury of the law of the case and that all the others, either asked or given, were superfluous.

It follows, from these observations, that the judgment of the circuit court will be reversed, and the cause remanded, to be proceeded with in accordance with this opinion.

SCAMMON, BAILEY & CO., Respondents, v. THE KANSAS CITY, ST. JOSEPH AND COUNCIL BLUFFS RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, May 12, 1890.

1. **Railroads:** FREIGHT RATES: ACTION FOR VIOLATION OF STATUTORY RATES AND COMMISSIONERS' RATES DISTINCT. In an action for penalty for violation of freight rates fixed by the state railroad commissioners, under sections 2684 and 2686, Revised Statutes, 1889, the plaintiff cannot, upon failure to prove that the commissioners had fixed the rates as in such sections required, recover as if his action had been brought under section 2676.

2. ———: EVIDENCE: WRITTEN CONTRACTS OF SHIPMENT: PAROL TESTIMONY: OVERCHARGES OF FREIGHT. Where the action is for overcharges of freight, it may properly be established by verbal testimony what the charges were and it is not required to produce the written contract of shipment.

3. **Interstate Commerce:** CONTRACT FOR SHIPMENT BETWEEN TWO POINTS IN THE SAME STATE. Where the contract was for a shipment between Phelps City and Kansas City, both in Missouri; and the stockyards where the cattle were unloaded extends into the states of Missouri and Kansas, the fact that the office of the consignee and the actual unloading were in the latter state, does not convert the transaction into interstate commerce.

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

REVERSED AND REMANDED.

Huston & Parrish, for appellant.

(1) To entitle the plaintiffs to recover, it devolved upon them to show that they made the shipments of stock; that the shipments were made between the points, and at the time charged in their petition, and that they paid to defendant as freight for the transportation thereof an amount in excess of the rates prescribed by law. All these facts were matters of written

contract, and parol evidence was inadmissible to establish them. *Price v. Hunt*, 59 Mo. 258-62, and authorities cited; *State ex rel. v. County Court*, 59 Mo. 513; *Cooper v. Ord*, 60 Mo. 430-31; *State v. Lewis*, 80 Mo. 110-11; *State v. Rugan*, 68 Mo. 214; *Kuhn v. Schwartz*, 33 Mo. App. 610, and authorities cited. The court erred in permitting witness Bailey to testify as to the contents of the contracts, without accounting for the originals. *Davis v. Hilton*, 17 Mo. App. 319; *Blondeau v. Sheridan*, 81 Mo. 545; *Hoskinson v. Adkins*, 77 Mo. 537. This is an elementary principle so well understood that it requires no citation of authorities. (2) The plaintiffs based their right to recover on counts 1, 2, 3, 4, 5, 6, 10, 14, 22 and 23, on the rates fixed by the railroad commissioners for the transportation of live stock. But after the plaintiffs failed to make the necessary proof to entitle them to recover on said counts, the court permitted them to ignore the causes of action stated, and recover on the statute prescribing such rates. This was plain error. The plaintiffs must recover, if at all, on the cause of action stated in their petition. *Bulline v. Smith*, 73 Mo. 151-2; *Abbott v. Railroad*, 83 Mo. 272-78, and authorities cited. (3) The court erred in refusing defendant's instructions number 1 and number 5, in the nature of a demurrer to the evidence on counts 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24. If the evidence showed that any shipments were made by plaintiffs, as charged in these counts, it showed that when the hogs were shipped they were to be carried, and were carried, into the state of Kansas and there delivered to the consignee. This was transportation from one state to another—was interstate commerce, and not subject to regulation by the state. *Railroad v. People*, 26 Am. & Eng. R. R. Cases, 1.

Lewis & Ramsay, for respondents.

(1) Appellant's first point, that no recovery can be had because the written contracts for the various

shipments were not produced, is not tenable. The suit is not upon the contract nor by virtue of the contracts, but in spite of the contracts. The contracts would not prove that the shipments were actually made nor the amount of freight actually paid. The authorities cited are not in point. (2) Appellant's second point is without merit and is unsupported by the authorities therein cited. In either case the claim is based on overcharges, and sections 835 and 844 only differ as to the extent of recovery. If by reason of a failure of proof as to the greater extent, or should the allegations by which the greater extent is sought to be reached, be faulty or insufficient, the court may still grant any relief consistent with the case and embraced within the issues. The character of the petition is not always determined by the relief it prays for. *Kneale v. Price*, 21 Mo. App. 297; *Hewett v. Harvey*, 46 Mo. 368. A party desiring to avail himself of the provisions of a public act is only required to state facts that bring his case clearly within it. *Reynolds v. Railroad*, 85 Mo. 90; *Comings v. Railroad*, 48 Mo. 516-517; *Northcraft v. Martin*, 28 Mo. 469; *Easly v. Prewitt*, 37 Mo. 361. The petition states a good cause of action without regard to allegations on sections 842 and 844. *Burkholder v. Trust Co.*, 82 Mo. 572. Questions of variance should be raised at the trial, so that an opportunity for amendment may be offered. *Blair v. Corby*, 29 Mo. 480. If appellants were misled by any variance between the allegations and the proof, it should have shown that fact by affidavit in the trial court. *Wolf v. Lauman*, 34 Mo. 578; *Turner v. Railroad*, 51 Mo. 509; *Fischer v. Max*, 49 Mo. 405; *Hotel Co. v. Sigement*, 53 Mo. 176; *Newton v. Miller*, 49 Mo. 298; *Miller v. Drake*, 62 Mo. 544; *Clements v. Malony*, 55 Mo. 360; *Wells v. Sharp*, 57 Mo. 57; *VanSickle v. Brown*, 68 Mo. 627; *Meyer v. Railroad*, 40 Mo. 154; *Kelly v. Railroad*, 70 Mo. 608; *Drury & Wiseman v. White*, 10 Mo. 354; *Burbridge v. Railroad*,

36 Mo. App. 679; *Buesching v. Gaslight Co.*, 73 Mo. 219–231; *Harris v. Railroad*, 89 Mo. 233. (3) The judgment, as appears from the whole record, is for the right party and ought to stand. *Tate v. Barcroft*, 1 Mo. 163; *Pratte v. Cabanne*, 12 Mo. 194.

ELLISON, J.—Plaintiffs filed their petition against the defendant containing twenty-nine counts. During the progress of the trial counts 25 to 29 inclusive were dismissed, and counts 7, 8, 9, 13 and 24 were withdrawn from the jury by the court. The first count of said petition, omitting formal allegations, is as follows.

"Plaintiffs for a first cause of action state that, at the time hereinafter mentioned, the defendant was and still is a corporation owning, operating and managing a certain railroad in the state of Missouri, extending from the town of Phelps City, in said state, to the city of St. Joseph in said state. That on or about the thirtieth day of November, 1886, plaintiffs, as partners by the style of Scammon, Bailey & Co., delivered to defendant at Phelps City aforesaid, a station on defendant's railroad in Atchison county, Missouri, to be carried, and defendant did carry for plaintiffs, one certain carload of live stock, to-wit: One carload of hogs from said Phelps City, Missouri, to the city of St. Joseph in said state of Missouri, over said railroad, owned, operated and managed by defendant as aforesaid. That the distance between the two places last mentioned was more than sixty-three miles and less than seventy miles. That the rate prescribed by sections 833 and 834 of the Revised Statutes of 1879 of the state of Missouri, for carrying said carload of hogs shipped as aforesaid, was not exceeding ten dollars for the first twenty-five miles, and not exceeding seven dollars for the second twenty-five miles, and four dollars for each additional twenty-five miles or fractional part thereof, unless the fraction be less than thirteen miles, and then not to exceed two dollars for

such fractional part of twenty-five miles per carload. That said rates, as provided by sections 833 and 834 of said Revised Statutes, had, by the railroad commissioners of said state, been reduced to, and established at, the sum of nine dollars for the first twenty-five miles, thirteen dollars for fifty miles, fourteen dollars and fifty cents for sixty-three miles, sixteen dollars for seventy-five miles per carload, which was the highest rate defendant was by law allowed to charge, and amounted for said shipment to the sum of sixteen dollars. That instead thereof, defendant wrongfully exacted, charged and received from plaintiffs the sum of thirty dollars for carrying said carload of hogs as aforesaid, being in excess of the legal rate aforesaid the sum of fourteen dollars. Wherefore, by virtue of the provisions of sections 835 and 844 of said Revised Statutes, plaintiff asks judgment for the sum of forty-two dollars, three times the amount of said excess so wrongfully charged and received by defendant, and for costs and all other and further proper relief."

Several counts upon which plaintiff recovered were under section 844, Revised Statutes, 1879, and were identical with the one quoted, except as to dates and amount of charges. The remaining counts were under section 835. At the trial plaintiff failed to prove that any of the charges had been fixed by the railroad commissioners as provided by sections 842 and 844; but he was nevertheless permitted to recover on those counts along with the balance, as if they had been drawn under section 835. This we think was error. The actions in those counts are grounded on the violation of a rate of charges fixed by the commissioners. They are based on section 844 of the statute, and were not proved. The cause of action covered by section 835 is a different cause of action from 844. Both are for overcharges of freight, it is true, but one is fixed by law while the other is fixed by the commissioners, and the penalties

prescribed are different. The defendant seeing that it is charged with violating a rate fixed by the commissioners prepares to defend that charge; perhaps relying upon the fact that the commissioners have not fixed a rate, it makes no preparations to defend or establish its innocence of having in any manner violated any rate. Defendant denies a rate was fixed by the commissioners, which threw the burden on plaintiff to establish that allegation; failing to do so, they fail in their case, and should not have been permitted to recover without amending the petition.

There is a familiar course of decisions in this state that where a plaintiff sues under section 809, Revised Statutes, 1879, asking double damages for killing his stock, he cannot have a common-law recovery, though it would be based on the same act of the defendant. It was held to be a different cause of action, which, until an amendment of the statutes, could not be amended. For this error, the judgment must be reversed.

II. It appeared in testimony that in the different shipments made there were written contracts of shipment, most of which were not produced. The defendant objected to any oral evidence of the shipments and was overruled. We approve of the view taken in this respect by the trial court. The action is not based on the contract, nor is there any attempt to orally prove the contents of a written instrument. The action is for overcharges of freight, which we think may be properly established by verbal testimony showing what those charges were. The action is not on defendant's agreement whereby it is charged with having violated the terms thereof.

III. The point is made by defendant's counsel that some of the shipments on account of which overcharges are alleged were from points in Missouri to points in Kansas and that, therefore, the Missouri statutes would not apply, it being interstate commerce and not within

the power of the state to regulate. We would be willing to concede the point, if the facts justified the statement. The shipment was not made to a point in Kansas. The facts appear to be these: The point of destination was Kansas City, Missouri; and the stockyards, where the cattle unloaded, extended into both the states of Missouri and Kansas, though the actual point of unloading was in Kansas and the consignment was to commission merchants whose place of business was across the state line in Kansas. The contract was for a shipment to Kansas City, Missouri. That was the point of delivery and the place to which an overcharge is alleged to have been made, and any other place than that point was beyond the obligation of defendant. Any other place of delivery was merely, it may be reasonably supposed from the shipper's testimony, for the convenience of the parties. We rule the point against the defendant.

The judgment will be reversed and the cause remanded. All concur.

41 200
46 538
41 200
63 314

FANNIE MCCARTHY, and her Husband, Respondents, v. E. H. MILLER & Co., Appellants.

Kansas City Court of Appeals, May 12, 1890.

1. **Chattel Mortgage:** DISPOSAL OF MORTGAGED PROPERTY. Where the evidence shows that the mortgagor had a right to dispose of the mortgaged property, and that he did at different times do so, selling, with consent of the mortgagee, the property from under the lien of the mortgage and retaining the proceeds, a court of equity should declare such mortgage void.

2. ———: SUBSTITUTION OF OTHER PROPERTY. Where the mortgagor could make sales as he saw fit, if he replaced something in its place, the mortgage is void, as there can be no real security where there is no certain lien.

8. ——— : VOID ON FACE: EXTRINSIC EVIDENCE: LAW AND EQUITY. While it is the rule that a mortgage will only be declared void as a matter of law, when it appears from its face that it is to the use of the grantor, and extrinsic evidence will not be heard in order to pronounce a conveyance void as matter of law, yet, where the evidence shows the mortgage void, a court of equity will so declare it, and a court of law should so instruct peremptorily.

Appeal from the Jackson Circuit Court.—HON. JAMES GIBSON, Judge.

REVERSED.

H. Lithgow, for appellant.

(1) Every deed of gift and conveyance of goods and chattels, in trust, to the use of the persons so making such deed of gift or conveyance, is declared to be void as against creditors, existing and subsequent, and purchasers. R. S. 1879, sec. 2496. The court should have found for defendants, under the evidence in this case. The testimony of mortgagee (respondent), at pages 60, 61, 62 and 63 of record, shows that the mortgagor was to remain in possession of the property, sell and dispose of it, and not account for the proceeds of sales. This mortgage being for the use of the person making it, and prohibited by the terms of the above statute, was fraudulent as to creditors. *State to use v. Jacob*, 2 Mo. App. 183; *Thompson v. Foerstel*, 2 Mo. App. 290; *State to use v. Nauert*, 2 Mo. App. 295; *Cordes v. Straszer*, 8 Mo. App. 61; *Brooks v. Wimer*, 20 Mo. 503; *Walter v. Wimer*, 24 Mo. 63; *Stanley v. Bruner*, 27 Mo. 270; *Reed v. Pelletier*, 28 Mo. 177; *Voorhis v. Langsdorf*, 31 Mo. 451; *State to use v. Tasker*, 31 Mo. 445; *Crow v. Beardsley*, 68 Mo. 435; *Shelley v. Boothe*, 73 Mo. 77; *Stone v. Spencer*, 77 Mo. 356; *Holmes v. Braidwood*, 82 Mo. 611. (2) Although the mortgage on its face was good, yet, under the evidence, it was fraudulent in fact. *Hisey v. Goodwin*, 90

Mo. 366; *Caton v. Collins*, 2 Mo. App. 225. Even though it was made to secure a *bona fide* debt. *Thompson v. Foerstel, supra; Holmes v. Braidwood*, 82 Mo. 611; *Nasse v. Algermissen*, 25 Mo. App. 187; *Stone v. Spencer, supra; Cordes v. Straszer, supra*, and authorities cited. (3) Respondents had an adequate remedy at law, being a *feme sole* as to this property. Sess. Acts, 1883, p. 113. The doctrine of estoppel *in pais* should apply in this case, it being the separate personal estate of respondent, a married woman. *Cottrell v. Spiess*, 23 Mo. App. 35; *Rannels v. Garner*, 80 Mo. 483; *Dunifer v. Jecks*, 87 Mo. 282. (4) Where the mortgage is between persons related to each other and holding confidential relations, as husband and wife, it is subject to more jealous scrutiny than as between strangers, and the parties are held to fuller and stricter construction of the fairness of such transactions when they conflict with the rights of others. Bump on Fraud. Con. 54, *et seq.; Renney v. Williams*, 89 Mo. 139; *Leavitt v. La Force*, 71 Mo. 353.

Chase & Powell, for respondent.

(1) To have rendered the mortgage in evidence of which appellants complain fraudulent upon the ground that it was for use of person making it, it must have appeared upon the face, or by necessary implication, that the grantor remaining in possession had the right to dispose of the property in like manner as though it was not mortgaged. *Voorhis v. Langsdorf*, 31 Mo. 451; *Weber v. Armstrong*, 70 Mo. 219; *State to use v. D'Oench*, 31 Mo. 453; *State to use v. Byrne*, 35 Mo. 147. (2) But appellant now claims that, though mortgage on its face was good, yet under the evidence it was fraudulent in fact. *Nicholson v. Golden*, 27 Mo. App. 132, and cases cited. (3) We hardly deem it necessary to reply to position of appellants that plaintiff had an adequate remedy at law, since mortgage was

made by husband to wife. The section of Session Acts of 1883, page 13, cited, does not apply as same was not in force when money loaned became property of plaintiff. *Roberts v. Walker*, 82 Mo. 208. (4) The doctrine of estoppel does not apply for the reason that the plaintiff had never represented, or induced E. M. Miller & Co. to believe, that her husband was the owner of the property involved, or that she had not a mortgage upon same when Miller & Co. took the note of defendant F. T. McCarthy, upon which their execution was procured. Hence, authorities cited by appellant upon this point do not apply to this cause. (5) The relationship between the parties is not sufficient to establish fraud. It is not even a suspicious circumstance, when taken in connection with the fact that the plaintiff, at the time she loaned her money to F. T. McCarthy, was his promised bride, and that he then did not owe any person. His neglect in not providing some security for such a loan would have evidenced the grossest disregard of the most sacred obligations.

ELLISON, J.—Defendants, E. M. Miller & Co., obtained judgment against F. T. McCarthy, and had execution issued and levied upon a horse and side-bar buggy as the property of said McCarthy. Plaintiff Fannie, who is McCarthy's wife, in conjunction with him, instituted this injunction proceedings against the constable and other defendants to restrain the sale, alleging that she had a chattel mortgage on the property, executed to her by her husband, which was unpaid. The injunction was made perpetual by the circuit court, and defendants appeal.

The mortgage is on the property in dispute, as well as other horses. It contains the usual provisions, permitting the husband to remain in possession until default, "but, in case of a sale or disposal, or attempt to sell or dispose, of said property, or a removal, or

attempt to remove," etc., the said Mrs. McCarthy "could take the property into her possession," etc. The mortgage, on its face, is valid, but we shall declare it to be void, on the evidence adduced. It was given on nineteen head of horses, including the one levied upon, and a buggy. The evidence of both husband and wife (mortgagor and mortgagee) establishes, without contradiction, that he had the right to dispose of the property by sale or exchange; and that he did, at different times, "trade" six of the horses. On one trade he got twenty dollars in money as a difference in value. He also sold two of the horses in liquidation of a grain or feed bill, which he was owing. This was all done with the knowledge and consent of Mrs. McCarthy, and without her getting any of the proceeds of the transactions. Her note was not reduced. But it would seem, from the tenor of Mrs. McCarthy's testimony, that she regarded the fact of her knowledge of these transactions at the time, and permitting them, as thereby making them valid. The reverse of this is true. It is her knowledge and permission which makes them invalid. It must be borne in mind that this was not a mere exercise of a right of a mortgagor in possession to sell, subject to the mortgage, the mortgagee still retaining the lien, but the case shows it to have been a sale, by consent of the mortgagee, from under the lien.

One portion of her testimony tends to show that he could make sales "as he saw fit, if he replaced something in its place." If such should be considered the agreement between them, then it would still render the mortgage void under the view taken in this state. *Walter v. Wimer*, 24 Mo. 63; *Stanley v. Bunce*, 27 Mo. 269; *Goddard v. Jones*, 78 Mo. 518. In the latter case it is said: "That, while the deed under consideration does not, in express terms, authorize the grantor to sell and dispose of the property, the power to do so is implied from the authority, expressly given, to substitute other

property of the kind conveyed." Such substitution can be no more nor less than replenishing a diminished lot of personal property, which is not permissible. Authorities cited, *supra*. In truth (as was said in *Brown v. Elliott*, 22 Wall. 513), the mortgage, if it can be so called, is but an expression of confidence, for there can be no real security where there is no certain lien. Whatever may have been the motive which actuated the parties to this instrument, it is manifest that the necessary result of what they did do was to allow the mortgagor, under cover of the mortgage, to sell the property as his own, and appropriate the proceeds to his own purposes, and this, too, for an indefinite length of time. This position renders it unnecessary to consider a second mortgage, which was, some time afterwards, given on four of the exchanged horses.

II. We are aware that the rule is that a mortgage will only be declared void as a matter of law when it appears from its face that it is to the use of the grantor; and that it has been said "that the court will not hear extrinsic evidence in relation to the validity of the conveyance, and, on such evidence, as a matter of law, pronounce the conveyance void." *Weber v. Armstrong*, 70 Mo. 217. Nor do we find this deed to be void as a matter of law. We so find it from the evidence, which it is our duty to examine in a case of this kind. But, if this had been a jury case, and the testimony of the plaintiffs themselves unequivocally disclosed facts which rendered the mortgage void, it would be the duty of the court, as in other cases, to give a peremptory instruction.

The judgment will be reversed. All concur.

VENA WANSCHAFF, Respondent, v. THE MASONIC MUTUAL BENEFIT SOCIETY OF INDIANA AND THE BANK OF ATCHISON COUNTY, Appellants.

Kansas City Court of Appeals, May 12, 1890.

1. **Insurance**: RULE AS TO CONSTRUCTION OF STATUTE. Section 5854, Revised Statutes, 1889, is in the nature of an exemption law, and like all statutes of that kind is to be construed liberally so as to effectuate the benign spirit and purpose of its enactment.

2. ———: ASSIGNMENT BY WIFE: RIGHTS OF CHILDREN UNDER THE STATUTE. When by the death of the party who has paid the premiums on a policy of life insurance, expressed to be for the benefit of any married woman, the right and title to the policy and the fund, by virtue of the statute absolutely and unconditionally vests in the married woman and her children, and her assignment of the policy cannot deprive the children of their right thereto, *quœre:* Whether she can assign her interest.

8. **Appellate Practice**: CONFLICT OF EVIDENCE: DEFERRING TO TRIAL JUDGE. In an issue as to whether an assignment of an insurance policy was secured by fraud and undue influence, where the evidence is conflicting and the determination of its preponderance difficult, the appellate court will defer to and follow the finding of the trial judge.

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

AFFIRMED.

H. S. Kelley and *M. McKillop*, for appellants.

(1) At the time said transfer of said policy was made the said plaintiff was *sui juris*, and had full and complete power and authority to enter into the contract and make said transfer; and her action in the premises was binding on her, and she was not prevented nor prohibited from assigning and transferring said policy by

the provision of section 5891, chapter 119, Revised Statutes of Missouri, 1879. *Baker v. Young*, 47 Mo. 453, construing section 18, General Statutes, 1865, which is identical with section 5891 of statutes of 1879; *Taylor v. Fox*, 16 Mo. App. 527, approved in *Rothschild v. Frensdorf*, 21 Mo. App. 323. (2) The evidence shows no duress or undue influence on the plaintiff sufficient to avoid her said act of transferring said policy. 1 Story's Eq., secs. 238, 239, and notes. (3) In order that said transfer and assignment should be set aside, duress, fraud, misrepresentation or concealment of facts on the part of the defendant bank should be proven. The supposed influence of one party over another is not sufficient unless it be proven that the person used his influence over such other to his or her detriment and that such person was induced by such influence of the other to do some act which was not the voluntary act of the party complaining. 2 Pomeroy's Eq., sec. 951, and notes. (4) No fiduciary relations were proved to exist between the plaintiff and the agents and officers of said bank. 2 Pomeroy's Eq., sec. 951, and notes. (5) There was a sufficient consideration for the transfer and assignment of said policy. *Markle v. Bank*, 8 Mo. 316. (6) The said contract of transfer and assignment of said policy was executed by the delivery of said policy and the execution of said written assignment, and could not afterwards be avoided by setting up a want of consideration. *Clemens v. Dryden*, 6 Mo. App. 597. (7) The second contract entered into by the parties and defendant bank was a good, valid and binding contract, though not reduced to writing. *Methudy v. Ross*, 10 Mo. App. 101.

Huston & Parrish and *John D. Campbell*, for respondent.

(1) Upon the death of Alfred J. Wanschaff the right to the proceeds of the life policies at once "inured to the benefit of plaintiff and her children." R. S. 1879,

sec. 5981, ch. 119. That section entered into and became a part of the contract as though written in the policy. Upon Alfred's death the interest vested. "Where a conveyance is made to A. and her children, A. and her children then *in esse* take as tenants in common." *Hamilton v. Pitcher*, 53 Mo. 334; *Baker v. Noll*, 59 Mo. 265. (2) After Alfred's death his widow was under no obligation, legal or equitable, to pay his debts. The marital relation had ceased, and she was not in any way bound to pay his debts, any more than to pay the debts of any stranger. Her undertaking to pay them was purely voluntary, without consideration, and the efforts of the bank officials in requesting her to beggar herself and children in paying a debt she was under no obligation to pay savors of fraud and unfairness. The only ground upon which they could hope to be successful was to play upon her affections, grief and fear. "A mere moral obligation alone, without some antecedent legal obligation, is not a good consideration. *Greenbaum v. Elliott*, 60 Mo. 25; *Kennedy v. Macklin*, 8 Mo. 698; *Bank v. Robidoux*, 57 Mo. 446; *Hoyt v. Oliver*, 59 Mo. 188; *White v. Bennett*, 1 Mo. 102; *Wessen v. Turner*, 25 Mo. 81; 1 Parsons, Cont. 1434, sec. 2; 1 Parsons on Cont., sec. 111, p. 436; *Railroad v. Brown*, 43 Mo. 294; *Durfee v. Moran*, 57 Mo. 374; *Cadwallader v. Wise*, 48 Mo. 483; *Cook v. Elliott*, 34 Mo. 586; *Todd v. Grove*, 33 Md. 183; *Underhill v. Harwood*, 10 Vesey, 209-19; *Haguenin v. Baseley*, 2 White & Tudor's Leading Cases in Equity, 1237-8-9; *Cruise v. Christopher*, 5 Dana, 181. (3) The finding and decree of the lower court is abundantly sustained by the testimony. *Haguenin v. Baseley*, *supra*, p. 1184-5; *Haguenin v. Baseley*, *supra*, p. 1193-4 and 1225-6; *Bayliss v. Williams*, 6 Caldwell, 442; *Long v. Mulford*, 17 Ohio (N. S.) 484-505; *Todd v. Grove*, 33 Md. 183. (4) "There is no standard or rule as to what constitutes, or definition of facts necessary to make, 'undue influence.'" *Haguenin v. Baseley*, *supra*, p. 1187-8;

Haguenin v. Baseley, *supra*, p. 1185-6; *Griffith v. Robins*, 3 Mad. 191; *Turley v. Edwards*, 18 Mo. App. 676; *Rankin v. Patten*, 65 Mo. 378; *Bradshaw v. Yates*, 67 Mo. 221; *Miller v. Simonds*, 72 Mo. 669; *Holloway v. Holloway*, 77 Mo. 392-6. (5) In determining whether the assignments were her deliberate acts, springing entirely from her own unbiased mind, or were the product of improper influences prompting thereto the following cases should be considered: *Haguenin v. Baseley*, *supra*, p. 1230; *Eadie v. Slimmon*, 26 N. Y. 9; *Turley v. Edwards*, 18 Mo. App. 686; *Long v. Mulford*, 17 Ohio (N. S.) 484; *Bellage v. Souther*, 9 Hare, 540; *McCormick v. Malins*, 5 Blackford, 509; *Rankin v. Patten*, 65 Mo. 379. (6) To say the least of it, the testimony strongly tends to prove undue influence. Concede that there is a conflict of testimony, yet the preponderance is doubtless with the respondent. The lower court having an opportunity not alone to see the cold face of the record, but the living witnesses face to face, and note their manner, has found the fact in favor of the respondent. In such case courts of last resort, even in equity cases, give much weight to the finding of the chancellor. *Bryder v. Bank*, 15 Mo. App. 580; *Erskine v. Loewenstein*, 82 Mo. 301; *Snell v. Harrison*, 83 Mo. 652; *McCunn v. Anthony*, 21 Mo. App. 83.

SMITH, P. J.—This was a suit brought in the circuit court of Atchison county by the plaintiff against the defendant insurance company to recover the sum of twenty-five hundred dollars on a policy of insurance, which had been effected in said company upon the life of her husband, who had subsequently died while the same was in force. The petition alleged that the defendant bank had the policy of insurance in its possession, though it had no right or title thereto. The answer of the defendant insurance company admitted the allegations in the plaintiff's petition, but further alleged as an excuse for not paying over the amount admitted to

be due by it in the policy that the defendant bank claimed the same, and to relieve itself from costs and expense it prayed for permission to deposit the money in court, and that upon a final determination of the controversy that the same be paid to the party adjudged entitled thereto.

The defendant bank answered that the plaintiff's husband, Alfred A. J. Wanschaff, was at the time of his death, and had for many years prior thereto been, the cashier, and that while acting in that capacity he had embezzled some sixty-three hundred dollars of its money, and that the fact was not discovered until after his death; that the policy of insurance sued on had been assigned and delivered by the plaintiff to secure the said amount of her husband's liabilities to it; that the first assignment was in writing, but that subsequently there was a modification of the same agreed to between plaintiff and defendant bank, by which it was provided that upon the collection of the amount due on the policy the defendant bank should pay plaintiff one-half. The plaintiff in her reply to the answer of the defendant bank alleged that the agreements and assignments mentioned in said answer were obtained from her by misrepresentation, undue influence, coercion and duress and without consideration; that said policy and the amount thereby insured under the provisions of section 5981, Revised Statutes, 1879, inured to the benefit of the plaintiff and her children, and that it was not in plaintiff's authority to assign the policy to the defendant bank. There was a prayer for the cancellation of the assignment and for the surrender of the same to plaintiff. There was a trial on the issues made by the pleadings before the court, where the finding and decree was for the plaintiff, to reverse which the defendant bank has appealed.

The foregoing synopsis of the pleadings is a sufficient statement of the case for purpose of correct understanding of the decisive questions involved.

I. In approaching the consideration of this case the first question of law with which we are confronted is whether the execution of the assignment of the policy to the defendant bank, through which it claims title to the fund in controversy, was within the authority of the plaintiff; for, if it was not, then we cannot disturb the decree of the trial court. This question must find its solution in the construction to be placed upon section 5981, Revised Statutes, 1879, which provides that, "Any policy of insurance heretofore or hereafter made by any insurance company on the life of any person expressed to be for the benefit of any married woman, whether the same be effected by herself or by her husband, or by any third person in her behalf, *shall inure to her separate use and benefit and that of her children*, if any, independently of her husband and of his creditors and representatives," etc. This section entered into and became a part of the contract as though written in the policy. The statute just quoted is in the nature of an exemption law, and like all statutes of this kind is to be construed liberally so as to effectuate the benign spirit and purpose of its enactment. *Flam v. Ward*, 64 Ala. 33; *Felrath v. Schenfield*, 76 Ala. 199; *Tompkins v. Levy*, 6 S. W. Rep. 346; *Ballou v. Giles*, 50 Wis. 614; *Casebolt v. Donaldson*, 67 Mo. 308.

A policy of insurance of this kind is in the nature of an executed voluntary settlement that vests in the persons to whom the insurance money is made payable an actual subsisting interest in the policy, but not an absolute unconditional ownership of it, and of the moneys therein agreed to be paid. The interest of the beneficiaries is subject to the right of the insured who has paid the premiums to revoke the same and retain it himself or vest it elsewhere. *Foster v. Giles*, 5 Wis. 603. The situation may be likened to that of a legacy provided in a will which does not become operative until the death of the testator, and which is subject to be modified or entirely changed at the time before the

happening of the event. This doctrine is in consonance with that of the supreme court of this state as declared in *Baker, Trustee, v. Young*, 47 Mo. 453. This was a case where the husband had procured insurance on his life for the benefit of his wife, the premium being paid by himself, and subsequently he joined his wife in the assignment of the policy to another. The husband later on caused himself to be appointed trustee for his wife and next friend for the children, and then in these capacities he brought suit against the holder of the policy under the assignment for its recovery.

Upon this state of facts it was held that the assignment was not void. No other question was before the court in that case. The facts there are wholly dissimilar to what they are in this case.

Charter Oak Life Ins. Co. v. Brant, 47 Mo. 418, was a case where a policy of insurance, taken out by the husband on his own life in favor of the wife, had been assigned by husband and wife for a valuable consideration, and it was held that the assignment was valid. No such question as is here presented was considered, or passed upon in either of the two cases last cited, and what is there said furnishes no controlling rule for our guidance in this case.

In this case, unlike those just reverted to, the right and title of the beneficiaries to the money to be paid under the policy had absolutely and unconditionally vested when the assignment was made to defendant bank. Who are the beneficiaries—the wife only, or the wife and her children? The statute declares in express terms both to be such beneficiaries. A construction of the statute that restricts the provisions of the policy for the use and benefit of the wife only would render ineffectual and nugatory the express terms of the statute which makes the children equal beneficiaries with the wife. This narrow construction would, in effect, eliminate from the statute the provision that the legislature

in its wisdom has made for the benefit of the children of the wife.

As has already been intimated, a policy of insurance of this character is in the nature of a voluntary settlement, and in some respects may be likened to a will, and, hence, the rules which obtain in determining the rights of legatees under the latter may be resorted to in determining the rights of beneficiaries under the former. In *Allen v. Claybrook*, 58 Mo. 124, a will directed the executor to invest a certain fund for the benefit of Jane Allen and her children, and not to be subject to the control of her husband. The fund was afterwards invested by a trustee in certain lands, which were conveyed by him to Jane Allen and her children to their only proper use and behoof forever. It was held that under the will and the deed Jane Allen had no power to dispose of the property and hence took no absolute and exclusive title to the land, but merely an estate in common with her children, and could convey no more than her individual share. So, in *Hamilton v. Pitcher*, 53 Mo. 334, which was a case where a woman and her children were grantees in a deed, it was said they took as tenants in common. Again, it has been held that under the statute of this state, which provides that in certain cases when the head of the family should die that his homestead "shall pass to and vest in his widow and minor children," that the wife cannot, by an act of hers, deprive the children of their right in the homestead. *Rhorer v. Brockhage*, 86 Mo. 544.

We think that, under any fair and just interpretation of the language of the statute, the children of the plaintiff have an absolute vested interest in the policy of insurance in question, as well as in the proceeds thereof in the custody of the court in common with her. We do not think that it comports with the benignant spirit or policy of the statute to allow a widow under such circumstances to assign the entire policy either to

secure her husband's debts or for any other purpose she may choose. This would be to discountenance the vested rights of the other beneficiaries, the children, in the policy and the fund, and to render the statute a meaningless thing. It would be giving a weak, improvident or unnatural mother the power, if she chose, to deprive the children of that which is theirs under the law. So dangerous a power was certainly not intended by the lawmaker to be left in the hands of one ordinarily so unfit to wield it. She is under no bond for the faithful application of the fund as to the children; and if she may appropriate it in its entirety for any purpose that may be her pleasure without let or hindrance, then indeed has the endeavor of the legislature to throw a shield around the rights of the children by the enactment of this statute been all in vain. The statute so construed has for its object the protection of the wife only, and not the children as well. Its words as to the children may as well have been omitted, as nothing would be implied by their presence there. A construction so unreasonable cannot have our approval.

It may be that the widow could assign her interest in the policy, but, in view of the disposition which we shall make of this case, that question becomes unimportant and need not be further noticed.

It may be, too, that in a suit on the policy that the children should be joined, but, as no question of this kind is raised by the record before us, we withhold the expression of any opinion as to that matter.

II. In respect to the issue of facts as to whether the assignment was procured by fraud and undue influence, it is sufficient to observe that we have subjected the entire evidence to quite a rigid scrutiny, and, owing to its conflicting and contradictory nature, it is very difficult to determine the question of the preponderance. The learned circuit judge, before whom the case was tried, was presumably acquainted with all the witnesses

who testified, and to his finding therein we think it is our duty to defer. *Snell v. Harrison*, 83 Mo. 651; *Sharp v. McPike*, 62 Mo. 300; *Hodges v. Black*, 76 Mo. 537.

The decree of the circuit court is affirmed. All concur.

JOHN DOWNEY, Respondent, v. LAURA HIGGS *et al.*, Appellants

Kansas City Court of Appeals, May 12, 1890.

41 215
55 106

Mechanic's Lien: OMISSION OF THE NAME OF ORIGINAL CONTRACTOR: PARTIES TO CONTRACT. H., the owner of the premises, contracted with F. for the erection of a block of buildings thereon. He sublet the brick work to R., who procured the brick of D., and failed to pay therefor. D. thereupon gave H. a regular ten days' notice of the furnishing of the materials to R., as subcontractor of F., but his sworn account and statement filed in the clerk's office, in pursuance of said notice, states nothing more, in this regard, than that the materials were "furnished by him under a contract with R. to, and for, the buildings," etc. *Held:* (1) That the omission to state the name of F. as contractor with H. did not defeat D.'s lien; and (2) that "the parties to the contract are the parties to that contract which is the subject of the inquiry, and as between whom a personal judgment is to be rendered," and (3) that the contract which is the subject of the inquiry for the enforcement of D.'s lien is the contract between him and R., who is a necessary party defendant, while the original contractor is not a necessary party.

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

AFFIRMED.

Botsford & Williams and *B. F. Deatherage*, for appellants.

Plaintiff, having failed to give the name of the contractor, A. A. Frazier, in his lien, the same is void. *Hoffman v. Walton*, 36 Mo. 618; *Kelly v. Laws*, 109 Mass. 395; *Ward v. Black*, 7 Phil. Pa. 342; Phillips on Mech. Liens [2 Ed.] sec. 21, 345.

L. Traber, *T. H. McNeil* and *R. J. Ingraham*, for respondent.

(1) A. A. Frazier, the original contractor, is not a necessary party to the suit, and, consequently, is not a necessary party to the lien. *Goff v. Papin*, 34 Mo. 180; *Steinmann v. Strimple*, 29 Mo. App. 482; *Whitmeyer v. Dart*, 29 Mo. App. 569; *Foster v. Wulfing*, 20 Mo. App. 87; *Fruin v. Furniture Co.*, 20 Mo. App. 313; *Davis v. Livingston*, 29 Cal. 283; *De Witt v. Smith*, 63 Mo. 266; *Putnam v. Ross*, 46 Mo. 337; *Morgan v. Railroad*, 76 Mo. 172; *Bradish v. James*, 83 Mo. 318. (2) Appellants cannot be heard on what they claim to be a defect of parties when it works no substantial injury to them and was not raised by demurrer or answer, and especially after their original answer admitted the correctness and sufficiency of respondent's claim and his right to a lien. *Murphy v. Type Foundry*, 29 Mo. App. 541; *Horstkotte v. Menier*, 50 Mo. 158; *Planing Mill v. Church*, 54 Mo. 520; *Dowzelot v. Rawlings*, 58 Mo. 75; *Bogie v. Nolan*, 96 Mo. 91; *Schad v. Sharp*, 95 Mo. 576; *Breckinridge v. Ins. Co.*, 87 Mo. 62; *Hotel Co. v. Sauer*, 65 Mo. 270; *Anderson v. McPike*, 86 Mo. 293; Greenleaf on Evidence, sec. 27, 171; *Schlicker v. Gordon*, 19 Mo. App. 485.

GILL, J.—One Frazier was contractor with Laura F. Higgs for the erection of a block of buildings on land belonging to Mrs. Higgs in Kansas City. Defendants

Richards & Banfield agreed with Frazier to do the brick work. Plaintiff Downey, under contract with said firm of Richards & Banfield, supplied the brick for, and which were used in, said block of buildings. The brick were not fully paid for, leaving a balance due Downey of three hundred and fifty-nine dollars, and the suit was brought to enforce a mechanics' lien against Mrs. Higgs' property. The judgment in the circuit court was for the plaintiff against said Richards & Banfield for the amount so due on account and for the enforcement of a lien against Mrs. Higgs' real estate. She appeals.

The sole point we are called upon to consider relates to the sufficiency of the lien filed by Downey in the office of the circuit clerk, November 1, 1886. The specific objection to the lien is that it omits to state the name of Frazier as contractor with Mrs. Higgs. The notice given on October 20 (ten days preceding the day the lien was filed) advised defendant Higgs of the furnishing of the materials to Richards & Banfield and that they were subcontractors under said Frazier; but the sworn account and statement of Downey, filed in pursuance of said notice, states nothing more, in this regard, than that the materials were "furnished by him under contract with Richards & Banfield to, and for, the buildings and improvements described as follows," etc., leaving out the name of Frazier as contractor with defendant Higgs. It is claimed by defendant's counsel, and urged, too, with much force and ability, that thus omitting to insert the name of the original contractor Frazier in the plaintiff's sworn account vitiates the lien.

Since the plaintiff was not the "original contractor," or "journeyman" or "day laborer" mentioned in section 6709, Revised Statutes, 1889, which declares the manner of placing a mechanics' lien on real estate, it was required of him, within four months after the indebtedness accrued, to file with the clerk of the circuit court of Jackson county a just and true account of his

demand, with a description of the property upon which the lien was intended to apply "*with the name of the owner or contractor*, or both, if known to the person filing the lien," which shall be verified, etc. Plaintiff claims to have complied with the requirements of this section by naming Mrs. Higgs as owner, and Richards & Banfield as contractors. Defendants insist that Frazier's name should appear as contractor, and in default thereof the effort to create a lien failed. While this section (6709, *supra*) is, when read alone, somewhat uncertain, yet, considering the entire law on mechanics' liens, as contained in the statute, we must hold with the plaintiff and decide that, in naming Richards & Banfield in the sworn statement of his account, plaintiff followed the demand of the statute.

By the terms of the section 6705 (the first section of the mechanics' lien law) this plaintiff was given a lien for materials that he might furnish for constructing these buildings "under or by virtue of any contract * * * with any subcontractor," etc. Preparatory to filing his lien the plaintiff was required by section 6723, ten days before such filing, to give Mrs. Higgs, the owner, notice of the claim he held against her building "setting forth the amount thereof and *from whom the same is due.*" Section 6713 (providing for parties to the suit to enforce the lien) directs "in all suits under this article the *parties to the contract* shall * * * be made parties," etc. Now under these various sections, viz.: 6705, 6723 and 6713, Richards & Banfield, as to the plaintiff at least, were contractors. They were the parties with whom he contracted to furnish materials to go in Mrs. Higgs' buildings. Richards & Banfield were the proper contracting parties to name in the notice to Mrs. Higgs, warning her of the charge plaintiff had against her property. Said Richards & Banfield were clearly the persons "from whom said claim was due," and directed by section 6723 to be named in the notice. They, too, are "*the parties to the contract*" who *must* be made

defendants in the action to enforce the lien, as commanded in section 6713. The "*parties to* the contract," mentioned in the section, are "the parties to that contract which is the subject of the inquiry, and as between whom a personal judgment is to be rendered." *Foster v. Wulfing*, 20 Mo. App. 87; *Whitmeyer v. Dart*, 29 Mo. App. 569; *Goff v. Papin*, 34 Mo. 180; *Peters v. Railroad*, 24 Mo. 587; *Kent v. Railroad*, 2 Kernan, 628.

The contract, which is "the subject-matter of inquiry" for the enforcement of plaintiff's lien, is the contract between Richards & Banfield and said plaintiff, and hence said Richards & Banfield are necessary parties defendant in plaintiff's suit, while said Frazier, the original contractor with Mrs. Higgs, is *not* a necessary party. See cases last cited. Since then Richards & Banfield, under section 6705, are the *contractors* with whom plaintiff agreed to furnish these materials in the construction of Mrs. Higgs' buildings; since too, under section 6723, said Richards & Banfield were the *contracting* parties necessary to be named in the notice to be served on Mrs. Higgs, reminding her of the lien thereafter to be filed, and since, too, said Richards & Banfield were *the contractors* (and the *only* contractors) intended to be included in the suit to enforce the lien, we are of the opinion that the same Richards & Banfield fill the description of *contractors*, under section 6709, and which were necessary to be named in the sworn statement and account filed in the circuit clerk's office.

Holding these views, then, the judgment of the circuit court must be affirmed. All concur.

41 220
45 370
45 574
41 220
48 165
41 220
51 427
53 79
53 320
41 220
60 112
41 220
63 481
41 220
67 273
41 220
71 257
41 220
72 261
41 220
80 101
41 220
f157s382

JAMES F. MCADOW, Respondent, v. EZRA T. STURTEVANT, Appellant.

Kansas City Court of Appeals, May 12, 1890.

1. **Mechanics' Lien:** CONSTRUCTION OF STATUTE. The entire statute relating to the liens of mechanics and materialmen must be liberally construed so as to effectuate the benign intent of the legislature in its enactment.

2. ——: COMMENCEMENT OF. A mechanics' lien does not commence until the performance of the work or the furnishing of the materials, but guarantees protection to the contractor and subcontractor from the commencement of the building.

3. ——: CONTRACT: CONDITION PRECEDENT. While a lien is not created by the contractual relation, still it must have its inception in that relation, which is an essential condition precedent to its existence.

4. ——: OWNER AT TIME OF CONTRACT OR OF WORK. The owner mentioned in the statute is the owner at the time of making the contract, and not the owner at the time of the performance of the labor or the furnishing of the materials.

5. ——: SUBSEQUENT OWNER: NOTICE. A purchaser is put upon inquiry by the fact that a building is in process of construction when he buys, which fact gives notice to all the world and is imparted by the commencement of the building, as well as by any later contributions to the structure.

6. ——: PRIOR MORTGAGEES. The holder of an equity of redemption in real property cannot improve the mortgage lienor out of his security.

7. ——: ——: LIENS ON LAND AND IMPROVEMENTS. Prior mortgage lienors are entitled to priority over mechanics' lien as to the ground, but their lien must be postponed to the latter lien as to the buildings to which it attaches.

8. ——: NAME OF OWNER IN STATEMENT. Where the lien statement contains the name of the owner it is unnecessary to repeat it in the affidavit.

9. ——: CONTRACTOR AND SUBCONTRACTOR: OWNER AND HIS VENDEE. A contract between the original owner and his vendee to complete the building does not convert the original contractor with such owner into a subcontractor.

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

REVERSED AND REMANDED.

B. F. Deatherage, O. G. Young and *Gage, Ladd & Small*, for appellant.

(1) The affidavit to the lien statement does not state that Sturtevant was the owner, nor does it, in general terms, cover all the facts stated in the lien, but specifies part of such facts only. The lien statement is, therefore, not verified by the affidavit and is void. R. S. 1889, sec. 6709. (2) An original contractor cannot maintain a lien except under contract with the person who was the owner at the time he began to furnish his materials or do the work. It is his duty to examine the records and see, when he begins the performance of his contract, that his contract is with the owner at that time. R. S. 1889, secs. 6705, 6706; *Gable v. Society*, 59 Md. 455, 460; *Barker v. Berry*, 8 Mo. App. 446; *Hughes v. Anslyn*, 7 Mo. App. 400; *Planing Mill v. Brundage*, 25 Mo. App. 268; *Tritch v. Norton*, 10 Col. 337; *Bridwell v. Clark*, 39 Mo. 170; Phillips on Mech. Liens [2 Ed.] sec. 232, p. 388. (3) The lien did not attach until the respondent had commenced to furnish the materials, and, the property having been transferred to Snyder before that time, Snyder took the property free and clear of the lien. *O'Brien v. Hanson*, 9 Mo. App. 545; *Fitzgerald v. Thomas*, 61 Mo. 499; *Hannon v. Gibson*, 14 Mo. App. 33; *Kuhleman v. Schuler*, 35 Mo. 142; *Meyers v. Bennett*, 7 Daily (N. Y.) 471; *Laring v. Flora*, 24 Ark. 151; *Noyes v. Burton*, 29 Barb. (N. Y.) 631. (4) The property having been conveyed to Snyder before any of the materials had been furnished by plaintiff, and consequently before the lien attached, and Sturtevant having agreed with Snyder to complete the

buildings, Sturtevant became an original contractor with Snyder as owner, and the plaintiff was a subcontractor and should have given to Snyder the ten days' notice required by the statute from subcontractors and filed his lien as such. Having failed to do so, his lien is void, and the judgment should have been for appellants. R. S. 1889, sec. 6723.

Botsford & Williams, for respondent.

(1) The objection and exception of defendants to the mechanic's lien in evidence as incompetent, irrelevant, immaterial, and because it enumerates in the affidavit itself what is sworn to, omitting in this enumeration many material facts, is too general and not sufficiently specific to be considered by this court. *Clark v. Conway*, 23 Mo. 438, 442; *Knipper v. Bechtner*, 32 Mo. 255; *Rosenheim v. Insler*, 33 Mo. 230; *Allen v. Mansfield*, 82 Mo. 688, 692. (2) Section 6705 gives a lien for material furnished for any building under contract with the owner thereof, and by section 6711 the lien takes effect from the commencement of the building, and is good as against all subsequent liens on, or transfers of, the property. And, Sturtevant having been the owner at the time plaintiff's contract with him was made, plaintiff's lien is good as against Sturtevant's subsequent transferees, and this would be so even if Sturtevant had not agreed with his purchasers to go on and complete the building, and if the objection were made by those purchasers instead of by Sturtevant's mortgagees. Although, as appellants' counsel contend, respondent's lien did not attach until his materials went into the block, yet, when said materials were so furnished and went into the block, respondent's lien attached and related back over intermediate incumbrances and sales, to the commencement of the block. *Brick Co. v. Bormans*, 19 Mo. App. 664; *Dubois v. Wilson*, 21 Mo. 213;

Douglas v. Zinc Co., 56 Mo. 388; *Allen v. Sales*, 56 Mo. 29, 38; *Warden v. Sabins*, 36 Kan. 165; *Sampson v. Bowen*, 41 Wis. 484; *Gale v. Blaikie*, 126 Mass. 274; *Jones v. Shawain*, 4 W. & S. 257; *Fire Co. v. Pringle*, 2 S. & R. 138; Phillips, Mech. Liens, secs. 226, 227 and 228. Apart from these views, appellants, who claim as Sturtevant's mortgagees and to whom Snyder is a stranger, cannot vicariously assert the rights of Snyder, who, although before the court, does not complain. *Clark v. Brown*, 22 Mo. 140. (3) And plaintiff's lien is good as against the mortgages to the Lombard Investment Company and Deatherage, Weston & White, which were given before the commencement of the block of buildings. R. S. 1889, sec. 6707; *Hall v. Mill Co.*, 16 Mo. App. 454. (4) Our courts have decided that, where there are successive owners, the owner when the materials are furnished is the "owner" meant by the statute to be named in the lien papers. *Brown v. Wright*, 25 Mo. App. 54; *Kuhleman v. Schuler*, 35 Mo. 142. Therefore, the meaning in the lien statement and affidavit of Snyder, who was the owner while all the plaintiff's materials was being furnished, and his (Snyder's) subsequent purchasers, as the owner of the property, was sufficient. (5) But, if it was necessary to name Sturtevant as owner with those who subsequently purchased and owned at the time the lien was filed, then we submit that Sturtevant is expressly named in the lien statement as owner, and the affidavit annexed thereto speaks of him as "said Sturtevant," thereby referring to the Sturtevant so named as such owner in the preceding statement with which the affidavit must be read. *Deatherage v. Woods*, 37 Kan. 59; *Hays v. Mercier*, 22 Neb. 656; *Merriam v. Bartlett*, 34 Minn. 524; *Shroeder v. Mueller*, 33 Mo. App. 33; *Putnam v. Ross*, 46 Mo. 337; *Ostor v. Rabenean*, 46 Mo. 595; *De Witt v. Smith*, 63 Mo. 263; *Hassett v. Rust*, 64 Mo. 325-7; *Brodish v.*

James, 83 Mo. 317. This statement expressly says that Sturtevant was the owner prior to the making of the conveyances from and under which Snyder and Lees & Lees became subsequent owners.

SMITH, P. J.—Plaintiff, a dealer in wooden mantels, grates, tiles, etc., on the first day of September, 1887, entered into an agreement with defendant Sturtevant, the owner of a certain block of ground and the building in process of construction thereon, situated in Woodland Place, Kansas City, to furnish the mantels and grates for said buildings, and to put the same in their places when said building should be ready for the same. At the time of the making of this agreement plaintiff did not have on hand the mantels of the kind which he had agreed to furnish defendant Sturtevant, but had to procure the same from the factory; that afterwards between the latter part of December, 1887, and the seventh of January following, plaintiff placed said mantels and grates in the said building according to the said agreement. Sturtevant having failed to pay the price agreed upon or any part thereof for the said mantels and grates, the plaintiff on the twenty-third of April, 1888, filed with the proper circuit clerk of Jackson county a verified statement of his account of the work and labor done, and materials furnished by him under his contract with Sturtevant, for the purpose of availing himself of the provisions of the statute relating to mechanics' liens. In May, 1887, one Deitrick, by proper deed, conveyed said block of ground to Sturtevant and Evans, who, on the thirty-first day of the same month, gave two deeds of trust thereon, respectively to Ettien as trustee for the Lombard Investment Company, and to Pearson, trustee for Weston, Deatherage & White. On August 12, 1887, Evans by deed conveyed said lot in said block to defendant Sturtevant. Sturtevant conveyed to Snyder on September 29, 1887.

The said building on said block was commenced about June 20, 1887, and was completed when plaintiff furnished and put in place said mantels and grates under his contract. On August 9, 1888, the defendant Rogers purchased said block at a trustee's sale made under one of the said Lombard Investment Company's deeds of trust. This suit was brought on the lien against Sturtevant and the other defendants who claimed an interest in the property against which it was sought to have the lien declared and enforced. The plaintiff in the circuit court had a general judgment against defendant Sturtevant, and a special judgment against the said block and building from which defendants appeal.

I. The appealing defendants contend: *First.* That an original contractor cannot maintain a lien, except under contract with the person who was the owner at the time *he began to furnish his materials;* and, *second,* that it is his duty to examine the records and to see when he begins to furnish his materials that his contract is with the owner at that time. As to the first branch of defendants' contention it is to be observed that the statute, Revised Statutes, section 3172, provides that any mechanic or other person who shall do or perform any work or labor upon, or furnish any materials * * * for any building * * * under and by virtue of any contract with the owner or proprietor thereof * * * upon complying with the provisions of this article shall have for his work or materials a lien upon such building and the lot upon which the same is situated.

The entire statute relating to the liens of mechanics and materialmen must be liberally construed so as to effectuate the benign intent of the legislature in its enactment. It is a remedial statute, and must not be construed with unfriendly strictness. The course of decisions is quite uniform in the states, that the lien does not commence until the performance of the work or labor, or the furnishing of the materials. *Hydraulic*

Press Brick Co. v. Bormans, 19 Mo. App. 664; *Schaeffer v. Lohman*, 34 Mo. 68; *Kuhleman v. Schuler*, 35 Mo. 142; *Douglas v. Zinc Co.*, 56 Mo. 388. And while this is so the performance of the work and labor, or the furnishing the materials, must have been under a contract with the owner. Although a lien of this kind is the creature of the statute, still it cannot exist in the absence of this condition precedent. The lien could not exist without the statute, nor with it without this essential condition precedent. And, while the lien is not created by the contractual relation, still it must have its inception in that relation. Must the owner mentioned in the statute be also the owner at the time of the performance of the labor or the furnishing of the materials? Can an owner make a contract with a mechanic or materialman for the erection of a structure and abrogate it by a sale and conveyance of the ground upon which it is building or to be built? Let us consider this question in the light of reason and authority. The mischievousness of the doctrine of defendants' contention finds an apt illustration in the facts of this very case. Plaintiff made a contract with Sturtevant, the owner of the building while in process of construction, to furnish a great number of mantels and grates of the kind required by the architects' specification, which not having on hand he was obliged to order from the factory at a large outlay. Now it is contended that though the plaintiff executed his contract made with the owner, that the materials and labor furnished by him under it have turned out to be a mere gratuity, since the owner with whom he made the contract had sold and conveyed the block, upon which the building was situated, to another, before the date he performed his work and furnished his materials. The mantels were, perhaps, purchased by plaintiff, though not put in place, before the sale of the block to Snyder. The hapless materialman may in the utmost good faith procure the material at great cost and expense for the purpose

of fulfilling the obligations of his contract with the owner, and yet, if that owner happens to convey his ownership of the ground to another before the materials are actually delivered, then his contract is annulled, and notwithstanding this cost and expense which he has been compelled to lay out to comply with the hitherto valid obligations of his contract, unless the later owner shall voluntarily and graciously step into his predecessor's shoes in respect to said contract. Even if the materialman should keep an eye on the records of conveyance made from the date of his contract until the owner shall convey away his title to the ground upon which the building was to be built or was building, and should have knowledge of the change of ownership, still what would be his predicament if the later owner should decline to recognize the binding validity of the contract? If the materials contracted for should be of a kind or quality not in general use, and, therefore, unsalable to any one else, except, perhaps, at great sacrifice, must the loss fall upon the materialman unless the new owner shall revive as to himself the obligations of the abrogated contract of his grantor? It would be no answer to this to say, that the materialman would have his remedy on the contract as on any other violated contract. We may presume the law which gave the lien was in contemplation of the contractor when he made the contract, and that he would not have made it had it not been for the security afforded by its benign provisions. The owner may have become insolvent. The subsequent owner who acquires the property was put upon his inquiry by the fact that the building was in process of construction when he purchased. This fact gave notice to all the world. This notice is imparted by the commencement of the building as well as by any later contribution to the structure. When the building begins the prospective incumbrancer is bound to observe that before its completion there may be work and materials furnished by the contractor

and subcontractor. The statute guarantees protection to both from the "commencement of the building." *Hydraulic Brick Co. v. Bormans*, *supra*. "Whoever takes a mortgage upon a building in the course of erection should assume that the mechanics' work is to go forward." *Brooks v. Railroad*, 101 U. S. 443. The commencement of the building is a patent fact which all persons can see and know, and persons dealing with reference to such property are put on their inquiry, and are justly charged with knowledge of all that inquiry would lead to, viz., that there is, or may be, a mechanics' lien, under the statute. *Welch v. Porter*, 63 Ala. 232. "All mechanics' liens commence at the date of the first stroke of the ax or spade, and continue in the erection of the house, without regard to the time of their being filed, or of the doing of the work or furnishing the materials. The man who does the last of the painting or plumbing comes *in pari passu* with him who built the foundation wall." *In the Matter of Denkel's Estate*, 1 Pearson (Pa.) 213; Purd. Dig. 578, sec. 10. Other adjudications in this line might be referred to; but the foregoing are deemed sufficient for our present purposes. If the rule announced in these authorities applies to mortgagees who are regarded in certain cases *bona fide* purchasers, why may it not apply in those cases where the later owner acquires by absolute deed the entire interest, which the owner who made the contract with the mechanic or materialman had in the property? We cannot see that a distinction could be made, or, if so, that it rests on any solid foundation of principle. Besides the succeeding owner by purchase has it in his power to fully protect himself, either by covenants of warranty in his deed, or by taking indemnity, or both. If he neglected to take these precautions surely he ought not to be permitted to claim after the contractor has executed his contract, and he has received the benefits, that the materials and labor were not furnished under contract

with the owner, and thus emancipate his property from the operation of the lien. Snyder acquired the interest of Sturtevant in the property some three months after the building had been commenced, and after it was far advanced towards completion, but before plaintiff had put in the mantels and grates under the contract with Sturtevant, which in point of time antedated the ownership of Snyder. It would seem, indeed, a harsh and unreasonable construction of the statute that would overthrow plaintiff's lien under such circumstances. But since Snyder, the succeeding owner, who is a party to this suit, is not one of the appealing defendants, and is not contesting the right of the plaintiff on this or any other ground, so that the questions which we have been discussing are not properly before us for decision (*Clark v. Brown*, 22 Mo. 140), they may be dismissed without further consideration.

II. The vital question in the case seems to be whether the plaintiff's lien on the ground and building thereon is valid as against the mortgages given to the Lombard Investment Company and to Deatherage, Weston & White, before the commencement of the building. The question is, therefore, one of priority between the mortgage lienors, or those claiming under them, and the materialman, who was an original contractor. The relative rights of these parties must be determined in the light of the statute, Revised Statutes, section 3174, which provides that the lien for materials or work shall attach to the buildings, erections or improvements for which they were furnished or the work was done, in preference to any prior lien or incumbrance or mortgage upon the land upon which said buildings, erections, improvements or machinery have been erected or put; and any person enforcing such lien may have such building, erection or improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter. It would seem that the liens of the materialman are

subordinate to that of the mortgages as to the block of ground in question, and paramount as to the building erected thereon. *Hall v. Planing Mill*, 16 Mo. App. 454, and 22 Mo. App. 33; *Dugan v. Scott*, 37 Mo. App. 663; *Crandall v. Cooper*, 62 Mo. 478; *Smith v. Phelps*, 63 Mo. 585; *Hotel Co. v. Sauer*, 65 Mo. 288. The complaint of the defendants in reference to the judgment of the circuit court, in so far as it subjects the said lot upon which the building was erected to the plaintiff's lien, is not entirely groundless. If the plaintiff can prevail in this case over the prior mortgagees, then the mechanics' lien statute has put it in the power of the holders of an equity of redemption in real property to improve the mortgage lienor out of their security. *Dugan v. Scott*, 37 Mo. App., *supra*. This, as the authorities cited abundantly show, cannot be done. On the other hand, the statute offers ample protection to the mechanics and materialmen, who furnish labor and materials for an improvement placed on the ground, under a contract with the owner of the equity of redemption, who is regarded by the law as the owner of the ground in so far that he may authorize an improvement thereon to be made, which can be charged and subjected to the lien of the mechanic and materialman for the reasonable cost of making the same. The lien, in this regard, will be as firmly upheld as that of the prior mortgage on the ground upon which the improvement is made, as was said by Judge NAPTON in *Smith v. Phelps*, *supra*: "In the mechanics' lien law it seems to have been the intent of our legislature to protect the title of the mechanic to a reimbursement for his expenditure in money or labor on the house he builds, by giving him a right to the house if all other means or remedy fail." It, therefore, seems to us that, while the mortgage lienors are entitled to priority over the mechanics' lien, as to the block of ground, that their lien must be postponed to the latter lien as to the buildings thereon.

III. As to the lien statement of the plaintiff, we think it was sufficiently verified. The account sworn to contained the name of the owner Sturtevant. It was unnecessary to repeat it in the affidavit. *Leise v. Schwartz*, 6 Mo. App. 413; *Deatherage v. Woods*, 37 Kansas, 59.

IV. There is nothing in the evidence in the case which justifies the assumption that the plaintiff was a mere subcontractor under Sturtevant, who, after his sale of the property to Snyder, under a contract for that purpose with Snyder, completed the building which he had commenced as owner. In view of the fact that the circuit court, by its judgment, gave plaintiff a lien on the block of ground, as well as the structures thereon, we must reverse the judgment. It is ordered that the judgment be reversed, and the cause remanded with instruction to the circuit court to enter judgment in favor of plaintiff and against defendant Sturtevant for the amount of his claim, with six per cent. thereon from the seventh day of January, 1888, with a lien clause against the building (but not the lot) described in plaintiff's petition, subjecting the said building to the payment of said judgment. All concur.

41 231
47 60

J. B. BURT *et al.*, Plaintiffs in Error, v. R. W. MEARS, Defendant in Error.

Kansas City Court of Appeals, May 12, 1890.

1. **Replevin: VENDOR RETAINING TITLE: REFUNDING PURCHASE MONEY PAID.** Under section 5181, Revised Statutes, 1889, a vendor of household goods, who retains the title thereto until the same are paid for in full, cannot replevin them from his vendee without tendering or refunding the sums of purchase money paid after deducting therefrom a reasonable compensation for the use of such property and for damage done.

2. ——— : JUDGMENT FOR DAMAGES : VENDEE'S INTEREST. In replevin by the vendor retaining the title against the vendee, who has paid some of the purchase money and defaulted on the balance, it is error to enter judgment for the defendant for the full value of the goods; but such judgment should only be the amount defendant has paid thereon less compensation for the use thereof and damage thereto.

Error to the Adair Circuit Court.—HON. ANDREW ELLISON, Judge.

REVERSED AND REMANDED.

Harrington & McCall, for appellants.

(1) The court erred in sustaining the demurrer to plaintiffs' evidence. Its action involves the construction of sections 5180 to 5181 of the Revised Statutes of 1889. These sections have reference to such sales as are made on the condition that the title is to remain in the vender till purchase price is fully paid. *Dailey v. Mfg. Co.*, 88 Mo. 305. But this has nothing to do with the case at bar. It was a leasing, and nothing from the record discloses any fact from which any other conclusion can be reached. (2) And although Mrs. Bowen might have had the option of keeping the goods on paying the price charged by plaintiffs on their books, if she had made a contract to that effect, yet as she did not, this cannot change the transaction from a hiring or renting to that of a conditional sale. *Foreman v. Drake*, 3 S. E. Rep. 842; *Mfg. Co. v. Heil*, 8 Atl. Rep. 616. (3) Plaintiffs have a perfect right to take possession of the property in question (R. S. 1889, sec. 7479), and so doing is no violation of section 5181 of statutes of 1889. *Weil v. State*, above cited; R. S. 1889, secs. 7481 and 7490. (4) The court erred in finding for and rendering judgment for defendant for one hundred dollars. The total value of property,

as shown by plaintiffs' ledger, which he had rented was $167.60. The total amount of credits shown by the ledger, including rent and goods returned, aggregate $80.25. The difference is $87.35, which would be the value of the balance of the goods defendant had in his possession. The evidence of Gerry shows the officer did not get all the goods, hence the $87.35 is in excess of the real difference to the value of the goods not found. (5) The law requires this not only, but that all questions growing out of the controversy, shall be finally settled in one and the same suit. *White v. VanHouten*, 51 Mo. 577; *Dilworth v. McKelvy*, 30 Mo. 150; *Dougherty v. Coeper*, 77 Mo. 535.

John W. Johnson, for respondent.

(1) The court did right in sustaining the demurrer to plaintiffs' evidence. Its action involves the construction of sections 5180 to 5181 of the Revised Statutes of 1889, and, whether the contract was that of a rental or conditional sale, it plainly comes within the provisions of sections above referred to. The above provisions of our statute would certainly be rendered nugatory if our courts were to decide that this case does not come within the provisions of the above statute. The cases, viz.: *Foreman v. Drake*, 3 S. E. Rep. 842; *Mfg. Co. v. Heil*, 8 Atl. Rep. 616; *Weil v. State*, 21 N. E. Rep. 643; *Edwards' Appeal*, 105 Pa. 103; *Dando v. Foulds*, 105 Pa. 74; *Forest v. Nelson*, 108 Pa. 481, are cited by plaintiffs as favoring their view of this case. We think not, and would further say that above authorities as far as in point favor respondent, therefore, we cite them. (2) Defendant being in possession of same, and all legal presumptions being in his favor he would be presumed to be a purchaser in good faith, or an agent, and there is no evidence to the contrary, and, the contract proven by the evidence being a conditional sale, such

contract must be evidenced by writing and recorded. In either instance this case comes within the provisions of sections 5180 and 5181 of Revised Statutes of 1889. *Dailey v. Mfg. Co.*, 88 Mo. 305.

GILL, J.—This case was submitted to the decision of the trial court, without the aid of a jury, and, upon a finding and judgment for defendant, plaintiffs bring the cause here by writ of error. It is an action of replevin for a lot of household goods. The court assessed the value thereof at one hundred dollars, and the plaintiffs having possession thereof at the trial, and the defendant electing to accept the value assessed rather than the return thereof, judgment went against plaintiffs and their sureties on the replevin bond for the said one hundred dollars and costs.

Burt & Gerry, the plaintiffs, are dealers in new and second-hand goods at Kirksville, Missouri; and in the conduct of their business they seemed to have furnished to defendant Mears, and his mother-in-law, Mrs. Bowen, the household goods in controversy to equip a hotel in said town of Kirksville. Mears & Bowen failing to pay for the goods, and Mrs. Bowen having left the town, plaintiffs took the goods from the possession of Mears by the writ of replevin herein. The only evidence at the trial was that offered by plaintiffs; and from this it is obvious that the court found a *conditional sale* by Burt & Gerry to Mears & Bowen, that the goods were purchased on credit, with an agreement that title should remain with plaintiffs until the same were paid for in full, that Mears & Bowen had paid something on the goods, and that, as the evidence showed that plaintiffs had never refunded or tendered anything to said purchasers on account of the partial payments thus made, the court held that plaintiffs must fail in their action, by reason of the provisions of section 2508, Revised Statutes, 1879. And indeed it is difficult to see how the

trial judge could, under the evidence, determine the *facts* any other way. The alleged "renting" was, clearly, a mere subterfuge.

I. The law governing the rights of the parties is found in sections 2507 and 2508, Revised Statutes, 1879 (now sections 5180 and 5181, revision of 1889). Section 2507 provides that such conditional sales (where the title is to lodge with a vendor until the goods are paid for) shall be void as to all subsequent purchasers in good faith, and creditors, unless such condition be evidenced by a writing acknowledging and recorded, etc. Whereas section 2508 reads as follows: "Whenever such property is so sold or leased, rented, hired or delivered, it shall be unlawful for the vendor, leasor, renter or deliverer, or his, or their, agent, or servant, to take possession of said property *without tendering or refunding to the purchaser*, leasor, renter or hirer thereof, or any party receiving the same, the sum or sums of money so paid, *after deducting therefrom a reasonable compensation for use of such property*, which shall in no case exceed twenty-five per cent. of the amount so paid, anything in the contract to the contrary notwithstanding, and whether such condition be expressed in such contract or not, unless such property has been broken or actually damaged, and then a reasonable compensation for such breakage or damage shall be allowed." Clearly then, at the institution of this suit, the plaintiffs were not entitled to the possession of these goods, as they had not returned or offered to return the purchase money so paid, after deducting therefrom compensation for the use thereof and damages, if any, done the same.

II. However this case must be reversed and remanded, because of the error in entering judgment for defendant and against plaintiffs for the *full value* of the goods in controversy, when, from the undisputed facts, it appears that defendant and his mother-in-law

only had a small interest or claim therein. Plaintiffs were the general owners, while Mears & Bowen were only entitled to have returned to them the small amount paid thereon, less compensation for the use thereof and damage thereto. The amount thus paid seems to have been less than thirty dollars. This must be reduced by compensation for use and by any damage done the property while in their possession. So that it may be that defendants may, in fact, have only a nominal interest in the goods. The goods then, subject to this small charge in favor of defendants, are the property of plaintiffs, and it would be unjust and inequitable to award defendants the entire value. In such case he is entitled to recover the *extent of this interest* in the property and nothing more. See *Baldridge v. Dawson*, 39 Mo. App. 527, and cases there cited; *Boutell v. Warne*, 66 Mo. 350; *Dilworth v. McKelvy*, 30 Mo. 149.

Judgment reversed and cause remanded for a new trial. All concur.

41 236
44 598

41 236
87 289

JOHN WIRT, Plaintiff in Error, v. ANNA DINAN and her Husband, Defendants in Error.

Kansas City Court of Appeals, May 12, 1890.

1. **Attachment:** APPELLATE PRACTICE: WRIT OF ERROR: JUDGMENT QUASHING ATTACHMENT. A judgment sustaining a motion to quash an attachment is not a final judgment, and an appellate court cannot, on writ of error, review such judgment.

2. ——: ——: ——: ABATEMENT: APPEAL OR ERROR. The provisions of section 439, Revised Statutes, 1879, in reference to appeals from judgments on pleas in abatement are not applicable to proceedings on motion to quash under section 445 of said revision;

but, if such provision did apply, said section is not intended to permit a writ of error which may be sued out at any time within three years, but to authorize only an appeal, which must be taken at the term of the judgment.

8. **Appellate Practice: MOOT CASE.** Appellate courts will not declare the law on a mere moot case—trying nothing but mere supposable legal issues.

Error to the Bates Circuit Court.—HON. D. A. DEARMOND, Judge.

WRIT DISMISSED.

Holcomb & Smith and *Parkinson & Graves*, for appellant.

(1) The judgment, to reverse which the writ of error has been sued out, is not a final judgment, and cannot, therefore, be reviewed by this court. *Tanner v. Irwin*, 1 Mo. 65; *Palmer v. Crane*, 8 Mo. 619; *Davis v. Perry*, 46 Mo. 449; *Anderson v. Moberly*, 46 Mo. 191; *Boggess v. Cox*, 48 Mo. 278; *Conn v. Ferree*, 60 Mo. 17; *Evans v. Russell*, 61 Mo. 37; *Walser v. Haley*, 61 Mo. 445; *Johnson v. Board of Ed.*, 65 Mo. 47; *Jones v. Evans*, 80 Mo. 565; *Railroad v. Kansas City*, 29 Mo. App. 89; *Richards v. Johnson*, 34 Mo. App. 83. (2) The fact that a judgment for cost was rendered against plaintiff does not make the judgment of the circuit court in this cause final. *Conn v. Ferree, supra; Evans v. Russell, supra.* (3) The judgment rendered by the circuit court was in pursuance of the provisions of section 445, Revised Statutes, 1879, page 70. No right of appeal or of writ of error is given by statute to review such a judgment. (4) The right of appeal from a judgment not final given by section 439, Revised Statutes, 1879, page 69, being in derogation of the general rule of law cannot be extended by judicial construction to apply to the judgment in this case. *Claflin v. Hoover*, 20 Mo. App. 314; *Hemelreich v. Carlos*, 24

Mo. App. 272, 273; *Easton v. Courtwright*, 84 Mo. 27. (5) Even granting that section 439, *supra*, does apply to the case at bar, then the plaintiff in error has no standing in this court on writ of error. *Duncan v. Forgey*, 25 Mo. App. 310; *Young v. Hudson*, Sup. Ct. (not yet reported); 12 S. W. Rep. 632; *St. Louis v. Marchel*, not reported.

J. T. Smith and *Railey & Burney*, for respondent.

(1) The judgment in this cause was such a final judgment as will support an appeal or writ of error. 2 Thompson on Trials, sec. 2337; *Leimer v. Railroad*, 26 Mo. 26; *Spears v. Bond*, 79 Mo. 469; *Rogers v. Gosnell*, 51 Mo. 468; *Moody v. Deutsch*, 85 Mo. 244. (2) Even if the writ of error was improperly sued out, under the practice in this state, it would be proper before dismissing the writ for the court to pass upon the merits involved, and thus save further expense and litigation. *Turpin v. Turpin*, 88 Mo. 339-340; *Holloway v. Holloway*, 97 Mo. 629.

GILL, J.—Plaintiff's counsel states this case as follows:

Plaintiff brought suit in the circuit court of Bates county, Missouri, by attachment, and levied upon the goods and lands of defendants found in said county. The ground of attachment alleged by the plaintiff is found in the twelfth subdivision of section 398 of the Revised Statutes of Missouri, 1879. The facts constituting the cause of action were fully set out in the petition and affidavit of the plaintiff. It was therein alleged, in substance, that defendant Anna Dinan, for the purpose of cheating and defrauding plaintiff, and obtaining money from him, did, about the thirty-first day of August, 1889, in the absence of her husband, and without his consent or knowledge, steal twenty-eight head of cattle in Bates county, Missouri, from August

Schuman, of the value of five hundred and fifty dollars; that she drove twenty-six head of said cattle to the farm of plaintiff in Cass county, Missouri, still in the absence of, and without the consent of, her husband, and falsely and fraudulently, and for the felonious purpose of obtaining money from plaintiff, represented to him that she was a poor unmarried woman of the name of Maggie O'Grady, and a widow; that she was traveling to the northern part of the state of Missouri to see her relations; that the twenty-six head of cattle were her own property, and all the property she had, and that she was greatly in need of money to continue her journey, and asked and solicited plaintiff to purchase them from her. It is further stated in the affidavit that plaintiff relied upon said statements and representations, and believed them to be true, although they were, in fact, all false, and well known by her to be false, and was thereby induced to, and did, purchase the cattle from her and pay her, in cash, $498.90; that, afterwards, the owner of the cattle, August Schuman, reclaimed them and took them out of the hands of plaintiff; that, by reason of the false and fraudulent conduct and representations of defendant Anna Dinan, plaintiff has lost and is damaged in the sum of $498.90. A writ of attachment was issued pursuant to the affidavit, and the sheriff levied upon a large amount of defendant's property.

Defendants then moved to quash the writ and the return thereof on the ground that the defendant Anna Dinan was a married woman, and, this being an action at law, it cannot be maintained against her. And, also, that the defendant Anna Dinan, being under coverture, her contract for the sale of the cattle to plaintiff was void, and the damages connected therewith could not be recovered, either against her or her husband. The court sustained the motion to quash, and rendered a judgment thereon against plaintiff, ordering and

adjudging that said motions "be, and they are hereby, sustained, and that the writ of attachment issued herein, together with the levy and return thereof by the sheriff of Bates county, be quashed and for naught held, and as to the same the defendants go hence without day, and have and recover of plaintiff their costs in this behalf expended, growing out of the issuing, levy and return of said writ of attachment herein, and thereof have execution. To which judgment and decision of the court in sustaining said motions, dissolving said attachments, quashing the writ, levy and return thereon, said plaintiff, by his attorney, at the time, duly excepted." Subsequently, plaintiff filed a motion for a rehearing. The same was on February, 1889, by the court overruled, and, thereafter, in December, 1889, plaintiff brought the case here by writ of error.

I. It is clear that this writ of error must be dismissed, as there is no authority, under the law, for a writ of error in a controversy of this character. This is an effort to have this court review, on a writ of error, the order and judgment of the circuit court sustaining a motion to quash an attachment, said motion filed as provided by section 445, Revised Statutes, 1879. Under that statute an attachment writ may be quashed, and the same dissolved, for three reasons therein mentioned, first of which is where the affidavit shall be adjudged insufficient in law to warrant the attachment. It was for this reason the court below dissolved the attachment and quashed the writ herein. And it was, too, from this judgment or order, and this alone, that plaintiff has sued out the writ of error. The judgment on the motion to quash was not the final disposition of the entire case in the court below; was not a final judgment of the cause, but simply a judgment on the motion to quash the attachment leaving the main case standing as before, a suit for damages without the auxiliary attachment. It has been long and well understood in

this state that there can be but one final judgment in a cause, and that such final judgment cannot be composed of fragments. As to the defendant the judgment must relieve him from further appearance as to the entire cause. He must be permitted to go "without day," etc. Such is not the case here. The defendants (as appears from this record) are still held in the court below to answer the merits of the action or petition, while this attachment—this adjunct to the main case—is brought here for review. The judgment below did not discharge defendants from the entire cause but only quashed "and for naught held" the writ and levy of attachment, and "*as to the same*" (to-wit, the writ of attachment only and nothing more) the defendants were permitted to go without day. Said judgment did not even award defendants their costs expended in the whole case, but simply adjudged costs only "growing out of the issuing, levy and return of *said writ of attachment.*" Obviously then the judgment complained of has only to do with a fragmentary portion of the case, and an appeal or writ of error therefrom is not allowed unless the statute takes this case from the general rule. *Evans v. Russell*, 61 Mo. 37; *K. C. Cable Co. v. Kansas City*, 29 Mo. App. 95; *Richards v. Johnson*, 34 Mo. App. 33; *Witthaus v. Bank*, 18 Mo. App. 183, and cases cited. "Every person aggrieved by any *final* judgment or decision of any circuit court," * * * may make his appeal, or sue out his writ of error, etc. R. S. 1879, sec. 3710. Prior to 1879, an appeal did not lie from a judgment on a plea in abatement to an attachment, and for the reason that the same was regarded as a mere *interlocutory* order and was not the *final* judgment prescribed by the statute. *Anderson v. Moberly*, 46 Mo. 191; *Davis v. Perry*, 46 Mo. 449; *Metzenberger v. Keil*, 31 Mo. App. 130; *Walser v. Haley*, 61 Mo. 445. But in the revision of 1879, the law was amended so as to permit *appeals* from such orders and judgments on

the plea in abatement (section 439, Revised Statutes, 1879). But this amendment to the old law applies, in terms, only to judgments on *pleas in abatement*, and makes no reference whatever to judgments or orders dissolving or quashing attachments on motion, such as we have here. The plea in abatement, provided by section 438 and mentioned in section 439 (Revised Statutes, 1879), is quite a different matter from the motion to quash mentioned in section 445. The first, by means of the affidavit of the defendant, puts in issue the *facts* which furnish the grounds for the attachment, while the latter (or motion to quash) simply calls for the judgment of the court as to the legal sufficiency of the affidavit on its face. We have in the case at bar a writ of error sued out on a judgment entered upon a motion to quash provided for in section 445. It is in *no* sense a plea in abatement, and, therefore, clearly not within the provisions of section 439.

But even did such motion to quash come within the spirit and intent of section 439, and a right for an appeal thereby provided, yet plaintiff is not justified in bringing the case here by *writ of error*. That statute authorizes only an *appeal*, which under the law must be made at "the term at which the judgment or decision appealed from was rendered." R. S. 1879, sec. 3712. It was not intended by said section 439 to permit a *writ of error* which may be sued out at any time within three years after such judgment or decision appealed from. R. S. 1879, sec. 3745. This point has been expressly so decided in this state. *Duncan v. Forgey*, 25 Mo. App. 310; *Young v. Hudson*, Mo. Sup. Ct. (not yet reported).

II. Counsel for plaintiff request that, notwithstanding this writ of error be dismissed, we examine into the issues of the main case, *as they may be hereafter presented*, and give our opinion thereon and thereby facilitate the trial of the cause on its merits.

We feel scarcely justified in so doing. We have in the record now before us nothing to advise us of just what the issues are in the main case. We discover a petition; but as to whether or not the case shall be tried thereon, whether or not the same may be amended, or whether a demurrer is or may be interposed, or an answer filed, and the nature thereof, or whether in fact there shall be any defense at all, we have no knowledge or means of knowing. Hence we should, in following the course suggested by the learned counsel, be justly charged with declaring the law on a *mere moot case*—trying nothing but mere *supposable* legal issues, which we conceive improper

The writ of error herein is dismissed. All concur.

G. W. BALDWIN *et al.*, Appellant, v. G. H. WALSER, Respondent.

41 243
59 231

Kansas City Court of Appeals, May 12, 1890.

1. **Libel: NOTICE OF DISSOLUTION OF PARTNERSHIP NOT ACTIONABLE: SPECIAL CHARACTER.** The giving of notice by one not a member of a banking firm, that he had withdrawn from it and that it was no longer authorized to do business as far as he was concerned, was of itself harmless. To render language concerning one in a special character or relation actionable, it must touch him in that special character or relation, otherwise it must be adjudged by the rules which apply to language concerning an individual as such. It is not sufficient that such language disparage him or his reputation generally, it must be such as, if true, disqualifies or renders him less fit to properly fulfill the duties incident to the special character; such as, imputing fraud, want of integrity, or misconduct in the particular line, and occasioning pecuniary loss as a necessary or natural proximate consequence of its publication in writing; and even special damages will not make the language actionable if the words are not defamatory.

2. ——— : ——— : EXTRANEOUS MATTER. The allegations in the petition that, in consequence of the publication of said notice of dissolution of the partnership, a general loss of custom had resulted to plaintiffs, and many people were prevented from transacting business with them, and their commercial and financial standing were reduced, do not render the publication libelous.

3. **Partnership**: ACTION AT LAW AGAINST PARTNERS. Several partners cannot maintain an action at law for damages against a copartner.

4. ——— : DISSOLUTION : DAMAGES. A partner has a right to withdraw from the firm and make his withdrawal effectual by giving notice thereof, and, though serious loss to the firm may be the natural and probable result of such withdrawal, no damages could ordinarily be recovered therefor.

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

AFFIRMED.

Buler & Timmonds, for appellant.

(1) The demurrer admits the falsehood in the publication, and the malice in the publisher. Townsend on Libel, note to p. 350; *Boogher v. Knapp*, 76 Mo. 457. The publications being admitted to be false, the malice of the publisher also being admitted, it cannot be, on demurrer, claimed as a privileged publication; for, if false and malicious, it cannot be privileged. Townsend on Libel, sec. 245. "Privileged publication" is a matmer of defense only to be pleaded and proven as any other defense. Townsend, sec. 208, *et seq.*, and sec. 245; 3 Sutherland on Damages, 653. (2) The publication is libelous *per se*. *Hermann v. Bradstreet Co.*, 19 Mo. App. 227; Townsend, secs. 146, 147, 150, 181, 182, 191, note on p. 279, notes on pp. 279, 298, 299. (3) If the publication should be held not to be libelous *per se*, it is, nevertheless, libelous by reason of the special injuries and damages alleged in petition. A general loss of customers is alleged. Many people have been

prevented from transacting business with plaintiffs. The bank is greatly reduced in its commercial and financial standing. Loss of customers is so manifestly special damage that it is unnecessary to state the cases in detail. 3 Sutherland on Damages, p. 666, and cases cited, p. 667, and cases cited. *Weiss v. Whitlemore*, 28 Mich. 373. If the petition is not sufficiently specific as to injuries and damages, defendant's remedy would have been by motion to make more specific, definite and certain, and not by demurrer.

R. J. Tucker and *G. H. Walser*, for respondent.

(1) The demurrer only admits facts well pleaded, and does not admit the unwarranted applications in the innuendo, and statement outside of the matter complained of, not legitimately deduced from the wording of the publication. *Dannan v. Coleman*, 8 Mo. App. 595; *Kleekamp v. Meyer*, 5 Mo. App. 444; *Boogher v. Knapp*, 76 Mo. 457; *State ex rel. v. Evert*, 52 Mo. 95. (2) The publication complained of is not actionable *per se*. It raises no imputation of malice in the publication. It is simply a notice of a dissolution of a copartnership, "so far as the publisher was concerned." To make it actionable *per se*, its legitimate import must blacken the reputation of the appellants, or expose them to hatred, contempt or ridicule; or, if true, disqualify them, or unfit them, for business as bankers, for moral turpitude, want of skill, honesty or standing, as men. *Legg v. Dunlevy*, 80 Mo. 558; Townsend on Libel and Slander, sec. 190; *Fitzgerald v. Redfield*, 51 Barb. 484; Odgers on Libel and Slander, 65; *Nelson v. Margrave*, 10 Mo. 648; *Hermann v. Bradstreet Co.*, 19 Mo. App. 227; *Price v. Whitely*, 50 Mo. 439; *Legg v. Dunlevy*, 10 Mo. App. 461; *Brooker v. Coffin*, 5 Johns. 191; *Martin v. Sulwell*, 13 Johns. 275; *Rammel v. Otis*, 60 Mo. 35; *Fry v. Bennet*, 15 Sand. 54; *More v. Bennett*, 33 Howard, 177; *Bennett v. Williamson*, 4 Sand.

60; *More v. Bennett*, 48 Barb. 229. (3) Where the publication is not actionable *per se*, and where the ordinary meaning of the words does not convey the meaning assigned to them, the petition must contain a statement of extrinsic facts necessary to make a cause of action. *Curry v. Collins*, 37 Mo. 324; *Christal v. Craig*, 80 Mo. 357; *Wood v. Hilfish*, 23 Mo. App. 389; *Salvatillo v. Ghio*, 9 Mo. App. 155; Chitty's Pleadings [10 Am. Ed.] 400; *Legg v. Dunlevy*, 80 Mo. 558; *McMannis v. Jackson*, 28 Mo. 58; *Bunday v. Heart*, 46 Mo. 460; *Masley v. Mass*, 6 Gratt, 538; *Stewart v. Wilson*, 23 Minn. 449; *Tappen v. Wilson*, 7 Ohio, 193; Estee's Pleading, sec. 3635; *Maynard v. Ins. Co.*, 47 Cal. 210; *Wilson v. Fitch*, 41 Cal. 378. (4) The innuendo cannot enlarge or change the ordinary meaning of the language used. *Greeley v. Cooper*, 1 Denio, 347; *Tappen v. Wilson*, 7 Ohio, 194. (5) The plaintiffs, suing in the special character of private bankers, must show that it referred to them in the capacity in which they sue. Townsend on Libel and Slander, 290. (6) The petition, as a whole, shows that appellants and respondent were partners, and that the publication complained of related to them in their partnership capacity. One partner cannot sue another at law. Kelley's Treatise, 677, 678, 679; *Bank v. Bemis*, 55 Mo. 524. (7) A partner may dissolve the firm at pleasure. 3 Kent, Com. [12 Ed.] 53. (8) If a retiring partner wishes to protect himself from the mismanagement or liabilities of the old firm which he retires from, the law makes it his duty to give notice to the public of his withdrawal. *Dowzelot v. Rawlings*, 58 Mo. 75; 3 Kent, Com. [12 Ed.] 63. (9) The pleader must rely upon some specific cause of action; they cannot rely upon the publication as being actionable *per se*, and, if they fail in that, sustain themselves by reason of the averment of "special injuries and damages." *Robinson v. Rice*, 20 Mo. 235. (10) Averment of general loss of business will only lie when the words are actionable *per*

se. Where the publication is not actionable *per se*, and the plaintiff suffers injury by the loss of customers, the names of the customers must be set out. *Ins. Co. v. Ecclesine*, 6 Abbott (N. S.) 9. (11) The petition avers that the defendant, contriving and falsely and fraudulently intending to injure the "Bank of Liberal," and these "plaintiffs in their good credit and reputation, and also in their said business as private bankers." Here are three different causes of action set up,—one in favor of the Bank of Liberal, one in favor of the individual members of the firm, and in such a cause of action they cannot sue jointly. *Duffy v. Gray*, 52 Mo. 528. And one for injuries to their business, which cannot be joined with injury to the members. *Duffy v. Gray*, 52 Mo. 528; Collyer on Partnerships, sec. 680; Story on Partnership, secs. 256, 257; Townsend on Libel and Slander, 381; Selwin, Nisi Prius, p. 1260; Town. on Libel and Slander, 201. The petition shows upon its face that the publication is in the nature of a legal proceeding to dissolve a copartnership, and, therefore, privileged. *Gilbert v. People*, 1 Denio, 41.

SMITH, P. J.—This suit was instituted in the circuit court of Barton county to recover damages for an alleged libel. The defendant filed a demurrer to the petition on the ground that it did not state facts sufficient to constitute a cause of action, which was by the court sustained. The plaintiffs declining to further plead, judgment was rendered in favor of the demurrant. The plaintiffs bring the case here by appeal.

The petition was as follows: "The above-named plaintiffs complain and allege that, on the —— day of January, 1889, long prior thereto, and every since that date, they were engaged in carrying on a banking business, as private bankers, under the style and name of 'Bank of Liberal,' at the town of Liberal, in Barton county, Missouri. That at, and prior to, the date aforesaid, plaintiffs, as such private bankers, under the name

of the Bank of Liberal, had built up, and maintained, a good, profitable and paying banking business at said town of Liberal; had merited and won the confidence and esteem of men of large means, who had become, and were, regular customers and depositors of said bank, and also the confidence and esteem of numerous banking institutions throughout the state of Missouri and many other states; and were largely engaged in negotiating loans, receiving deposits and transacting a general banking business. That said plaintiffs, as such private bankers, at the date aforesaid, long prior thereto and ever since then, were, and are, duly and lawfully authorized to transact a general banking business, to contract liabilities, negotiate loans and receive deposits in the name of the Bank of Liberal. That the defendant, well knowing the premises, but contriving and falsely and fraudulently intending to injure said Bank of Liberal and these plaintiffs in their good credit and reputation, and also in their said business as private bankers, and to cause it to be suspected and believed that said Bank of Liberal had been dissolved and plaintiffs were wrongfully and unlawfully engaged in the banking business, and had no right or authority to longer engage in the banking business, at said town of Liberal, nor any right or authority to contract liabilities, negotiate loans, receive deposits, nor prosecute the business of bankers, nor use the name of the Bank of Liberal; and, also, contriving and falsely and fraudulently intending to injure and destroy the custom and business which plaintiffs had built up as aforesaid; and to prevent persons from depositing their means with said bank, and from negotiating loans at said bank; and to injure said bank in its good credit and reputation with its correspondent banks in this and other states, and to vex, harass, oppress and injure the plaintiffs, did, on the —— day of January, 1889, at the county and state aforesaid, wrongfully and maliciously and injuriously compose and publish, and caused to be

published, of, and concerning, plaintiffs and their said bank a certain, false, scandalous, malicious and defamatory libel in the way of, and in respect to, their said business as bankers; which said false, scandalous and defamatory libel is, and was, of the tenor following, that is to say:

"'*To all whom this may concern:*

"'Notice is hereby given that the copartnership heretofore existing by and between G. W. Baldwin, G. H. Walser, J. G. Pitgen, J. A. Noyes, John Betz, F. L. Yale, Joseph York, J. S. Van Law, P. G. Boulware, Geo. Boulware and R. L. Baldwin, doing business under the firm name and style of the Bank of Liberal, and engaged in the business of private bankers in the town of Liberal, Missouri (meaning the bank hereinbefore mentioned), is hereby dissolved, so far as the undersigned is concerned; and on, and after, this day said parties (meaning the plaintiffs), each of them, are not authorized or permitted to do any business, contract any liabilities, negotiate any loans, or receive deposits of any kind, directly or indirectly, or further prosecute the business of bankers, or further use the name of said firm of the Bank of Liberal in the business aforesaid.

"'G. H. WALSER.'

"That said defendant signed said false, scandalous, malicious and defamatory libel, and wrongfully, maliciously and injuriously procured the same to be published in the *Messenger*, a newspaper regularly published in said town of Liberal, and largely circulated in said town, county and state; and also falsely, wrongfully and maliciously and injuriously sent, and procured to be sent, to many of plaintiffs' depositors in said bank and to plaintiffs' banking correspondents in other cities and states, copies of said false, scandalous, malicious and defamatory libel.

"That by means of the premises the plaintiffs and the said Bank of Liberal have greatly been injured in

their credit and reputation aforesaid, and have and are suspected to have been guilty of the misconduct so as aforesaid mentioned to have been charged upon and imputed to them, and to have conducted themselves dishonorably, injudiciously, improperly and unlawfully in undertaking to transact a banking business at the town of Liberal as aforesaid; and many of their said customers, depositors and bank correspondents, as well as the people generally, have been caused to suspect and believe that plaintiffs are, and have been, wrongfully and unlawfully engaged in the business of banking, as private bankers, and have no right or authority to do any business, contract any liabilities, negotiate any loans, or receive deposits of any kind, directly or indirectly, or to prosecute the business of bankers, or to use the name of the said firm of the Bank of Liberal in the business aforesaid. And many of plaintiffs' depositors, by reason thereof, have withdrawn from said bank their deposits; many other people have been thereby prevented from transacting any banking business with plaintiffs; many of their banking correspondents have lost confidence in said Bank of Liberal; and said Bank of Liberal has been greatly reduced in its commercial and financial standing; and plaintiffs have been greatly vexed, harassed, oppressed and injured, and lost and been deprived of divers great gains and profits, which, but for said libel, would have arisen and accrued to them in their said business as private bankers; and have been and are greatly injured and damaged, in the sum of ten thousand dollars; for which sum and for costs plaintiffs pray judgment."

The demurrer controverts the conclusions of the pleading, but, not denying the facts which are therein well pleaded, it by necessary implication admits their truth. Bliss on Code Plead., sec. 418. The defendant was not a member of said banking firm as we must infer from the petition was the fact. Then the giving of notice that he had withdrawn from it and that it was no

longer authorized to do any business as far as he was concerned was of itself harmless, unless there is something else in it of a libelous character. The rule is that in order to render language concerning one in a special character or relation actionable "it must touch him" in that special character or relation; for, unless it does, it must be judged in regard to its actionable quality by the rules which apply to language concerning an individual as such. It is not sufficient that the language disparages him generally, or that his general reputation is thereby affected, it must be such as, if true, would disqualify him or render him less fit properly to fulfill the duties incident to the special character assumed. Townsend on Libel and Slander, sec. 190. And in the authority just cited it is further stated in section 191, in those trades or professions in which ordinarily credit is essential to their successful prosecution, language is actionable *per se* which imputes to one in any such trade or profession a want of credit or responsibility or insolvency past, present or future. Language concerning one in his trade or profession to be actionable *per se* must impute to him fraud, want of integrity or misconduct in the line of his business or profession whereby he gains his bread. Every publication of language concerning a man or his affairs, which, as a necessary or natural proximate consequence, occasions pecuniary loss, is *prima facie* a libel if the publication be by writing.

The statute of this state (section 1591, Revised Statutes) declares: "A libel is the malicious defamation of a person made public by any printing, writing, sign, picture, representation or effigy tending to provoke him to wrath or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse, or any malicious defamation made public as aforesaid, designed to blacken or vilify the memory of one who is dead and tending to scandalize or provoke his surviving relations and friends." Similar definitions to that given in the

statute just referred are to be found among the cases which have been adjudged in the appellate courts of this state. *Nelson v. Margrave*, 10 Mo. 648; *Price v. Whitely*, 50 Mo. 439; *Legg v. Dunlevy*, 80 Mo. 563; *Hermann v. Bradstreet Co.*, 19 Mo. App. 227. In some of these cases the definition there given of libel is broader and more comprehensive than that given in the statute? As already intimated we think the publication contains no statement that is libelous *per se*. The words of the publication, though they relate to the plaintiffs in their business capacity, do not on their face bear any injurious meaning. Interpreting the words of the publication as therein collocated according to their usual and ordinary meaning, and it is quite clear that they do not fall within the definition of libel as declared in the statute and adjudicated cases of this state.

If the publication is a libel on the plaintiffs in their business, it must be so on account of some extrinsic fact alleged in the petition. The universal rule is that, if the words are not libelous *per se*, the petition must by preliminary averments show extrinsic facts from which the libel results. *Pollard v. Lyon*, 91 U. S. 225; *Legg v. Dunlevy*, *supra*; *McManus v. Jackson*, 28 Mo. 58; *Salvatelli v. Ghio*, 9 Mo. App. 155. The nature of the present action is that of special damages actually sustained in consequence of words written and published by defendant, and, unless such damage is the natural and probable consequences of those words and of that publication, the defendant cannot be held liable. And the special damage will not help plaintiffs if the words are not defamatory. *Legg v. Dunlevy*, 10 Mo. App. 461; *Young v. McCrea*, 3 Best & S. 264.

The plaintiffs contend that the averment in the petition of these extrinsic facts, viz.: *First.* "General loss of customers. *Second.* Many people were prevented from transacting business with the bank, and *third*, their reduced commercial and financial standing,"

renders the publication libelous. Were these injuries to plaintiffs in their special quality as bankers the natural and probable consequences of the words of the publication? The demurrer admits that the publication was untrue. Now, if it was untrue that the defendant was a member of said banking firm, as stated in the publication, then the declaring of the dissolution of the firm was a vain act—was nothing. And it must inevitably further follow that if the defendant was not a member of the plaintiffs' firm that it was no more authorized after than before said publication to transact any business to bind him. It is quite difficult to perceive how the extrinsic facts alleged in the petition in respect to said publication show that the damages therein specially stated could naturally and probably result from the publication. It is incomprehensible how a banking firm could lose depositors or the confidence of its correspondent banks or the banking business of the public generally because some reputable or disreputable person had falsely published a notice that his partnership relations with it have terminated and that it was no longer authorized to transact business as far as he is concerned, or how such injuries would naturally and probably result from such publication.

On the other hand if, as is conceded, it was untrue that defendant had dissolved his partnership relations with plaintiffs, and that it was untrue that they, in their partnership capacity, were no longer authorized to transact a banking business in the name of said firm so as to bind defendant, then this action is by several partners against a single one for damages in an action at law which cannot be maintained. *Bank v. Beans*, 55 Mo. 524; *Scott v. Caruth*, 50 Mo. 120; *Fuert v. Brown*, 23 Mo. App. 332. Damages would not be recoverable in such case even in a proceeding in equity. *Gaty v. Tyler*, 33 Mo. App. 494; *Fletcher v. Reed*, 121 Mass. 312. If the publication related to the firm and the defendant

was a member of it, then we have the singular spectacle of ten members of a partnership suing the eleventh member for damages resulting from the wrongful conduct of the latter in respect to the partnership. This is the *reductio ad absurdum* of the argument on this line. The withdrawal of a partner from any business firm might very naturally and probably subject it to serious loss and yet no damages could ordinarily be recovered therefor, and if none could be recovered for the act it must needs follow that none could be recovered for making it effectual by giving notice of it to the world. It would be his duty to give the notice in such case. *Dowzelot v. Rawlings*, 58 Mo. 75; *Pope & West v. Risley*, 23 Mo. 185.

We are unable to discover any charge in the publication or in the extrinsic facts alleged in respect thereto, which constitutes a cause of action. The judgment of the circuit court will be affirmed.

---

41 254
50 524
41 254
58 501
60 320
41 254
76 91
80 432
41 254
88 459

ARMSTRONG, GILBERT & Co., Appellants, v. THE JOHNSON TOBACCO COMPANY, Respondent.

Kansas City Court of Appeals, May 12, 1890.

1. **Sales: IMPLIED WARRANTY OF FITNESS: SECOND ORDER.** When a dealer contracts to supply an article in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment of the dealer, there is an implied warranty that it shall be reasonably fit for the purpose to which it is to be applied, and the fact that the purchaser did not examine the first order within a reasonable time after its receipt, and paid for the same before discovering that it was bottlers' foil, instead of tobacco foil, and unfit for wrapping tobacco, and so retained it, does not bind the purchaser to accept and pay for a second order made before the discovery.

2. ——— : ——— : RESCISSION : PURCHASER'S LIABILITY : CONSIDERATION. Where the purchaser retains the article bought, though wholly worthless for the purpose for which purchased, yet valuable for other purposes (as bottlers' foil having a commercial value), and does not within a reasonable time offer to return it, he cannot plead a total failure of consideration, when sued for the purchase price, and such unfitness can defeat the recovery of the entire purchase price only to the extent of the difference between the value of the article had it been fit for the purpose for which it was purchased, and its value for any purpose.

Appeal from the Livingston Circuit Court. — HON. J. M. DAVIS, Judge.

REVERSED AND REMANDED.

Frank Sheetz, for appellants.

(1) Evidence as to quality of shipment of two hundred pounds was inadmissible. This shipment was paid for, and used, by defendant. The contract was in writing, and contains no warranty, and the goods were the very goods ordered by defendant. *Wallace v. Blake*, 2 New York Sup. 403; *Iron Co. v. Pope*, 15 N. E. Rep. 335; *Bottle Co. v. Gunther*, 31 Fed. Rep. 208; *Glassworks Co. v. Coal Co.*, 5 Atl. Rep. 253. (2) Instructions 1, 2 and 4, on behalf of plaintiffs, should have been given. A certain article was ordered for no particular purpose, and furnished. Defendant got what it bargained for, relying on its own judgment, and there was no fraud or warranty on part of plaintiffs, and they complied strictly with the terms of the written contract. Benjamin on Sales [4 Am. Ed.] secs. 986 and 987, and cases cited in note; *Wallace v. Blake, supra; Bottle Co. v. Gunther, supra; Glassworks Co. v. Coal Co., supra; Gerst v. Jones*, 34 Am. Rep. 773. (3) The instructions 2 and 4, as modified by the court, are not the law, and have no evidence to support them. *Bottle Co. v. Gunther, supra; Glassworks Co.*

v. Coal Co., *supra*. (4) Defendant cannot rescind contract without examination of goods; and, if goods are what he intended to buy, there is no failure of consideration. Benjamin on Sales [4 Am. Ed.] sec. 620, p. 542.

B. B. Gill, for respondent.

The appellants knowing for what use the goods were designed at the time they received the order, it was obligatory on their part to furnish goods suitable for the use intended, and having failed to do so the defendant was not bound to receive and pay for them. The defendant, having shown that the goods were worthless for the use intended, proved an entire failure of consideration, and it was not bound to notify the plaintiffs of the worthlessness or to return the goods. *Compton v. Parsons*, 76 Mo. 455; *Murphy v. Gray*, 37 Mo. 535; *Kerr v. Haymaker*, 20 Mo. App. 350; *Barr v. Baker*, 9 Mo. 850; 2 Addison on Contracts [Morgan's Ed.] sec. 618; Hilliard on Sales [2 Ed.] ch. 28, sec. 4, p. 254.

SMITH, P. J.—Plaintiffs, who were dealers in cork and brewers' supplies, brought suit against defendant, a business corporation engaged in the manufacture of tobacco, before a justice of the peace, to recover one hundred and five dollars for three hundred pounds of number 3 tin foil twelve by twelve, at thirty-five cents, sold and delivered defendant by plaintiffs. The case was appealed to the circuit court of Livingston county, where there was a trial, and the facts disclosed by the evidence in the record before us seem to be that defendant ordered its commission merchant, White, to purchase some tin foil to be used by it in its business of manufacturing tobacco. There was considerable written correspondence between White and defendant, and between plaintiffs and defendant, introduced in evidence, but the first letter written by defendant to White, and the reply thereto, though referred to in one of the

letters of the defendant to White, was not offered in evidence for some reason. The letters written to White by defendant show upon their face the business defendant was engaged in, and these letters were exhibited to plaintiffs when White ordered the tin foil for the defendant. Besides, one of the last letters of the plaintiffs to the defendant conclusively shows that the plaintiffs knew that defendant was a manufacturer of tobacco and that the foil was being purchased for use in that business. In the letter of defendant to White, of March 26, 1888, it is written:

"Your postal at hand. The size you name, twelve by thirty-six, is a new one to us. * * * Now, suppose you ship on for us one hundred to two hundred pounds of twelve by thirty-six inches. * * * We will try it any way."

White thereupon ordered the plaintiff to fill this order. They only had fifty pounds of the foil on hand. The defendant, being informed of this fact, directed White, by a subsequent letter, to ship the fifty pounds and "to order two hundred pounds, thirty-four sheets to the pound, thirty-five cents." The fifty pounds shipped were received and proved satisfactory. On April 18, 1888, the defendant wrote White, "What about the two hundred pounds of tin foil we ordered at the same time you had fifty pounds, twelve by thirty-six, shipped us? As yet we have no invoice, and are about out. You wrote us you had ordered two hundred pounds twelve by twelve, and if it is coming we want to know it. And you may order three hundred pounds more to follow." These orders were placed with the plaintiffs by White, who, not having on hand the foil of the description therein mentioned, ordered the same to be shipped defendant by an eastern manufacturer. It does not appear that the manufacturer was notified by the plaintiffs of the use for which the foil was intended The two hundred pounds were received by

the defendant and were found out, before the three hundred pounds arrived, to be wholly unfit for the use for which it had been ordered. It was *bottlers' foil* and could not be used to wrap plug tobacco, for the reason that it would adhere thereto. It could not be used by the defendant. The defendant on ascertaining this fact declined to pay for the three hundred pounds last ordered. The two hundred pounds had been paid for before defendant had examined it and ascertained it to be bottlers' foil and unfit for its use. The three hundred pounds of foil were shipped to defendant from Philadelphia, on April 26, 1888, but did not reach Chillicothe, the residence of defendant, until several days later. On the third day of May, 1888, and before the defendant was notified by the carrier of the arrival of the foil, he wired the plaintiffs to cancel the order therefor. There was some correspondence between the parties looking to an adjustment of the difference thus arising, but it is unnecessary to set forth the same here. The defendant had judgment, and the plaintiffs appeal.

I. The principle is elemental that, when a dealer contracts to supply an article in which he deals, to be applied to a particular purpose so that the buyer necessarily trusts to the judgment of the dealer, there is, in that case, an implied term of warranty, that it shall be reasonably fit for the purpose to which it is to be applied. In such case the buyer trusts to the dealer and relies upon his judgment. Benj. on Sales, secs. 987, 988; *Oshkosh P. & P. Co. v. Ins. Co.*, 31 Fed. Rep. 200; *Brown v. Edgington*, 2 Man & G. 279; *Dutton v. Gorrish*, 9 Cush. 89. We see no reason why this just principle is not applicable to this case. The defendant directed its commission merchant, White, to purchase tin foil to be used in its business of manufacturing tobacco. It does not appear that it then had any business or other acquaintance with plaintiffs. The first letter of defendant to White, which is referred to, but does not, as has been already stated, appear in the evidence,

requesting him to purchase the foil for him, was no doubt seen by plaintiffs, because it was testified by one of the plaintiffs, that his firm always required a commission merchant, desiring to place an order with it to be filled, to exhibit the original order of his customer. This fact, with other facts, appearing in the written correspondence we have referred to, authorizes the inference that the plaintiffs knew the purpose for which the defendant desired to use the foil it wanted to buy. The defendant trusted to the plaintiffs' judgment, that the foil, which it contracted for, would be reasonably fit for the purpose to which it was to be applied. The implied obligation which was imposed upon plaintiffs, under their contract to fill the defendant's order with tin foil reasonably fit for their business, was not met by shipping to it bottlers' foil. The sheets of tin foil sent the defendant may have been of the thickness, size and price ordered, and yet, if it was bottlers' foil, and was not reasonably fit for the purpose it was purchased, he was not bound to retain and pay for it. If the defendant did not examine the two hundred pounds of foil within a reasonable time after the receipt thereof, and paid for the same before it made the discovery that it was bottlers' foil, and unfit for use in wrapping tobacco, and so retained it, this, we think, ought not to bind him to accept and pay for the three hundred pounds last ordered. It follows, from these considerations, that the second instruction asked by plaintiffs and modified by the court, and which was not in harmony with these views, was erroneous. Besides, the evidence is insufficient to sustain the theory of this instruction.

II. While the defendant was not bound to accept the three hundred pounds of bottlers' foil, still, if he kept it, and did not return, or offer to return it, within a reasonable time after he discovered its worthlessness, he could not plead a total failure of consideration when sued for the contract price, unless it was totally valueless for every other purpose. *Brown v. Weldon*, 99 Mo.

564; *Keystone Iron Co. v. Leonard*, decided by us at the present term. It may have been wholly worthless for the purpose for which it was purchased, and yet be of value for other purposes. That it had a commercial value, the written correspondence already referred to quite conclusively shows. The foil was delivered and the title vested in the defendant. It was by the judgment of the circuit court permitted to retain the foil and yet excused from making payment for it. This is not the law. The fourth instruction asked by the plaintiffs, as modified by the court, declared *that if the foil was of no value for the uses for which it was purchased by defendant*, then it was not liable. This was an erroneous theory. These suppletive words should have been added to those just *italicized*, in order to make the instruction complete, viz.: "*And that if it was of no value for any other purpose.*" If the foil was valueable for any other purpose, and the defendant did not offer to return it, but retained it, the plea of failure of consideration ought not to avail him, to defeat the recovery for the entire purchase price, but only to the extent of the difference between the value of the foil had it been reasonably fit for the purpose for which it was purchased, and its value for any purpose. It follows that the judgment must be reversed, and cause remanded to be proceeded with in conformity to the views of the law herein expressed. All concur.

---

41 260
f 156a 386

DUDLEY BAKER, Respondent, v. THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, May 12, 1890.

1. **Railroads: FENCING TRACK: TRESPASSING CATTLE.** The statute in relation to fencing railroads requires not only that animals shall be fenced off the track, but also that they may be prevented from trespassing by passing over or under the track, and a railway

company will be liable where cattle may pass through space under a bridge on either side of a branch, which might properly have been fenced without injury or obstruction to the stream, and they do pass under the bridge onto a meadow and do injury thereto.

2. ——: ——: OWNER OF CATTLE AND LAND. Whether the owner of the land on both sides of an unfenced railroad, who knowingly turns his cattle on the pasture side, can recover for the inevitable injury to his crop on the other side, is not raised in this case.

Appeal from the Livingston Circuit Court.—HON. J. M. DAVIS, Judge.

AFFIRMED.

E. J. Broaddus, for appellant.

(1) The appellant was not required to fence the stream in question. R. S. 1889, sec. 2543, p. 639. (2) Section 2611, page 659, Revised Statutes of Missouri, 1889, does not require the right of way to be fenced, but the "railroad." "It is not the right of way which the law requires to be fenced, but its road." See opinion of Judge SMITH in *Emerson v. Railroad*, 35 Mo. App. 627. (3) The statute is penal and must be strictly construed. See *Revelle v. Railroad*, 74 Mo. 438.

R. A. DeBolt, for respondent.

(1) Railroad corporations are required to fence their tracks for two purposes: One to prevent stock from "getting" on the track, the other to prevent stock from trespassing upon the crops in adjoining fields, and double damages are given to the owners of the fields suffering from trespass of stock by reason of any failure to fence the road. *Silver v. Railroad*, 78 Mo. 528, 532, 533, 534. These authorities also require the road to be fenced for the security of the traveling public. (2) Belshe's cattle being in the pasture of respondent by his consent and express agreement, appellant is liable

for all damages done by those cattle passing over the right of way into the meadow and destroying the grass. *Harrinton v. Railroad*, 71 Mo. 385; *Berry v. Railroad*, 65 Mo. 175; *Smith v. Railroad*, 25 Mo. App. 115; *Ferris v. Railroad*, 30 Mo. App. 124. Also see the evidence of Dudley Baker, the respondent, on page 6 of appellant's brief.

ELLISON, J.—This action is for double damages and arises under section 809, Revised Statutes, 1879. The defendant's road passes through plaintiff's field. He has a pasture on one side and a meadow on the other. A stream called Black Oak branch runs through the land and is crossed by the railroad in his field. The right of way is fenced up to the ends of the bridge over the branch; the bridge being about one hundred and fifty feet long. Cattle passed from the pasture under the bridge onto the meadow and did the injury complained of.

I. Without going into the question whether the railway company was liable to an action for damages resulting from not fencing across the channel of the stream proper, which was only from ten to fifteen feet wide, and leaving that out of consideration, it yet appears from the testimony that there was space under the bridge, on either side of the branch, which might properly have been fenced without injury or obstruction to the stream. We do not agree to the proposition that a railroad company need only erect such fences as will keep animals *off of the track*. If such was the law, the depressions to be found in all level fields and over which the railroad builds bridges or trestle work need not be fenced. The true interpretation of the statute is that it requires not only that animals shall be fenced off the track, but also that they may be prevented from trespassing by passing over or under the track, where it may be fenced.

II. The question whether where the plaintiff owns the land on both sides of an unfenced railroad, one side being cultivated and the other pasture, can knowingly turn his cattle in on the pasture side, and recover for the inevitable injury to his crop, was not raised. The judgment is affirmed. All concur.

JAMES MCCORMICK, Defendant in Error, v. WILSON KAYE *et al.*, Plaintiffs in Error.

41 263
55 138

Kansas City Court of Appeals, May 12, 1890.

1. **Trespass**: PENALTY: LIMITATION: COMMON LAW. An action for treble or double damages under the Missouri trespass statute is an action for a penalty, and the three years' statute of limitation is a good bar to such action; and plaintiff, having framed his action for a penalty on the statute, will not be permitted at the trial, with a view to avoid such bar, to recover as for a common-law trespass.

2. ——: TEST OF CONSISTENT DEFENSES. The defenses of a general denial, a justification and limitation are not so inconsistent that the proof of one necessarily disproves the other, which is the test of inconsistent defenses.

Error to the Carroll Circuit Court.—HON. J. M. DAVIS, Judge.

REVERSED.

Huston & Parrish, for plaintiffs in error.

(1) The petition contains two counts. The first is aptly framed under section 3921, Revised Statutes, 1879, page 669. The second under the next section, section 3922, Revised Statutes, 1879, page 669. Both are penal,

and a right of action thereon is barred in three years. *Holliday v. Jackson*, 21 Mo. App. 660; *Young v. Railroad*, 33 Mo. App. 509; *Barnett v. Railroad*, 68 Mo. 58; *Cummings v. Railroad*, 70 Mo. 570; *Revelle v. Railroad*, 74 Mo. 438; *Goodridge v. Railroad*, 35 Fed. Rep. 35; R. S. 1879, sec. 3231, p. 547; sec. 1710, p. 291; secs. 3923–3926. It is an action for a penalty, or the very statute on which the action is founded is unconstitutional. *Cummings Case, supra; Barnett Case, supra.* If it is not a penalty it is imprisonment for debt. R. S., sec. 3926, p. 670; Const. of Mo., sec. 16, art. 2. (2) The lower court erred in holding, as it did, that the causes of action set out in the petition were governed by the five years' limitation provided in the statute for the ordinary action of trespass on real estate. We have in this state this statutory trespass and the common-law trespass, *quare clausum fregit. Tackett v. Hausman*, 19 Mo. 525; *Hewitt v. Harvey*, 46 Mo. 368; *Railroad v. Freeman*, 61 Mo. 80; *Holliday v. Jackson*, 21 Mo. App. 660; Const. of Mo., sec. 16, art. 2. The statute of five years applies to the common-law action, but the three years' statute to an action under the statute. (3) The lower court erred in overruling appellant's objection to the introduction of any testimony under the pleadings. On the face of the petition it appeared that more than three years had elapsed from the alleged injuries to the time of bringing suit. The defendants plead the statute of three years. This was equivalent to a demurrer specifying the three years' limitation as a cause therefor. The date stated in the petition was October 18 and 20, 1882. Suit brought in February, 1887, more than four years after. *Henock v. Cheny*, 61 Mo. 129. (4) The lower court erred in refusing instructions of plaintiffs in error in the nature of demurrer to the evidence at the close of plaintiffs' case. The petition charged the facts to have been done more than four years before suit was brought, and plaintiffs' evidence all placed the last

alleged wrongful act on October 20, 1882, more than four years before suit. *Young v. Railroad*, 33 Mo. App. 509; *Holliday v. Jackson*, 21 Mo. App. 660; *Revelle v. Railroad*, 74 Mo. 438.

A. W. Mullins, for defendant in error.

(1) The plea of the statute of limitations to a petition charging a trespass upon real estate is, necessarily, a plea of confession and avoidance, and, if the statute be not so pleaded, the plea will be disregarded. 1 Chitty on Pleading [13 Am. Ed.] p. 506; 3 Chitty on Pleading [13 Am. Ed.] p. 1067; *Bauer v. Wagner*, 39 Mo. 385; *Nelson v. Brodhack*, 44 Mo. 596. (2) In this case, however, the attempted plea of the statute of limitations constitutes no defense and was misconceived. This is "an action for trespass on real estate" (R. S. 1889, sec. 6775; R. S. 1879, sec. 3230), and, therefore, the limitation applicable to it is five years, and not three years as contended by counsel for the defendants. "It seems that the short statute of limitations above referred to is intended only to embrace penalties and forfeitures, properly so called, and other causes of action penal in their nature, and where both the cause of action and the remedy are given by statute; but does not extend to cases where the action is partly given by the common law and partly by statute." *Corning v. McCullough*, 1 Com. (N. Y.) 47; Sedgwick on Stat. and Con. Law, pp. 107-8; *Shrewsbury v. Bawtlitz*, 57 Mo. 414; *Combs v. Smith*, 78 Mo. 32; *James v. City of Kansas*, 83 Mo. 567. (3) Although relief is asked in plaintiff's petition under the statute relating to trespass, yet the facts stated in the petition, and in each count thereof, set forth a good cause of action at common law; and some matters are charged and for which redress is sought that are not embraced within the statute referred to, and, therefore, in such case only actual

damages may be recovered, or, when the evidence justifies it, exemplary damages may be added thereto. *Shrewsbury v. Bawtlitz*, 57 Mo. 414, and cases cited; *Parker v. Shackelford*, 61 Mo. 68; 1 Sedgwick on Damages [7 Ed.] pp. 272-3, note *a*; *Barnes v. Jones*, 51 Cal. 303.

Huston & Parrish, for plaintiffs in error in reply.

(1) The point that the statute of limitations is not well pleaded is not well taken for several reasons. *May v. Buck*, 80 Mo. 675; *Rine v. Montgomery*, 50 Mo. 566; *Schafer v. Causey*, 8 Mo. App. 142; s. c., affirmed, 76 Mo. 365. (2) The proposition that though the petition is founded on the statute, yet a recovery as for a common-law trespass can be had, is utterly opposed to repeated decisions of our courts, and to the science and logic of pleading. The plea is addressed to the issuable facts stated in the petition. *Young Case*, 33 Mo. App. 518-19.

GILL, J.—The petition in this case contains two counts, one under section 3921, Revised Statutes, 1879, demanding treble damages, the other under section 3923, Revised Statutes, 1879, page 669, demanding double damages. The time laid in the petition when the wrongful acts were done was the eighteenth and twentieth of October, 1882. The same acts—the removal of the fence—constitute the cause of action in both counts. Suit was commenced in February, 1887. The answer was a general denial—a plea of justification, that the *locus in quo* was a public road, and that Charles Johnson, road overseer, required the other defendants to assist in removing obstructions, and that what was done was in the discharge of his duty as such road overseer, *third*, a plea of the statute of limitations of three years. To this answer a general denial was filed.

On the trial defendants objected to the introduction of any testimony, upon the ground that the statute of limitations was pleaded, and that upon the face of the petition such plea was confessed; that it showed on its face that the several causes of action therein set forth were all barred, and that the petition did not state facts sufficient to constitute any cause of action. This objection was overruled and defendants excepted. The plaintiff then proceeded with his testimony tending to sustain the allegations of the petition, and to prove that whatever was done by defendants was done on the eighteenth and twentieth of October, 1882, and that since that time they have not in any way interfered with or taken down his fences, and it was admitted that this suit was not commenced until February, 1887. The defendants then asked the court to give to the jury the instructions found in the printed record in the nature of a demurrer to the evidence, on the ground that the petition and all the evidence showed that the acts complained of were done more than three years next before the commencement of this suit. These instructions the court refused to give, and defendants excepted. Defendants did not offer any evidence.

Upon instructions given by the court at the instance of the plaintiff the cause was submitted to the jury, and a verdict was rendered for plaintiff on both counts of the petition,—on the first count in the sum of one hundred and twenty-five dollars, and on the second count for three hundred dollars. But it seems the court did not enter judgment for treble the damages found on the first count, and double the damages found on the second count, as the statute authorizes in such actions, and only gave judgment for single damages on both counts. Defendants have brought the case here by writ of error.

I. It requires but few words to dispose of this case. The first count is based clearly and specifically

upon section 3921, Revised Statutes, 1879, and asks judgment against defendants in treble the damages committed by tearing down and destroying a quantity of plank fence and some hedge fencing belonging to the plaintiff. The second count quite as definitely charges damages under section 3922, wherein defendants, for the same act of tearing down said fences and letting cattle onto plaintiff's premises to the destruction of his crop, are charged in double damages as provided in said section 3922. The two counts are framed clearly and avowedly on these two sections—alleging, as near as may be, the very language of the statute, and referring in express words to such sections as legal grounds for relief. The action, then, being upon a statute for a penalty where the right of action is given to the party aggrieved, was barred by the statute of limitations three years after the action accrued. R. S. 1879, sec. 3231; *Holliday v. Jackson*, 21 Mo. App. 660; *Young v. Railroad*, 33 Mo. App. 509, and other cases cited in brief for appellants. The petition and evidence, *all*, show that the matters complained of by the plaintiff occurred more than three years before this suit was commenced, and hence the action was barred, and the court should have instructed the jury to find for defendants. This being, in form and substance, an action for a penalty on the statute, the plaintiff will not be permitted at the trial—with the view of avoiding the limitation of three years applicable to such an action—to recover as for a common-law trespass, which may not be barred. Plaintiff has chosen his ground of action, and invited defendants to meet him thereon, and he cannot avoid the result of his own choosing. *Young v. Railroad*, 33 Mo. App. 518.

II. Defendants by their answer, containing a general denial, a justification and limitation of three years, have not deprived themselves of the right to invoke the said statute of limitations, as claimed by plaintiff's

counsel. These several defenses are not so inconsistent that the proof of the one necessarily disproves the other. This, as repeatedly held in this state, is the test of inconsistent defences. *Nelson v. Brodhack*, 44 Mo. 596; *Cohn v. Lehman*, 93 Mo. 583 and cases cited. It results from the foregoing considerations that the judgment of the circuit court should be reversed, and it is so ordered. All concur.

---

41 269
91 584

T. W. ENOS *et al.*, Respondents, v. ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, May 12, 1890.

1. **Costs**: OFFER TO HAVE JUDGMENT ENTERED: PROOF OF SERVICE: PAROL EVIDENCE. To justify an order of the court taxing costs against a successful plaintiff on the ground that defendant had offered in writing to let judgment go for a greater amount than that recovered on the trial, it must be shown that such offer was made in writing, and that such written offer was served on plaintiff must be shown to the satisfaction of the court, just as any other fact is proved, and an affidavit of the service of such notice is not conclusive, and oral evidence is admissible to contradict such affidavit.

2. ———: ———: SERVICE ON ALL THE PLAINTIFFS. The service of such written notice to let judgment go, is a condition precedent to defendant's right to have the costs taxed against the plaintiff, and, where there are several plaintiffs, the service must be on all of them, and service on one will not justify the order.

3. ———: ———: ATTORNEY AND CLIENT. The fact that plaintiffs' attorney well knew of such offer of compromise has nothing to do with the merits of the controversy; and even service on the attorney would be nugatory.

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

AFFIRMED.

E. D. Kenna and *Adiel Sherwood*, for appellant.

(1) The proof of service upon the notice is conclusive, and cannot be contradicted by oral evidence. It occupies exactly the same position as a return upon a subpœna or summons. R. S. 1889, sec. 8938; R. S. 1889, sec. 2019; *Phillips v. Evans*, 62 Mo. 17; *Putnam v. Man*, 3 Wend. 202; *Wheeler v. Lampman*, 14 Johns. 481; *Hallowell v. Page*, 24 Mo. 590; 2 Salk. 601; *Stewart v. Stringer*, 41 Mo. 400; *Delinger v. Higgins*, 26 Mo. 180. The only exception to this salutary rule is where the facts constituting lawful service do not appear with all reasonable certainty, then the return is only *prima facie* correct, and may be impeached by competent proof. *Heath v. Railroad*, 83 Mo. 617. (2) Conceding, for the sake of argument, that the return of service of the notice is not conclusive, and could be contradicted by oral evidence, still the service was sufficient within the terms of section 2191, Revised Statutes, 1889; for all the evidence showed that the notice was served. *Smith v. Ponath*, 17 Mo. App. 262; R. S. 1889, sec. 2036; *Masterson v. Homberg*, 29 Kan. 106. (3) The motion to tax against plaintiffs costs which accrued after the date of the service of the notice by defendant is the proper motion in this behalf. In fact, there is no other way to obtain the benefits of the statute. Service upon an attorney has been held sufficient; why is it not good served upon the party himself? R. S. 1889, sec. 2191; *Mann v. Warner*, 22 Mo. App. *loc. cit.* 579 and 581; *Railroad v. Beebe*, 38 Kan. *loc. cit.* 429; *Clippenger v. Ingram*, 17 Kan. *loc. cit.* 588; *Masterson v. Homberg*, 29 Kan. *loc. cit.* 107; *Vose v. McGuire*, 26 Mo. App. 452; *Spaulding v. Warner*, 57 Vt. 654. (4) The question of actual notice is a question of fact, and it is to be determined like any other fact. The plaintiffs knew of the offer to let judgment go. Whether served or not, as the statute requires, defendant is entitled to its costs after the

time they knew of the offer. *Muldrow v. Robinson*, 58 Mo. 331; *Eyerman v. Bank*, 13 Mo. App. 289; *Masterson v. Homberg*, 29 Kan. *loc. cit.* 107. (5) Service upon one of the owners of the hay was service upon the other. (6) Plaintiff failed to accept the offer made by defendant, insisted on trial and recovered a less sum than the amount tendered. They must pay the costs since the tender was made. *The Rossend Castle*, 30 Fed. Rep. 462; *Railroad v. Beebe*, 38 Kan. 427; *Masterson v. Homberg*, 29 Kan. 106.

McReynolds & Halliburton, for respondents.

(1) The notice read in evidence by appellant is not such a one as respondents were bound to take notice of, as it was not entitled in the case T. W. Enos and H. W. Enos, plaintiffs, *v.* Railroad, defendant. *Towner v. Remick*, 19 Mo. App. 209. (2) The affidavit on said notice, made by Wm. Bartlett, does not show any service of said notice upon respondents, especially when taken in connection with his oral testimony. (3) The evidence shows that there was no service or attempted service of said notice upon respondent, H. W. Enos, and the service was not good to bind both or either. R. S. 1889, sec. 2191; *Corneli v. Partridge*, 3 Mo. App. 575; *Ryan v. Kelley*, 9 Mo. App. 396; *Towner v. Remick*, 19 Mo. App. 209. (4) The evidence of Wm. Bartlett, who attempted to serve the notice upon the respondents, is that he did not know either of them and that he served the notice by reading and attempting to leave a copy with persons who said their names were T. W. Enos and H. W. Enos. (5) If notice was served on T. W. Enos it would not be service on, or notice to, H. W. Enos. See *Corneli v. Partridge*, *supra*; *Ryan v. Kelley*, *supra*; *Towner v. Remick*, *supra*.

GILL, J.—The defendant has appealed from the decision of the circuit court on a motion to tax all costs made in the action after June 10, 1889, for the alleged

reason that on that day (and during the pendency of the action) defendant had offered to have judgment entered against it in the sum of ninety dollars, whereas on a trial subsequently had plaintiffs secured a judgment for sixty-five dollars only. On a trial of the motion an issue of fact was raised and tried, as to whether or not the offer was made as the statute required. The circuit court found this issue in the negative and denied the motion.

I. The motion is based on section 3658, Revised Statutes, 1879, which reads as follows: "The defendant in any action may, at any time before trial or judgment, serve upon the plaintiff an offer, in writing, to allow judgment to be taken against him for the sum or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof, within ten days, he may file the offer, and an affidavit of notice of acceptance, and judgment shall be entered accordingly. If the notice of acceptance be not given the offer shall be deemed withdrawn, and shall not be given in evidence or commented on before a jury; and if the plaintiff fail to obtain a more favorable judgment he shall pay the defendant's costs from the time of the offer. Defendant, to prove the offer in this section provided, introduced the affidavit of one Bartlett, which stated that he served the written offer on each of the plaintiffs, T. W. Enos and H. W. Enos, by reading and tendering a true copy thereof to each of said plaintiffs, they refusing to accept the same. Thereupon plaintiffs proposed by oral evidence to contradict such service of a written offer, and defendant objected, taking the ground that the affidavit of service was conclusive against the plaintiffs and could not be contradicted. The court overruled the objection, and the action of the court is assigned for error.

We have been unable to discover any rule of law, statutory or otherwise, tending, in the remotest degree,

to sustain defendant's counsel in this contention. Section 8938, Revised Statutes, 1889, cited by counsel, relates to service of *subpoenas*, and not offers of compromise, and even there the return of an *officer*, only, is made conclusive, and the affidavit of service by a private person in such case is only made *evidence* tending to show service. And the cases cited are equally foreign to the point here. For example the case of *Hallowell v. Page*, 24 Mo. 590, decides simply that a *sheriff's* return of process, regular on its face, is conclusive upon the parties to the suit, the truth of which can only be controverted in an action against the sheriff for a false return. In the case at bar, to justify the order of the court in taxing costs against the plaintiffs, it must be shown that defendant made the offer in writing to let judgment go; and that this written offer was served on the plaintiffs must be shown to the satisfaction of the court, just as any other fact is proved. Were it otherwise, and plaintiffs were concluded by such affidavits, grievous outrages might thereby be done through the instrumentality of reckless affidavits from irresponsible and corruptly inclined third parties. The matter is quite different where the litigant, in case of alleged service by an officer, may have recourse on the official bond.

II. The plaintiffs, T. W. Enos and H. W. Enos, are father and son, and as coplaintiffs were jointly interested in prosecuting this action against the defendant. The evidence was quite conclusive that on June 10, 1889, the elder Enos had read to him the offer of compromise, while as to the service on the junior Enos the testimony was conflicting, so much so indeed that the court was justified in finding either way. We defer then to the court's finding, and concede as to one of the plaintiffs (H. W. Enos) no offer in writing to permit judgment to go against defendant was served.

Defendant's counsel insists, however, that service on the one was good as to both. We cannot accede to this contention. It was clearly the intention of the legislature, as we think, to require this offer of compromise to be served on all the plaintiffs, before visiting upon them the penalties of the foregoing statute. Where the singular appears the *plural* number should be understood. Hence the statute in this case must read: "The defendant in any action may, at any time before trial or judgment, serve upon the *plaintiffs* an offer in writing," etc. The service of this written offer of judgment is a condition precedent to defendant's right to have his costs taxed against the plaintiffs. *Towner v. Remick*, 19 Mo. App. 205. Where there are several plaintiffs the service of the writing must be on all such, before defendant can rightly claim a judgment so unusual, to-wit, that, while defeated in the action, defendant may yet require the successful plaintiffs to pay the costs of his own making.

III. The same answer applies to the claim that because plaintiffs' attorney, acting for them in the cause, well knew of such offer to compromise, and the same was not accepted, plaintiffs are to be charged with these costs. The attorney's knowledge of such offer has nothing to do with the merits of this controversy: *First.* Because the statute authorizes such costs to be taxed against the plaintiffs, only after an offer *in writing served on the plaintiffs*—not on *plaintiffs* or *their agent* or attorney. And, again, service even of the writing on the attorney would be nugatory, since the statute contemplates that the party receiving the offer in writing *may accept* the same, and by producing it in court have judgment entered thereon. An attorney, as such, in the conduct of a case for his client, is not authorized to compromise his client's claim. *Davis v. Hall*, 90 Mo. 665, and cases there cited. Judgment affirmed. All concur.

WILLARD S. PAUL, Appellant, v. E. S. SMITH, Respondent.

Kansas City Court of Appeals, May 12, 1890.

1. **Infancy**: CONTRACTS FOR NECESSARIES: PARENT AND CHILD. Contracts of infants for necessaries are neither void or voidable; and by both the common and civil law parents are bound to maintain their children, but, if the authority of the parent is abjured without any necessity occasioned by the parent, all obligation to provide for the infant is at an end, and the infant himself is chargeable for necessaries for his support; and each case is governed more or less by its own peculiar circumstances. 41 275; 56 120; 41 275; 181 606

2. ———: NECESSARIES: DEFINITIONS: CONTRACT. Necessaries not only comprehend the infant's necessary meat, drink, apparel, physic and education, but is a relative term to be construed with reference to infant's age, state and degree; and in all cases there must be a personal advantage from the contract derived to the infant himself.

3. ———: WAGON NOT A NECESSARY: RETAINED AFTER MAJORITY. The defendant in the fall while living with his father, and within four months of his majority, bought of plaintiff a wagon for seventy dollars, and gave his note therefor, payable one year after date, secured by a mortgage on the wagon. During the fall he rented a farm and did some work thereon, and in the next spring married a wife, put in and cultivated a crop on the rented farm, using the wagon until the maturity of the note, when, on account of default in payment, plaintiff took possession of and sold the wagon for thirty-seven and one-half dollars. He afterwards brought this suit for the balance due on the note. *Held*, on defendant's plea of infancy,

   (1) That he cannot be held liable upon theory that the wagon was a necessary within the meaning the law has affixed to that term, when employed in connection with the contracts of infants.

   (2) Nor on the ground that he retained and used the wagon after his majority.

4. ———: RATIFICATION. The record in this case discloses no such evidence of ratification as the statute requires.

Paul v. Smith.

Appeal from the Jasper Circuit Court.—Hon. M. G. McGregor, Judge.

Affirmed.

C. H. Montgomery, for appellant.

(1) The court erred in refusing to give instruction number 1, asked on behalf of plaintiff, and in giving instruction number 1, asked on behalf of defendant. No article could have been more necessary to defendant under the circumstances than a wagon. 7 Wait's Act. & Def. 134; 5 Wait's Act. & Def. 64; Wait on Fraud. Con. & Creditors' Bills, sec. 459; *Mahoney v. Evans*, 51 Pa. St. 80; 59 N. H. 354; 47 Am. Rep. 214, 215. If an infant is carrying on business for himself with the consent of his parent or guardian, he can bind himself for articles necessary for that business. *Smith v. Young*, 2 Dev. & B. 26; *Guthrie v. Murphy*, 4 Watts (Penn.) 80; *Story v. Perry*, 19 Eng. C. L. 508, 4 C. & P. 526; *Mortara v. Hall*, 6 Sim. 465. (2) In refusing to give instruction number 2, asked by and on behalf of plaintiff, and in giving instruction number 2, asked and given on behalf of defendant. The defendant appropriated and converted the wagon to his own use for ten months and twenty-one days after he became of age. "Any exercise of ownership of a chattel, after coming of age, ratifies the purchase of it." 1 Benjamin on Sales [6 Ed.] p. 39, sec. 30. Last part of note 30 uses above language and cites: *Robinson v. Hoskins*, 14 Bush (Ky.) 393; *Boodey v. McKinney*, 23 Me. 525; *Cheshire v. Barrett*, 4 McCord, 241; *Messick v. Shortridge*, 21 Mich. 318; *Walsh v. Powers*, 43 N. Y. 23; *Dana v. Combs*, 6 Me. (6 Greenleaf) 89; *Lowry v. Drake*, 1 Dana (Ky.) 46; *Higley v. Burrows*, 49 Me. 103. Section 2516, Revised Statutes of 1879, only applies where plaintiff relies upon a promise, or parol recognition of the indebtedness. Plaintiff does not rely upon any

such promise or recognition. Benjamin on Sales [6 Ed.] American Notes by Charles L. Corbin, top p. 39, sec. 30. Last part of note 30 cites: *Robinson v. Hoskins*, 14 Bush (Ky.) 393; *Boodey v. McKinney*, 23 Me. 525; *Cheshire v. Barrett*, 4 McCord, 241; *Messick v. Shortridge*, 21 Mich. 318; *Walsh v. Powers*, 43 N. Y. 23. By keeping and using and wearing the wagon out after attaining majority, he elects as an adult to keep the property at the price and on the terms agreed upon when an infant. *Robinson v. Hoskins*, 14 Bush (Ky.) 393. (3) In refusing to give instruction number 3, asked on behalf of plaintiff. If a minor would repudiate a contract, he must disaffirm it within a reasonable time. *Green v. Willding*, 59 Ia. 679; *Jones v. Jones*, 46 Ia. 466. Defendant never did disaffirm this contract. If his acts at the trial were a disaffirmance they came too late. *Green v. Willding*, 44 Am. Rep. 696. (4) In refusing instruction number 4, asked on behalf of plaintiff. Section 2516, Revised Statutes, 1879, is an amendment of the statute of frauds. The contract was wholly performed on the part of plaintiff and accepted by defendant a long time after majority. He cannot take refuge under the statute. *Adm'r v. Adm'r*, 26 Mo. 221; *McConnell v. Brayner*, 63 Mo. 461; *Self v. Cordell*, 45 Mo. 345. (5) The facts were undisputed in this case, and, under the law and the evidence, the finding should have been for plaintiff.

L. P. Cunningham and *T. Dolan*, for respondent.

(1) He never at any time ratified the contract as is required by section 2516, Revised Statutes, 1879, so as to bind himself to pay the note given for the purchase price. R. S. 1879, sec. 2516, now R. S., sec. 5189. In treating on the subject of ratification of infant's contracts, Tyler on Infancy and Coverture [2 Ed.] page 98, side page 50, says: "In some of the states they have (*Wood v. Lacy*, 50 Mich. 475; *Payne v. Wood*, 14 N. E.

Rep. 775) statutes providing that the ratification of transactions by infants must be in writing, and when such is the law the subject is easily disposed of." Tyler, Infancy and Cov., p. 103, side p. 53. (2) But even at common law the plaintiff is not entitled to recover, and the judgment of the circuit court should be affirmed, because, the wagon was not a necessary. Articles purchased for business purposes, agricultural or commercial, are not necessaries. *House v. Alexander*, 4 N. E. Rep. (Ind.) 891-2; Benjamin on Sales, side p. 26, top p. 34; 2 Kent's Com. [11 Ed.] top p. 263, side p. 239; 5 Wait's Act. & Def., pp. 63-4. This is the law in this state. *Perrin v. Wilson*, 10 Mo. 451. (3) Even at common law the defendant would not be obliged to disaffirm the contract and would only be bound by his affirmance or ratification of it after reaching his majority, for the contract was executory as to him. Where, at the common law, a contract is executed on the part of the infant, he must disaffirm to avoid its consequences; but where it is executory as to him, it is not binding on him unless ratified after he becomes of age. 1 Minor's Institutes, p. 493; 1 Am. Lead. Cases, 559-60; *Mithred v. Wohlford*, Grit. 329, 340; *Messick v. Shortridge*, 21 Mich. 303, 315; *Boodey v. McKinney*, 23 Maine, 522; Benjamin on Sales [4 Ed.] side p. 27.

SMITH, P. J.—This was a suit brought before a justice of the peace by plaintiff against the defendant to recover the balance claimed to be due on a promissory note. The case was appealed to the circuit court of Jasper county, where it was tried *de novo*. The defense was that of infancy. The facts disclosed by the record appear to have been that the plaintiff, who was a merchant and dealer in agricultural implements, sold to the defendant a wagon for seventy dollars and took his note therefor, payable one year after date, secured by a

mortgage on the wagon. It appears, further, that the defendant was, at the time of the purchase of the wagon, residing with his father, and then lacked about four months of being twenty-one years of age; that the defendant, during the fall that he bought the wagon of plaintiff, rented a farm and did some work thereon; that, in the following spring, he married, and put in and cultivated a crop on the land which he had previously rented. He used the wagon on his farm until the note given for it became due, when, not making payment according to its terms, the plaintiff took possession of the wagon, as he was, in such case, authorized to do under the mortgage. He sold the wagon, which brought $37.50, which he indorsed as a credit on the note, and then sued for the balance due thereon. The evidence further discloses that the wagon sold by plaintiff under the mortgage brought all it was then worth. The defendant did not at any time offer to return the wagon and rescind the contract in respect thereto. On this state of facts the court found the issues for the defendant and rendered judgment accordingly, to reverse which the plaintiff prosecutes this appeal.

I. The defendant seeks to avoid his promissory note upon the plea of infancy. And the question is whether this defense can be successfully invoked under the facts of the case. This must be determined by the principles of the law applicable to the executory contracts of infants. Contracts of infants for necessaries are neither void nor voidable. Tyler on Inf. and Cov. 107; 1 Parsons on Contracts [3 Ed.] 244; 1 Bacon's Abr. Inf. 1. By both the common and civil law, parents are bound to maintain their children, but, if the authority of the parent is abjured without any necessity occasioned by the parent, all obligation to provide for the infant is at an end, and the infant himself is chargeable for necessaries for his support. Authoritative precedents cannot be found which are binding in all cases,

as each case is governed, more or less, by its own peculiar circumstances, taking into consideration the age, fortune, condition and rank of life of the infant. It is stated by Lord COKE (Coke Litl. 172) that the necessaries for which an infant may make a valid contract of purchase are "his necessary meat, drink, apparel, necessary physic and such other necessaries, and likewise for his good teaching or instruction whereby he may profit himself afterwards." But these are not the only articles that are comprehended by the term "necessaries." "In all cases," says Baron ALDERSON in *Chipple v. Cooper*, 13 M. & W. 256, "there must be personal advantage from the contract derived to the infant himself." The word "necessaries" must, therefore, be regarded as a relative term to be construed with reference to the infant's age, state and degree. Benj. on Sales, sec. 23.

And the rule is that, in an action for necessaries, the question, whether the articles are of the classes for which an infant is bound to pay, is one of law for the court. Tyler on Inf. and Cov. 126. We must now determine whether the wagon furnished the defendant, tested by these rules, is comprehended by the term "necessaries." The defendant, we must infer, had abjured the authority of his father when he purchased the wagon, for it appears that he either then had, or shortly thereafter did enter into a contract for a wife and for the rent of a farm, both of which contracts he proceeded to quite reasonably execute. So the question is, whether, in prosecuting his chosen agricultural pursuit under these conditions, a wagon was a necessary, within the meaning of the rule. That he could not successfully prosecute the labors of a husbandman, without the use of this indispensable auxiliary, is quite obvious. If it was a necessary, then he was primarily liable for its reasonable value and he cannot be permitted to plead his infancy in defense, whether he was under age or not, at

the time this action was commenced. Tyler on Inf. and Cov. 108.

If the question was not well settled, I should hesitate long before concluding this useful machine, furnished the defendant by the plaintiff, was not included in the term "necessaries." But it must be ruled to the contrary upon that well-recognized principle of law which does not encourage persons to engage in business during non-age, but, on the contrary, its policy is to keep infants from engaging in business until they have attained full age. On this ground, it has been held that articles purchased for business purposes, whether agricultural or commercial, cannot be deemed *necessaries*, and that, too, when the infant depends upon his business for support. *House v. Alexander*, 4 N. W. Rep. 89; *Woods v. Lacy*, 50 Mich. 475; *Lowe v. Griffith*, Scott, 458; *Mason v. Wright*, 13 Metc. 308; *Merriam v. Cunningham*, 11 Cush, 40; *Decell v. Leourthal*, 57 Miss. 331; *Grace v. Hale*, 20 Tenn. 28; *Price v. Sanders*, 60 Ind. 30; *Harrison v. Faun*, 1 Man. G. 550; *Wharton v. McKinzie*, 5 Q. B. 606. In view of these authoritative assertions of the law, I am constrained to rule that the defendant cannot be held liable upon the theory that the wagon was a necessary, within the meaning the law has affixed to that term, when employed in connection with the contracts of infants.

II. Can the defendant be held liable on any other ground of principle? The wagon he used after the purchase during the remainder of his minority, and for several months after he attained his majority. It, I infer from the price it brought at the sale by the plaintiff, was nearly half worn out. He did not offer to return it, even in that condition. The plaintiff, under the terms of the mortgage, it is true, got the wagon back, but it was hardly the wagon he had sold defendant. It was but barely half of it. The defendant had

enjoyed the beneficial use of the wagon, as has been stated, and, to the extent that it was worn by use and had deteriorated in value, it would seem that he was morally obligated to make restitution to the extent of the deterioration. Especially ought this to be so since he was of age, during the last nine months of the year in which he used the wagon. The return of the wagon under such circumstances would hardly meet the just requirements of his moral obligation to the plaintiff. He has, in effect, kept half of the plaintiff's chattel. He still has it, and has not, and does not, offer to return it, though years have elapsed since he received it, and since he attained his majority. To the extent he has had the beneficial use of the plaintiff's property after his majority, he ought to be made liable. Since the wagon sold to defendant cannot be held to be a necessary, the contract, therefore, was violable at his election. The right of infants, lunatics and persons *non compos mentis* to avoid their contracts is placed on the same ground in this and some other states. *Holly v. Troester*, 72 Mo. 76; *Tolson's Adm'r v. Garner*, 15 Mo. 464; *Heard v. Lack*, 81 Mo. 615; *Hall v. Butterfield*, 59 N. H. 354; *Ferguson v. Bell, Adm'r*, 17 Mo. 347; *Huth v. Railroad*, 56 Mo. 202; *Slaver v. Phelps*, 11 Pick. 304; *Breckenridge v. Ormsby*, 1 J. J. Marsh, 236. They are considered to be void if that freedom of will, combined with the assent necessary to make a valid contract, was absent. To protect them from fraud and imposition, to which they are exposed on this account, they are permitted to allege their want of capacity to bind themselves by contract. But this privilege is to be used as a shield, not as a sword; not to do injustice, but to prevent it. *Zerch v. Parsons*, 3 Burr. 1794; *Slaver v. Phelps*, 11 Pick. 304; *Allis v. Billings*, 6 Metc. 415; *Hallett v. Oaks*, 1 Cush. 296; *Lincoln v. Breckmaster*, 32 Vt. 652. Since the ordinary contracts of infants and persons *non compos mentis* stand on the

same legal footing, it is worth while to inquire into the law as it has been authoritatively declared in this state, in respect to the contracts of the latter class of persons. In *Holly v. Troester*, *supra*, the plaintiff, an insane person, exchanged horses with defendant, and afterwards his guardian demanded of the defendant the mare he got of plaintiff, without returning, or offering to return, to the defendant the one he had received of him. Holly, by his guardian, sued in replevin to recover of defendant the horse he had traded to him. This instruction was given: "If the plaintiff, at the time he contracted with defendant for the exchange of horses, was a person of unsound mind, and incapable of comprehending the nature of the contract he was making, then such contract was of no validity, and, if it further appears from the evidence that the horse in controversy was demanded by the guardian of the plaintiff before the commencement of the suit, then the finding should be for plaintiff." This instruction was refused: "If the plaintiff Holly traded his horse for defendant's mare, and then traded the mare to Brown, he cannot maintain this action until he produces and tenders the mare he got of defendant, and demands rescission of the contract. The trade made by Holly and Brown was not void, but voidable, and Holly or his guardian could only rescind such trade on the ground of imbecility of the mind of Holly." The court said that the case of *Tolson's Adm'r v. Garner*, *supra*, fully warranted this action of the trial court. In the last-named case, the right of recovery was neither predicated on making demand, nor offer to return the consideration. It is held in other jurisdictions that persons of these classes cannot rescind without restoring, or offering to restore, the consideration remaining in *specie*, and in possession and capable of return.

It has been held, too, that when the consideration cannot be restored, the infant, before he can be allowed

to rescind, must place the adult in as good condition as though he had returned the consideration, or he must account for its value. *Heath v. West*, 28 N. H. 101; *Moung v. Stevens*, 48 N. H. 133; *Price v. Freeman*, 27 Vt. 268; *Budge v. Phinney*, 15 Mass. 359; *Riley v. Mallory*, 33 Conn. 268. When the goods cannot be restored by the infant, it has been held that he is bound to pay the value not exceeding the contract price, or so much of the goods forming the consideration of the notes as were disposed of by him after he became of age, and that the recovery could be supported under the court for goods sold and delivered. And this upon the principle that, if he obtained the goods without payment, and retained and sold them, and pocketed the proceeds, it was his duty, under such circumstances, to pay for them. In such case the law allows a recovery upon the theory that the parties undertook to do what was their duty. *Messick v. Shortridge*, 21 Mich. 304. This just principle does not seem to find recognition in the jurisprudence of this state. I think it is discountenanced by the cases of *Tolson's Adm'r v. Garner*, *supra*, and the other cases which have followed it. The disability of infancy, instead of being for the infant's protection merely affords him an extraordinary legal capacity to plunder others with impunity. I regret to be compelled to apply a rule which my own judgment so strongly condemns.

III. But it is contended that the defendant has ratified the sale. It is sufficient to say that there is no evidence in the record of the kind of ratification required by the statute. R. S., sec. 2516. I am unable to discover any theory upon which the plaintiff can recover in this case. The judgment must, therefore, be affirmed.

41 285
76 83

JOPLIN WATER COMPANY, Respondent, v. M. BATHE, Appellant.

Kansas City Court of Appeals, May 12, 1890.

1. **Sales: FRAUDULENT CONCEALMENT OF LATENT DEFECT: WARRANTY: RESCISSION.** The evidence showed that plaintiff had gathered and packed and sold to defendant the ice for the purchase price of which this suit was brought, and it must have known its quality; that it knew defendant bought for the usual purposes of patrons of the retail trade; that the ice was so packed as to prevent the defendant's learning its quality by inspection. *Held*—

   (1) That defects, if they materially affected the ice for the purpose of its purchase, and were unknown to the defendant, should have been disclosed to him by the plaintiff, and this, though defendant may have sought and gotten information from third parties.

   (2) That it was not a necessary prerequisite to the maintenance of his defense to show an express warranty.

   (3) Nor will the fact that he failed to rescind the contract bar his defense.

2. **Damages: MEASURE OF.** The measure of damages, in case like this, would ordinarily be the difference in the value of the ice as it actually was and what it would have been worth, if of merchantable quality; but, if it appear defendant sold the ice for the same price he would have received for a merchantable quality, he would be entitled to no damage; yet, if the inferior quality caused any loss or extra waste or expense, such matters enter into the damages.

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

REVERSED AND REMANDED.

Statement by the court.

This is an action brought by plaintiff against defendant to recover the principal and interest of two promissory notes given by defendant to plaintiff in payment for a lot of ice purchased by defendant from plaintiff. Defendant filed an answer containing three counts:

The *first* was a general denial except that it admitted the signing of the two notes sued on.

Second. A counter-claim averring that on the —— day of ——, 1888, plaintiff came to defendant and fraudulently designing and intending to cheat and defraud defendant, falsely represented to defendant, that plaintiff had an icehouse filled with ice, free from all dirt or foreign substances of any kind. And that the same would be the best ice in the market, in Joplin, for the season of 1888. That said ice was stored in an icehouse and so covered with sawdust, and packed and covered in such a manner, that it was impossible for defendant to examine the same, to learn its quality, or determine whether or not said statements were, or were not, true. That said ice had been packed by the agents and servants of plaintiff, and plaintiff was in a position to know the quality and condition of said ice. That said ice was not the best ice in the market in Joplin, Missouri, during the season of 1888, but was impure, dirty, full of moss and other impurities. That defendant, relying upon such false representations, and believing them to be true, and not knowing of its bad and worthless quality, purchased the ice from plaintiff, for the sum of twelve hundred and forty dollars, and gave the two notes sued on as part payment for said ice. That defendant had paid plaintiff the sum of nine hundred and fifty-five dollars on the purchase price of the ice. That defendant bought the ice as an article of merchandise, to retail in the Joplin market, and that plaintiff well knew this fact when he sold it to defendant. That, by reason of its quality and condition, the ice was worthless as an article of merchandise, or for any purpose, by reason of which the notes sued on were without consideration and void. Defendant prayed that the notes be declared without consideration and void, and asked judgment for the sum of nine hundred and fifty-five dollars, paid on the purchase price of the

Third. A counter-claim averring that, in 1888, defendant purchased from plaintiff a lot of ice packed and stored in an icehouse. That the two notes sued on were given in part payment for the ice. That defendant bought the ice to sell at retail, a fact which plaintiff well knew at the time of the sale. That the ice was dirty, impure and worthless, for any and all purposes. That plaintiff knew, at and before the said sale, of its impure and worthless condition, and that defendant did not know, at or before said sale, of its worthless and impure quality, and plaintiff knew, at and before the sale, that defendant believed the ice to be pure and good, and plaintiff, knowing that defendant labored under such belief, did not, at or before the sale, disclose to defendant its impure and worthless quality, but concealed such impure and worthless condition from defendant. And for this reason, the two notes sued on are without consideration and void, that defendant paid nine hundred and fifty-five dollars to plaintiff on the purchase price of the ice, but that he made such payments before he fully knew the worthless condition of the ice, or how much he would be damaged thereby, and made the payments under protest, and on the assurance of plaintiff that the bottom would be better than the top had been, and prayed judgment for nine hundred and fifty-five dollars.

C. H. Montgomery, for appellant.

(1) Instruction number 3 on behalf of the plaintiff should not have been given because a jury might well infer from it, that any reliance on information which the court assumed defendant had obtained from witness Simpson would defeat a recovery, notwithstanding plaintiff might also have relied on representations made by plaintiff. *Cahn v. Reid*, 18 Mo. 115; *Jones v. Jones*, 57 Mo. 138; *Spohn v. Railroad*, 87 Mo. 74; *Bank v. Currie*, 44 Mo. 91; *Meyer v. Railroad*, 45 Mo.

137. (2) Instruction number 1, asked by and on behalf of defendant, should have been given. It is the law; it was properly pleaded, and it was supported by ample testimony. Where there is any evidence at all to support a defense, it will furnish a basis for an instruction, and to refuse such instruction under such circumstances would be error. *Maupin v. Lead Co.*, 78 Mo. 26, 27. When a vendor sells property having a latent defect of which he is aware, but fails to disclose to the vendee, knowing that the latter is acting upon the supposition no such defect exists, he is guilty of a fraud, and the fraud may be pleaded as a defense to any action for the price of the property. *Cecil v. Spurger*, 32 Mo. 462; *McAdams v. Cates*, 24 Mo. 223; *Grigsby v. Stapleton*, 94 Mo. 423. It is not necessary that there should be any warranty or representations to entitle plaintiff to recover. *Grigsby v. Stapleton*, 94 Mo. 423; *Merriam v. Field*, 39 Wis. 578. And the fact that he did not rescind the contract does not prevent him from making his defense. *Parker v. Marquis*, 64 Mo. 38.

L. P. Cunningham, for respondent.

(1) "A misrepresentation to be fraudulent must be as to a material fact or facts; must be false; must be relied upon by the one to whom it is made; must constitute an inducement to enter into the transaction; must work injury or result directly in damages to the party relying thereon." Thompson on Trials, sec. 1980, p. 1426; 3 Wait's Act. & Def. sec. 9, p. 440; *Brownlee v. Hewitt*, 1 Mo. App. 360; *Wannell v. Kemm*, 57 Mo. 487; *Baily v. Smock*, 61 Mo. 213; 3 Wait's A. & D., sec. 7, 438; *Dunn v. White*, 63 Mo. 181; *Delaney v. Rogers*, 64 Mo. 201. Simple affirmation of soundness or an opinion does not amount to a fraud. Kerr on Fraud and Mistake [Am. Ed.] pp. 82-85; note 5, p. 53; *Lindsay v. Dorris*, 30 Mo. 406; 3 Wait's Act. & Def., p. 441.

The evidence does not disclose any concealment of facts on the part of the water company. Kerr on Fraud & Mistake [Am. Ed.] p. 57. Even if Conner was better acquainted with the ice and knew it to contain defects, he was not obliged to disclose them. *Stewart v. Dugin*, 4 Mo. 245; *Jillet v. Bank*, 56 Mo. 304; 3 Wait's Act. & Def., p. 433, sec. 3. (3) Even if erroneous instructions are given, if the verdict be the only one that could have been found consistent with the evidence the judgment will be affirmed. *Fitzgerald v. Barker*, 96 Mo. 661; *Bassett v. Glover*, 31 Mo. App. 150; *Blesse v. Blackburn*, 31 Mo. App. 264; *Fairbanks v. Long*, 91 Mo. 635; *Valle v. Pickton*, 91 Mo. 207; *Cooksey v. Crooks*, 23 Mo. App. 463; 3 Wait's Act. & Def. 435, 440, 441, 446; *Bank v. Hunt*, 7 Mo. App. 42; *Reed v. Ewing*, 4 Mo. App. 569; *Noething v. Wright*, 72 Ill. 390; *Livingston v. Strong*, 107 Ill. 295; *Rumbolds v. Parr*, 51 Mo. 592; *Chapman v. McIlroth*, 77 Mo. 38; Sacket, Ins. to Juries [2 Ed.] sec. 16, p. 237; *Ward v. Borkenhagen*, 50 Miss. 459. (4) "That mere silence or failure to communicate facts within the seller's knowledge is not such a fraud as will avoid a contract. To have this effect, there must be some concealment as by withholding information when asked or using some trick or device to mislead the purchaser." *Kohl v. Lindley*, 39 Ill. 195; Kerr on Fraud and Mistake [Am. Ed.] p. 75; *Eams v. Morgan*, 37 Ill. 260.

ELLISON, J.—The testimony tended to prove the allegations of the answer as to the impure quality of the ice. It further showed that defendant had paid all the other notes but those sued upon. It also tended to show that the fact of the ice being packed prevented defendant from learning its quality by an inspection. The court instructed the jury to find for plaintiff unless he made false representations to the defendant as to the quality of the ice. This was improper. There was

evidence tending to prove that plaintiff had knowledge of the impure quality of the ice. It being so situated that defendant could not discover such defect, it became plaintiff's duty to disclose it, and his failure to do so was a fraudulent concealment of a latent defect. The case shows that plaintiff knew that defendant was purchasing the ice as a retail dealer for the purpose of retailing to purchasers in quantities which might be needed and for the usual purposes of patrons of the retail trade; the suppression, therefore, of a fact which made the ice unfit for such purpose was a deceit. *Grigsby v. Stapleton*, 94 Mo. 423. The evidence showed that plaintiff had gathered and packed the ice and must have known its quality. The defects shown, if they materially affected it for the purpose of its purchase, and were unknown to defendant, should have been disclosed to him by plaintiff. Fair dealing required this. And this is true, notwithstanding the fact defendant may have sought and gotten information from third parties. For, however much he may have endeavored to learn the quality and condition of the property, it was plaintiff's duty not to take advantage of his failure. In other words, it was an obligation resting on plaintiff, founded on law and morals, to disclose to defendant any hidden matter which materially affected the property. This case does not belong to that class of cases where one party places no reliance on the representations of the other. Nor is it a necessary prerequisite that an express warranty be shown. Nor will the fact that defendant failed to rescind the contract, but sold out the ice, bar him of his defense; he has his option to rescind the contract or stand on it and recover damages. *Parker v. Marquis*, 64 Mo. 38; *Cahn v. Reid*, 18 Mo. App. 115.

The measure of defendant's damages, ordinarily, would be the difference in the value of the ice as it actually was and what it would have been worth if it

had been of good merchantable quality. But as it appears that defendant has sold it out, if he received the same prices which he would have received for that of a merchantable quality, he would not be entitled to any damage, for the single reason that no damage resulted. If, however, the inferior quality caused extra waste or loss or imposed extra expense in its sale, such matters should be taken into consideration.

These remarks are a sufficient disposition of the objections to instructions which have been urged before us and will indicate the view we entertain of the case. We might remark in addition that on a retrial the court should be careful to avoid an apparent assumption of the disputed points of the cause, and thus avoid the criticism of counsel made for that reason. The judgment is reversed and the cause remanded. All concur.

Farmers and Merchants Bank of Humansville, Appellant, v. W. H. Price, Respondent.

Kansas City Court of Appeals, May 12, 1890.

41 291
49 88
41 291
56 342

1. **Fraudulent Conveyances**: VOLUNTARY DEED: ATTACHMENT. A deed from a debtor to his wife's sister, the only consideration or excuse for which was, that the wife had bought the sister's interest in their father's estate and still owed therefor (the sister at the time knowing nothing of the conveyance, nor holding the husband as her debtor), is either a voluntary gift to the sister, or the wife, and is fraudulent in law and void as to existing creditors, and furnishes ample ground for attachment.

2. ——: ——: GRANTOR'S MOTIVE: INSTRUCTION. The motives of the grantor are immaterial, the law fixes the character of the transaction as fraudulent, regardless of such motives; and it is error to tell the jury that "to render such conveyance fraudulent as to creditors, it must appear from the evidence, and they must be satisfied, that such conveyance was made for that purpose."

Appeal from the Polk Circuit Court.—HON. W. I. WALLACE, Judge.

REVERSED AND REMANDED (*with directions*).

J. B. Upton and *J. D. Abbe*, for appellant.

Ordinarily, the instructions given for respondent would have been correct, but, applied to the facts in this case, they are grossly erroneous. Wm. H. Price conveyed a lot, worth two hundred dollars, to Melissa Kee. He didn't owe her a dollar. He testifies: "I was not owing Melissa Kee anything, but my wife was and she and I are one. She knew nothing about it when I made the deed, nor for a long time after." Melissa Kee testified: "Mr. Price was not indebted to me in any sum, nor did I pay him anything for the lot he deeded to me." This conveyance constituted a legal fraud, regardless of the intention of the grantor. These instructions would have been proper in some cases, but, in this case, an insolvent debtor conveys his real estate not to pay his own "honest debt," but the debt of some one else. This was equivalent to a gift of the lot to Melissa Kee, or to his wife one, either of which would be in fraud of creditors. The viciousness of the instructions consists in their not discriminating between a case where an insolvent debtor prefers a particular creditor of his own and a case where such debtor conveys his property without any consideration to pay the "honest debt" of some one else. On Price's own testimony, the court should have instructed that the conveyance to Melissa Kee was fraudulent as to creditors.

C. W. Hamlin and *E. P. Miller*, for respondent.

(1) The verdict of the jury was fully sustained by the testimony, and was for the right party. (2) The

instructions given on the part of the plaintiffs were certainly all that they deserved, and fairly stated the law. (3) Appellants claim that the transfer of the lot to Melissa Kee and to Paxton, by respondent, were *per se* fraudulent, and that the court erred in giving the instruction: "If W. H. Price transferred part of his property in good faith for the purpose of paying an honest debt, such conveyance is not fraudulent as to creditors." However, they admit the correctness of said instruction except as to this case, yet there is not a word of testimony or an intimation that the indebtedness either to Melissa Kee or Paxton & Miller Lumber Company were not *bona fide* claims. (4) Upon the whole, the verdict in this case was a righteous one and most decidedly for the right party, and we are persuaded that this same "occult influence" inducing this "Granger jury," etc., would operate in the same way with all other juries after hearing this testimony.

GILL, J.—In September, 1888, the plaintiff bank, being a creditor of defendant Price, in the sum of three thousand dollars, sued defendant by attachment. The ground of attachment, as set out in the affidavit, was "that defendant had fraudulently conveyed or assigned his property and effects so as to hinder or delay his creditors." Defendant joined issue with the plaintiff by filing his plea in abatement denying such allegation. The matter thus at issue was tried in the circuit court before a jury, a finding and judgment was had for defendant and plaintiff has appealed to this court.

I. Aside from other manifest errors appearing in this record we call attention to *one*, all-sufficient to warrant a reversal.

The evidence is undisputed, that a few days prior to the institution of this suit defendant conveyed away all his property, so that indeed (as he stated to plaintiff's cashier) he did not have left "a dollar's worth of property." A portion of this was transferred to the

"Miller Lumber Company," an alleged creditor, but without the knowledge or consent, at the time, of said lumber company; a portion was deeded to one John Price (his brother) for the alleged purpose of securing such brother as security on plaintiff's claim against defendant; and the remainder was conveyed to Melissa Kee (the sister of defendant's wife). Whatever may be said as to the good or bad faith of the conveyances to said lumber company or said John Price, it is clear that the transfer to Melissa Kee was fraudulent and void as to existing creditors and furnished ample ground for plaintiff's attachment. It stands admitted, and without a syllable of contradiction, that defendant Price conveyed the real estate named in the deed to Melissa Kee, without any consideration whatever, that such conveyance was purely voluntary. The excuse for this transfer to Melissa Kee is that defendant's wife had bought said *Melissa's* interest in their father's estate, and that Mrs. Price still owed her sister therefor. Defendant claims to have voluntarily paid this debt by deeding the real estate to said Melissa Kee. Strange to say, however, that said Melissa knew nothing of the conveyance till weeks after the deed was made and recorded. However this may be, all testify the defendant never assumed or agreed in any way to pay this debt of his wife. Melissa Kee swore that defendant Price was not indebted to her in any sum, or on any account. The conveyance then to said Melissa was, and must be taken, either as a voluntary gift by defendant to her, or to defendant's wife. In either case it is fraudulent at law and void as to plaintiff and other existing creditors, since thereby these creditors were deprived of the means of even partially satisfying their claims against the grantor therein.

II. It matters not as to Price's *motives* in the matter, the law fixes the character of the transaction as fraudulent, regardless of such motives. Hence the court erred in declaring to the jury "that to render

such conveyance fraudulent as to creditors it must appear from the evidence, and they must be satisfied, that such conveyance *was made for that purpose.*" Under the seventh clause (or ground) authorizing attachment (Revised Statutes, 1879, section 398) it is not necessary to show an *actual fraudulent intent.* If such deed was fraudulent in and of itself as matter of law, it was a fraudulent conveyance within the meaning of said section. And, if the judgment of the law denounced it as fraudulent, it would support that allegation of the affidavit. *Douglass v. Cissna*, 17 Mo. App. 44; *Cooper v. Standley*, 40 Mo. App. 138, and cases cited.

Since then from the undisputed facts it appears defendant did fraudulently convey or assign his property so as to hinder and delay his creditors; and since it is admitted that plaintiff was, at the time, one of such creditors, it follows that the court below, on the issue made by the plea in abatement, should have instructed the jury to find for the plaintiff.

The judgment is clearly for the wrong party, and will be reversed and the cause remanded, with directions to the circuit court to enter a judgment sustaining the attachment. All concur.

JOHN SENATE, Respondent, v. THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Appellant.

41 295
57 224
41 295
65 363

Kansas City Court of Appeals, May 12, 1890.

Negligence: KILLING STOCK AT DEPOT: INSTRUCTION. In an action against a railroad company for killing stock at a depot, it is the duty of those operating the train, if they discover the perilous condition of the stock in time to avert the injury to use every reasonable effort at their command consistent with the safety of the

train, etc., but if they failed to do so, and injury thereby resulted, then plaintiff is entitled to recover; and an instruction failing to advise the jury as to the constituent elements of negligence in this case is erroneous.

Appeal from the Sullivan Circuit Court.—HON. G. D. BURGESS, Judge.

REVERSED AND REMANDED.

E. J. Broaddus, for appellant.

(1) There was no evidence in this case tending to show that the animal was seen in time to have avoided the injury, and the respondent was not entitled to recover. *Young v. Railroad*, 79 Mo. 336. (2) It does not appear, even if the engineer had seen, or could have seen, the animal as she came upon the track, that it was possible to have stopped the train with safety, in order to avoid the injury. *Maher v. Railroad*, 64 Mo. 267. (3) There being no evidence of negligence it was the duty of the court to say so to the jury. *Lord v. Railroad*, 82 Mo. 139; *Sloop v. Railroad*, 22 Mo. App. 593. (4) It was the duty of the court to instruct the jury as to what constituted negligence. *Ravenscraft v. Railroad*, 27 Mo. App. 73; *Goodman v. Railroad*, 75 Mo. 73; *Yarnall v. Railroad*, 75 Mo. 583.

E. C. Eubanks, for respondent.

GILL, J.—Plaintiff had a judgment in the court below against defendant for the value of a mare run over and killed by defendant's train of cars at a station known as Harris, on defendant's railroad. From said judgment defendant has appealed. It seems that plaintiff resided quite near the depot and switchyards at said station; that he permitted the mare to feed on the commons thereabouts, and, at the time in question, she appeared on the grounds of defendant's railroad, and was

run over and killed by a passing freight train, which did not stop at Harris. No claim is made that the mare entered on the track, or was killed, at a point on said road where defendant was legally bound to fence, nor at a point where the defendant may have lawfully fenced its track. Hence, the case must rest upon the claim of actual negligence. The evidence, most strongly stated for the plaintiff, and which, it seems, was relied upon to sustain the action, was that the mare entered upon the track some two hundred feet ahead of the passing train, that, being frightened, she ran in advance of the locomotive for about four hundred feet, when she was overtaken at a cattle-guard, where she was caught and killed. There is no evidence that the engineer saw the mare as she was being chased by the train, except that some witness testified that he heard the alarm whistle sounded just before the mare was killed, and the further circumstance that the mare's condition could have been seen by those managing the train for a distance of several hundred feet from where she entered upon the track.

This, then, is clearly of that class of cases where the railroad company is liable only for a failure to make every reasonable exertion to avoid injury to the animal *after discovering* its perilous condition. See *Jewett v. Railroad*, 38 Mo. App. 48, and cases there cited. The trial court gave to the jury, however, at the request of plaintiff, instruction to the following effect: "That, if the jury believe from the evidence that plaintiff's mare" was struck and killed, etc., "and that said striking of said animal was caused by defendant's agents and servants in charge of said engine and train by *carelessly and negligently* running the same over, and against, said mare, then, and in that event, they must find their verdict for the plaintiff." It will be noticed that the court, by this instruction, failed to advise the jury as to the constituent elements of negligence in the case, but left the jury to determine for themselves as to what

facts would make good the charge of negligence against defendant. This was clearly erroneous. *Yarnall v. Railroad*, 75 Mo. 583. The jury should have been told that, if those operating the train discovered the perilous condition of the mare in time to have averted the injury by the use of every reasonable effort at their command consistent with the safety of the train, etc., but failed to do so, and injury thereby resulted, then plaintiff might recover. *Grant v. Railroad*, 25 Mo. App. 231; *Young v. Railroad*, 79 Mo. 341. Neither was the error on the part of the court cured by any other instruction. It results, therefore, that the judgment must be reversed, and the cause remanded for a new trial. All concur.

JOHN R. ROUSE, Respondent, v. THE METROPOLITAN STREET RAILWAY COMPANY, Appellant.

Kansas Court of Appeals, October Term, 1889.

Rehearing denied, May 12, 1890.

41 298
119m342
41 298
61 316
41 298
85 32
41 298
102 611

Exemplary Damages: PASSENGER CARRIERS NOT LIABLE FOR. A carrier of passengers using due care in selecting its servants is liable for compensatory damages only, and not for exemplary damages, where its conductor wrongfully ejects a passenger from its cars, unless such wrongful act is authorized or ratified by the carrier, per ELLISON, J.; SMITH, P. J., concurring in a separate opinion; GILL, J., dissenting in a separate opinion; rehearing denied per ELLISON, J.

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

REVERSED AND REMANDED.

Pratt, *McCrary* and *Ferry & Hagerman*, for appellant.

(1) The true rule of the appellate courts is: Wherever error intervenes a presumption of prejudice arises, and, unless the record shows, beyond a doubt, that no prejudice resulted, there must be a reversal. *Clark v. Fairley*, 30 Mo. App. 335; *Deery v. Cray*, 5 Wall. 807; *Smiths v. Shoemaker*, 17 Wall. 630, 639; *Railroad v. O'Brien*, 119 U. S. 99, 103; *Gilmer v. Higley*, 110 U. S. 47, 50; *Potter v. Railroad*, 46 Iowa, 399; *Stafford v. Oskaloosa*, 57 Ia. 748, 750; *Reynolds v. City of Keokuk*, 34 N. W. Rep. 167; *Gillett v. Corum*, 5 Kan. 608, 614; *Hall v. Jenness*, 6 Kan. 356, 364. (2) If, upon a trial, an erroneous instruction is given as to exemplary damages, there must be a reversal. This, for the very satisfactory reason that there is no means of knowing whether the jury was affected thereby. *Prueitt v. Quarry Co.*, 33 Mo. App. 18; *Kennedy v. Railroad*, 36 Mo. 351; *Whalen v. Church*, 62 Mo. 326; *Morgan v. Durfee*, 69 Mo. 469; *Bruce v. Ulery*, 79 Mo. 322; *Brown v. C. G., etc., Co.*, 89 Mo. 152; *Rose v. Story*, 1 Pa. St. 190; *Amer v. Longstreet*, 10 Pa. St. 145; *Railroad v. Taylor*, 104 Pa. St. 306; *Traction Co. v. Orbann*, 12 Atl. Rep. (Pa.) 816; *Hirshberg v. Strauss*, 64 Cal. 272; *Railroad v. Quigley*, 21 How. 213; *Winstead v. Hulme*, 32 Kan. 568. (3) The court erred in giving instruction 2, upon its own motion, because a recovery of exemplary damages was permitted for a malicious act of a servant, regardless of a direction of the act or a ratification thereof by the master; and as expressing the true rule, instruction 13, asked by defendant, should have been given. *First.* No master, whether corporate or otherwise, can be compelled to respond in exemplary damages for the malicious act of a servant, unless the master has directed the particular act to be done in a malicious

manner, or ratifies it after it is done, or knowingly employs one who has reason to believe will commit such act. The reason being that exemplary damages are only given to punish those in fact guilty as distinguished from those constructively guilty of a wrong. *Randolph v. Railroad*, 18 Mo. App. 609; *Perkins v. Railroad*, 55 Mo. 201; *Graham v. Railroad*, 66 Mo. 536; *Cleyhorn v. Railroad*, 56 N. Y. 47; *Craker v. Railroad*, 36 Wis. 657; *The Amiable Nancy*, 3 Wheat. 546; *Hagan v. Railroad*, 3 R. I. 88; *Wardrobe v. Stage Co.*, 7 Cal. 118; *Mandelsohn v. Lighter Co.*, 40 Cal. 657; *Keene v. Lizardi*, 8 La. Ann. 32; *Boulard v. Calhoun*, 13 La. Ann. 445; *Hill v. Railroad*, 11 La. Ann. 292; *Railroad v. Finney*, 10 Wis. 388; *Ackerson v. Railroad*, 32 N. J. L. 254; *"Post" Co. v. McArthur*, 16 Mich. 446; *Railroad v. Miller*, 19 Mich. 205; *Fisher v. Railroad*, 34 Hun. (N. Y.) 43; *Townsend v. Railroad*, 56 N. Y. 295; *Parker v. Railroad*, 13 Hun. 319; *Hays v. Railroad*, 46 Tex. 272; *International Co. v. Tel. Co.*, 5 S. W. Rep. (Tex.) 517; *Sullivan v. Railroad*, 12 Ore. 392; *Turner v. Railroad*, 34 Cal. 594; *Kline v. Railroad*, 37 Cal. 400; *Railroad v. Donahue*, 56 Tex. 162; *Abradle v. Railroad*, L. R. 11 App. 250. *Second.* The case of *Hicks v. Railroad*, 68 Mo. 329, is not an authority against this position, because this question was neither argued nor decided. *Carroll v. Carroll*, —— ——; *State ex rel. v. Brassfield*, 67 Mo. 332; *Welch v. Stewart*, 31 Mo. App. 376. *Third.* If our position be well taken, it was error to refuse defendant's instructions withdrawing the question of exemplary damages, because there was no evidence of authorization and none of ratification. (4) Instruction 3, given by the court upon its own motion, was erroneous in that it permitted a recovery of exemplary damages when there was constructive, as distinguished from actual, malice. *First.* Malice, within the meaning of the rule, authorizing a reward of

exemplary damages, is malice in fact as distinguished from malice in law. *Railroad v. Quigley*, 21 How. 202, 214; *Edelman v. Transfer Co.*, 3 Mo. App. 503; *Inman v. Ball*, 65 Iowa, 543. *Second.* The instruction complained of defines malice in law only. 2 Rapalje's Law Dict. 783, 784. *Third.* In line with this principle, exemplary damages have been refused in many cases where an intentional act was done, for which there was no legal excuse so as to constitute malice in law, but the state of the mind was not such as to constitute malice in fact. *Dibble v. Morris*, 26 Conn. 416; *Dean v. Blackwell*, 18 Ill. 336; *Bridge Ass'n v. Loomis*, 20 Ill. 236; *Ousley v. Hardin*, 23 Ill. 352; *Railroad v. Blocher*, 27 Md. 277; *Bell v. Morrison*, 27 Miss. 68; *Hopkins v. Railroad*, 36 N. H. 9; *Wallace v. Mayor*, 2 Hilt. (N. Y.) 440. The same result has been reached in the following cases: *Selden v. Cushman*, 20 Cal. 56; *Turner v. Railroad*, 34 Cal. 594; *Gould v. Christianson*, 1 Blatch. & H. Adm. 507; *Morford v. Woodworth*, 7 Md. 83; *Railroad v. Ramsey*, 3 Laws. (N. Y.) 178; *McCall v. McDowell*, 1 Abb. (U. S.) 212; *Hamilton v. Railroad*, 53 N. Y. 25; *Scott v. Bryson*, 74 Ill. 421; *Waldron v. Marcier*, 82 Ill. 550; *Fitzgerald v. Railroad*, 50 Ia. 79; *Kiff v. Youmans*, 86 N. Y. 324; *Railroad v. Boyd*, 10 Atl. Rep. (Md.) 315. *Fourth.* Upon the same principle it has been repeatedly held that exemplary damages were not recoverable against the estate of a wrongdoer. *Sheik v. Hobson*, 64 Ia. 146; *Reppy v. Miller*, 11 Iredel, Law, 247; *Wright's Adm'r v. Donnell*, 34 Tex. 291; Sutherland on Damages, 758. (5) *Lillis v. Railroad*, 64 Mo. 464, sustains the principle contended for. (6) Instruction 3, given on the court's own motion, was erroneous, in that it indicated to the jury that they should attempt to fix the exemplary damages at such a sum as would be sufficient to prevent like acts in the future. *First.* Because the language may be sufficient in a legal

treatise is no reason why it should be used in an instruction. *Parkhill v. Brighton*, 61 Ia. 103, 109; *Hendrickson v. Kingsbury*, 21 Ia. 379, 384, 385; *Hurt v. Railroad*, 94 Mo. 255, 263. *Second.* There is direct authority for condemning such an instruction. *Hendrickson v. Kingsbury*, 21 Ia. 379. *Third.* As to the amount of exemplary damages the jury was the sole judge without any suggestions from the court. 2 Thompson on Trials, sec. 2065, and cases; 1 Sutherland on Damages, 742.

Sherry & Hughes, for respondent.

(1) When the wrongful act is accompanied by circumstances of malice, wantonness or oppression, exemplary damages may be given. *Newman v. Railroad*, 2 Mo. App. 402; *Kennedy v. Railroad*, 36 Mo. 364; *Green v. Craig*, 47 Mo. 90; *Malick v. Railroad*, 57 Mo. 17; *Hicks v. Railroad*, 68 Mo. 329; Pierce on Railroads, 305; *Buckley v. Knapp*, 48 Mo. 162, and cases cited. (2) Exemplary damages may now be given whether the wilful and malicious act of the agent was authorized or ratified by the principal or not, in contravention of the old rule, requiring such authorization or ratification to render the principal liable. *Evans v. Railroad*, 11 Mo. App. 474; 3 Sutherland on Damages, 271; *Gunter v. Mfg. Co.*, 18 S. C. 270; *State v. Railroad*, 23 N. J. L. 367; Thompson on Carriers of Passengers; *Quinn v. Railroad*, 7 S. E. Rep. 614; *Quigley v. Railroad*, 11 Nev. 350; *Railroad v. Slussen*, 19 Ohio St. 157; *Kellett v. Railroad*, 22 Mo. App. 356.

Ellison, J.—The plaintiff sued for and recovered damages in the trial court for being wrongfully ejected from defendant's street car. The evidence tended to show that soon after getting onto the car a controversy arose between plaintiff and the conductor as to a transfer ticket. Plaintiff contended it was good for a ride

and the conductor telling him to pay or he would put him off. Plaintiff, though protesting that it was unjust, paid his fare in money. Whereupon the conductor continued the controversy and applied to plaintiff some grossly offensive remarks, and finally, calling the "gripman" to his assistance, forcibly ejected plaintiff from the car, though still retaining his fare. No report of the matter was made to the company either by the plaintiff, the conductor or the gripman, but on learning of the conductor's conduct the defendant discharged him, as well as the gripman, from its service. The court gave, over defendant's objection, the following instruction, permitting plaintiff to recover punitory or exemplary damages, in addition to damages compensatory:

"2. And, if the jury shall find for the plaintiff, they will allow him as his actual damages such sum as will fairly compensate him for his physical injuries, if any, and for his humiliation, if any was suffered, in being ejected from defendant's car; and, if the agents of defendant, with malice toward plaintiff, and in the manner and under the circumstances set forth in the preceding instruction, ejected plaintiff from said car, then in addition to the actual damages above authorized, if any such were sustained, the jury may allow plaintiff, by way of punishing defendant and making an example of it for others in like cases, such further sum as the jury believe will be effective in that behalf. The whole amount of the verdict of the jury, however, cannot exceed five thousand dollars."

This action of the court is the chief matter we are asked to review. It is apparent from the testimony that the defendant did not directly, or by any circumstance, ratify the action of its servants. Nor does it appear that they had any knowledge of any such misbehavior of these servants at any other time.

The terms exemplary, vindictive and punitory damages are used interchangeably, but by whichever name we call them they are allowed as smart money, as a

punishment over and above compensation. The question then immediately arises, for what is the defendant to be punished in this case? What has it done? All that can be brought against it is, that it employed the man who did the injury. But that was a lawful and proper thing to do if it did not know (and which is not pretended) of his liability to commit such a wrong. It has not rendered itself accessory after the fact, for upon learning of the affair it discharged the wrongdoer, thereby refusing to adopt or ratify his act. To uphold the instruction, then, we would be compelled to say that one may be punished for a wrong he did not commit; for a wrong he did not wish to be committed, and which he denounced when he learned of its commission. This would be contrary to law and fundamental right. In determining what sum should be allowed as exemplary damages, the turpitude of the defendant's conduct alone is to be considered, not to appreciate the injury or distress of the sufferer, in the particular instance, but contemplating, in behalf of the public, the act as exemplifying the wrongdoer's *vicious mind.* 1 Sutherland, Damages, 723. It is a question of action, or at least acquiescence, on the part of him sought to be held responsible. Punishment should never be inflicted upon one, *as a* punishment, who has committed a wrong by implication only. Such damages are everywhere said to have for one of their principal objects an example and warning to others that they may not commit the same wrong; and such is the instruction complained of, but of what profit is the example of warning, if a party may be punished who does not do the wrong and could not prevent it? The example should be made of those who do the wrong. So they are allowed for the purpose of deterring a repetition of the wrong by the same person; but how can one be deterred from doing that which he cannot by any human foresight prevent? The theory upon which such damages are allowed is that the party sought to be punished has voluntarily committed a

wrong which he might have abstained from committing. That he has done that which by an exercise of his will he could have avoided. The only possible answer to these suggestions is that the act of the servant is the act of the master. But the act of the servant is the act of the master only in theory or by implication of law which makes the master liable to render full compensation for such act; and when we go beyond this and ask to inflict punishment, we enter the domain of personal responsibility which must be founded on the act of the wrongdoer *in fact*, and the punishment inflicted on the perpetrator alone.

Plaintiff has, of course, a right to compensatory damages, for however innocent and blameless defendant may in fact be, it must nevertheless stand for the act of the conductor in so far as to compensate plaintiff for all legal injury received. In this respect the conductor is, *pro hac vice*, the corporation. And when we consider the extent to which the courts may go, under our adjudications, by way of compensating the injured party, it will be seen that we are not fixing the limits any too narrow in the views to which we have given expression.

It is, however, contended that controlling decisions of the supreme court uphold the instruction of the trial court. It is undoubtedly the rule that in actions of tort, where the wrong complained of has been wilfully, maliciously or wantonly committed, exemplary damages may be allowed. This rule has been frequently stated. But the rule has its exceptions or qualifications. One of these is that the master will not be held liable for exemplary damages for the wrong of his servant if he neither authorized it before commission, or ratified it after commission. Slight acts of ratification it is true will be held to be sufficient, but there must be either prior authorization or subsequent ratification. Some confusion has unnecessarily resulted from the fact that the courts have, in cases where the facts upon which

the exception is based did not appear, merely stated the rule without the exception. But in no case which I have been able to discover in the decisions of this state has the exception been rejected where it appeared among the facts disclosed in the evidence. The exception to the rule is stated and recognized in *Perkins v. Railroad*, 55 Mo. 201; *Graham v. Railroad*, 66 Mo. 536, and *Randolph v. Railroad*, 18 Mo. App. 609. But it is insisted that whatever recognition was given to the exception, as stated in these cases, was practically disavowed in the case of *Hicks v. Railroad*, 68 Mo. 329. In that case the rule is stated and no mention made of the exception, and no point seems to have been urged in that regard by counsel. We have no means of knowing what the evidence was, but in view of the fact that the experienced counsel appear not to have brought the exception to the rule to the attention of the court, and when we consider that the judge delivering the opinion in that case is the same who wrote the opinion in *Graham v. Railroad*, *supra*, where he expressly recognized the exception, we are led to the conclusion that the evidence was such as to exclude the exception. Certainly the court did not intend to disavow law it had but recently before announced, without even referring to the cases. And certainly, if the evidence had justified it, the experienced counsel in that case would not have refrained from calling to his aid an exception to a rule of law which he must have known had before been recognized.

It is not to be denied that the authorities in the country generally are not uniform, but it arises from the fact, as I conceive, that all those who have held that the master, in addition to making compensation, may be punished for the act of his servant, which he did not authorize or ratify, have failed to note the reason upon which, and for which, such damages are allowed. The reason and the only reason why such damages are allowed, as before intimated, is that their infliction will deter the

defendant from repeating the same act, and will be an example and warning to others not to commit the same wrong. Indeed, the object and end of all punishment is not an atonement or expiation for the wrong or crime committed, but it is a precaution against future offenses of the same kind. All human punishment says 2 Blackstone (3 book, 252) should tend to the amendment of the offender himself, or to deprive him of the power to do future mischief, or to deter others by his example. Now when one is confronted with this only foundation supporting the rule for such damages, he can come to but one conclusion as to whom the rule applies. There is hardly any need of argument or illustration. The matter is self-evident.

So strongly logical is this position that it cannot be combated without betraying an admission of its truth. Thus in *Goddard v. Railroad*, 57 Maine, 202, the judge writing the opinion says, by way of enforcing his argument, that the corporation "*can* secure conductors and brakemen who will not assault and insult passengers. When it is thoroughly understood that it is not profitable to employ careless and indifferent agents or reckless and inslvent servants, better men will take their places, and not before. * * * It will be an impressive lesson to these defendants, and to the managers of other lines of public travel, of the risk they incur when they retain in their service servants known to be reckless, ill-mannered and unfit for their places." That is, of course, the corporation must be an agent in the matter in failing to do that which by prudence and care it could have done. I take it to be a matter of course, that if the master is not careful and prudent in the selection of his servants, he has committed a wrong upon which a foundation may be laid for punishing him. But if the master has exhausted every reasonable endeavor to secure good servants, and is deceived in a way of which no business foresight could have given warning and discharges such servant as soon as he learns of his wrong, is the master

nevertheless to be punished for the wrong? This is not all; suppose the master, by prudence and care, does in fact select a good servant, one without a single bad trait of temper, disposition or character; one who has a wide reputation for these characteristics, and yet, of a sudden, by one of those changes or freaks in the human makeup he commits a gross wrong, and the master disowns the act and discharges him: is such master to be held liable to the injured party not only for his loss of property, his pain of body and mind, his indignity and humiliation by way of compensatory damages, but *in addition* to this a further sum is to be added to punish him for what he did not do? The matter can, perhaps, be brought closer to the perception if we leave out of view the corporation and consider the question as it will apply to the great variety of individuals who prosecute various business interests through the aid of servants. In such case the injustice of inflicting punishment for a wrong one does not commit, authorize or ratify can be more easily appreciated.

In support of the position which we have taken, I cite from among the array of authorities collected by counsel, the following: *Craker v. Railroad*, 36 Wis. 657; *The Amiable Nancy*, 3 Wheat. 546; *Cleyhorn v. Railroad*, 56 N. Y. 44; *Sullivan v. Railroad*, 12 Ore. 392; *Hagan v. Railroad*, 3 R. I. 88. For the error in giving the instruction complained of the judgment will be reversed and the cause remanded. SMITH, P. J., concurs in a separate opinion; GILL, J., dissents.

SMITH, P. J. (*concurring*).—I confess that the rule in relation to punitory damages, as applied to corporations, is not well settled in this state. The cases have left room for doubt on the subject. The rulings of the supreme court, as may be seen by reference to the cases cited in the opinions in this case, instead of settling, seem to unsettle, the rule. It is contended that the adjudged cases support either view of the law. The rule either does or does not obtain in this state. Its

existence has been rendered uncertain by the course of judicial decision in this state. *Res est misera ubi jus est vagum et incertum.*

I do not, myself, however, regard the question of the existence of the rule, with its qualification, an open one in this state. If the question were *res integra*, I should hesitate long before lending it my sanction. I do not think the qualification a logical corollary to the proposition. Besides, I am inclined to think that the application of the qualification is not countenanced by a sound public policy. But the cases of *Perkins v. Railroad*, 55 Mo. 201; *Graham v. Railroad*, 66 Mo. 536, and *Randolph v. Railroad*, 18 Mo. 609, I think, are conclusive upon us.

Whatever may be the diversity of opinion which has arisen in consequence of other decisions of the supreme court, where no mention is made of the qualification, I think, in the absence of an express ruling, overthrowing the *Perkins* and *Graham cases*, just cited, that we must follow them, whether they have the approval of our judgment or not. With these convictions, I feel constrained to concur with Judge ELLISON in the result which he has reached in his opinion.

GILL, J. (*dissenting*).—With my understanding of the law as it is, and as it should be, I cannot concur in the foregoing opinion. In the language of Judge THOMPSON, in his work on carriers and passengers, it seems to me, even in the face of authorities to the contrary, that "the rule which is in accord with reason and the weight of authority, is that passenger carriers, although corporations, may be liable, in a proper case, in exemplary damages, for injuries caused by their agents, without a direct authorization, or subsequent ratification, of the act complained of." Thompson on Carriers of Passengers, p. 575. This view is sustained by other eminent judges and text-writers. One of the latter, in stating the law, uses

the language, "as the corporation can only act through natural persons, its officers and servants, and, as it of necessity commits its trains or vehicles absolutely to the charge of persons of its own appointment, passengers of necessity commit to them their safety and comfort *in transitu;* the whole power of the corporation, *pro hac vice*, is vested in such officers and servants, and, as to such passengers, *they are the corporation.*" This being the rule, it follows that, by a preponderance of authority (in the same writer's opinion), no prior express authority to commit the oppressive act, nor any subsequent ratification thereof, is required to impose exemplary or punitive damages on the corporation. 3 Sutherland on Damages, p. 271, and authorities there cited. Also, 1 Redfield on Railways, sec. 130, and notes, and note, sec. 187; 2 Redfield on Railways, in criticism of *Hagan v. Railroad*, 3 R. I. 88, etc.

By the opinion of the majority herein, it is admitted that the passenger-carrier corporation is liable for such damages wrongfully committed by the conductor while managing and operating the trains as are denominated "compensatory damages," but that the corporation is not responsible for exemplary damages, except it appear that it had notice of the cruel and oppressive acts of the conductor, and ratified the same, or had previously directed such malicious conduct. This is noted in the opinion as an exception to, or qualification of, the general rule, and reliance is placed on decisions reported in 55 Mo. 201; 66 Mo. 536, and 18 Mo. App. 609. This contention grows out of a remark made by Judge VORIES in *Perkins v. Railroad*, 55 Mo. 214, where the learned judge, after admitting the right of the injured and insulted plaintiff to recover exemplary damages from the corporation, for the wilful and malicious wrongs of the conductor, voluntarily stated (on a point not in issue in that case) "that a principal cannot, in general, be compelled to pay exemplary damages for the fault of his agent, if it be neither

ratified nor authorized by the principal." The case decided was that of an alleged wrongful and malicious expulsion from a passenger car; and it was in answer to the position of the appellant in that case, to the effect that the railroad company was not liable for injuries wilfully and maliciously committed by the conductor, nor for exemplary damages, that Judge VORIES used the above language. Exemption was not claimed by the corporation on account of there being a discharge of the offending conductor, after notice of his treatment of the plaintiff, nor was the point made that the corporation would have been released of the exemplary damages if the company, on notice of the conductor's malicious acts, had dismissed him from its service. No such issue was made by the pleadings in the circuit court, nor was such an issue presented in the appellate court. But the supreme court affirmed the judgment below (which was for the plaintiff), and expressly approved an instruction given by the court, to the effect that, if, in removing the plaintiff from the car, the conductor did the act in a malicious, cruel and inhuman manner, the defendant railroad company was responsible in exemplary damages, without coupling such general proposition of liability with any qualification whatever. Now, as to what effect we should give this expression of Judge VORIES in the case, *supra*, defendant's able and industrious counsel have furnished us the words of a great jurist in disposing of the comments of the opinion-writer, when going further than the case in hand demanded. Mr. Chief Justice MARSHALL said: "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be *respected, but ought not to control the judgment in a subsequent suit, when the very point is presented.* The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its

full extent; other principles, which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated. What is here said of the *Perkins case*, *supra*, applies with still more force to the *Graham case*, 66 Mo. 536, and the *Randolph case*, 18 Mo. App. 609. In neither was the question which we have in review in the case at bar fairly at issue before the court, and, hence, was not considered nor decided.

While then the cases before cited do not in my opinion furnish controlling matter for our decision here, the supreme court of Missouri has in other cases given us strong argument for the application of the general rule before contended for, to-wit: That where the officers or agents of a corporation act wantonly or maliciously, the corporation may be held to answer in exemplary damages, and that, too, without proof of prior express authorization or subsequent ratification. *Hicks v. Railroad*, 68 Mo. 329; *Travers v. Railroad*, 63 Mo. 421; *Doss v. Railroad*, 59 Mo. 27; *Eckart v. Transfer Co.*, 2 Mo. App. 46; *Maleck v. Railroad*, 57 Mo. 17. It will be found, in an examination of these decisions, that they uniformly recognize the liability of the corporation for exemplary damages where the injury is committed by the officer or agent in the line of his employment and is attended by circumstances of oppression, insults or malice; and that in adhering to this doctrine, announcing and reannouncing the same, there is no qualification attached (as is contended for by defendant) that the corporation is not liable for such punitive damages unless it had previously authorized the malicious acts, or had subsequently, on notice, approved the same. I do not claim these cases furnish precedents controlling the case now under review. The exact point here made was not presented there; at least, it does not so appear from the published opinions. They are, however, potent, as argument, in support of

this plaintiff's right to have the judgment herein affirmed. As I view the decisions this exact question is *res nova* in this state; and from the consideration of decided cases elsewhere I am of the opinion that reason and authority are in support of the ruling of the circuit judge who tried this case.

In *Goddard v. Railroad*, 57 Me. 202, *et seq.*, is found a very vigorous and exhaustive review of this question; and since our supreme court has, on *two* occasions, at least, cited the same with apparent approval (55 Mo., pp. 213-214 and 57 Mo., p. 22) I beg to quote from the court's opinion, and adopt its reasoning, so applicable to the facts of this case: "The law requires the common carrier of passengers to exercise the highest degree of care that human judgment and foresight are capable of to make his passengers' journey safe. Whoever engages in the business impliedly promises that his passenger shall have this degree of care. * * * If the passenger does not have such care, but on the contrary is unlawfully assaulted and insulted by one of the very persons to whom his conveyance is intrusted, the carrier's promise is broken, and his legal duty is left unperformed, and he is necessarily responsible to the passenger for the damage he thereby sustains." This was said in reference to the general doctrine of liability for damages occasioned by the acts of the agent or employe of a carrier. Further on, in relation to the question of punitive or exemplary damages, the same court uses the following language: "But it is said that if the doctrine of exemplary damages must be regarded as established in suits against *natural persons* for their own wilful and malicious torts, it ought not to apply to *corporations* for the torts of their servants on a train (such as a brakeman in that case) when the tortious act was not directly nor impliedly authorized nor ratified by the corporation." * * * "We confess," says the court, "that it seems to us that there is no class of cases where the doctrine

of exemplary damages can be more beneficially applied than to railroad corporations in their capacity of common carriers of passengers; and it might as well not be applied to them at all as to limit its application to cases where the servant is directly or impliedly commanded to maltreat and insult a passenger, or to cases where such an act is directly or impliedly ratified, *for no such cases will ever occur*. A corporation is an imaginary being. It has no mind but the mind of its servants. It has no voice but the voice of servants; and it has no hands with which to act but the hands of its servants. All its schemes of mischief, as well as its schemes of public enterprise, are conceived by human minds and executed by human hands, and these minds and hands are its servants' minds and hands. All attempt, therefore, to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant and the malice of the corporation; or the punishment of the servant and the punishment of the corporation, 'is entirely fruitless,' and only tends to confuse the mind and confound the judgment. Neither guilt, malice nor suffering is predicable of this ideal existence, called a corporation, and yet under cover of its name and authority there is in fact as much wickedness, and as much deserving of punishment, as can be found any where else. And since these ideal existences can neither be hung, imprisoned, whipped or put in the stocks, since in fact no corrective influence can be brought to bear upon them except that of pecuniary loss, it does seem to us that the doctrine of exemplary damages is more beneficial in its application to them, than in its application to natural persons." * * * "Careful engineers *can* be selected who will not run their trains into open draws; and careful baggage men *can* be secured, who will not handle and smash trunks and boxes as is now the universal custom, and *conductors* and brakemen *can* be had who will not assault and

insult passengers; and if the courts will only let the verdicts of upright and intelligent juries alone, and let the doctrine of exemplary damages have its legitimate influence, we predict these great and growing evils will be very much lessened, if not entirely cured. There is but one vulnerable point about these ideal existences, called corporations, and that is the pocket of the moneyed power that is concealed behind them. * * * When it is thoroughly understood that it is not profitable to employ careless and indifferent agents, or reckless and insolent servants, better men will take their places, and not before. It is our judgment, therefore, that actions against corporations, for the wilful and malicious acts of their agents and servants, in executing the business of the corporation, should not form exceptions to the general rule allowing exemplary damages. On the contrary we think this is the very class of cases of all others where it will do the most good, and where it is most needed." The Maine court supplements the foregoing with a liberal reference to other decided cases, supporting its views, found noted in 57 Me. 225, *et seq.*

The judgment of the trial court should, in my opinion, be affirmed.

ON REHEARING.

ELLISON, J.—After further consideration we adhere to the original opinion. We believe it to be in line with the supreme court of this state. It is in accord with the great weight of authority elsewhere, and is the *only* result to be deduced from the reason upon which such damages are allowed. The suggestion that the conductor *is* the master will apply just as readily to the teamster or other servant of an individual, and we cannot make out a rule for one that will not apply to the other. It would be out of all reason to permit one rule for a corporation and another for an individual,

concerning the same act or offense. There must be undue want of care in the selection of the servant or previous authorization, or subsequent ratification. And this appears as the *real* ground, after all, upon which the case of *Goddard v. Railroad*, 57 Maine, 202, which is relied upon by plaintiff, and is always cited in favor of exemplary damages. The court there said: "A careful examination of the case fails to satisfy us that the jury acted dishonestly, or that they made any mistake in their application of the doctrine of exemplary damages. We have no doubt that the highly punitive character of their verdict is owing to the fact that, after Jackson's misconduct was known to the defendants, they still retained him in their service. The jury undoubtedly felt that it was due to the plaintiff, and due to every other traveler upon that road, to have him instantly discharged, and that to retain him in his place, and thus shield and protect him against the protestation of the plaintiff, made to the servant himself at the time of the assault, that he would lose his place, was a practical ratification and approval of the servant's conduct, and would be so understood by him and by every other servant on the road."

The original opinion, we find to be sustained by the following text-writers: Wood's Field on the Law of Corp., secs. 316, 318; Field on Dam., sec. 86; Hutchinson on Carriers, sec. 813; 2 Rorer on Railroads, 870; 2 Morawetz on Corp., sec. 728; Patterson on Railway Accident Laws, sec. 392, pp. 471, 472. In Wood's Field's Law of Corporations, section 316, it is said: "But the weight of authority, in order to hold the corporation liable for exemplary or punitive damages, would seem to require that the corporation either consent to, or authorize, or ratify the tort of the servant; the same as would be required, if the wrong were done by a natural person, in order to visit on him exemplary damages. Why punish the principal, who has not done

the injury or had any such purpose, and is personally free from fault; and especially where there are no circumstances indicating any want of care or any negligence in fact on his part?" And at section 318 it is said: "The difficulty and inconsistency, if not the absurdity, of the application of the doctrine of exemplary damages, especially to corporations, has been frequently referred to and maintained by the most conclusive reasoning. The doctrine is based upon the supposition of wilful wrong or wicked intention. It supposes the purpose to do wrong. And the ground for the infliction of exemplary damages is in the nature of a punishment for that wrong, and also to thereby afford an example to others."

We have not considered how the case would be, if the wanton acts were committed by the general managing agent in general charge or oversight of the principal's business. Upon such state of case we express no opinion either way, and only mention it because of a distinction which seems to be made in some adjudications.

The judgment is reversed and the cause is remanded. SMITH, P. J., concurs; GILL, J., dissents.

HOOVER, RHODES & CO., Respondents, v. THE PACIFIC OIL COMPANY, Appellant.

Kansas City Court of Appeals, May 12, 1890.

1. **Frauds and Perjuries:** AGENT'S AUTHORITY: CONVERTIBILITY OF ESTATE AT WILL. Though an agent have no authority to make a lease and his attempt to do so may by law result only in an estate at will, yet entry and payment of rent under such lease may convert the estate into an implied tenancy from year to year.

41 317
47 613
41 317
56 551
41 317
89 149
41 317
92 345
41 317
96 1439

2. ——— : AGENT'S AUTHORITY NOT IN WRITING : LEASE LESS THAN A YEAR. An agent's authority to make a written lease for one year need not be in writing, and his lease creates an estate for that term.

On motion for rehearing.

3. ——— : CONSTRUCTION OF STATUTE : CONVERTIBILITY OF ESTATE AT WILL. Sections 2509 and 2513 of the statute of frauds and perjuries are to be construed together, and so construed do not require an agent's authority to make a lease for one year to be in writing. But were it otherwise a lease by such an agent would create an estate at will, which, in this case, was converted into an estate for years by entry and payment of rent referring to a year's letting.

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

AFFIRMED.

Statement of the case by the court.

Plaintiffs brought suit against the defendant for certain rents then alleged to be due on a written contract of lease, alleged to have been entered into in February, 1886, for the period of one year. Plaintiffs recovered in the circuit court, and defendant appealed. Defendant, Pacific Oil Company, it seems, was conducting a business at St. Louis, and engaged one T. N. Shepard to go to Kansas City and sell its goods. The secretary of the oil company, with that view, entered into verbal negotiations with the plaintiffs at Kansas City, and agreed verbally to rent from them the wareroom in which the oil company was to conduct its business. After the secretary had returned to St. Louis, plaintiffs suggested to defendant's agent, Shepard, at Kansas City, that a written lease be made, and thereupon it was made, and Shepard signed the name of the oil company thereto. The evidence is conflicting as to whether or not there was a verbal understanding between the officers of the oil company and Hoover, Rhodes & Co., that Shepard should enter into the written lease. It is certain, and uncontradicted, however,

that Shepard, the agent, had no authority *in writing* for making said lease. It appears from the evidence that, during the second month's occupancy of the storeroom by the oil company, Shepard bought the business of the company, and thereafter for a few months ran business on his own account at the same place. The oil company paid plaintiffs the rent for the period of their occupancy, and plaintiffs collected one month's rent thereafter (May, 1886) from Shepard, fully understanding, too, the changed relations between the oil company and Shepard, but as plaintiffs claim they intended to release the obligations of the oil company, under the lease to pay rent for the whole year. Shepard defaulted in the rents due for June, July, August and September, and plaintiffs seek by this action to hold defendant therefor, basing their claim on the written lease made by Shepard in defendant's name. In its answer the defendant denies, under oath, the execution of said lease, and denies that Shepard had any authority to execute the same in its behalf.

Lathrop, Smith & Morrow, for appellant.

(1) The demurrer, offered by defendant at the close of plaintiffs' evidence, and relating to the first count of the petition, should have been sustained. There was no proof of authority given Shepard as agent to execute the alleged lease sued upon. There was no evidence of express authority granted to Shepard by the defendant company to execute the lease; there was no evidence of any ratification by defendant and no proof of any estoppel against defendant relating to said lease. Express authority must have been given for the special purpose of executing the lease, or the execution by Shepard did not bind defendant. *Howard v. Carpenter*, 11 Md. 259, 281; *Alexander v. Rollins*, 84 Mo. 657; *Alexander v. Rollins*, 14 Mo. App. 109, and cases cited. (2) Even if there was any color of authority from defendant to

Shepard as agent to execute a lease, still the nature of the employment of Shepard by defendant would have to be looked to, in order to determine whether there was authority in point of fact for this particular purpose. The evidence shows he was simply a salesman of merchandise. So that no warrant could be found here for the execution by him for defendant of a written lease, and the nature and scope of his employment is conclusive against the question of authority. *Gentry v. Ins. Co.*, 15 Mo. App. 215, 222. (3) Even if Shepard were an agent of defendant, still, unless his authority to execute the lease in question was in writing, the execution thereof, by him as such agent, would not be binding. Parol authority for such purpose is expressly prohibited by our statutes. R. S., secs. 2510, 3078. (4) In other states where similar statutes exist, the courts have held, in questions of execution of a written lease by an agent, that the authority must be in writing. *Jennings v. McComb*, 112 Pa. St. 518, 521; *Post v. Morteus*, 2 Robertson's Reports (N. Y.) 437, 439; *Folsom v Perrin*, 2 California, 603, 604; *Porter v. Bleiler*, 17 Barb. 149, 154; *Judd v. Arnold*, 31 Minn. 430, 431. (5) It would have required a vote of the board of directors of defendant company, to have authorized Shepard to execute the lease. The evidence shows there was no such vote. *Gillis v. Bailey*, 17 N. H. 22.

Warner, Dean & Hagerman, for respondents.

(1) The authority of an officer or agent of a corporation to make contracts in the course of its business, such as that of renting a building, or securing the services of attorneys or issuing promissory notes, without any formal resolution of the board of directors to that effect, is clearly established by repeated decisions of the supreme court of this state. *Southgate v. Railroad*, 61 Mo. 39; *Bank v. Coal Co.*, 86 Mo. 125; *Kiley v.*

Forsee, 47 Mo. 290; *Holmes v. Board of Trade*, 81 Mo. 137. It is settled law that, where an agent has authority to make a contract, he can reduce it to writing, so that there may be no mistakes about what the contract is. (2) Did the authority of Shepard to sign the contract have to be in writing? We presume this is the only point seriously relied upon by the counsel on the other side. It is worthy, therefore, of respectful consideration. It is claimed that section 2510, Revised Statutes of Missouri, requires the authority of an agent to be in writing. This section, known as the statute of frauds, was construed at an early date by the supreme court of this state, when it was held to have no application to leases for a year. Such leases can be made by parol, and are not within the statute of frauds. *Kerr v. Clark*, 19 Mo. 139; *Ridgeley v. Stillwell*, 28 Mo. 400. The defendant cannot avail himself, in this action, of the statute of frauds, because that defense has not been pleaded. *Gardiner v. Armstrong*, 31 Mo. 535; *Hook v. Turner*, 22 Mo. 333; *Sherwood v. Sexton*, 63 Mo. 78. There is no plea of the statute of frauds in this case. The plea, to be good, would have to specify that the agent was not authorized in writing. The answer contains no such allegation. The plea of non-execution cannot be distorted into a plea of the statute of frauds. It was also held that a parol lease for a term of years has the effect of creating a tenancy from year to year. The lease in question was only for one year. It could have been made orally on oral authorization. It follows, therefore, as night the day, that it could be made in writing, upon oral authority. The doctrine is well expressed in Bishop on Contracts, section 1049. Story on Agency, sec. 50; 2 Kent's Com. Lect. 41. Even if section 2510 applied to a yearly lease, we insist that section 3078 withdraws all leases of buildings in cities from the operation of section 2510.

Lathrop, Smith & Morrow, for appellant.

On motion for rehearing, cited: Reed, Statute of Frauds, secs. 795-6; *Ellis v. Page*, 1 Pick. (Mass.) 43; *Grant v. Ramsey*, Ohio St. 157, 167; Sugden on Vendors, p. 95; *Hollis v. Edwards*, 1 Vern. 159; *Whitney v. Swett*, 2 Foster (N. H.) 10; *McVey v. McVey*, 51 Mo. 420; *State v. Green*, 87 Mo. 587; *Withers v. Larrabee*, 48 Me. 570; *Robinson v. Deering*, 56 Me. 357; *Goodwin v. Allen*, 68 Me. 308; *Orr v. McCurdy*, 34 Mo. App. 418; *Tincher v. Phillips*, not reported; *McKinley v. Railroad*, 40 Mo. App. 449; *Commonwealth v. Mottichmed*, 32 Eng. L. & E. 84; *Bogardus v. Church*, 4 Sand. Chan. 633; *Riggs v. Wilton*, 13 Ill. 15; *Collins v. Wilhoit*, 35 Mo. App. 589; *Adams v. Field*, 26 Vt. 256; *Winters v. Cherry*, 78 Mo. 344.

Warner, Dean & Hagerman, for respondents.

On motion for rehearing, cited: *Kerr v. Clark*, 19 Mo. 139; *Ridgeley v. Stillwell*, 20 Mo. 400; *Hammon v. Douglas*, 50 Mo. 435; *Winters v. Cherry*, 78 Mo. 344; *Porter v. Bleiler*, 17 Barb. 156; *McWhorter v. McMahan*, 10 Paige's Chan. Rep. 386, *et seq.*; *United States v. Tynen*, 2 Wall. 88; *State v. Green*, 87 Mo. 583; *Sacramento v. Bird*, 15 Cal. 294; *Swan v. Buck*, 40 Miss. 268; *Weeks v. Walcott*, 15 Gray, 54; *People v. Syttle*, 1 Idaho T. 161; *Becor v. Fliss*, 64 N. Y. 518-20; *Young v. Duke*, 5 N. Y. 463.

PER CURIAM.—The controlling question for decision here is this: Can the agent bind his principal by entering into a written lease of real estate, unless the authority therefor be in writing? The agent, who executed the lease in controversy, not having authority in writing, by the literal terms of section 2509, Revised Statutes, 1879 (considered alone), the estate created by the renting was an estate at will only. The statute

thus making the estate merely one at will leaves it, however, with all the common-law incidents of such estates, among which is its convertibility into an estate from year to year, or from month to month, as may be implied by entry and payment of rent. 4 Kent, 112; *Williams v. Deriar*, 31 Mo. 13; *Hammon v. Douglas*, 50 Mo. 434; *Reeder v. Sayre*, 70 N. Y. 180; Browne on St. of Frauds, sec. 38. This is true, notwithstanding our statute at the time of the foregoing cases had not the exception as to leases for a period of three years, as has the original English statute from which it is taken. This fact disturbed Judge BLISS in *Hammon v. Douglas*, *supra*. But it is said in *Williams v. Deriar*, *supra*, quoting from Browne on Statute of Frauds, 38, that the doctrine of convertibility of estates at will into estates from year to year by entry and payment of rent is older than the statute, and, therefore, the presence or absence of such exception to the statute does not alter the rule. So, therefore, we are of the opinion that, though there was no written authority to the agent making this lease, which, by the terms of section 2509 (considered unaffected by any other section), made an estate at will, only, yet, since there was an entry and payment of rent thereunder, the estate was converted into an implied tenancy from year to year, or for some other time, as may be indicated by the payment of rent. 2 Blackstone, 140, 143; *Shaffer v. Sutton*, 5 Binn. 228; *Ridgeley v. Stillwell*, 25 Mo. 570; *Kerr v. Clark*, 19 Mo. 132; *Ridgeley v. Stillwell*, 28 Mo. 401; *Goodfellow v. Noble*, 25 Mo. 62; *Hammon v. Douglas*, 50 Mo. 437. The foregoing is the status in which we would consider this case placed, was the lease governed by section *2509, alone.*

But, when this section is construed in connection with section 2513, we are of the opinion that the agent's authority to make the written lease in this case need not be in writing, and that the estate he created was the term named in the lease. By the terms of the latter section, "No action shall be brought * * * upon

any contract for the sale of lands, tenements, hereditaments, or an interest in or concerning them, or *any lease thereof, for a longer time than one year*, * * * unless the agreement upon which the action shall be brought * * * shall be in writing and signed by the party to be charged therewith, or some other person by him thereto lawfully authorized." By reading and construing these sections together, as should be done, since they refer to the same subject-matter, the only reasonable construction is to say that the clause in section 2513, declaring that no action shall be brought upon any lease of lands, tenements or hereditaments for a longer period than one year unless it be put in writing, operates as an exception or proviso—as the statute now stands—to section 2509. This is made quite evident by reference to the original English statute of frauds and those of the different states. Nearly, if not all the states have adopted literally or substantially the first section of the English statute, section 2509, of our statute. And by far the major part of them have also adopted an exception or proviso to the broad terms of that section. This exception in the English statute, is embodied in section 2 as a separate section; and excepts all leases not exceeding the term of three years. In the states, the exception is enacted in various ways. In some, the proviso is found in the section itself; in others it is a separate section; while, in others, it is embodied in some other section of the same statute. And in most of the states the length of the time of the excepted lease is one year, instead of three, as in England. The exception of one year is found in the statute of New York, and we have the ruling in that state that a lease for one year or less need not be in writing: *Reeder v. Sayre*, 70 N. Y. 180; *Porter v. Bleiler*, 17 Barb. 149, 157. In the latter case it is said: "The authority to Baldwin (the agent) was not in writing, but this objection is not well founded in relation to leases for a term not exceeding one year." The one

year provision is enacted also in Mississippi, and is found in the corresponding section 2513 of our statute, and embodied in the same part thereof. It is held in that state that a verbal lease was void under the statute because made for a *longer* term than one *year*. *Phipps v. Ingraham*, 41 Miss. 256. In California, the sixth section of the statute of frauds as there enacted is that "no estate or interest in lands, other than leases for a term *not exceeding one year*, * * * shall hereafter be created or granted * * * unless by deed or conveyance in writing," by the party granting or creating, "or by his lawful agent thereunto authorized by writing." It was held that a lease being made by an agent, not authorized by writing, was void for the reason that it was for more than one year. *Folsom v. Perrin*, 2 California, 603. So, under a similar statute a like ruling was made in Minnesota: *Judd v. Arnold*, 31 Minn. 430.

Now section 2513 of our statute declares that no action shall be brought upon any lease of lands, tenements or hereditaments for a longer time than one year unless such lease be signed by the lessor or some other person by him lawfully authorized. This section in effect declares that, if the lease is for one year or less, it need not be writing, or if made by an agent in writing, such agent's authority need not be in writing. In this view of the case, section 3078 is not applicable, for the reason that the contract of leasing here is in writing. And not being for more than one year, the authority of the agent making it need not be in writing. Judgment affirmed.

ON MOTION FOR REHEARING.

ELLISON, J.—The contention in this motion is that section 2509 should be construed alone without reference to section 2513. Section 2509 corresponds to sections 1 and 2 of the English statute, and 2513 corresponds to section 4 of that statute, though there is

material change made by each of our sections. Thus, section 2509 omits the exception of three years contained in the English statute, and section 2513 provides that no action shall be brought on any lease of lands or tenements for a longer time than one year. Sections 1 and 2 of the English statute provided that unwritten leases for three years or less were valid. Yet, at the same time, section 4 of that statute provided that no action should be brought upon any contract or sale of lands or tenements or any *interest in or concerning them* unless the contract was in writing. In this condition of the statute, it came about that when a verbal lease was made for three years or less, as permitted by the first section, its validity was questioned under the fourth section, as being an interest in or concerning lands, which must be evidenced by writing. But the courts held that as it could not be supposed that one section was intended to permit the lease, and the other not to permit it, that, therefore, sections 1 and 2 should be construed unconnected with section 4. And this was, of course, the proper disposition of the question as the *statutes then stood.* But if section 2 of the English statute had not made the exception to section 1, and section 4, in addition to the provision as to interests in or concerning lands and tenements, had contained the provision now found in section 2513, as to leases for one year, it could scarcely be doubted that the courts would have construed them together, and held the latter as limiting the former. It is true section 4 of the English statute has been held to refer to future interests; but we must be careful to observe the change of its phraseology at the period of each particular decision. The decisions were under the original statute, or under such changes as yet made it refer to future interests. Thus the case of *Tillman v. Fuller*, 13 Mich. 113, held the two sections covered different purposes and were not to be construed together. One section was that "no estate or interest in lands, other than

leases for a term not exceeding one year" shall be created except by writing. The other section provided that "every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void unless the contract" be in writing. The court said the first one referred to a lease and the other to a *contract for* a lease. One referred to a present matter, the other to a future interest. But our section 2513 does not refer to a contract for a lease, a future interest, but refers to the *lease itself*. It reads that "no action shall be brought * * * upon * * * any lease thereof (lands and tenements) for a longer time than one year" unless evidenced by writing. It, therefore, appears to me as evident that the legislature has intended by this provision in section 2513 (inserted in Revised Statutes, 1879, as an amendment) to ingraft an exception onto section 2509. So from either of the two points, upon which this case may be said to turn, the judgment of the trial court must be affirmed.

The exception of land leases for one year or less, which we have shown to exist in section 2513, makes it unnecessary that the agent's authority should have been in writing, or that there should have been a writing at all. And if we should concede there is no exception, as contended by defendant, yet the estate created by the lease itself was an estate at will, converted into an estate for years by entry and payment of rent referring to a year's letting. This latter construction does not depend on an exception in the statute. The convertibility of estates at will into an estate for years is older than the statute, and when the courts so convert them, where there has been an entry and payment of rent, they are only obeying the statute; for, when the statute declared that a verbal lease should create an estate at will, it but indirectly said that it should be an estate for years on entry and payment of rent. *Koplitz v. Gustavus*, 48 Wis. 48. The motion is overruled. The other judges concur.

41 328
45 516
41 328
49 276
41 328
59 253
60 683
41 328
68 560
41 328
76 346
41 328
83 553

REUBEN ANDERSON *et al.*, Respondents, v. AARON MCPIKE, Appellant.

St. Louis Court of Appeals, May 13, 1890.

1. **Pleading:** MISJOINDER OF CAUSES OF ACTION AND PARTIES PLAINTIFF: WAIVER OF OBJECTION. An objection that there is both a misjoinder of parties plaintiff and of causes of action must be made either by demurrer or answer; otherwise it is waived.

2. **Practice, Trial:** SEPARATE FINDINGS. When there are separate findings on different issues as to elements of damage, and the finding on one issue, which should not have been submitted to the jury, can therefore be separated from the aggregate assessment of the damages, the error in the submission of said issue is not ground for the setting aside of the entire verdict.

3. **Evidence:** GENERAL OBJECTION. Evidence, which is admissible for any purpose in a cause, cannot be excluded upon a general objection as to its relevancy.

4. **Practice, Trial:** SPECIAL INTERROGATORIES. The refusal of the trial court, while the law in regard to special interrogatories was in force, to submit to the jury interrogatories which are clearly leading and suggestive of the answer expected is not error.

Appeal from the Hannibal Court of Common Pleas.
HON. THOS. H. BACON, Judge.

AFFIRMED.

Reynolds & Lewis, for appellant.

Elijah Robinson, *I. C. Dempsey* and *John Farrell*, for respondents.

ROMBAUER, P. J.—Plaintiffs brought this action to recover from the defendant damages, caused by false and fraudulent representations made by him to them touching the financial condition of one Modisett, their debtor, and touching the value and title of certain

lands, which were formerly the property of Modisett, but, at the date of such representations, were held by the defendant. The plaintiffs, in their second amended petition, allege that, owing to such representations and relying upon them, they were induced to take the lands in full payment of their claims against Modisett, which were then collectible in full, and that, owing to the land being much inferior in value than represented, and to a defect in the title, they suffered damages in the sum of four thousand dollars, for which they ask judgment.

The transaction took place in 1873, and the plaintiffs, it would seem, instituted suit shortly after discovery of the facts. The cause was repeatedly tried, resulting in verdicts for the plaintiffs. The verdict of the jury upon the last trial was for twenty-three hundred and thirteen dollars and ninety-nine cents, composed, as shown by the finding, of the following items: One thousand and ninety-six dollars for the difference between the value of land and the aggregate claims of the plaintiffs against Modisett; nine hundred and seventeen dollars and eighty-nine cents for interest on such difference up to the date of the finding at the rate of six per cent. per annum, and three hundred dollars for expenses incurred by plaintiffs in getting possession of the land from an adverse claimant. The court entered judgment upon this verdict.

The defendant, appealing, assigns for error that the court failed to sustain its motion in arrest of judgment; that it admitted illegal evidence against his objection; that it refused to submit certain special interrogatories to the jury at his request, and that it erred in its instructions to the jury.

After the trial preceding the last one, the defendant appealed to the supreme court, and that court reversed the judgment and remanded the cause. The opinion of the supreme court is reported in 86 Mo. 293, and its decision touching questions of law arising upon the

record is the law of the case, and, of course, conclusive upon us (*Metropolitan Bank v. Taylor*, 62 Mo. 338; *Adair County v. Ownby*, 75 Mo. 282; *Gaines v. Fender*, 82 Mo. 497), unless the facts developed on the retrial of the cause require a different decision to be applied thereto. *Musser v. Brink*, 80 Mo. 350.

The first error assigned arises in this manner. The plaintiffs, in their petition, state that Modisett was indebted to them in the sum of twenty-eight hundred dollars on promissory notes, without stating whether the notes were given to them jointly. The answer admits the indebtedness, but adds "that said indebtedness was several and not joint, as is alleged in said petition;" but the answer does not, in specific terms, object to the joinder of the two plaintiffs in one action. The proof shows that the indebtedness of Modisett to the plaintiffs was several in the sum of one thousand dollars to one, and in the sum of eight hundred dollars to the other. The defendant made no objection on that account to the evidence during the trial, but, at its close, asked an instruction in the following words:

"The court declares as a matter of law that, under the testimony in this case, there is a misjoinder of parties plaintiff, and a misjoinder of causes of action, and the verdict should be for the defendant."

The court refused the instruction, and the defendant, after verdict, made the same objection by motion in arrest of judgment, which the court overruled.

The point made by the defendant on this ruling is that there was a fatal misjoinder both of plaintiffs and causes of action, which was not waived under the provisions of sections 3515 and 3519 of the Revised Statutes, 1879.

The fact that several causes of action have been improperly united is made a ground of special demurrer by the provisions of section 3515, and, if *no objection is taken thereto* by demurrer or answer, it is necessarily

waived. We use the words *objection taken* advisedly, because the mere statement of the existence of a fact, and an objection taken on account thereof, are essentially different things. The section does not mention a misjoinder of parties, but only a defect of parties, and it has been held in other jurisdictions, under similar codes, that these terms are not synonymous. *Palmer v. Davis*, 28 N. Y. 242; *Bort v. Yaw*, 46 Iowa, 323; *Hinkle v. Davenport*, 38 Iowa, 355. In this state, the construction given to the statute has been otherwise. *Kellogg v. Malin*, 62 Mo. 431; *Edmonson v. Phillips*, 73 Mo. 60; *Pettingill v. Jones*, 21 Mo. App. 211. As intimated by Judge SHERWOOD in *Elfrank v. Seiler*, 54 Mo. 134, and decided by the Kansas City Court of Appeals in *Ryors v. Prior*, 31 Mo. App. 561, the only objections under our code, which are not waived by pleading over, are that the petition does not contain facts sufficient to constitute a cause of action, and that the court has no jurisdiction of the subject-matter.

As we take the view that the right of objection was waived, it is needless to decide whether the objection, if properly raised upon the record, would have been valid, a question on which we desire to be understood as not expressing any opinion.

Passing to the objections against the evidence admitted, we will first dispose of evidence touching the adverse occupancy by one Means of the land conveyed to the plaintiffs. It appeared upon the last trial of the cause, as upon the trial next preceding, that, in conveying the land, the defendant refused to agree to put the plaintiffs into possession. The supreme court, when the cause was before it on the former appeal, held that, by accepting the conveyance on such terms, it was no part of defendant's duty to put them into possession. The evidence on this subject was the same on the last trial as on the one next preceding. Evidence, therefore, on the subject of the nature of Means' occupancy,

and the expenses to which the plaintiffs were put in dispossessing him, was, under that decision, irrelevant to the issues, and should have been ruled out. But, as the jury made a separate finding on that subject, it can be segregated from their general finding, and there is no necessity for wholly setting aside the verdict on that account alone.

The defendant next objects that the court erroneously admitted in evidence a conveyance made by Modisett to the defendant in January, 1873, and shortly before the transaction, which gave rise to the present action, took place. The evidence of the defendant in regard to this matter was that Modisett made this conveyance to him for a pretended consideration of three thousand dollars in notes, but that the understanding between them was that he was not to keep the land, but should convey it to Modisett's wife and children and get back his notes, which arrangement was subsequently consummated. The defendant's counsel claims that this transaction, if fraudulent, was an independent and disconnected transaction from the fraud alleged to have been perpetrated on the plaintiffs, and hence evidence of a collateral matter, and wholly irrelevant to any issues in this case. The defendant further claims that the admission of the evidence had a tendency to prejudice the jurors against him.

The rule in this state is that evidence, which is admissible for any purpose in the case, cannot be excluded on a general objection as to its relevancy. *Union Savings Association v. Edwards*, 47 Mo. 445, 449. The objection made in this case was that the evidence was irrelevant. While it was evidence of a collateral transaction, it had a direct bearing on the question of the defendant's knowledge of the extent of Modisett's means, when he represented to the plaintiffs his embarrassed condition. For that purpose it was clearly admissible, and, if admissible for any purpose, it could not be excluded by the court for irrelevancy.

As to the admission of the defendant's evidence, as preserved in a former bill of exceptions, it is not necessary to discuss whether it was proper or not, since his counsel in their statement filed in this court concede that there is nothing in it, which was not contained in his oral testimony at the trial in question; hence its admission was clearly not prejudicial.

We have examined the instructions given and refused, and have commented upon them in the original opinion filed in this cause. We have re-examined them and can only reiterate in general terms, what we then stated upon a detailed examination, that we see no error in these instructions, nor anything which is opposed to the views of the law expressed by the supreme court upon the last appeal of the cause.

When this cause was tried, the law providing for the submission of special interrogatories to juries was in force. The defendant asked the court to submit to the jury for their special finding four interrogatories, which the court refused to do. The first two related exclusively to the adverse possession of the land by Means, and, as on that question our conclusions are with the defendant, it is needless to set them out. The last two were as follows:

"3. In making the trade, did the defendant refer Reuben Anderson to James D. Biggs for information in reference to the value and quality of the land sold, and did Anderson apply to Biggs for information in reference thereto, and was such information obtained from Biggs?

"4. Did the defendant at the time of or before the sale of the land by him to plaintiffs inform both or either of them that Modisett had property enough to pay his debts, and have something left for his family, if Modisett's creditors would give defendant time to dispose of Modisett's estate?"

The law in regard to special interrogatories was in force in this state but for a comparatively brief period.

We are not aware of any decision of our supreme court relating to the form of the interrogatories which parties under the law had a right to demand. We gave the question an extended examination in *Benton v. Railroad*, 25 Mo. App. 155, and, although that cause was decided by a divided court, on the question which is decisive of this case the court was unanimous. The opinion delivered by myself and concurred in by Judge LEWIS held that "it is more consonant with the aims and objects of the law, and the proper administration of justice, that questions put to the jury should be governed by the rules applying to questions put to witnesses, and that it should be left to the sound discretion of the judge to permit or refuse a leading interrogatory, —merely intimating that it is the better practice to avoid them." In applying the law to the facts of that case we held that the court committed no error in refusing certain interrogatories, which were leading, although it would have committed none in giving them, because to give or refuse leading interrogatories was discretionary with the court. Judge THOMPSON, dissenting, went further and held that, "notwithstanding what may have been ruled in other jurisdictions, it would have been error for the court to give the leading interrogatories in this case." It will be thus seen that, whether we apply to the facts of this case the ruling of the majority of the court in the *Benton case*, or the individual views of Judge THOMPSON, we cannot put the trial court in the wrong, because the interrogatories asked and refused were clearly leading, and suggestive of the answer expected.

As above stated, we see no warrant, under the ruling of the supreme court upon the former appeal of the cause, for the recovery of the three hundred dollars' expenses to which the plaintiffs were put in obtaining possession of the land. The plaintiffs having heretofore remitted in this court three hundred dollars of the

judgment recovered by them, it is now affirmed as to the residue, the costs of this appeal to be paid by the respondents. Judge THOMPSON concurs; Judge BIGGS, having been of counsel, does not participate in the decision.

41 335
48 577
41 335
64 91
41 335
66 294

STATE OF MISSOURI *ex rel.* CIRCUIT ATTORNEY, Relator, v. WILLIAM P. MACKLIN, Respondent.

SAME v. HENRY L. ROGERS, Respondent.

SAME v. OSCAR H. BOLLMAN, Respondent.

SAME v. RICHARD BARTHOLDT, Respondent.

St. Louis Court of Appeals, April 1 and May 13, 1890.

1. **Statutes**: CONSTITUTIONALITY. Provisions prescribing the qualications of directors of school boards are germane to the general subject of an act which provides for their election, and an act, which according to its title provides for the election of certain officers, sufficiently indicates by its title that their qualifications are provided for in it. *Held*, accordingly, that section 5 of the act of March 30, 1887, entitled "An act fixing the number of directors in public school boards in certain cities, and providing for election of such directors, and for districting said cities therefor," is not opposed to the provision of the constitution of this state, prescribing that no bill shall contain more than one subject, which shall be clearly expressed in its title.

2. **St. Louis**: QUALIFICATIONS OF DIRECTORS OF PUBLIC SCHOOL BOARD. Section 5 of the act above referred to, which requires that no person shall be eligible for office as a director "who shall not have paid a school tax within said city for two consecutive years immediately preceding his election" construed, and *held* to mean that no person shall be eligible "who shall not have paid, at any time preceding his election, a tax for the benefit of schools within said city for the two consecutive calendar years, next preceding the year of his election, assessed on property in which he has an interest subject to taxation at the date of assessment or date of payment."

3. ——— : ———. The payment by a copartnership of a tax in part for school purposes against its personal property is a payment within the purview of said section by one who is a member of the copartnership at the time.

4. ——— : ———. The payment of taxes on land by one having a tenancy by the curtesy initiate, out of his own means, constitutes the payment of taxes within the purview of said section.

5. ——— : ———. And so will the payment of delinquent taxes on land purchased by the payor, though the land was purchased, and the payment was made, immediately before the election, and for the express purpose of qualifying for office.

6. ——— : ———. But if delinquent taxes on land, assessed against the owner, are paid by a stranger, who has no interest in the land, for the purpose of qualifying for office, such payment will not satisfy the requirements of said section.

7. ——— : ———. Nor will the payment of taxes for the current year, though made prior to the election, be considered in the determination of the eligibility of directors; the payment required is that of taxes for the two years immediately preceding the election.

8. ——— : ———. Nor is the payment of a merchant's license any evidence of the payment of a school tax, it not appearing that the charge for license included any taxes for schools.

Original Proceedings of Quo Warranto.

WRIT OF OUSTER DENIED as to defendants Bollman, Macklin and Bartholdt.

WRIT OF OUSTER ISSUED as to defendant Rogers.

Campbell & Ryan, for relator.

Estes, Bashaw & Clark, for respondents William P. Macklin and Henry L. Rogers.

Lubke & Muench, for respondent Richard Bartholdt.

Jay L. Torrey and *E. W. Pattison*, for respondent Oscar H. Bollman.

OPINION ON DEMURRER TO INFORMATION.

ROMBAUER, P. J.—Under the stipulation filed March 27, 1890, the only question submitted for our decision on this demurrer is, whether the fifth section of an act entitled "An act fixing the number of directors in public school boards in certain cities, and providing for election of such directors, and for districting said cities therefor," approved March 30, 1887, is constitutionally valid.

On the question, whether the whole act is constitutionally valid, as impairing the restrictions imposed upon the legislature in the passage of local acts, or whether said act is to be considered a local or general law, we have heretofore refrained from expressing an opinion, and we desire to be understood as not now passing on that question one way or the other.

The section under consideration is as follows: "Sec. 5. No person shall be eligible for office of director of school board in any such city who shall not have resided in such city and paid a school tax therein for two consecutive years immediately preceding his election, and each director shall also possess such additional qualifications as may be required by existing law or charter."

The constitutional validity of this section is challenged on the ground, that it is touching a subject not clearly expressed in the title of the act, as required by section 28 of the fourth article of the constitution of Missouri, which section, omitting exceptions foreign to this inquiry, is as follows: "No bill shall contain more than one subject, which shall be clearly expressed in its title."

The true scope and meaning of this section has been very fully discussed in *City of St. Louis v. Tiefel*, 42 Mo. 578, which case has ever since been a leading case on that subject. There the title of the act was "An act

to amend an act to enable the city of St. Louis to procure a supply of wholesome water," approved March 13, 1867. The second section of the amendatory act provided for a water rate payable by all owners and lessees, whether they used the water of the city or not, provided they were notified of the readiness of the water board to supply them with water, and provided the board of health by resolution declared that the use of water from the public water works of the city, in such houses, was demanded as a sanitary measure. The section further subjected the persons who failed so to use the water to the same penalties as those who used the water and failed to pay for the same. The provision was not contained in the original act. Objection was made that the power thus conferred was extraordinary, was not germane to the main subject, and that the provisions contained in the section were in nowise referred to in the title of the act. The supreme court held the section constitutionally valid, and in so doing Judge WAGNER in delivering the opinion said: "In the act to which the section under consideration is amendatory, the title is, 'To enable the city of St. Louis to procure a supply of wholesome water.' To accomplish that object it was necessary to act through agents, and hence a board of water commissioners was constituted; and, as a consequence, their powers, duties and responsibilities were defined. That the board of health should say when in their judgment it was necessary as a sanitary measure that certain houses should be supplied with water, does not alter the case. They take no steps toward carrying out the act, nor do they exert any active agency in the matter. When their views are made known, the board of water commissioners then act, if they see proper. The section, although it confers extraordinary powers, relates clearly to the subject intimated in the title, and is entirely congruous and connected with it. Every person, upon an inspection of the title, would naturally expect to find the full

scope of the powers, duties and privileges of the commissioners set forth in the act."

We are referred by respondents to *State v. Everage*, 33 La. Ann. 120; *State v. Demouchet*, 40 La. Ann. 205, and *Brown v. State*, 79 Ga. 324, as supporting a contrary view. If they do, they are entitled to no consideration when opposed to the decisions of our own supreme court.

The views expressed in *City of St. Louis v. Tiefel* were approved in *State v. Mathews*, 44 Mo. 523; *State v. Bank*, 45 Mo. 536, and *State v. Mead*, 71 Mo. 266. In the last case cited the supreme court held that, "If any matter contained in a statute be objected to, as not referred to in the title, or that the bill contains more than one subject, the objection urged will not be held well taken, if the clause or section to which objection is raised be germane to the subject treated of in the title." It was there held that a section providing for filling, by appointment of the governor, vacancies temporarily occurring in offices filled by election in the first instance was germane to the subject of an act and sufficiently expressed in its title, which was, "Concerning popular elections."

It is needless to elaborate this subject further. It is evident from the above authorities that, in this state, provisions prescribing the qualifications of directors, are germane to the general subject of an act which provides for their election, and it must also be conceded that an act, which, according to its title, provides for the election of certain officers, sufficiently indicates by its title that their qualifications are provided for in it. The respondents' demurrer is overruled. All concur.

OPINION ON THE MERITS.

ROMBAUER, P. J.—The proceeding in these cases is upon official information filed by the circuit attorney of St. Louis, charging that the respondents have

usurped and do unlawfully usurp the offices of directors of the Board of President and Directors of the St. Louis Public Schools, not being legally qualified to hold such offices. The cases were tried upon separate records, but, as the main question involved in all of them is substantially the same, we have concluded to dispose of them together, first stating our conclusions of law, and then their application to the case made by the evidence of each individual respondent.

The Board of President and Directors of the St. Louis Public Schools is a public school corporation in and for the city of St. Louis, which is a city of over three hundred thousand inhabitants, and an act of the legislature, approved March 30, 1887, provides in its fifth section among other things: "No person shall be eligible for office of director of school board in any such city who *shall not have* * * * *paid a school tax therein for two consecutive years immediately preceding his election*, and each director shall also possess such additional qualifications as may be required by existing law and charter." It was admitted, by the relator in the case of each respondent, that he was duly elected, and was also duly qualified at the date of his election for the office in all other respects, save the payment of a school tax by him in said city for two consecutive years, immediately preceding his election. On this fact, and on this fact alone, issue was taken by the pleadings.

After the institution of these proceedings, the respondents challenged the constitutional validity of the law as a whole, and also the constitutional validity of the fifth section, separately and on independent grounds. We refused to pass upon the constitutional validity of the act as a whole, as not affecting the result as far as respondents were interested therein one way or the other. The attorney general of the state thereupon, deeming the question of sufficient public importance, instituted proceedings by official information

before the supreme court against two of the directors, and that court, in an elaborate opinion carefully reviewing the entire act in all its parts, decided that the act in all its parts was constitutionally valid, and by such decision set all objections to the constitutional validity of the act or any of its parts finally at rest, and removed any constitutional questions from our consideration therein.

The language of the act is, "that no person shall he eligible * * * who shall not have paid a school tax therein for two consecutive years immediately preceding his election." The contention of the relator is that the true meaning of this clause is, who shall not have paid a school tax assessed against him for the benefit of schools in such city in each year for two years immediately preceding his election. That is to say, if a director is elected on the fifth day of November, 1889, in order to be eligible, he must, according to the relator's contention, have paid a tax within the year between November 5, 1887, and November 5, 1888, and one within the year from November 5, 1888, to November 5, 1889, and such tax must have been assessed against him or his property.

This contention is untenable. The payment of a tax for a preceding year can mean only either the fiscal year or the calendar year. There is no fiscal year designated as such in this state, although taxation is of property from June to June. The scheme of assessment in the city of St. Louis is somewhat different from that employed in other parts of the state. It provides for district assessors, who shall list and assess property, as of the first of June in each year, between the first of June and the first Monday in January next following. They make their report to the president of the board, who makes up the assessment books on or before the first Monday in March. The books are then submitted to the board of equalization, and when the proper

corrections are made, an abstract thereof is delivered to the mayor of the city and state auditor on or before the fourth Monday of May. The taxes assessed in said book are known as the taxes for the year in which the assessment is finally completed, corrected and abstracted, although assessed as of the first day of June in the year next preceding. They are so stated on the books, and so mentioned in the tax bills. There is, therefore, no other tax known, than a tax for a calendar year, when reference is made to a tax for a certain year. It results from this, that, when reference is made to taxes for two consecutive years immediately preceding an election, the term has reference to the calendar years preceding the year in which the election takes place. This is the common and ordinary sense of the term used and, therefore, must be taken to be the sense in which the legislature has used it.

Nor is there any force in the argument that the taxes must be paid *within* each calendar year. The law simply requires that it shall be paid *for* two consecutive years, and not that it shall also be paid *within* those years. There is no ambiguity in the terms used and we cannot read them otherwise than they are written. Our duty is to declare and not to make the law. We had occasion to go over this subject in the case of *Boyd v. The J. M. Ward Furniture Co.*, 38 Mo. App. 210, when an argument as to the inconvenience of a certain construction was made, to which we replied by quoting Chief Justice MARSHALL in *United States v. Fisher*, 2 Cranch., 386, that, "where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain, *in which case it must be obeyed.*" We quote in that case the emphatic declarations of Chief Justice TINDALL in *Everett v. Wells*, 2 Scott. N. R. 531, and Lord TENDERDEN in *Brandling v. Barrington*, 6 Barn. & Cres. 467, which are to the same effect, and

concluded by the statement of the very obvious proposition, that the laws and liberties of a nation would stand on but a slender foundation, if the judiciary would assume the power of first finding an ambiguity in a law where none exists, and then resolving that ambiguity according to its own notions of right and expediency.

While we are clear that the word tax, in the connection in which it is used in the law, means a tax or impost on the person's property, we are equally clear that an antecedent assessment, against *the person himself*, is not essential. A person is not relieved from paying taxes on property owned by him, simply because it is erroneously assessed to another, nor is he under any legal obligation whatever to pay a tax on realty in which he has no interest, simply because it is assessed to him. The assessment of a tax creates no debt in the ordinary sense of the term. *City of Carondelet v. Picot*, 38 Mo. 125; *Peirce v. City of Boston*, 3 Met. 520; *Green v. Wood*, 7 Ad. & Ell. N. S. 178. If a person owns an interest in property and pays a tax thereon, he pays *his* tax regardless of the fact to whom the property is assessed.

A further and equally conclusive argument is found in the fact that the law under consideration does not require an antecedent assessment *against the person* to make him eligible. It does require an antecedent assessment, otherwise the liability would not be in the nature of a tax. In determining the meaning of words and phrases used in a law, where they admit of more than one meaning, it is the duty of the courts to adopt that meaning which is in harmony with the context of the entire law, and prevents the mischief sought to be remedied; but this does not authorize courts to interpolate into the law new provisions, in no way necessary to the clear definition of terms actually employed by the legislature.

Our conclusion is that the true construction of the phrase employed, "who shall have paid a school tax

within said city for two consecutive years immediately preceding his election," is, "*who shall have paid, at any time preceding his election, a tax for the benefit of schools within said city for the two consecutive calendar years, next preceding the year of his election, assessed on property in which he has an interest subject to taxation, at the date of assessment or date of payment.*" The last qualification is inherent in the term employed, because, if he has no such interest the assessment as to him is no tax.

Having thus defined the meaning of the law, we proceed to apply it to each individual respondent, according to the uncontroverted evidence.

I. *Oscar H. Bollman* was elected November 5, 1889. In the year 1888, he was a member of the firm of H. Bollman & Son, and, in the year 1887, a member of the firm of Bollman Bros. A tax on personal property was assessed against the last-named firm in 1887 and paid by the firm April 26, 1888. A tax on personal property was assessed against the first-named firm for the year 1888 and paid by the firm December 31, 1888. Part of the tax on both these bills was for school purposes. As each member of the firm has an individual interest in its property, which under the laws of this state is subject to execution, therein materially differing from property held by a corporation, the evidence offered by him shows that within the definition above given, he complied with the requirement in regard to paying taxes, as a condition precedent to his eligibility. This respondent also offered evidence that the two firms, above stated, had paid a merchant's license to the city of St. Louis for the years ending respectively on the first Monday of July, 1887, and first Monday of July, 1888, and claimed that because it was the duty of the city register, under the decision of *State v. Tracy*, 94 Mo. 217, to extend a tax for the schools on such licenses, the production of the license was evidence of the payment of such tax. This contention is untenable. It

did not appear that the register had extended the tax, or even that it was ever levied, hence the production of the licenses could in no view of the law be evidence of the *payment* of a school tax.

II. *William P. Macklin* was elected November 5, 1889. He paid November 4, 1889, a school tax assessed for the year 1888 against him on a piece of real estate situated within the city of St. Louis, and owned by himself. He also proved that for years anterior to his election, and at the date of the assessment and payment of the tax bills hereinafter recited, he was the husband of Lillian J. B. Macklin, with issue born of such marriage; that said Lillian was the owner, as of a legal estate, of an undivided half interest in certain realty in the city of St. Louis, of which property, by virtue of his marital rights as such husband, he collected the rents; that school taxes were assessed against said property for the years 1887 and 1888, which he paid with his own means, on December 28, 1887, and December 29, 1888, respectively.

The relator challenged these last payments as insufficient to qualify the respondent Macklin, but the objection under our definition of the meaning of the clause is untenable. The respondent had, notwithstanding the married woman's act, by virtue of his marital rights, an interest in the property which he was justified to protect. *Clark v. Bank*, 47 Mo. 17; *Tillman v. Tillman*, 50 Mo. 40; *Dillenberger v. Wrisberg*, 10 Mo. App. 465, and his life-interest was chargeable with such taxes. 1 Washburn on Real Prop. [5 Ed.] p. 130. Provisions of this character are not construed with the strictness contended for by the relator. Thus in Massachusetts, where the law provided that, to entitle a man to vote, he must have paid a state or county tax by himself or his parent, master or guardian, it was held that a voter was qualified, if the tax was paid for him by another, who was neither his

parent, master or guardian, even though paid without his previous authority, if he recognizes the act and repays or promises to repay the amount. *Humphrey v. Kingman*, 5 Met. 162. And, although it was held in the opinion of the judges, given to the house of representatives in that state, 18 Pick. 575, that, after a general assessment of a tax has been made, and returned to the collector, the assessors could not assess a poll tax on anyone simply for the purpose of qualifying him to vote, the decision was put upon the ground that, after an assessment made and returned, the assessors were *functus officio* for that year, and could not assess any tax whatever.

We must conclude, therefore, that the respondent Macklin has shown himself to have been duly qualified at the date of his election.

III. *Richard Bartholdt* was elected November 5, 1889. He proved that, on October 17, 1889, he paid a personal tax bill assessed against him for the year 1889. As this was not the tax for a year preceding his election, within our definition of the term, that evidence is irrelevant. He further proved that, prior to his election, having doubts as to his qualifications, he bought a small piece of property in the city of St. Louis, on which there were delinquent school taxes for the years 1887 and 1888 and paid them, the one on the eighteenth, and the other on the nineteenth, of October, 1889. He testified that he bought this property, partly as a speculation and partly for the purpose of rendering himself eligible as a school director, by the payment of such delinquent taxes. At the date when these taxes were paid the respondent unquestionably had an interest in the land, which he had a right to protect, although he had none at the date of their assessment, and, by paying the taxes, he did pay taxes for the benefit of schools within the city of St. Louis *for* two consecutive years immediately preceding his election.

The case of this respondent presents some difficulties owing to the fact that what to the common understanding would seem to be the aim and object of the qualification provided for in the statute is not expressed in the language used. To the common understanding it would unquestionably seem that what the legislature intended to accomplish was to make no one eligible as a director, who has not for a period of two years consecutively, immediately preceding his election, contributed to the support of schools within the city, by payment of taxes assessed against him or against his property. But, if the legislature so intended, it certainly did not so say, and it is the imperative duty of courts to gather the intention of the legislature from the words employed. As Lord TENDERDEN aptly remarked in *Brandling v. Barrington*, *supra*, "there is always danger in giving effect to what is called the equity of a statute, and it is much better to rely on and abide by the plain words." Provisions touching the qualifications of officers and electors, contained in the constitutions and laws of other states, are drawn with the most painful detail, and an extensive examination of this subject has failed to bring to our notice a case, where the mere fact that the person affected has paid taxes immediately preceding an election with the *sole* object of obtaining thereby a qualification as elector or officer, which he did not otherwise possess, was treated as a fraud upon the law.

These considerations lead us to conclude that, although the case of respondent Bartholdt may stand upon the verge, it is our duty to declare that he has shown himself duly qualified.

IV. *Henry L. Rogers* was elected November 5, 1889. He paid no taxes whatever for the year 1887. On November 4, 1889, he called at the collector's office, and, finding that no taxes were assessed against him for the years 1888 and 1889, he paid two tax bills assessed

against real estate in the city of St. Louis of one Julius Greffet, for the years 1888 and 1889, aggregating two dollars and twenty cents. He had no interest whatever in the property of Greffet, on which he paid these taxes, and did not even pay them upon the request of Greffet. There was, on that very day, a delinquent tax bill for the year 1887 in the collector's office against the respondent, for which the respondent did not even inquire. It is clear, under the view of the law taken by us, that this respondent has not properly qualified for two reasons: *First*, he paid no taxes whatever for the year 1887, which was one of the two consecutive years immediately preceding the year of his election, which in itself is fatal to his qualification, and, *next*, the payments made by him on property, in which he had no interest whatever, without even the owner's request, was in no sense the payment of a tax as far as he was concerned, but a mere sham.

It results from the foregoing that the writ of ouster in the cases of Bollman, Macklin and Bartholdt must be denied, and that, in the case of Rogers, a writ of ouster must issue. So ordered. All the judges concur.

41 348
45 311
46 395
41 348
47 26
48 225
41 348
52 119
41 348
96 1677

HARRIET L. MAUERMAN, Respondent, v. ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY, Appellant.

St. Louis Court of Appeals, May 13, 1890.

1. **Railroads:** NEGLIGENCE. When one, who is not a trespasser, is injured on railroad tracks by being run over by an engine of the railroad company, and the accident occurs in a city, and is due in part to a disregard of municipal regulations, the railway company is liable for the injury, notwithstanding contributory negligence on the part of the injured person, if those in charge of its engine saw, or by the exercise of ordinary care could have seen, the perilous condition of that person in time to have averted the injury.

2. **Practice, Appellate:** WEIGHING THE EVIDENCE IN ACTIONS AT LAW. While appellate courts in this state may grant new trials for the reason that the verdict was against the weight of the evidence, the exercise of the power is confined to the cases where the verdict is so strongly opposed to all reasonable probabilities as to be the manifest result of mistake, bias or prejudice.

3. **Instructions:** NOT PREDICATED ON EVIDENCE. It is error in an action by a mother for personal injury to her minor child to direct the jury to include, in the assessment of the damages, the value of the care given by the mother to such son owing to the injuries received by him, if there is no evidence of the value of such care.

4. **Damages:** PARENT AND CHILD. A mother on the death of her husband succeeds to the obligations of the latter towards their minor child, and, therefore, if such child receives personal injury through the negligence of another, and if the mother in compliance with her obligations actually supports him thereafter during his minority, she is entitled in the assessment of the damages to all the wages which the child could have earned during its minority, without any deduction for or on account of the support of the child.

Appeal from the St. Louis City Circuit Court.—HON DANIEL D. FISHER, Judge.

AFFIRMED.

Henry G. Herbel, for appellant.

(1) The court erred in overruling the demurrers to the evidence offered by defendant at the close of plaintiff's case, and at the close of the whole case. *Loeffler v. Railroad*, 96 Mo. 270; *Yarnell v. Railroad*, 75 Mo. 584; *Rogstad v. Railroad*, 14 Am. & Eng. R. R. Cases, 648; *Taylor v. Railroad*, 86 Mo. 463; *Sloop v. Railroad*, 22 Mo. App. 596; *Diel v. Railroad*, 37 Mo. App. 454; *Milburn v. Railroad*, 21 Mo. App. 431; *Cone's Adm'r v. Railroad*, 14 West. Rep. 100; *Artz v. Railroad*, 34 Iowa, 153; *Anderson v. McPike*, 86 Mo. 300; *Bene v. Jeantet*, 129 U. S. 683; *Peterson v. Case*, 18 Am. & Eng. R. R. Cases, 581. (2) The court erred in refusing the instructions asked by defendant. *Rafferty v. Railroad*, 91 Mo. 37; *Henry v. Railroad*,

76 Mo. 295; *Yarnell v. Railroad*, 75 Mo. 584. (3) The court erred in giving the instructions asked by plaintiff. *Turner v. Railroad*, 76 Mo. 262; *Loeffler v. Railroad*, 96 Mo. 270; *Bell v. Railroad*, 86 Mo. 608; *Prior v. Railroad*, 69 Mo. 218; *Judd v. Railroad*, 23 Mo. App. 64. (4) The court erred in giving the instructions of its own motion. *Bell v. Railroad*, 86 Mo. 612; *Eisenberg v. Railroad*, 33 Mo. App. 85; *Fath v. Railroad*, 39 Mo. App. 447; *Rafferty v. Railroad*, 91 Mo. 37; *Meyers v. Trust Co.*, 82 Mo. 237; *Duke v. Railroad*, 12 S. W. Rep. 636.

D. P. Dyer, for respondent.

(1) The trial court could not properly withdraw the cause from the jury on the ground of contributory negligence. *First.* Because the evidence was not so decisive as to warrant the court in declaring, as a matter of law, that there was such contributory negligence. *Second.* Because there was substantial evidence to the effect that there was no contributory negligence at all. *Third.* Because, even if the plaintiff's son was guilty of contributory negligence, the defendant was liable if its servants could, by the exercise of reasonable care, have discovered her son's danger in time to have avoided the accident. *Guenther v. Railroad*, 95 Mo. 286; *Dunkman v. Railroad*, 95 Mo. 232; *Sullivan v. Railroad*, 97 Mo. 113; *Bergman v. Railroad*, 88 Mo. 678; *Welsh v. Railroad*, 81 Mo. 466. (2) The fact that the accident occurred on these yards of the defendant does not relieve the defendant from liability on any theory on which the cause was submitted to the jury. *Merz v. Railroad*, 88 Mo. 672; 14 Mo. App. 459; *Kelly v. Railroad*, 18 Mo. App. 160; 95 Mo. 285, 286; 2 Shearman & Redfield on Neg., sec. 484, and note 1, p. 298; *Sullivan v. Railroad*, 97 Mo. 119. (3) The specific objections made to the individual instructions are not well taken. The use of the terms, "due" and "proper," were not

erroneous, nor was it prejudicial under the evidence in this cause. *Donahoe v. Railroad*, 83 Mo. 543; Thompson on Trials, sec. 1731; *Dahlstrom v. Railroad*, 103, 104. (4) The instruction on the *quantum* of damages is not erroneous. *Parsons v. Railroad*, 94 Mo. 296; *Googan v. Foundry Co.*, 87 Mo. 326; 14 Mo. App. 588; *Nagel v. Railroad*, 75 Mo. 653.

ROMBAUER, P. J.—The plaintiff is the surviving parent of Peter Mauerman, who, at the date of the accident hereinafter mentioned, was a minor. She brought this action to recover the value of his services between the date of the accident and the date of his arriving at age, and, upon a trial before a jury, recovered a verdict for one thousand and twenty-seven dollars. The defendant, appealing, assigns for error that the court overruled its demurrer to the plaintiff's evidence; that it misdirected the jury in its instructions; that the verdict is excessive, and that the court erred in not sustaining the defendant's motion for new trial.

The place where the accident occurred was in the defendant's switch-yards in the city of St. Louis. The time of the accident was near midnight. These switch-yards, as shown by the evidence, consist of seventeen or more parallel tracks, with a main or lead track on the western side thereof, which, near the place of the accident, was straight for several hundred feet on either side. The switch-engine, with tender attached, was going southwardly at a slow rate of speed on this lead track, when it struck and ran over plaintiff's son. A number of streets, running east and west, cross this switch-yard at right angles. The plaintiff's version of the accident, as detailed by her son, was as follows:

The plaintiff's son Peter was in the employ of an electric lighting company, which had a contract with the defendant for lighting these yards. The lights were suspended on poles about thirty-five feet above the ground, and it was the duty of plaintiff's son to see

that they were kept burning and to renew their carbons from time to time. One of these lights was on the west side of the yard near Marian street, and one diagonally across and one block southeast of the yard on Carroll street. The plaintiff's son testified that he had just renewed the carbon in this western light, and, on descending from the pole, had dropped his pliers on or near defendant's track. He stepped upon the track, and, in doing so, looked and listened for an approaching engine; not seeing nor hearing any, and not hearing the sound of any bell, he bent down to search for his pliers, and while in that position was struck by the engine, and received the injuries complained of. The plaintiff also gave in evidence the ordinance of the city of St. Louis, which requires engines moving within the city limits to ring their bells constantly while in motion.

We cannot see how, on this evidence, the court could have nonsuited the plaintiff. Her son was lawfully in the place where he was injured, and, as far as his evidence shows, was guilty of no contributory negligence. Whether his evidence was true or not, was, even in the light of defendant's evidence, a question for the jury, but, for the purposes of a demurrer to its legal effect, must be presumed to be true.

The defendant's answer contained the plea of contributory negligence, which was denied by the reply, the reply containing the further averment that the defendant's servants could have avoided the injury by using reasonable efforts to stop the engine, after they saw, or by use of ordinary care could have seen, the perilous position of Mauerman.

The defendant's evidence, a correct epitome of which is set out in the brief of its counsel, was in substance as follows: The engine was moving southwardly, on what was known as the "lead" track, at a speed of less than six miles per hour, on its way to its

destination,—the round-house at Lesperance street. There were aboard of it the engineer, the fireman, the foreman of the engine crew, and his two helpers who were standing on the foot-board in front of the engine. The foreman had been ringing the bell of the engine as it approached Miller street, which was distant about three hundred feet north of the point of the accident; but, as the engine passed over Miller street, he ceased ringing the bell and began oiling the engine, as it was his custom to do at that place; his engineer was likewise so engaged, though not having to leave his seat while so occupied. The bell continued to sound until the engine reached a point about one hundred and fifty feet north of the accident. There are five switch-frogs between Miller street and the point of the accident, over which the engine ran, making a noise which could be heard for several hundred feet; the headlight of the engine was burning brightly, and the engineer and crew on the front of the engine were looking south along the track in the direction the engine was running. When they reached a point fifteen or twenty feet north of the place where Mauerman was struck, one of the helpers standing on the foot-board in front of the engine discovered an object on the track, the character of which he could not distinguish at the distance, but he immediately signaled the engineer with his lantern to stop. His signal was immediately acted upon by the engineer, and the engine was stopped within thirty feet, but too late to avoid striking Mauerman, who was sitting on the west rail of the track asleep with his head upon his knees, directly beneath and in the shadow of the electric light. None of the men in front of the engine saw Mauerman before the engine got within fifteen or twenty feet of him, and the engineer did not see him until he got the signal from the helper to stop, for the reason, as they testified, that Mauerman was sitting in the shadow produced by the electric light, which was of

such intensity as to render an object indiscernible until a person entered its orbit, which was about thirty feet in diameter. The track on which appellant's engine was moving was perfectly straight for a distance of from three hundred to five hundred feet north of the point of the accident, and, if plaintiff had looked, he could have seen the engine, and if he had listened he could have heard it. Plaintiff's son within an hour before the accident had drunk five Jumbo glasses of beer, each of which had a capacity of one quart, at a saloon situated within a few blocks of the scene of the accident; and he was seen a half hour previous to the accident in a hilarious and half-drunken mood, his condition being such that one of his associates then cautioned him against attempting to do any more work that night. While convalescing at the defendant's hospital he told a sister of charity, who was nursing him, that he had been drinking the night of the accident, and had sat down upon the track and fallen asleep, and was struck by the engine. Two or three days after he was brought to the hospital he told the attending physician that he was injured while sitting on the rail of the track and having a stool.

The plaintiff, in opposition to this, introduced evidence tending to show that, owing to the height of the electric light, there was no shadow; that a person lying on the ground in the center of the alleged shadow could have been seen at a distance of four hundred feet; that the engine, at the rate of speed at which it was running, could have been stopped, and when plaintiff was discovered was actually stopped, within thirty feet, and that the headlight of the engine would have enabled the engineer, if he had been on the lookout, to see an object on the ground for a distance of one hundred feet. This evidence had a tendency to show that the real reason, why Mauerman's position was not discovered, was that the engineer and fireman were not on the lookout, but were engaged in oiling the engine.

This being in substance all the evidence, the court upon its own motion instructed the jury as follows:

"The court instructs the jury that, if they find from the evidence that plaintiff's son Peter Mauerman at the time of the accident was sitting upon the west rail of the so-called "lead" track of defendant's railway, in its yards between Carroll and Miller streets in the city of St. Louis, with his head lying upon his arms and in a position that prevented him from seeing an engine approaching him on said track, and that, while in such position, he was struck by one of defendant's engines that was running southwardly on said track, and injured, then in that event the jury will find for the defendant, unless they shall further find from the evidence that defendant's servants in charge of said engine, after seeing or knowing that plaintiff was in a perilous position, *or after being able to see or know by the exercise of ordinary care that he was in a perilous position*, failed to do all they reasonably could to avoid striking him and thus avert the injury.

"If the jury believe from the evidence that Peter Mauerman, plaintiff's son, at the time of the accident remained upon the so-called "lead" track of defendant's railway in its yards between Carroll and Miller streets in the city of St. Louis in a position that prevented him from seeing an engine or train approaching him on said track from the north, and that, at the time of the accident, while remaining on said track, he was paying no attention to his own safety, and, while there in such position, he was struck by one of defendant's engines that was running southwardly on said track, and injured, then the jury will find a verdict for defendant, unless the jury shall find, further, from the evidence, that defendant's servants in charge of said engine, after seeing or knowing that he was in a perilous position on said track, *or after being able to see or know by the exercise of ordinary care that he was in a perilous*

position, failed to do all they reasonably could to avoid striking him."

The instructions thus given were identical with two instructions asked by the defendant and refused by the court, excepting the words put in italics, which were added by the court against defendant's objections. Whether this modification was justified, is really the main question in the case.

We had occasion to say, in *Hudson v. Railroad*, 32 Mo. App. 678, that the supreme court has refined upon and conditioned the question of contributory negligence to such an extent, that it admits of serious doubt whether the defense is of any practical value to any railroad company in this state. If we apply to this case the rule as stated by that court in *Rine v. Railroad*, 88 Mo. 399, then the defendant's instructions should have been given without any modifications. If, on the other hand, we apply to it the rule as stated by a majority of the court in *Dunkman v. Railroad*, 95 Mo. 232, then the modification was proper. In the last of these cases a distinction is made between the liability of railroads for accidents in cities, where the disregard of municipal regulations is in part the cause of the accident. Here, the testimony concedes that the accident occurred in the defendant's yards intersected by numerous streets, and that the defendant's servants were guilty of a violation of the municipal regulation in failing to ring the bell of the engine constantly while it was in motion. Hence, under the rule stated in the *Dunkman case* which is the last controlling decision of the supreme court, and, as such, binding upon us, the modification was proper. See, also, *Kelly v. Railroad*, 95 Mo. 285, 286. In the subsequent case of *Loeffler v. Railroad*, 96 Mo. 267, the jury specially found "that the servants in charge of the engine did not, *and, by the exercise of ordinary care, could not*, have known that plaintiff was in a dangerous place in time to have

seen him before he was struck by the car," and further specially found that the plaintiff had unnecessarily and voluntarily placed himself in a dangerous position; hence, a judgment for the defendant upon the conceded facts was unavoidable. There is nothing in that case opposed to the ruling in the *Dunkman case*, as the jury specially found the facts which the court, in its modified instruction in the case at bar, submitted to them. Nor is there anything opposed to this view in *Rafferty v. Railroad*, 91 Mo. 33, which does not hold, as the defendant claims, that the municipal ordinances do not apply to the running of engines and trains in the railroad yards, but simply that, when cars are moved detached from an engine, there is no necessity for ringing the bell on an engine which is standing. This assignment of error, therefore, must be ruled against the defendant.

Objection is made to the use of the words, "due care and proper use of the means at hand," used in the plaintiff's instructions given. Since the court, upon its own motion, defined the care, to which the defendant was bound, as reasonable care, we cannot see how the use of the words complained of in plaintiff's instructions could have been prejudicial to the defendant.

The assignment of error, that the court erred in overruling the defendant's motion for a new trial, we conceive to be a complaint that the verdict is against the weight of the evidence, and that the trial court should have set it aside, and hence erred in failing to do so. While appellate courts in this state may grant new trials for the reason that the verdict is against the weight of the evidence, the exercise of the power is confined to cases where the verdict is so strongly opposed to all reasonable probabilities as to be the manifest result of mistake, bias or prejudice. It is the duty of the trial court to grant a new trial, when in its opinion the verdict is opposed to the weight of the evidence, but,

as this is a duty which depends on the view which that court takes of the evidence, it is one which the appellate court cannot control, except in the cases above stated.

The defendant's complaint that the verdict is excessive is without merit. The plaintiff's son at the date of the accident was engaged at monthly wages of sixty dollars per month. He had been in the same employ for years, and there was no evidence tending to show that he could not have continued in such employ at the same wages for the period elapsing between the accident and the date of his majority, which was nineteen months and seven days thereafter. He was living with the plaintiff, who supported him, and received his wages. He was totally disabled by his injuries. The cause was tried after the plaintiff's son had arrived at age. There was evidence that the plaintiff had incurred expenses for medical attendance and medicines in certain definite sums, but there was no evidence what the care or nursing given to him during the period of his being laid up was worth.

The court on the question of damages instructed the jury as follows:

"The court instructs the jury that, if they find for the plaintiff, they will assess her damages at such a sum as the evidence shows she has been injured by reason of the loss of her said son's services, so far as such loss was occasioned by reason of his injuries during the period between the date of the accident and the time when he arrived at the age of twenty-one years, together with such sums as will compensate her for the money she expended for medicine and medical attendance and the care she gave him during that period on account of his injuries, less such amount as you shall find from the evidence to have been the reasonable cost of his board, washing and clothing during that period."

This instruction was erroneous in submitting to the jury the value of the care given to her son during the

period in which he was laid up, on account of his injuries, there being no evidence of such value before the jury, and this was an error against the defendant; but that was more than equalized by requiring the jury to deduct the reasonable cost of the board, washing and clothing during the entire period. Under the decisions of this court in *Girls' Industrial Home v. Fritchey*, 10 Mo. App. 344, and *Matthews v. Railroad*, 26 Mo. App. 75, the mother on the death of the father succeeds to the duties and obligations of her husband touching minor children. If this be so, the fact that her son was disabled did not discharge her of the obligation to support him, even though he could earn nothing, and his support was a dead loss to her. She did in fact support him until he became of age, hence, as she was both under obligation to support him and did support him, and lost his entire wages, such wages were not subject to deduction except for the period of time while the plaintiff's son was in the defendant's hospital. As the wages would have amounted to eleven hundred and fifty-two dollars, and the recovery was for one thousand and twenty-seven dollars, it is evident that the verdict on the uncontroverted evidence was not excessive. All the judges concurring, the judgment is affirmed.

ANNA HOEFFNER, Respondent, v. GRAND LODGE OF THE GERMAN ORDER OF HARUGARI OF THE STATE OF MISSOURI, Appellant.

St. Louis Court of Appeals, May 13, 1890.

1. **Benefit Societies:** EXPULSION OF MEMBER. A member of a benevolent insurance association has the right to exact that, on proceedings for his expulsion, there should be a substantial compliance with the rules of the society governing the proceedings, but this right may be waived. And, where there is, furthermore, an express rule of the society that there shall be a trial only in the

manner prescribed by other regulations, a judgment of expulsion is invalid if the votes on the expulsion of the member are taken in a manner different from that prescribed, as, if the votes be taken by casting white or black balls, when the rule prescribes that the votes shall be given in writing.

2. ——— : ——— : REMEDY. If a judgment for the expulsion of a member is void because rendered in an unauthorized manner, and the member treats it as invalid, his membership continues, and he need not seek reinstatement. *Held*, accordingly, that when the beneficiary of an expelled member sues for benefits in the nature of life insurance, and the judgment of expulsion is set up as a defense to the action, it is sufficient for the beneficiary to show that this judgment was invalid; the beneficiary need not further show that he has exhausted all remedies within the order, or society, to have the judgment vacated.

3. ——— : ——— : EFFECT OF MEMBER'S INSANITY. In an action involving the validity of the judgment of a society for the expulsion of a member, no waiver, by such member, of the rules of procedure of the society can arise, if such member was insane at the time of the rendition of the judgment. And *semble* that such a judgment is invalid, if such insane person was under guardianship at the time, and his guardian was not made a party to the proceeding for his expulsion.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL DILLON, Judge.

AFFIRMED.

Kehr & Tittmann, for appellant.

(1) Aside from by-laws, every benevolent society, organized for the purpose of extending aid to its members, and which pays such benefits from contributions assessed upon its members, has the inherent power to expel a member for fraud upon the fund. Niblack on Mut. Ben. Societies, secs. 37–41, 59; Bacon on Benefit Societies, sec. 97; *Society v. Commonwealth*, 52 Pa. St. 125–33. (2) It is settled law that voluntary associations, or corporations, for benevolent purposes are left to enforce their own rules of discipline, without interference from the courts. The latter will not declare the

expulsion of a member to be invalid because of irregularities in the steps which have led up to it. The sentence of expulsion is conclusive, except where there is want of jurisdiction, either of the subject-matter or of the person accused. *Mulroy v. Knights of Honor*, 28 Mo. App. 469; *Society v. Van Dyke*, 2 Whart. 309; *Commonwealth v. Society*, 8 Watts & S. 247; *Society v. Commonwealth*, 52 Pa. St. 125-31; *Sperry's Appeal*, 116 Pa. St. 391-7; *Otto v. P. and B. Union*, 75 Cal. 308-14; *Schmidt v. Lodge*, 84 Ky. 490-2; *Anacosta Tribe v. Murbach*, 13 Md. 91; *Osceola Tribe v. Schmidt*, 57 Md. 98; *Woolsey v. Odd Fellows*, 61 Iowa, 492; *Rood v. Ass'n*, 31 Fed. Rep. 62; Note to *Van Houten v. Pine*, 36 N. J. Eq. 134; *White v. Brownell*, 2 Daly, 359; Niblack on Mut. Ben. Soc., secs. 48, 59-62; Bacon on Ben. Soc., sec. 442; Hirschel on Law of Fraternities, p. 59. (3) Hoeffner was not in good standing at the time of his death, owing to his expulsion, the judgment whereof was not reversed. He had appealed to the grand lodge, as he had a right to do. It was his duty to exhaust the remedies provided by the society of which he was a member. *Karcher v. Sup. Lodge*, 137 Mass. 368; *Chamberlain v. Lincoln*, 129 Mass. 70; *Oliver v. Hopkins*, 144 Mass. 175; *Laford v. Deems*, 81 N. Y. 507-14; Niblack Mut. Ben. Soc., secs. 79, 130-1; also, 360, 414; *Harrington v. Society*, 70 Ga. 340. (4) The supposed defects in the proceedings against Hoeffner are mere irregularities in the steps which led up to the sentence of expulsion. They do not in anywise touch the question of jurisdiction. The courts, therefore, will not examine or review them. But they are not even irregularities which controlled or affected the result, as an examination of the three supposed defects, dwelt upon by the court below, will show. By appearing generally, the accused waived all objections as to the regularity of the appointment of the tribunal, and all objections to notice. Bacon on Ben. Soc., sec. 102; Niblack on Mut. Ben. Soc., secs. 68, 71. (5) The

insanity of the accused does not excuse the non-performance of lodge duties, nor does it prevent or abate his trial. *Karshaw v. Sup. Lodge*, 24 Cent. Law Jour. 129; *Pfeiffer v. Weishaupt*, 13 Daly, 161; *Hellenberg v. Dist. No. 1*, 94 N. Y. 580, 587; Freeman on Judgments [3 Ed.] sec. 152.

Henry Kortjohn and *W. E. Fisse*, for respondent.

(1) All proceedings of societies in the expulsion of members must be in substantial accordance with the letter of their rules. Bacon Ben. Soc., sec. 101; Niblack Mut. Ben. Soc., secs. 48, 52; Hirschel on Frat. & Soc., pp. 55, 56, 57; *White v. Brownell*, 2 Daly, 329, 359; *Otto v. Ass'n*, 75 Cal. 309, 314; *Albers v. Exchange*, 39 Mo. App. 583. (2) In the present case there were substantial departures from the rules of the society concerning expulsions. (3) It is also essential to the validity of a judgment of expulsion that the proceedings of the association be marked with good faith, and that they shall be consistent with the principles of natural justice. Where the expulsion is not founded on reasonable evidence, the judgment cannot be regarded other than malicious. *Otto v. Ass'n*, 75 Cal. 308; *Albers v. Exchange, supra.*

ROMBAUER, P. J.—This is an action by the widow of a member of a benevolent society to recover the death benefit, payable upon the decease of a member to his widow. The petition states that the member's death occurred in December, 1887, but that the society declined to pay the plaintiff anything as a death benefit, although she made due proofs of death. The answer denies that the plaintiff's husband was a member of the society at the date of his death. The answer then states that the plaintiff's husband was tried, found guilty and expelled from the society, by his lodge, for simulating sickness in order to obtain sick benefits;

that this offense, under the laws of the society, was punishable by expulsion, and that such expulsion took place in May, 1886, and that the deceased was not at any time thereafter a member of the society.

The reply denies the new matter set out in the answer, and adds that the deceased was, at the date of his trial and anterior thereto, insane, and irresponsible for his conduct; that this fact was well known to the officers and members of his lodge, and that such insanity continued to the date of his death. The cause was tried by the court without a jury, and the trial resulted in a judgment for the plaintiff, the court declaring that, on the pleadings and evidence, the judgment must be in favor of the plaintiff.

The defendant assigns numerous errors, all having reference to the controlling proposition that the court erred in not giving to the finding of the lodge a conclusive effect, in determining the rightfulness of the member's expulsion.

We may state, at the outset, that the power of the society to expel a member for simulating sickness is conceded by the plaintiff, and it is also conceded that by such expulsion, if brought about in strict conformity with the laws of the society, the member and his beneficiary forfeit all further claim on the society. To what extent the finding of these societies, in proceedings against their own members, are conclusive upon the courts, is the only question presented for our consideration.

"When the charter of a society provides for an offense, directs the mode of proceeding, and authorizes the society on conviction of a member to expel him, this expulsion, *if the proceedings are not irregular*, is conclusive and cannot be inquired into collaterally by *mandamus*, action or any other mode. The courts have jurisdiction to keep such tribunals in the line of order, and to prevent abuses, but they do not inquire

into the merits of what has passed *in rem judicatum, in a regular course of proceeding.*" Niblack on Benevolent Societies, 48.

This statement, although not very definite and precise, is perhaps as satisfactory a statement as, owing to the inherent difficulties of the subject, can be made. In the leading case of *Black and White-Smiths' Society v. Van Dyke*, 2 Whart. 309, GIBSON, C. J., referring to the effect of such trials, says the member "stands convicted by the sentence of a tribunal of his own choice, which, like an award of arbitrators, concludes him," and this view has met with approval in other states. *Anacosta Tribe v. Murbach*, 13 Md. 91; *Osceola Tribe v. Schmidt*, 57 Md. 98; *Schmidt v. Abraham Lincoln Lodge*, 84 Ky. 490. But the award of arbitrators has no conclusive effect, unless it is made within the terms of the submission. Hence, in *Society v. Commonwealth*, 52 Pa. St. 125, it was held that the rightfulness of the expulsion cannot be questioned in the courts *except in cases of irregularity of proceedings*, and in *Sherry's Appeal*, 116 Pa. St. 391, which was decided by an almost evenly divided court, Justice GREEN in an able dissenting opinion holds that, "in proceedings against corporators, within the corporation, whether for suspension or expulsion, the procedure itself must be in conformity with the organic law of the corporation; the cause must be sufficient, the trial and proceedings must be regular, and the proof must be at least adequate in the judgment of the corporation."

We think that the courts in dealing with these benevolent societies should keep the following propositions in view: They are organizations whose members are not versed in the nice technicalities of the law, but are governed by a code of their own, which they deem sufficient to insure practical justice in the management of their affairs. They have a right to expect a strict compliance with their rules on part of their members,

as such compliance is essential to the successful continuance of the society. On the other hand, their members have a right to exact a substantial compliance on the part of the society with all such rules, by which their money interests in the society are affected, and a forfeiture of their membership is brought about. This of course does not exclude the question of waiver either by the society or by the member, but, in the absence of such waiver, the terms of their constitution and laws form the contract binding on both.

Now, the constitution and laws of the defendant order do not give it a general jurisdiction to try offenses against its rules, nor do they anywhere provide that the decision of the lodge, or that of the grand lodge upon appeal, shall be final or conclusive on the member. They do provide for the trial of certain offenses, but they further provide that "the same shall be brought to the knowledge of the lodge, to a trial and a judgment *only* in the manner prescribed in the following sections." Among the sections referred to, is one providing for a committee of investigation composed in a certain manner; and it appeared in evidence that the committee in the present instance was not thus composed. This requirement the member could waive, and, as there was some evidence that the plaintiff's husband had waived it, the court could not have withdrawn the question of waiver from its own consideration by peremptory instruction. There was also some evidence that the member had waived another provision, which required that the report of the committee should be read at two successive meetings, and voted on at the third. A vote of two-thirds of all of the members present at that meeting was required to carry into effect a recommendation for permanent suspension or expulsion. These provisions are prescribed by paragraph 6. The rules then contain the following provision:

"Sec. 7. At all votes which are prescribed in the foregoing paragraphs, the parties must retire from the lodge room, and thereafter no further debates shall be allowed. In case the motion of the committee is not affirmed, any member is entitled to move a lesser penalty. All such votes shall be taken in writing, 'yes' or 'no' for or against the pending motion."

It appeared, without contradiction, that the vote taken on the expulsion of plaintiff's husband was taken by casting white and black balls, and not in writing; and there was no evidence, whatever, that the member had waived this requirement, as he was neither present when the vote was taken, nor, as far as the record shows, ever informed of how the vote was taken. The judge of the trial court put his ruling, by which he set aside the judgment of the lodge, on the ground that no proper vote was ever taken on the expulsion of the plaintiff's husband, and that there was no evidence, whatever, that he had ever waived the requirement of a written vote; and this ruling was unquestionably correct, and leads to an affirmance of the judgment.

The defendant's counsel argues extensively that the phrase, "all such votes," refers only to a vote upon a motion for a lesser penalty, but such a construction is narrow, opposed to the spirit of the entire law, and at best designed to subject the laws of these societies to a strict technical test, which the defendant's counsel is anxious to avoid in all other respects.

As above seen the rules of the society provide that a judgment shall be rendered only in the manner prescribed in the foregoing sections. This provision is, therefore, jurisdictional, and we need not rest our decision on the sole ground that the manner of voting is of the substance of every election. We held in *Mulroy v. Supreme Counsel Knights of Honor*, 28 Mo. App. 463, that, where a society expels a member for cause unauthorized, its judgment is void; and the same

result must follow, where it expels him in a mode not only unauthorized, but expressly prohibited, by its rules. We are as little justified in setting aside provisions in favor of the member, as we would be in setting aside those in favor of the society. If we can set aside the requirement of a written vote, we might, by parity of reasoning, set aside the requirements of a two-third vote, which the rules require, and make the judgments of these societies depend for their validity, not upon what they have deemed essential requisites in their constitution and laws, but what we, ourselves, may deem essential.

A point is made that it does not clearly appear that the member exhausted his remedies by appeal to the grand lodge. Under the view we take, this question is immaterial. If the judgment was void, its affirmance on appeal could not validate it. Where a member seeks reinstatement by *mandamus* he must show that he has exhausted his remedies within the order, but where a judgment of expulsion is void, and the member treats it as such, he continues a member and need not seek reinstatement. *Mulroy v. Knights of Honor*, *supra*.

It was in evidence in this case that all dues to the society were tendered when payable, between the date of the alleged expulsion, and the date of the member's death. There was no evidence that other duties were required of the member, which he failed to perform. Had the amount of these dues been shown, it would have been the duty of the court to deduct their aggregate from the amount of recovery in this case, but, as they were not shown, it cannot even be claimed that the judgment is excessive.

Some other questions are raised by the record, which, in view of the probability of their recurrence in other cases, we deem proper to notice briefly. The answer sets up the fact, that the plaintiff's husband was insane, while his trial and expulsion took place.

Upon the trial of the cause the plaintiff offered to show that her husband was actually sick and not shamming sickness prior to his expulsion, and that, prior to his trial and at the date of his trial and expulsion, he was actually insane. The court ruled out all this evidence. It was decided by Judge BLODGETT in the case of *Hawkshaw v. Supreme Lodge*, 25 Cent. Law J. 129, that insanity is no excuse for the non-payment of assessments in a benevolent society, any more than it would furnish an excuse for the non-payment of premiums on a policy of insurance. It was decided in *Hellenberg v. District No. 1*, 94 N. Y. 580, that, when the member, on account of his insanity, fails to make a designation, and his benefit lapses on account of such failure, the courts cannot change the contract by providing a beneficiary. The ruling in these cases was unquestionably correct, as the contract is made by the parties, and the court can make no contract for them. It was also decided in *Pfeiffer v. Weishaupt*, 13 Daly. 161, that a trial of, and judgment against, an insane member of one of these societies is not necessarily void, as, under the laws of New York, a judgment may be recovered against a lunatic without suing him by committee. In this state an insane person, who is under guardianship, must be sued by service upon his guardian, and must defend by guardian, and a judgment recovered against him in any other manner is void; hence the ruling in *Pfeiffer v. Weishaupt*, *supra*, could have application to such cases only, where the insane member is not under guardianship. However this may be, one thing seems to be clear, and that is that no questions of waiver can arise in case of an insane person, who is served and appears personally to the action, since not even a guardian *ad litem* could make any admissions binding on him. *Collins v. Trotter*, 81 Mo. 275. It is, therefore, essential that, where a judgment of forfeiture is invoked by the society against one of its members, who

is shown to have been insane at the date when such judgment was obtained, the court should see that every step taken in the proceeding was in *strict conformity* with the requirements of the rules of the society, in order to uphold the forfeiture. In that view of the case, evidence of the insanity of the deceased member at the date of the trial was clearly competent, as it was evidence tending to negative the possibility of a waiver, and the court, in rejecting the evidence, made concessions in favor of the defendant, which the defendant was not entitled to.

In the present state of the record, this ruling does not affect the result either way, as the judgment of the trial court must be upheld on the ground first hereinabove stated. All the judges concurring, the judgment is affirmed.

---

41 369
42 297
41 369
46 465
41 369
81 518
41 369
83 655

JULIA A. ASHBROOK *et al.*, Appellants, v. GILES C. LETCHER, Respondent.

St. Louis Court of Appeals, May 13, 1890.

1. **Bills and Notes:** BURDEN OF PROOF. In an action on a note by an indorser against the maker, the plaintiff establishes a *prima facie* case by producing and offering in evidence the note with the indorsement of the payee.

2. **Payment:** EVIDENCE. Payment may always be proven by inferential evidence.

3. **Witnesses:** COMPETENCY OF PARTY. The maker of a promissory note is not a competent witness in a suit thereon against him by an indorsee, if, at the time the payee of the note, who was also an indorser, is dead; and this rule is so though such payee was merely an accommodation indorser, and was, moreover, subsequently released from liability through the failure of the holder to make due presentment of the note for payment.

Per Thompson, J., dissenting.

4. ——— : ———. If a note be by the payee indorsed for the accommodation of the maker, and the note given is directly by the maker to a third person in payment of a liability of the maker to such third person, such payee, though in form a contracting party, is not one in substance, and if the payee, moreover, is released from liability on the note through the absence of any presentation of it for payment at its maturity, his death will not render the maker an incompetent witness in a suit against him on the note by an indorsee, especially when the testimony of the maker is not antagonistic, but is favorable, to the payee, as if its sole tendency be to show that, prior to the acquisition of the note by the plaintiff in the suit, the note was paid out of funds of the payee at her direction.

Appeal from the St. Louis County Circuit Court.
HON. W. W. EDWARDS, Judge.

REVERSED AND REMANDED.

Zach. J. Mitchell, for appellants.

(1) The verdict was against the evidence, and wholly without evidence to support it; and plaintiffs' motion should have been sustained upon this point. (2) That the deposition of defendant, admitted upon and after proof of the death of Mrs. Julia A. Letcher in 1884, was clearly inadmissible, is *res adjudicata*, since the cases of *Meier v. Thieman*, 90 Mo. 442; *Ring v. Jamison*, 66 Mo. 424; *Angell v. Hester*, 64 Mo. 142; 1 Whart. Ev., sec. 466; *Chapman v. Dougherty*, 87 Mo. 609; 1 Greenl. Ev., secs. 392, 386, 390.

John N. Straat, for respondent.

ROMBAUER, P. J.—The plaintiffs brought a suit by attachment against the defendant, who is a non-resident, upon two promissory notes. One of the notes was paid by consent, out of the proceeds of the attached property before trial, leaving only the issue to be tried, whether

the plaintiffs were entitled to recover on the remaining note.

The plaintiffs' petition states that this note was a negotiable note for six hundred dollars made by the defendant on April 22, 1875; that he thereby promised to pay said sum to Julia A. Letcher, sixty days after date thereof, with interest from maturity at the rate of ten per centum per annum; that Julia A. Letcher assigned it in writing to John A. Nies, and that Nies assigned it in the same manner to the Market Street Bank, and that the Market Street Bank sold and transferred it to one Charles Bobb, who again sold and transferred it to the plaintiff, Julia A. Ashbrook. The petition further states that no part of said note had ever been paid, and prays judgment for its amount with interest.

The answer admits the making of the note, and its successive transfers, until it reached the Market Street Bank, but denies that the plaintiffs ever had any right, title or interest in it, and further avers that the note had long since been fully paid. On the issues thus made the parties went to trial, which, under the instructions of the court, resulted in a verdict in favor of the defendant.

The only substantial errors assigned are that the verdict is wholly unsupported by the evidence, and that the court admitted illegal evidence for the defendant against the objection of the plaintiffs.

The production of the note in court, with the indorsement of the payee thereon, constituted *prima facie* evidence of ownership in the plaintiff (*Mechanics' Bank v. Wright*, 53 Mo. 153; *Rubelman v. McNichol*, 13 Mo. App. 584); also *prima facie* evidence that it was acquired in good faith and in the regular course of business. *Grelle v. Loxen*, 7 Mo. App. 97. This made a *prima facie* case of a right of recovery, which could be overcome only by evidence to

the contrary. *Lachance v. Loeblein*, 15 Mo. App. 460. This evidence, however, need not be direct, as payment may always be proved by inferential evidence. 2 Greenleaf on Evidence, sec. 528.

The evidence of the defendant was all of an inferential character, and did not attempt to prove a direct payment of the note. The defense sought to be established was two-fold: *First.* That Bobb *paid* the note to the Market Street Bank upon the request either of the defendant or of his mother, and that thereby the note was extinguished as a subsisting cause of action, and that any action which Bobb thereafter had, or could transfer to any one, was not an action upon the note, but only an action for money paid at the request and to the use of the defendant. If this were established, there could be no recovery in this form of action, regardless of the question whether Bobb paid the note with his own money or not, since the note would have been paid and extinguished as a note, and its subsequent transfer would have been a transfer of dead paper.

The *second* branch of the defense was that Bobb not only paid the note, but paid it upon the request of the payee for the defendant, either with the moneys of the payee in his hands when he paid it, or else reimbursing himself out of such moneys prior to the assignment of the claim to the plaintiff. If this were established, the plaintiff could not recover in any form of action, since Bobb himself would have had no cause of action whatever against the defendant at the date of the alleged assignment to plaintiff, and, therefore, could assign none.

To establish these defenses, the defendant adduced evidence tending to show that the note matured in the summer of 1875, and that the defendant did not leave this state until the fall of 1875; that he was possessed of valuable real estate in the city of St. Louis, part of which in January, 1875, he conveyed to Bobb, as trustee

for his wife and children, love and affection being the only consideration of the deed; that, in 1882, while Bobb was still, according to his claim, the holder and owner of this note, the defendant conveyed to him another piece of real estate in St. Louis in trust for his wife and children, the consideration of the deed being love and affection; that, while Bobb was the holder of this note, the defendant became a distributee of his brother's estate, of which Bobb was executor, and that his distributive share was much more than one hundred dollars; that Bobb claimed to have acquired this note before maturity in 1875, took no steps to charge the indorsers thereon, and sold it in 1887, with accrued interest for one hundred dollars; that Bobb was the agent of the defendant's mother, the payee of the note, prior to and after the maturity of this note, and collected rents for her both before and after he claimed to have acquired it, and that, owing to his connection with the family, he was in a position to be thoroughly informed, from the time he claims to have acquired the note until its transfer to the plaintiffs, of the fact that the note was collectible, and yet made no efforts to collect it.

On this evidence, we are not prepared to say that there was not substantial evidence authorizing the jury to infer either that Bobb *paid* the note and did not buy it, or that he not only paid it, but was, also, reimbursed for the outlay, either of which facts was fatal to plaintiffs' recovery in this form of action. The assignment that the verdict is not supported by substantial evidence must, therefore, be ruled against the plaintiffs, even if we reject the defendant's deposition hereinafter mentioned.

The next assignment is that the court admitted, against the plaintiffs' objection, the deposition of the defendant, taken in his own behalf, in May, 1883, several years after the death of Julia A. Letcher, the payee

and other party to the contract. The deposition, when offered, was objected to on the specific ground that, when it was taken, the payee of the note was dead, and and, hence, under the statute, the maker, who was both a party in interest and a party to the record, was an incompetent witness in his own behalf. The court, in overruling this objection, must have held either that the defendant was not *the other party* to the contract, within the meaning of the statute, or that, although not competent to testify to the contract itself, he was competent to testify to facts subsequently transpiring touching the contract between himself and the payee, or himself, the payee and third parties. Either of these views was erroneous.

The statute provides that, in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, the other party shall not be admitted to testify in his own favor (subject to certain exceptions). The supreme court has construed this section to mean that it contains another exception, namely, where persons were competent to testify at common law.

The non-liability of Mrs. Julia A. Letcher upon the contract would have made her a competent witness at common law, because she was neither a party to the record nor a party in interest, and could not be excluded on either ground. She stands upon the same footing as if her competency had been established by release. *Steigers v. Gross*, 7 Mo. 261; *Hogg v. Breckenridge*, 12 Mo. 369; *Long v. Story*, 13 Mo. 4. But, how does the fact that she is released affect Giles C. Letcher, who is incompetent to testify at common law, both as a party in interest and as a party to the record?

In *Ring v. Jamison*, 66 Mo. 429, Judge HENRY approves of the definition of Judge WELLS, in *Granger v. Bassett*, 98 Mass. 462: "The test of competency is the contract or cause of action in issue and on trial, not the

fact to which the party is called to testify." This we consider still to be the law of this state, so that the fact, concerning which the defendant was called upon to testify, could not make him competent, if he was otherwise incompetent. Julia A. Letcher was, unquestionably, one of the *other parties* to the note. The defendant's promise was made to her, and that is the promise which she assigned, and upon which the plaintiff now seeks to recover. That she indorsed the note for the defendant's accommodation cannot affect the question, as that did not in any way constitute her a joint promisor, but her rights and liabilities on the note still remained as they were determined by her position thereon. *Deits v. Corwin*, 35 Mo. 376; *McCune v. Belt*, 45 Mo. 174.

It is important that the rules governing the competency of witnesses should be simple and easily understood. The rule stated in *Granger v. Bassett*, and approved in *Ring v. Jamison*, *supra*, is one that is clear and comprehensive, and makes the defendant Letcher an incompetent witness in this case. If we attempt to modify the rule in each case as its apparent equities seemingly demand, we must abandon a clear and comprehensive rule and substitute for it the varying views of judges in individual cases, a practice which tends to make the law uncertain and, hence, necessarily unjust. The evidence thus admitted was, undoubtedly, prejudicial to the plaintiffs, and, on account of this error, the judgment must be reversed and the cause remanded. So ordered. Judge BIGGS concurs; Judge THOMPSON dissents.

THOMPSON, J. (*dissenting*)—This is an action upon a promissory note for the principal sum of six hundred dollars and accrued interest at the rate of ten per cent. per annum, executed on the twenty-second day of April, 1875, by the defendant, Giles C. Letcher, in favor of Julia A. Letcher, and indorsed by Julia A.

Letcher and also by one J. A. Nies. The petition alleges that the defendant made and delivered the note to Julia A. Letcher, who indorsed and delivered it to J. A. Nies, by whom it was indorsed and delivered to the Market Street Bank; that subsequently the bank *sold*, transferred and delivered the note for value to Charles Bobb, who afterwards sold, transferred and delivered the note for value to the plaintiff, Julia A. Ashbrook, and that the note is unpaid.

The defendant in his answer admits the allegations of the petition so far as concerns the making and delivery of the note to Julia A. Letcher, its indorsement by her, its subsequent indorsement by Nies, and its delivery to the Market Street Bank; but denies that the bank sold, transferred and delivered the note to the plaintiff, Julia A. Ashbrook, and avers affirmatively that the note had long since been paid, and that the plaintiffs have no right, title or interest therein.

A trial before a jury resulted in a verdict and judgment for the defendant, and the plaintiffs prosecute an appeal to this court.

The evidence showed that Julia A. Letcher, who was in form the payee of the note, was the mother of Julia A. Ashbrook, the plaintiff, and also of the defendant, and the sister of Charles Bobb; that Julia A. Letcher died in 1884; that she was the nominal payee and the indorser of this note for the accommodation of her son, this defendant, and that Nies was also an accommodation indorser; that the note was thus made and indorsed for the purpose of taking up in part a debt of twelve hundred dollars, which the defendant then owed the Market Street Bank, the other half of the debt being paid in cash. It further appeared without dispute that the note was never protested for nonpayment, and that it was not indorsed by the Market Street Bank when it was turned over to Bobb, or by Bobb when he turned it over to the plaintiff, Mrs. Ashbrook. Concerning these facts there is no controversy.

The theory of the defense was that Bobb *paid* and satisfied the note for Mrs. Letcher, the mother of the defendant, and did not pay it or acquire any title to it, and that Mrs. Letcher never regarded the note as an existing claim against her son, the maker; that Bobb held the note for twelve years without making any effort to enforce collection of it, and until some time after death had sealed the lips of Mrs. Letcher, and then transferred it to Mrs. Ashbrook for the purpose of reviving it as a cause of action against the defendant. On the other hand, the theory of the plaintiff was that Bobb, at the request of the defendant, the latter not having money to take up the note when it matured, and promising Bobb to refund him the money which he should advance in taking it up, went to the Market Street Bank and *purchased* it of the bank and took it up and held it, expecting that the defendant would pay it in his hands, but did not pay it, in a legal sense, over the counter of the bank. The transaction took place in June, 1875, and in the fall of that year the defendant emigrated to California, and has been a non-resident of the state ever since. Reasons were offered by the plaintiff, through the mouth of Bobb as a witness, why Bobb had made no efforts, during these twelve years, to collect the note, upon the sufficiency of which we shall make no comments, as it presented a question of fact for the jury.

The errors assigned are: *First.* That the verdict is against the evidence. *Second.* That the court erred in admitting the deposition of the defendant, the other party to the contract, Julia A. Letcher, being dead. *Third.* That the court erred in the instructions given for the defendant.

I. The possession of the note uncanceled by the plaintiff, Mrs. Ashbrook, its execution being admitted, was *prima facie* evidence of her title to it, and that it was a subsisting liability of the defendant. The burden of showing a state of circumstances discharging that

liability rested upon him, in conformity with the rules that the burden of proving payment is on the defendant. *Yarnell v. Anderson*, 14 Mo. 619. This state of facts might be shown by circumstantial as well as by direct evidence. Here there were strong circumstances tending to the conclusion that the note either had never been a liability in the hands of Bobb in his own favor, or else, if it had, that such liability had been discharged by Mrs. Letcher. He had held it for some twelve years. During most of this time the defendant had, it is true, been a non-resident of the state, but there was evidence tending to show that he had property in St. Louis out of which the note could have been made. Again, when Bobb took up the note, he was the agent of Mrs. Letcher, the nominal payee and accommodation indorser, collecting rents belonging to her of the aggregate value of eighteen hundred dollars a year. The jury were fairly entitled to consider these circumstances, in determining the question whether he had taken this note up before maturity with his own money at the request of the defendant, and had allowed his sister, Mrs. Letcher, who was an indorser upon it, to become released by operation of law by failing to make demand upon the maker and give her notice of its dishonor, or whether he had taken it up with her money, or with his own money and had afterwards reimbursed himself out of her funds,—she being liable upon it.

II. Nor do I think that the court committed error in admitting the deposition of the defendant against the objection of the plaintiffs, grounded upon the fact that Mrs. Letcher, the payee of the note, was dead. Mrs. Letcher is shown by the evidence, and without controversy, to have been an accommodation indorser of the note; and the note is shown, without controversy, to have been given to the Market Street Bank to take up another indebtedness. When the witness Bobb took the note out of the bank, either before or at maturity,

and failed, when the note matured, to make demand of payment on Letcher and notify Mrs. Letcher, she became discharged as an indorser, and passed out of the contract, as effectually as though she had never been a party to it. She thereby ceased to have any legal interest in the note in any manner whatever. The statute could not have been intended to disqualify a living witness in such a case.

But aside from this, although Mrs. Letcher was, *in form*, "the other party" to the note, within the language of the proviso of section 4010, of the Revised Statutes of 1879, she is shown by the undisputed evidence not to have been the other party *in substance*. In substance the parties to the contract ranged themselves thus: The defendant, Mrs. Letcher, and the other accommodation indorser Nies, on the one side, and the Market Street Bank, to whom the note was delivered to take up the antecedent indebtedness, on the other side. If Mrs. Letcher had taken up the note upon it and her personal representative were here suing, then the statute and the reason of it would apply, so as to exclude his evidence. The case does not fall within the reasoning of *Meier v. Thieman*, 90 Mo. 433, and other cases which have preceded and followed that decision.

The statute (R. S. 1879, sec. 4010), after providing that parties shall not be disqualified from testifying as witnesses, contains this proviso, creating an exception to the rule thus established: "Provided, that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party shall not be admitted to testify in his own favor." This statute has been the subject of many adjudications, and no very consistent line of interpretation can be deduced from the decisions. Some of them have been overruled in terms, by subsequent decisions; others have been

overruled without mentioning them. The supreme court started out by drawing attention to the purpose of the statute, which abolished the common-law rule of exclusion and retained the above exceptions to the new rule thus created. In the first opinion in which the statute was construed, it was said: "The great object and purpose of the law was to destroy the restrictions and incapacities which operated as rules of exclusion by the law of evidence, and to permit every person, inclusive of parties, to give evidence; to allow all, without regard to interest, even though they were parties to the suit, to disclose all the facts within their knowledge or possession, and let whatever credibility they might be entitled to be passed upon by the jury. This may be calculated to draw forth the truth, though we entertain serious doubts about the wisdom of the enactment. But it was seen that, where one of the parties was dead, or disqualified by reason of insanity, that the parties would not stand on an equal footing; he would be unable to oppose his oath to that of the opposite party, and, therefore, the party living or sane was precluded from testifying." *Stanton v. Ryan*, 41 Mo. 514. In the next decision in which the construction of the statute came before the court, the reason of the exception which the legislature reserved to the new rule which it thus created was again pointed out,—that it was to prevent the living party from having "an undue and unfair advantage." *Looker v. Davis*, 47 Mo. 140, 146. "The object of the law," said the court, in the next case in which the statute came before them, "was to prevent one party from testifying to a contract in issue, where the lips of the other party were closed, so that his version of the contract could not be given." *Poe v. Domec*, 54 Mo. 119, 124. The language of the judges in many other decisions emphasizes this purpose of the statute. *Chapman v. Dougherty*, 87 Mo. 616, 623; *Fulkerson v. Thornton*, 68 Mo. 468, 469; *Coughlin*

v. Haeussler, 50 Mo. 126; *Berlin v. Berlin*, 52 Mo. 151; *Williams v. Edwards*, 94 Mo. 447, 452; *Meier v. Thieman*, 90 Mo. 433, 443.

Such being the purpose of the statute, an effort is discovered on the part of the supreme court so to construe it as to give effect to that purpose. To this end that court has, on the one hand, extended it to cases within its spirit, but not within its letter, and has, on the other hand, denied its application in cases within its letter, but not within its spirit. Thus, it has been held, on the one hand, that where one of two parties jointly found by a contract is dead, the adverse party is not thereby disqualified as a witness in an action on the contract between himself and the survivor. *Fulkerson v. Thornton*, 68 Mo. 468; *Nugent v. Curran*, 77 Mo. 323. On the other hand, it has been held that where, in such a case, the transaction has been had with one of two partners who has since died, the opposite party is not competent as a witness to prove what passed between him and the deceased partner in respect of the transaction. *Butts v. Phelps*, 79 Mo. 302. To the same effect see *Williamson v. Perkins*, 83 Mo. 379. So, where the other party to the contract is a corporation, and the corporation has been dissolved, and is hence dead in the sense of the law, this does not disqualify the opposing party as a witness; since the statute means natural and not artificial death, and refers to the death of persons and not of artificial bodies. *Williams v. Edwards*, 94 Mo. 447, 450. Yet this, it is perceived, is within the letter of the statute, though obviously not within its meaning. On the other hand, if the contracting agent of the corporation, through whom the contract with the corporation was made, has since died, this disqualifies the opposing party to the contract from testifying as a witness, though this is not within the letter of the statute, for it is within its meaning. *Williams v. Edwards*, 94

Mo. 451. Again: A. makes a promise to B., to pay the debts of B. C. is a creditor of B. C. brings an action upon the promise, as he may lawfully do, under the law of the forum. Before the trial, B., the original promisee, dies. This does not disqualify C., since he was not an original party to the contract. *Amonett v. Montague*, 63 Mo. 201. Here C. is allowed to testify, although his testimony in consequence of the death of B., the original promisee, may put A., the defendant in the action and the original promisor, at a disadvantage, because this case is not within the letter of the statute. In the same case it was held that the death of B., the original promisee, did not disqualify A., the original promisor. *Amonett v. Montague*, 75 Mo. 43, 48. Here the case was within the literal terms of the statute; for B., the promisee who had died, was an original party to the contract, and A., the promisor, was "the other" original party to the contract, and yet the court regarded it as coming within the reason of the decision of *Fulkerson v. Thornton*, above quoted, and as not requiring the exclusion of A. as a witness. On the other hand, in the decision of the supreme court which has probably excited the most attention in this state, *Meier v. Thieman*, *supra*, the witness, Adolphus Meier, whom the supreme court held incompetent, was neither a party to the contract nor to the cause of action which was the subject of the suit; but he was interested in supporting the contention of the defendant, because he was liable to the defendant, in case he should fail in the suit. He was, therefore, regarded, and with some reason, as being within the meaning of the statute.

Decisions could be multiplied, showing the manner in which this statute has been construed and applied by the court of last resort in this state. They would show that scarcely a position has been taken in any one case, which has not been either denied or ignored in

some other case. That court started out with holding, though with some hesitation, that the statute only applies so as to exclude as a witness one, who is at once a party to the contract, which is the subject of the suit, and a party to the suit itself. *Looker v. Davis*, 47 Mo. 140. This decision was long regarded as the law of this state. *Klosterman v. Loos*, 58 Mo. 290; *Martin v. Jones*, 59 Mo. 187; *Amonett v. Montague*, 63 Mo. 205; *State ex rel. v. Huff*, 63 Mo. 290; *Angell v. Hester*, 64 Mo. 143; *Bradley v. West*, 68 Mo. 73; *Hughes v. Israel*, 73 Mo. 546; *Chapman v. Dougherty*, 87 Mo. 622; *Priest v. Chouteau*, 12 Mo. App. 260; *Pritchett v. Reynolds*, 21 Mo. App. 677; *Fyke v. Lewis*, 15 Mo. App. 588. In all these cases *Looker v. Davis*, *supra*, was cited with approval, and in some of them its doctrine was applied. Finally, the supreme court, without citing *Looker v. Davis* at all, overruled that decision, and all the subsequent cases which had followed it, in an opinion in which the court said that "the rules of evidence should not, like the color of the chameleon, change because of their fortuitous surroundings. *Meier v. Thieman*, 90 Mo. 433, 443; reversing s. c., 15 Mo. App. 307.

In one case the supreme court undertakes to lay down a technical rule which, if followed, would probably determine in every case, without much doubt, whether the witness is competent or incompetent,—the determination in some cases complying with, and in others opposing, the spirit and meaning of the statute. That rule was thus stated: "We take the true distinction to be that, where one of the original parties to the contract or 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; that, where one of the parties is dead, the other party stands in regard to testifying precisely as if the statute

allowing persons to testify (parties was intended) had not been enacted." *Angell v. Hester*, 64 Mo. 142; again quoted in *Meier v. Thieman*, 90 Mo. 433, 442. If the court had laid this down as a deliberate test for the decision of all cases, we should be bound by it, at least until that court should change it. But, as I have shown above, although this test was laid down as early as the sixty-fourth volume of the reports of the supreme court, that court has not adhered to it with any considerable uniformity.

I do not question the doctrine that the rule may be invoked in favor of a party to an action, who claims under or through the deceased party to the contract which is the subject of the action so as to exclude the other party to the contract from testifying as a witness. This, I take it, must be accepted as the law since the decision of *Chapman v. Dougherty*, 87 Mo. 617. See also *Carter v. Prior*, 8 Mo. App. 577. Thus, where the devisee of land brings an action of ejectment, supporting his title by a deed from the defendant to his testator, the defendant will be incompetent to testify as to the non-delivery of the deed, because the other party to the contract, namely the testator, is dead,—and the rule may be invoked by a party claiming the land through him. *Chapman v. Dougherty, supra.* So, if the plaintiff in an action is the heir and legatee of one, between whom and the defendant the contract in controversy was made, the defendant, for a like reason, will not be competent as a witness. *Carter v. Prior, supra.*

I take it that this principle would furnish the rule for the decision of the present case if the note, which is the foundation of the action, had been given by the defendant to his mother, Mrs. Letcher, *for value*, and by her indorsed to Nies, and by Nies to the Market Street Bank, and by the bank to Bobb, and by Bobb to the plaintiff; since, in that case, the plaintiff would claim through Mrs. Letcher, and the death of Mrs.

Letcher would disqualify the defendant on the principle of the two cases last cited, the defendant being "the other party to the contract," when contrasted with her. But here, Mrs. Letcher being merely an indorser for the accommodation of Letcher, as shown by the testimony of Bobb, as well as by that of Letcher, the principle does not seem to apply. They never became, unless she and not Bobb paid the note, in respect of each other, opposing parties to the same contract. She was merely his surety, in the qualified sense that she agreed to be bound according to the law merchant, provided she had seasonable notice of the dishonor of the note by him, or provided facts existed dispensing with such notice. The real transaction was between Letcher and the bank, with which this note, made by him in form to his mother and indorsed by her for his accommodation, and again indorsed by Nies for his accommodation, was negotiated to be used in taking up a previous note which was maturing. The opposing parties to the contract were really Letcher and the bank, in substance and in sense, and Mrs. Letcher and Nies were mere sureties. They ranged themselves on the same side of the contract with him and occupied toward the other real party to the contract,—none the less really because its name was not expressed thereon,—a position substantially similar, so far as this question is concerned, to that which they would have occupied if they had written their names on the note successively under his. As between Letcher and Mrs. Letcher, the latter was merely his surety. If she had written her name on the note under his so as to become in form a comaker, and the note had been assigned by their joint indorsement, and had thus passed through Bobb to the plaintiff, and Mrs. Letcher had thereafter died,—then upon the rule in *Nugent v. Curran*, which was the case where one of two makers of a note had died,—the defendant would not have been disqualified as a witness. If the statute

is to be construed according to reason and sense, what different position does she occupy from the mere fact that the note is made nominally payable to her, and by her indorsed to Nies, and by Nies to the bank? But, beyond this, if she had signed the note as a joint maker for the accommodation of Letcher, so that she would not have been discharged by its non-protest under the law merchant, and so that her estate would still be liable, Letcher would nevertheless be a competent witness, although his testimony might incidentally operate to settle a liability upon her estate. But here, when the note, in the hands of Bobb, taken up according to his testimony and also according to Letcher's testimony, was held by him without being protested, Mrs. Letcher passed out of the contract as effectually as if she had never been in it. If, with this fact in view, we recur to the reason of the rule as expressed by numerous decisions—to put the parties to the contract on an equality—we shall see that the reason has no application to this case. For, who are the parties to the contract to be put on an equality? The answer is that Letcher, and Mrs. Letcher, are such parties. But she having ceased to be liable under any circumstances, no disadvantage can accrue to her, or to her heirs or creditors, by permitting Letcher to testify. If the contest were, as in the two cases above cited, between Letcher and her devisee or legatee, or if it were between Letcher and her executor or administrator, then the reason of the rule would apply. But here it is between Letcher and the party who claims to have derived title through her in form merely, and who did not derive title through her in substance.

Moreover, while it is true that "the test of competency is the contract or cause of action in issue and on trial, not the fact to which the party is called to testify" (*Granger v. Bassett*, 98 Mass. 462; *Ring v. Jamison*, 66 Mo. 422, 429), yet, in determining, in a doubtful case,

whether the case is within the statute or not, the character of the testimony should not entirely escape consideration. Here, the essential fact to which Letcher testified was an alleged declaration of his mother, Mrs. Letcher, made in the presence of Bobb, the plaintiff's immediate assignor, by whose testimony the plaintiff seeks to support her right of recovery. Bobb, was at that time, as already seen, the agent of Mrs. Letcher, collecting the rents of her real estate and handling her money. According to the testimony of Letcher, he and Bobb called upon Mrs. Letcher and explained to her that Letcher would not be able to take up the note at maturity, whereupon Mrs. Letcher directed Bobb to take it up with her money. This is the substance of Letcher's testimony, and it is the only part of it which has any substantial bearing upon the case, except so much of it as explains that the note was an accommodation note. His additional statement, as to what his mother subsequently told him, might perhaps have been excluded, if specially objected to at the trial. The testimony of Letcher as to a conversation that took place with his mother in the presence of Bobb, and as to a direction which she gave to Bobb as her agent, is of a character capable of being rebutted by Bobb, and its admission, therefore, does not place the plaintiff at any disadvantage as against the defendant, any more than the death of any person whose declaration might be competent would have this effect. If the case were otherwise within the statute, the fact that this was the character of the evidence would not take it out of the statute; but, if the case is not within the statute, there is nothing in the peculiar nature of the evidence which furnishes an argument for bringing it within the statute.

This case rather falls within the principle of *Dolan v. Kehr*, 9 Mo. App. 351, which holds that the statute has no application to a case where the witness delivers testimony "for and on behalf of the interest that the

deceased had represented, not on his own part and against that interest." "The object of the statute," said Judge HAYDEN, "is to protect the estate from the inequality which would exist if the party opposed to the estate could give his version of the transaction in his own favor," etc. In this case, if the deposition of Letcher is true, it tends to show that he owes the note, not to this plaintiff, but to the estate of his mother. It tends, in connection with other circumstances, to show that Bobb took up the note with her money in conformity with her direction. So much of it as states that she, in conversations with the witness, released him from all obligation to her would have no effect in exonerating him, in an action brought by her executor or administrator upon the note; for it does not show any consideration for the release thus made by her, nor any circumstances which would create an estoppel against her or her personal representative.

The note is, then, a subsisting liability of Letcher, either in favor of the plaintiff or in favor of his mother's estate. The statute was intended to protect the estate of the deceased party to the contract. An interpretation of the statute which closes the mouth of Letcher and at the same time opens the mouth of Bobb, would not operate to protect the estate of Mrs. Letcher, but might operate to defraud it. Such an interpretation would not, in my opinion, be a reasonable and just interpretation of the statute, but it might have the effect of turning the statute from a means of justice into a mere means of fraud.

III. Neither party has offered any argument upon the assignment of error which challenges the instructions. I see nothing in them of which the plaintiff can justly complain. My opinion is that neither the law nor the ends of justice would be subserved by a reversal of this case.

41 389
44 38
44 287
41 389
47 24
41 389
65 5
65 120

Chicago Coffin Company, Appellant, v. Mildred K. Fritz, Respondent.

St. Louis Court of Appeals, May 13, 1890.

1. **Married Woman:** CHARGING SEPARATE ESTATE. If a married woman possesses a separate estate, and, after charging it with an indebtedness, forms a copartnership with another, and contributes her separate estate to the capital of such partnership, her interest in the partnership may be charged by suit in equity with such indebtedness; and this may be done after the death of her husband.

2. **Parties:** ACTION CHARGING INTEREST OF MARRIED WOMAN IN PARTNERSHIP WITH DEBTS. In an action to charge the interest of a married woman in a partnership, as her separate estate, with a debt contracted by her individually, her partner is a necessary party defendant.

Appeal from the Hannibal Court of Common Pleas.
Hon. Thos. H. Bacon, Judge.

Reversed and remanded.

Anderson & Schofield, for appellant.

The petition is sufficient. It declares and the demurrer admits that the stock of goods sought to be charged is respondent's separate property--the proceeds or continuation in trade of the same stock owned by her separately at the time the debt was contracted; she being then a *feme covert* such obligation can only be enforced in equity against her separate property, even after dissolution of coverture. *Davis v. Smith*, 75 Mo. 219 (overruling *King v. Mittleburger*, 60 Mo. 182); *Hooton v. Ransom*, 6 Mo. App. 19; *Schaffer v. Ivory*, 7 Mo. App. 461; *Klenke v. Koeltze*, 75 Mo. 239. It is not alone the identical fund or specific goods constituting

a separate estate at any given time, but as well also the property in which such fund has been invested or for which such specific goods have been exchanged, that remains the separate property of the *feme covert*. *State to use v. Smit*, 20 Mo. App. 50; *State ex rel. v. Bank*, 80 Mo. 62; *Botts v. Gooch*, 97 Mo. 88; *Kidwell v. Kirkpatrick*, 70 Mo. 214; *Conrad v. Howard*, 89 Mo. 217. And a woman's separate estate shifts with her changing conditions and so remains whether she continue married or single; in other words that which is once her separate property always remains her separate property or until she divests herself of it in the manner provided by statute. *Bank v. Taylor*, 53 Mo. 444; *Rieper v. Rieper*, 79 Mo. 352.

Harrison & Mahan, for respondent.

The petition did not state a cause of action, and objection to the introduction of any evidence was properly sustained. *Bank v. Collins*, 75 Mo. 280; *Arnold v. Brokenbrough*, 29 Mo. App. 625; *Coon v. Brock*, 21 Barb. 548; *Whiteside v. Cannon*, 23 Mo. 457, 472; *Daily v. Mfg. Co.*, 88 Mo. 304; *Davis v. Smith*, 75 Mo. 224; *Bank v. McMenamy, Adm'r*, 35 Mo. App. 198; *Druhe v. DeLassus*, 51 Mo. 167; *DeBaum v. Van Wagoner*, 56 Mo. 349.

Biggs, J.—This is a suit in equity brought by the plaintiff, in which the interest of the defendant Mildred K. Fritz in the firm business of Fritz & Curts is sought to be charged with a certain indebtedness, which the plaintiff alleged was due from the defendant. On the trial of the cause, the court on the defendant's objection refused to permit the plaintiff to introduce any evidence in support of its alleged cause of action, for the reason that the petition failed to state facts sufficient to constitute a cause of action. The plaintiff declined to amend the pleading, and the court thereupon

dismissed the bill and entered a final judgment in favor of the defendant. The correctness of this ruling is the only question presented by the record for our determination.

The plaintiff went to trial on its second amended petition, which, omitting the caption, is as follows:

"The above-named plaintiff with leave of court first obtained comes and for its second amended petition states:

"That on the fourth day of June, 1885, the plaintiff was, and from that time hitherto hath been and still is, a corporation duly incorporated under the laws of the state of Illinois, and engaged in the business of wholesale dealer in coffins and undertakers furnishing goods at the city of Chicago in the state aforesaid.

"That, at the time of the accruing to the plaintiff of the cause of action herein declared on, and of the several items of the account thereof, the defendant was a married woman, the wife of one Evans Fritz, and by and with the knowledge and consent of her said husband was engaged at the city of Hannibal, Missouri, as a sole trader in the business of an undertaker, and buying and selling coffins and undertakers furnishing goods; and which said business was carried on by her to her own sole and separate use, the stock of goods, wares and merchandise in her said trade being her separate property, having been purchased by her with her separate money and means.

"That, at divers dates, between said fourth day of June, 1885, and the nineteenth day of March, 1886, at the special instance and request of the defendant, the plaintiff sold and delivered to the defendant, to be used by her in her said separate business as a sole trader, divers goods, wares and merchandise, consisting of coffins and undertakers furnishing goods, which were by her added to, and placed for sale in, and thence afterwards composed a part of, her said stock in her

said separate trade; and which said goods, wares and merchandise were of the reasonable market value of three hundred and forty-one and eighty-four-hundredths dollars; which said last-mentioned sum the defendant then and there undertook, and faithfully promised, to pay plaintiff, when thereunto requested, and with the payment whereof the defendant then and there intended to charge, and did charge, her separate estate, and, especially, said stock in her said separate trade, together with all income, increase and profits thereof.

"That, at divers dates, between the twenty-eighth day of December, 1885, and the seventh day of May, 1887, the defendant paid, on said demand of plaintiff, various sums, amounting in the aggregate to one hundred and thirty dollars, leaving a balance due and owing the plaintiff thereon of two hundred and eleven and eighty-four-hundredths dollars; the particulars of all which, and also the credits thereon, will fully and at large appear by an itemized account thereof, filed with plaintiff's original petition in this cause, and now hereby referred to, and made a part of this amended petition.

"That on, to-wit, the —— day of ——, 188–, and after the sale and delivery of said goods, wares and merchandise by plaintiff to defendant, the defendant, sole and separate trader, as aforesaid, and by and with the knowledge and consent of her husband, entered into copartnership, in the said business of undertakers and dealers in coffins and undertakers furnishing goods, with her brother, Robert A. Curts, at the said city of Hannibal, under the firm name and style of Fritz & Curts. That defendant took into said copartnership business all, and singular, her then stock in trade aforesaid, and also invested, and embarked, therein a large sum of money, the income, increase and profit of her said separate trade and business, and, from the date last aforesaid, hitherto, the defendant has been, and still is, a full partner in said business and firm of

Fritz & Curts. That, during all that time, the defendant has been, and still is, the sole owner of a large interest in said firm business, with all, and singular, the stock in trade thereof, together with certain horses and wagons incident to, and used and owned in connection therewith; and that her present interest, to-wit, an undivided half interest in, and to, said property now owned by the said firm of Fritz & Curts, came to the defendant during her coverture, as aforesaid,—is the income, increase and profits thereof, and was acquired by her by her said trade and business, so conducted on her own separate account, and is of great value, to-wit, of the value of one thousand dollars, and now being in the stand, or store, of said firm at number 322 Broadway, in the city of Hannibal, Missouri, consisting of coffins, burial caskets, undertakers furnishing goods, shrouds, embalming case, implements, trimmings, stools, desks, show cases, and, generally, such goods, wares and merchandise as are usually kept in stock by the like establishments in large towns and cities in Missouri, together with said spring wagons, horses, harness, etc., used in connection therewith.

"That the defendant on, to-wit, the —— day of ——, 1888, became discovert by the death of her said husband, Evans Fritz, and has since been, and now is, sole and unmarried.

"Plaintiff further states that it will be in great danger of losing its remedy against the defendant, and against her said property, if the defendant be allowed to remain in possession and control thereof, selling and disposing of same in the usual course of trade, in which, with her said partner, she is now engaged.

"That, although often thereunto by the plaintiff requested, the defendant hath hitherto wholly neglected, failed and refused, and still refuses, to pay said balance of two hundred and eleven and eighty-four-hundredths dollars, due plaintiff, as aforesaid, or any part thereof, but the same, together with legal interest

thereon from the —— day of ——, 188–, on which said date plaintiff demanded of defendant the same, are yet due plaintiff, and unpaid.

"Wherefore plaintiff prays judgment for said sum of two hundred and eleven and eighty-four-hundredths dollars, with six per cent. interest per annum thereon from said —— day of ——, 188–, and costs; and that the court, by its appropriate order and decree, shall subject the interest of the defendant in all, and singular, the property and effects, accounts, choses in action, and other assets of the said firm of Fritz & Curts, to the payment of the plaintiff's demand, and that the court shall appoint a receiver to take charge of, keep and preserve the said property, and to take the business and business interest of the defendant, pending proceeding, according to the orders of the court; and for such other further and general relief as to the court may seem meet."

This record presents one of the many troublesome questions concerning the rights and liabilities of married women in respect of their separate property.

In 1885 the defendant was a married woman and with the consent of her husband she carried on a separate business as a "sole trader." This she might lawfully do. *Tuttle v. Hoag*, 46 Mo. 38; *Ploss v. Thomas*, 6 Mo. App. 157.

The averments in the petition are sufficient to show that the defendant, in the purchase of the goods from the plaintiff, created an obligation or debt which a court of equity, in a proceeding for the purpose, would declare to be a charge upon her separate property. This equitable charge could be made to extend not only to her stock in trade, but to any other separate property owned by her at the time when the debt was contracted. But the difficulty suggested by the defendant about the enforcement of the plaintiff's equitable right grows out of the subsequent change of the status of the separate

property owned by her at the time when the debt was created. She claims that the character and nature of the plaintiff's claim and the mode of its enforcement suggests the difficulty. If the property owned at the time when the debt was created had been disposed of, and other property of a like or different character had been substituted for it, the substituted property would be made to take the place of the original, and a court of equity would decree its sale in satisfaction of the debt; or, if the property sought to be charged had been mixed with other property belonging to third parties, but was still susceptible of identification, the creditor's right of action would be free from difficulty or doubt. In either case the judgment would be against specific and tangible property, and the question would be entirely free of difficulty. She claims, however, that additional complications are added in this case by the formation of the partnership of Fritz & Curts, and the transfer by her of her property to the firm, which are fatal to the present proceedings. In answer to this we say that the complications thus suggested are more apparent than real. Every partner is seized of the property belonging to the firm, and, unless restrained by the articles of copartnership, has an absolute right of disposition of that interest. By conveying his property to the firm he does not divest himself of that interest, although he shares it with another. If the defendant had been a *feme sole* when she made her contract, and had afterwards formed a copartnership, her interest in the assets of the firm or any part thereof would have been subject to levy, under *Wiles v. Maddox*, 26 Mo. 77, for the debt thus created. The rule established in that case has never been questioned since, but on the contrary has expressly been recognized in *Sheedy v. National Bank*, 62 Mo. 17; in *Shackleford's Adm'r v. Clark*, 78 Mo. 491, and in *McCoy v. Hyatt*, 80 Mo. 130. Now in point of fact the

defendant was a *feme sole* in equity when she made the contract, although she was a married woman. Her contract then made was an equitable charge on her property, and so remained as long as she retained an interest therein. The mere fact that, since the making of the contract, she has become discovert, does not change the character of her contract, nor relieve the property from this charge. No general judgment can be obtained against her, nor can a general execution be issued against her property, because the foundation of the judgment is still the contract, which she made while a *feme covert;* but there is nothing in the way of enforcing the claim in equity against the property which she sought to charge, and in which she still retains an interest.

This is not a proceeding by garnishment, legal or equitable, but a seizure of property. In this state equitable, as well as legal, rights in property are subject to seizure on execution and attachment, although claims affected by trusts are not subject to garnishment. *Lackland v. Garesche*, 56 Mo. 267. So far, therefore, from this case presenting any difficulties, the very difficulties, which Judge RICHARDSON suggests in *Wiles v. Maddox*, *supra*, are avoided by the fact, that the proceeding is one in equity, where all parties interested can be heard, and where the exact balance, which is due to the defendant as a partner, and subject to seizure in this proceeding, can be ascertained.

The demurrer interposed in this case is a general demurrer and not a demurrer for want of proper parties. The demurrer, therefore, concedes that the defendant at the date of the purchase was possessed of separate property as a *feme sole* in equity; that by the purchase she intended to charge that property; and that, at the date of the institution of this suit, she was still possessed of the substitute of such property, although she had placed it into a firm of which Curts is a member, being

according to the allegation of the petition entitled to one undivided half of all the assets of said firm. As the proceeding is in equity and affects the rights of Curts, he is a necessary party defendant, and should be made such by amendment. The demurrer, however, was not interposed on that ground, but was a general demurrer on the ground that the petition failed to state a cause of action against the demurring defendant. We are of opinion, for reasons above stated, that it was improperly sustained, and that the judgment must be reversed and the cause remanded to be proceeded with in conformity with this opinion. All the judges concurring, it is so ordered.

JOHN H. A. MEYER AND LOUIS HOFFMAN, Respondents, v. ARNOLD WITHMAR, ROBERT B. GRAY, LOUIS KAMINSKI AND J. M. WARD FURNITURE AND CARPET COMPANY, Defendants; ARNOLD WITHMAR AND ROBERT B. GRAY, Appellants.

St. Louis Court of Appeals, May 13, 1890.

Bills and Notes: BONA FIDE PURCHASER: BURDEN OF PROOF. If a partner fraudulently indorse a negotiable promissory note in the name of his firm, and the indorser seeks to hold his copartners on the indorsement, it devolves on such indorsee, after proof of fraud in the indorsement, to show that he purchased the note for value in the regular course of business, and that he acted in good faith in making the purchase; and, *held*, that the purchaser in the case at bar could not be deemed a purchaser in good faith, since it appeared that he gave in consideration of the transfer his own note payable to the wife of the partner who had fraudulently indorsed the note to him, and there was no evidence of a practice on the part of such partner with the knowledge of his copartners to so deal with partnership property.

Appeal from the St. Louis City Circuit Court.—Hon. Daniel D. Fisher, Judge.

Reversed and remanded.

W. H. Clopton, for appellants.

(1) When Kaminski took the note sued on, it was in pursuance of the agreement of dissolution, and he had no power to bind defendants, Gray & Withmar, by his indorsement of it after it passed into his hands. Story on Part. [7 Ed.] sec. 268; 1 Colly. on Part. [6 Ed.] p. 155; *Spaunhorst v. Link*, 46 Mo. 197; *Tutt v. Colony*, 62 Mo. 116; *Mudd v. Bart*, 34 Mo. 465; *Featherstonough v. Fenwick*, 17 Vesey, 298; 1 Colly. on Part. 158. (2) The second instruction asked by defendants, and refused, should have been given. According to Kaminski's testimony of what transpired at the time he sold (?) the notes to plaintiffs, the transaction was so glaringly outside of the scope of the partnership business that the indorsement of the firm name by Kaminski could not bind the firm to plaintiffs. *Clayton v. Hardy*, 27 Mo. 536-7; *Hager v. Gravis*, 25 Ct. of App. 164; *Mercien v. Mock*, 10 Wend. (N. Y.) 463; *Dab v. Halsey*, 16 John. (N. Y.) 38; *Williams v. Gilchrist*, 11 N. H. 535; *Whitman v. Oxford*, 6 Wis. 677; Colly. on Part., notes by Wood. [6 Ed.] pp. 785-6, sec. 501; p. 793, note; Story on Part., secs. 127, 128, 130. (3) The third instruction asked by defendants, and refused, should have been given. Plaintiffs were not purchasers for value; they had merely issued their note which was still in the hands of the payee. 1 Perry on Trusts [3 Ed.] sec. 221; 2 Sugden on Vend., bot. p. 753; *Peabody v. Fenton*, 3 Barb. Ch. 464. (4) After the dissolution of a partnership, one of the parties cannot indorse notes payable to the firm so as to bind the partnership. *McDaniel v. Wood*, 7 Mo. 543; *Long v.*

Story, 10 Mo. 636; *Bredon v. Ins. Co.*, 28 Mo. 185; *Moore v. Lochman*, 52 Mo. 325. (5) When the note sued on was turned over to Kaminski by the other partners, it was with the implied authority to indorse the note with the firm name, without recourse, for the purpose of collection or sale. *Fellows v. Wyman*, 33 N. H. 351-7; *Yule v. Eames*, 1 Met. (Mass.) 486-7; *Waite v. Foster*, 33 Maine, 424-6.

Charles A. Davis, for respondents.

BIGGS, J.—The plaintiffs compose the firm of Meyer & Hoffman, and they instituted this action upon a negotiable promissory note, signed by the J. M. Ward Furniture and Carpet Company, as maker, and payable to the order of the firm of A. Withmar & Co. The plaintiffs claimed that they were the owners of the note, and that it had been indorsed to them before its maturity by A. Withmar & Co.; that the note at its maturity was presented to the maker for payment, which was refused; that it was duly and regularly protested for non-payment, and due notice thereof given to the defendants, Arnold Withmar, Robert B. Gray and Louis Kaminski, composing the firm of A. Withmar & Co.; wherefore the plaintiffs prayed judgment against all of the defendants for the amount of the note.

The Ward Furniture Company and Kaminski made default. The appellants Withmar and Gray filed their separate answer, and, after tendering the general issue, they averred that, at the date of the note, to-wit, October 2, 1888, the firm of A. Withmar & Co. was composed of themselves and Louis Kaminski; that the note was delivered to their said firm by the "Ward Furniture Company;" that a few days thereafter, to-wit, on the nineteenth day of the same month, the firm was by mutual consent dissolved; that, in the distribution of the assets, the note in suit was set apart to Louis

Kaminski, and that in the consideration of the settlement Kaminski agreed to accept the note sued on as so much cash, without any further or contingent liability of the firm for its payment. It is then averred that the indorsement of the firm name on the note by Kaminski, and its delivery by him to the plaintiffs, were made after the dissolution, and that the note was received by the plaintiffs under such circumstances as to impart notice to them of the fact of dissolution, or at least to put them upon inquiry as to Kaminski's right to bind the firm by the indorsement. To this answer a replication was filed.

The cause was submitted to the court without a jury, and the finding and judgment were in favor of the plaintiffs and against all the defendants. The defendants Withmar and Gray have prosecuted this appeal.

The evidence in the case does not exactly sustain the averments of the appellant's answer as to the circumstances under which the note was turned over to Kaminski. It is shown by the evidence that on the nineteenth day of October, 1888, the firm of A. Withmar & Co. was dissolved by the purchase of the respective interests of Withmar and Kaminski by one L. B. Stephenson. The agreement was that Stephenson should pay to each one of the retiring parties a stipulated sum for their respective interests in all of the assets of the firm, and that the new firm of R. B. Gray & Co., composed of the defendant R. B. Gray and Stephenson, should continue the business, and assume and pay all outstanding debts of the old firm. After the terms of the sale had been agreed on, Kaminski and Stephenson disagreed as to the manner of payment. Stephenson asked Kaminski to accept his individual notes on short time for a portion of the purchase money. This Kaminski declined to do. Stephenson then agreed to transfer to him two notes against a third party, which he agreed to accept, provided the new firm would

indorse the paper. This was agreed to by Stephenson and Gray. This left a small balance due Kaminski, and he agreed with Stephenson and Gray to accept in payment thereof the J. M. Ward Furniture Company note, which, at that time, constituted a part of the assets of the old firm, and by the terms of the purchase was to become the property of the new firm. Immediately thereafter the bookkeeper at the request of Kaminski delivered to him the note in controversy, and Kaminski thereupon indorsed the name of the firm on the back of the note, and at the same time, or a little while thereafter, Stephenson paid to Kaminski twenty-five hundred dollars in money. After Kaminski received the money and note, he immediately made application to the plaintiffs to lend them the money paid by Stephenson, and also to sell to them the Ward Furniture Company note. The plaintiffs agreed to this, and, in consideration of the money and the note, they executed and delivered to Kaminski their note, payable to Kaminski's wife. There is no substantial conflict in the evidence concerning the above-stated facts. The only matter, concerning which there was a material conflict, was the agreement concerning the mode and manner of the assignment of the note to Kaminski. The defendants' evidence tended to prove that Kaminski agreed to receive the note without the firm's indorsement, and that it was distinctly understood that he would look to the Ward Furniture Company alone for its payment; that the Ward Furniture Company at that time was supposed to be perfectly good, and that Kaminski preferred this note, without any indorsement, to the individual note of Stephenson indorsed by the new firm. On the other hand, Kaminski testified that it was agreed by all parties that the note should be transferred to him in part payment of the balance due him from Stephenson, and that there was no special agreement in respect of the manner of its indorsement. Concerning the purchase of the note by

the plaintiffs there was no evidence impeaching its good faith, except the circumstances attending it.

There are no exceptions as to the admission or rejection of evidence, and the errors complained of are based solely on the instructions given and refused. The theory upon which the trial judge determined the case, as we gather it from his own instructions, was that Withmar and Gray, as members of the firm of A. Withmar & Co., were bound as indorsers by the assignment of the note by Kaminski, if the firm was not dissolved at the time when the indorsement was made; and, if, as a matter of fact, the firm was dissolved at the time when Kaminski made the indorsement, Gray and Withmar must be still held, unless the plaintiffs had notice or knowledge of the dissolution prior to the delivery of the note to them by Kaminski. No other conditions were attached to the plaintiffs' right of recovery, except that they must have acquired the note for value; and, on this subject, the court declared by instruction that the execution by plaintiffs of their note to Mrs. Kaminski, in consideration of the indorsement, constituted them holders for value. On the other hand, the defendants Gray and Withmar insist that the indorsement of the note by Kaminski was made after the dissolution of the firm, and that, therefore, his indorsement of the firm's name on the note, with the intention of binding the firm as indorser, was a fraud, and that, when the defendants introduced evidence tending to prove this fact, then it devolved on the plaintiffs to show that they acquired the note for value in the regular course of their business, without notice of the dissolution of the firm and, without any knowledge of any facts or circumstances which would lead a prudent person to suspect the fraud.

The defendants' view of the law seems to be the correct one, as far as it goes, but, under the facts in this case, as we will hereafter show, it matters not whether, at the time of the indorsement by Kaminski, the dissolution had been finally consummated or not; in either

case, his action in attempting to bind his partners by the indorsement was an actual fraud upon them, unless they consented to be thus bound. The general rule undoubtedly is that, while a partnership continues to do business, one partner can, within the scope of the business, sell and transfer the securities of the firm; and, if negotiable paper belonging to the firm is transferred by one partner before its maturity, the other members of the firm will be held as indorsers. But this rule has some limitations. When it appears that the paper was wrongfully negotiated for the individual use and benefit of the member making the indorsement, then, in order to bind the other members as indorsers, the holder must prove that he acquired the paper in his usual course of business for a valuable consideration, and under circumstances not affecting him with notice of the fraud. This is the rule when a member of the firm, without authority, signs the firm name to a note in payment of his private debt; and we can see no reason why the same principle does not apply to the fraudulent indorsement of the firm name in a transfer of negotiable paper, when it is done for the private advantage of one partner. 1 Daniel, Negotiable Instruments [3 Ed.] sec. 369; *Bank v. Gilliland*, 23 Wend. 311; *Bank v. Cameron*, 7 Barb. 143; *Munroe v. Cooper*, 5 Pick. 412. It is also the rule that, when the maker of negotiable paper proves that the instrument sued on had its origin in fraud, or was fraudulently put in circulation, it devolves upon the holder to prove that he received it "*bona fide* before maturity and for value." *Franklin Savings Institution v. Heinsman*, 1 Mo. App. 336; *Hamilton v. Marks*, 63 Mo. 167; *Johnson v. McMurray*, 72 Mo. 278; *Carson v. Porter*, 22 Mo. App. 179. The case under consideration and those cited are analogous, and the principles of law governing the one ought to be equally applicable to the other.

Now, let us apply the law to the facts in this case. According to Kaminski's own testimony it was the

contract between him and Withmar on the one side, and Stephenson on the other, that the latter should pay to each one a certain amount for their respective interests in the old firm; that the note sued on (together with all assets belonging to the old firm) should become the property of the new firm, without any contingent liability for its payment by the members of the old firm. When Stephenson and Kaminski were closing up the deal, the latter refused to accept Stephenson's notes for a small balance due him, but he suggested to Stephenson and Gray that, in lieu of Stephenson's note or the money, he would take the note of the Ward Furniture Company. This was agreed to. At the time when this agreement was made, the note of the Ward Furniture Company was, to all intents and purposes, the property of the new firm, and the old firm under the contract of purchase was not to be held liable for its payment. Therefore, we say, that the claim made by the plaintiffs that Kaminski received the note on the faith of the indorsement of the old firm, and that he had a right to bind its members as indorsers by a sale to the plaintiffs, cannot be sustained, unless it was so agreed by Gray and Withmar, which they deny. In the absence of such an agreement, the attempt by Kaminski to make a contract of indorsement for the firm, other than without recourse, was a positive fraud as to Withmar and Gray. *Fellows v. Wyman*, 33 N. H. 351; *Yule v. Eames*, 1 Metc. (Mass.) 486. At the time wher Kaminski received the note, he had no legal right to make an unconditional indorsement in his own favor, whether the dissolution at that particular moment had been finally consummated or not, as the contract of dissolution had been agreed to.

If the unconditional indorsement of the note by Kaminski was fraudulent and without authority, then, before the plaintiffs can recover against Withmar and Gray, they must show that they purchased the note for value in the regular course of their business, and that in making the purchase they acted in good faith. It

may be conceded that the plaintiffs bought the note before its maturity and that they gave value for it, and it may also be conceded that the plaintiffs purchased the note in their usual course of business, although there is nothing to show that they were in the habit of dealing in negotiable securities; but the question whether they were *bona fide* purchasers within the meaning of the law still remains. The defendants urge that the plaintiffs cannot be regarded as purchasers in good faith, because they paid for the note in suit by giving their note (which is still outstanding), to Kaminski's wife. This transaction must certainly be regarded as unusual, and outside of the ordinary scope of partnership business, and it ought to defeat plaintiffs' right of recovery against Gray and Withmar, unless it is supplemented by testimony to the effect that Kaminski had been in the habit, with the knowledge of his partners, of disposing of the firm's property for the benefit of himself or wife, or unless it was agreed by Gray and Withmar that Kaminski should take the note with the firm's indorsement. *Cayton v. Hardy*, 27 Mo. 536; *Grear v. Yosti*, 56 Mo. 307; *Horton v. Bayne*, 52 Mo. 531. The fact that Kaminski demanded that his wife should receive the benefit of the discount of the firm's paper does not make a case of mere suspicion that Kaminski was acting fraudulently, but it was so clearly outside of the scope of ordinary partnership business, that plaintiffs' action in acceding to it, instead of being evidence of good faith, was evidence of bad faith, which in the absence of explanatory circumstances became conclusive. This conclusion in no way conflicts with the doctrine announced in *Hamilton v. Marks*, 63 Mo. 167.

If Gray and Withmar are properly chargeable as indorsers, the notice of protest left at Gray's place of business was sufficient to bind both Gray and Withmar.

The judgment of the circuit court will be reversed and the cause remanded for retrial in accordance with this opinion. All the judges concurring, it is so ordered.

41 406
66 514

THE SOUTHWEST LEAD & ZINC COMPANY, Respondent, v. PHŒNIX INSURANCE COMPANY, Appellant.

St. Louis Court of Appeals, May 13, 1890.

Practice, Appellate: SECOND APPEAL: RES ADJUDICATA. When a cause is twice appealed, the declaration of the law on the first appeal governs both its retrial and the decision on the second appeal, provided the facts are substantially the same on both occasions.

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

AFFIRMED.

W. H. Phelps and *E. O. Brown*, for appellant.

(1) The court below erred in not withdrawing the case from the jury and directing a verdict for defendant at the close of plaintiff's evidence. *Powell v. Railroad*, 76 Mo. 83; *Lenix v. Railroad*, 76 Mo. 86-91; *Bank v. Bank*, 10 Wall. 939; *Glass v. Gelvin*, 80 Mo. 297; *Commissioners v. Clark*, 94 U. S. 284; *Spiva v. C. and M. Co.*, 88 Mo. 68. (2) By the terms of the policy declared on, the amount insured was distributed in specific items upon several buildings and pieces of property, the effect of which was to limit the extent of the insurance to each building or piece of property. The risk in this case was expressly taken on their "one-story frame building occupied by furnaces for smelting zinc," and cannot be extended or construed so as to make it cover more than "one building." Clearly then both buildings, "Furnace A." and "Gas Producer," were not covered by the policy, and in determining to which of these two frame buildings the description most

appropriately applies we find that the building called "Furnace A," as distinguished from the "Gas Producer," is the only building which falls within the description used in the policy, and this building was not injured. *St. Clare v. Ins. Co.*, 45 Ill. 306; *Hews v. Ins. Co.*, 126 Mass. 389; *Hare v. Bardstow*, 8 Jur. 938; 5 R. I. 433; *Moadinger v. Ins. Co.*, 2 Hall, 490; *Foundry v. Ins. Co.*, 1 Cliff. 300; *Ins. Co. v. Ins. Co.*, 36 Md. 37; *Ins. Co. v. Updegraff*, 40 Penn. St. 311; May on Insurance, secs. 420, 424; Wood on Insurance, secs. 55, 56, 57.

L. P. Cunningham, *Galen Spencer* and *Thomas Dolan*, for respondent.

The action of the circuit court, from which the appeal was taken, was strictly correct. The judgment is for the right party. The circuit court did not err in refusing to take the case from the jury, or in refusing to instruct that the plaintiff could not recover. To have done so would have been flagrant error. See this identical case, upon the same policy, and for the same fire. *Lead & Zinc Co. v. Ins. Co.*, 27 Mo. App. 446. It was purely a question of fact to be determined by the jury, under instructions, as to which was the "one-story frame building" that was occupied by furnaces for smelting zinc. This could only be determined by the evidence, and after the evidence was heard; what it proved, or tended to prove, was wholly for the jury.

Biggs, J.—This is an action on a policy of insurance to recover for the destruction of a building, which the plaintiff claimed was covered by a policy issued by the defendant. The defense was that the building burned was not covered by the policy, and that consequently the defendant was not liable. There was a jury trial, and the verdict and judgment were in favor of the plaintiff for the full amount. From this judgment the defendant has appealed

The errors complained of relate to the instructions and the admission of incompetent and irrelevant testimony.

The plaintiff is, and was at the times hereinafter mentioned, the owner of certain works for the reduction of zinc ore. The works consisted of various buildings, all of which were in process of construction at the time the insurance in question was taken out. The policy was issued on the thirteenth day of July, 1882, and by its terms the following specific property was insured for the period of one year: *First.* "Five hundred dollars on their two and one-half story metal building * * * to be occupied as reduction works, pottery, engine-house and elevator." *Second.* "Eight hundred dollars on fixed and movable machinery," etc. *Third.* "Four hundred dollars on their one-story frame building to be occupied as a calciner." *Fourth.* "Four hundred dollars on *their one-story frame building to be occupied by furnaces for smelting zinc.*" *Fifth.* "One hundred and fifty dollars on their one-story frame building occupied as an office." During the life of the policy one of the buildings belonging to the plaintiff's zinc works was destroyed by fire, and the plaintiff claims that the burned building was covered by the fourth clause of the policy. The defendant denied this and contended that the building occupied by the furnaces for smelting zinc was not burned. This was the sole issue.

The controversy concerning the identity of the building or the subject-matter of the insurance grew out of the following state of facts. The plaintiff's zinc works were constructed for the purpose of smelting the kind of zinc ore designated as "zinc blende." The process consists in crushing the ore and placing it in a furnace called a "roaster" or "calciner." The roasting separates the sulphur and leaves a crude oxide of zinc. After the ore has been roasted, the smelting

process begins in retorts constructed of fire clay. The retorts belonging to plaintiff's works were constructed in a one-story frame building, which we will designate as "A." This building was incomplete at the time the policy was issued. The heat is not applied directly to the ore, but to the outside of the retorts. The pattern of furnace used by plaintiff was known as "Seiman's regenerative gas furnace," in which, instead of building fires directly under the retorts, the actual firing of the fuel was done in furnaces usually detached from the retorts. The furnaces or "gas ovens" as they were sometimes called, belonging to the plaintiff's works, were situated in a one-story building, which we will designate as "B," and which was also, at the date of insurance, in process of construction. This structure was about forty feet from structure "A," and the two were connected by a tramway and two large iron pipes. The gas generated in the ovens or furnaces in "B" was conveyed through the pipes to the retorts in "A" in which the ore was placed. When the gas reached the retorts, it came in contact with a stream of air, and this produced a flame or blaze sufficiently hot to smelt the ore contained in the retorts. In this manner the smelting of the ore was completed. The structure "B" only was burned.

The plaintiff's theory was that, under the peculiar process adopted by the plaintiff for smelting ore, the phrase, "building occupied by furnaces for smelting zinc," must be construed to mean a building composed of two parts; one where the gas was generated and the fuel directly applied, the other where the heat was applied to the retorts containing the ore. On the other hand, the insurance company resisted the claim upon the ground, that the description of the property in the fourth clause of the policy could only apply to *one building*, and that, as the structure containing the retorts was the only one to which the descriptive words

in the policy could possibly be made to apply, its demurrer to plaintiff's evidence ought to have been sustained. The principle upon which the defense is predicated is that, "if the property insured is specifically designated, all other is excluded, even though usually of the same tribe of that insured."

The plaintiff, in support of its case, introduced as a witness, O. H. Pitcher, its former president. It was admitted that the witness was an expert in the smelting of zinc ore, and that he was thoroughly acquainted with the process adopted by plaintiff for reducing ore. After giving a detailed description of this particular method, the witness undertook to describe to the jury the two buildings "A" and "B," and the relation that they bore to each other in the smelting of ore. We extract the following from his testimony bearing directly on the subject:

"*Q.* Now, that we may understand this subject, you say that the eight furnaces were situated in this building on the left (meaning 'B')? *A.* Yes.

"*Q.* You say that the heat is produced in those furnaces by what process; what kind of fuel? *A.* Coal.

"*Q.* And where does that heat ascend? *A.* Well, those eight furnaces are located or built in groups of four. The combustion products from four of them are led into one stack, and from four others into another stack; the top of these stacks are hooded with a square box; each of them delivers its combustion product through a separate tube, which in this case extends just far enough so that the down-take of it will miss the building. Each one of those drops down with a down-take, as shown in the picture, and below them it connects into a main pipe five feet in diameter, which then runs over into the room where the retorts are.

"*Q.* Then in which of those rooms were the fires made? *A.* Well, there is fire all over zinc works. I can't to my idea divide those things. The fires, as

originally built, the firing of the coal—the fuel—is done in that part of the building which is marked there number 1 (designated in this opinion as 'B') on the left of those pictures. But the flame and heat in that, and in the part which contains the retorts, comes back through the checker work, until it finally goes out of the stack and is discharged; there isn't any one place which is free from fire, flame and heat.

"*Q.* But I asked you in which building was the fire built? *A.* In that part of the building which was burned (meaning 'B').

"*Q.* In which building were the eight furnaces contained? *A.* That same building.

"*Q.* Were there any furnaces in the other compartment or room of that building—I mean the building in which the retorts were? *A.* Well, to my mind, as I have already said, *the whole thing is a furnace.*

"*Q.* But in the sense that I mean, a furnace wherein you build a fire? *A.* Well, the fire is built in this part which was burned, as I say. But that doesn't comprise to my mind *the whole furnace.* * * *

"*Q.* I will ask you whether or not these two portions of the building ('A' and 'B') were essential to each other in the use and operations of the works. *A. They are parts of the same furnace necessarily, because they are both necessary to get the fire and heat to the material to be reduced and smelted.* Indeed, furnaces in which the fire is made, which were in that part which was burned, are to the rest of the furnace exactly what *any firebox is to any common furnace.* They are a part of that furnace."

The plaintiff relied chiefly upon the testimony of Mr. Pitcher, and the portion of his testimony embodied herein is deemed by us sufficient for a proper understanding of the court's declarations of law to the jury. On plaintiff's motion the court gave the following instructions:

"1. If the jury believe from the evidence that the one-story frame building or a portion thereof, occupied by furnaces for smelting zinc, described in the policy introduced in evidence, was destroyed by fire at the time testified by the witnesses, the jury will find the issues for the plaintiff and assess its damages at the value of the building or portion thereof destroyed, not exceeding the sum of four hundred dollars, together with interest at the rate of six per cent. per annum from the ninth day of November, 1883.

"2. If the jury believe from the evidence that plaintiff's furnaces for smelting zinc mentioned in the policy read in evidence from their construction and use consisted of two sections or parts, each of which was necessary for the smelting of zinc in the process used by plaintiff, and that the fuel for smelting such ore was charged and fired in one of said sections or parts, and the other section or part contained the retorts, into which the calcined zinc ore was charged and the metal finally produced by the heat generated from the fuel charged and fired in the other section or part, and that said two sections or parts were necessarily connected by a pipe or tube sufficient to carry the heat and product of combustion from one section or part to the other, and by a tramway for carrying coal and for the passage of the workmen from one section or part to the other, although distant forty feet or more from each other, and not resting on the same foundation or covered by the same roof, then either of said sections or parts was covered by the terms of said policy."

On behalf of the defendant the court gave the following instruction: "2. The court instructs the jury that only one building was covered by the fourth clause of the policy read in evidence, and that is their one-story frame building occupied by furnaces for smelting zinc. It was this building and no other that defendant insured, and in this case, if the jury find

from the evidence that the plaintiff's one-story building occupied by furnaces for smelting zinc was not injured or destroyed by the fire in question, the plaintiff cannot recover, and your verdict should be for the defendant."

The defendant's counsel object to the plaintiff's second instruction for the reasons that it states an erroneous proposition of law, and is diametrically opposed to the defendant's instruction, which declared that but *one building* was covered by the policy. The last objection is untenable, because the theory of the plaintiff's second instruction is, that there was *really but one building* occupied by the plaintiff's furnaces for smelting zinc, but that the peculiar process adopted by plaintiff necessitated two compartments, and that the gas ovens in the one and the retorts in the other must be regarded as composing the component parts of "the furnaces for smelting zinc." Looking at the question from this standpoint, it will be readily conceded that the instruction does not authorize a recovery upon the idea that the policy covered two separate and distinct buildings. The other objection urged against the instruction presents a question of much difficulty, and it really presents the legal proposition upon which the whole case hinges. It is a well-settled rule of insurance law that where property insured is specifically designated, all other is excluded, even though of the same class. From this premise, the defendant argues that, by the very words of the policy, only one building was insured, and that, necessarily, all other buildings were excluded; that, as the building "A" is the only one that answers the descriptive words in the policy, the ordinary rules of construction would confine the risk to that building alone. Hence it is claimed that the trial court committed error in submitting to the jury the question, whether the building containing the "gas ovens" and that containing the retorts were to be

regarded as one structure, and whether they together comprised "the one-story frame building occupied by furnaces for smelting zinc."

This suit originated in the Jasper county circuit court, and, on a trial, that court held that, under the evidence, the plaintiff could not recover. An appeal was had from this judgment to the Kansas City Court of Appeals, where the judgment of the lower court was reversed, and the cause remanded. *Southwest Lead & Zinc Co. v. Ins. Co.*, 27 Mo. App. 446. There was a change of venue to the circuit court of Greene county, and the case has in this way reached us on a second appeal. Upon this state of the record, it is quite important for us to ascertain the purport and extent of the decision of the Kansas City Court of Appeals, because whatever was there decided furnishes the law for this case, provided the facts are substantially the same. *Bevis v. Railroad*, 30 Mo. App. 564; *Bank v. Taylor*, 62 Mo. 338; *Forester v. Railroad*, 26 Mo. App. 123; *Adair County v. Ownby*, 75 Mo. 282; *Gaines v. Fender*, 82 Mo. 497; *McKinney v. Harral*, 36 Mo. App. 337. If the second trial was had in conformity to the rulings of the Kansas City Court of Appeals, then we are bound to uphold the judgment, whatever our individual opinions of the legal questions involved may be.

The determination of the case on the former appeal was made to turn, as it must in this case, upon the admissibility of Pitcher's testimony, and its force and effect. The opinion contains a very full statement of this testimony, and we find, upon comparison, that it is substantially the same as in the record before us. The court said: "The only contest between the parties was whether the building burned was covered by the policy. The court, in effect, declared that the structure burned was not only not the building mentioned in the policy, but no part of it. We do not believe such declaration is justified by the testimony. The question, whether

the property burned was in whole or in part the property described in the policy, was, under the evidence contained in the record, a question for the jury. The case of *Tesson v. Ins. Co.*, 40 Mo. 33; s. c., 50 Mo. 112, is, in some respects, analogous to the questions presented here. That portion of the case which can be fairly said to apply to this is expressed in the syllabus as follows: 'Whether the description in the policy covers, or fully describes, the property intended to be insured, is *a matter of fact* for a jury to determine, and the terms of the policy are to be reasonably construed with reference to the whole subject-matter.' I am of the opinion that the jury should pass upon the facts as developed; that they should find whether what has been called here the furnace building and the retort building are to be construed as one structure, or whether together they comprise the 'one-story frame building, to be occupied by furnaces for smelting zinc.'"

It must be conceded that the case was retried in conformity with the foregoing decision, and we ought not, and cannot, put the trial court in the wrong without violating well-established law. The doctrine of *res adjudicata*, as applicable to this case, is both reasonable and just. If the law was otherwise, there would be no end to litigation, and litigants would be led to speculate on their chances of success by successive appeals. It follows that we must rule adversely to the defendant in reference to the various assignments touching the admission of evidence and refusal of instructions.

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

41 416
52 306
41 416
56 187
41 416
59 217
41 416
64 457
41 416
77 316
41 416
99 *132
41 416
02 *400

THOMAS A. SHERWOOD, Appellant, v. WILLIAM G. NEAL AND H. C. FOX, Respondents.

St. Louis Court of Appeals, May 13, 1890.

1. **Guardian and Ward:** RIGHTS OF NATURAL GUARDIAN. A father, as natural guardian of his child, has no control whatever over the property of such child which is not derived from him, unless he has qualified by giving bond in accordance with the statute; hence, until he thus qualifies, he has no right to sue for such property.

2. **Estoppel:** BAILOR AND BAILEE. When one receives as bailee property from another, and, on his refusal to return the property to the bailor, the latter sues him for the property, he is estopped in such suit from denying his bailor's title.

3. **Bailment:** AGISTMENT: LIEN. One who feeds and takes care of a horse under a contract with another who is merely a bailee of the horse, and whom he knows to be in charge of the animal as bailee, is bound to know the extent of the authority of such bailee, and has no lien as against the bailor for the feed so furnished, or for his services, if such bailee had no authority under the terms of the bailment to contract therefor.

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

REVERSED AND REMANDED.

Adiel Sherwood, for appellant.

(1) No objection being made to plaintiff's legal capacity to sue, or on the score of defects of parties plaintiff, either by demurrer or by answer, any such objections, if existing, cannot be reached by the declarations of law, and were waived. R. S. 1879, secs. 3515, 3519; *Horstette v. Menier*, 50 Mo. 158; *Reugger v. Lindenberger*, 53 Mo. 366; *Dunn v. Railroad*, 68 Mo. 279; *State v. Sappington*, 68 Mo. 457; *Rogers v.*

March, 73 Mo. 70; *Mill Co. v. Church*, 54 Mo. 524; *Rickey v. Tenbroeck*, 63 Mo. 570; *Kellogg v. Malin*, 62 Mo. 429; *May v. Burk*, 80 Mo. 679; *State v. Benning*, 74 Mo. 99; *Clowen v. Railroad*, 21 Mo. App. 216; *Paxon v. Pierce*, 25 Mo. App. 62. (2) But it was perfectly competent for plaintiff to bring this suit in his own name; he had a special property in the horse, in so much that if the horse had been stolen from his possession, the thief could have been prosecuted on the basis of ownership in the plaintiff. Besides the plaintiff, being entitled to the possession of the horse as natural guardian of his minor child, was authorized, by reason of such possession, to maintain replevin for the same. *Smith v. Williamson*, 1 H. & J. 147; *Newman v. Bennett*, 23 Ill. 427; Wells on Replevin, sec. 643. (3) And defendant Neal, having obtained possession of the horse under the contract, became thereby the bailee of the plaintiff, sustaining toward him a relation analogous to that of tenant towards landlord and consequently, in the absence of a paramount title asserted against him, estopped to deny the title of plaintiff to the property; estopped to deny the right of the plaintiff to maintain his possessory action for the same, and estopped to set up the *jus tertii* against plaintiff. Bigelow Estop. [3 Ed.] 430, and cas. cit.; *Wear v. Sawyer*, 91 Mo., *loc. cit.* 355; *Pulliam v. Burlingame*, 81 Mo. 111; Stephen's Dig. Ev., art. 105. (4) The contract entered into between plaintiff and Neal, for the keeping and training of the horse, was a matter of personal trust and confidence in Neal; and the maxim applies, *delegata non potest*, etc. Section 3196, Revised Statutes, 1879, therefore, does not apply to a case of this sort; it only applies where the lien originates in right and not in wrong—at least known wrong. Fox knew that Neal had possession of the horse from plaintiff, and was aware of the contract between plaintiff and Neal. He will be presumed to have had notice of the contents of the contract under

which Neal held. Gross negligence in failing to make proper inquiry is notice and tantamount to knowledge. *Leavitt v. LaFonce*, 71 Mo. *loc. cit.* 356; *Hageman v. Sutton*, 91 Mo. 533. (5) It was proper to bring in all parties in interest and have their rights adjusted and adjudged in this action of replevin. *Lewis v. Mason*, 94 Mo. 557, and cas. cit. But, if there had been any misjoinder of parties defendant, then the remarks under the first point apply.

B. U. Massey and *Ethelbert Ward*, for respondents.

(1) Plaintiff Sherwood has no right to the possession of said horse. R. S. 1879, sec. 2560; 2 Kent's Com. 220-221; *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631; *Perry v. Carmichael*, 95 Ill. 519; *Duncan v. Crook*, 49 Mo. 116. Plaintiff Sherwood did not bring suit as natural guardian of his child. The replevin suit was brought in the name of Sherwood individually. Neal did not dispute the title of his bailor, the natural guardian of Pansy Sherwood, but, in his general denial, disputed the title of Sherwood, the plaintiff, individually. This is no estoppel as claimed by appellant. (2) There was failure of proof that plaintiff Sherwood was entitled to the possession of said horse. This did not appear in the pleading and could not be taken advantage of by either demurrer or answer. It is proper in such cases for the court, sitting as a jury, to determine the case by instructions. Such an instruction is of the nature of a demurrer to the evidence. R. S. 1879, sec. 3702; Greene-Meyer Mo. Plead., secs. 1056-1068. (3) Fox has a special lien as a keeper and boarder of the horse. R. S. 1879, secs. 3196, 3197. Should the appellate court hold that the form of the entry of the judgment is erroneous, it will direct the entry of the proper judgment in the lower court. *Puller v. Thomas*, 36 Mo. App. 105.

BIGGS, J.—Plaintiff seeks to recover from the defendant Neal the possession of a stallion. There was an order of delivery, and the horse was taken from Neal and delivered to the plaintiff. The amended petition contains two counts. The first is in the usual form of suits in replevin, and the other sets forth that, on the fourth day of April, 1886, the plaintiff delivered to Neal the possession of the horse, under a written contract. The contract referred to was filed with the petition, and it was in substance as follows: Plaintiff agreed to deliver possession of the horse to Neal, and Neal was to have the care and custody of the animal for two years, provided he complied with the conditions of the contract, which were to the effect that Neal should thoroughly train the horse to trot and bear all expenses for feeding, sheltering and otherwise caring for the animal during the time. As compensation, Neal was to receive one-half of the earnings of the stallion during the two years, and the other half he agreed to pay to plaintiff's agent, Dr. E. T. Robberson, payments to be made at regular periods, to be determined and fixed by Robberson. It was also agreed, in consideration of the services to be performed by Neal, that the title to one-half of the stallion was to be vested in Dr. Robberson, as trustee, and, at the expiration of the two years, the animal was to be sold and one-half of the proceeds was to go to Robberson for Neal. But it was distinctly stipulated that the title to the horse should not vest in Neal, but that one-half interest was to remain in plaintiff, and that the other half was to vest in Robberson as trustee, subject to be divested upon a failure by Neal to carry out his part of the contract. It was also expressly agreed that, if Neal failed in any manner to fully and fairly comply with the conditions of his contract, he was to forfeit all rights thereunder. Plaintiff then averred that he delivered the horse to Neal under the contract, and that the latter had in every particular failed to comply with its conditions,

i. e., he had failed to train the horse, and, in fact he was entirely incompetent to properly perform such duties; that the stallion had earned over five hundred dollars, and that Neal had failed to pay Dr. Robberson any part thereof, although the time for such payments had been fixed by Robberson as required by the contract, of which Neal had due notice. Plaintiff asked judgment against Neal for the amount of the earnings of the horse.

After the suit had been instituted, the defendant Fox was made a party because he claimed a lien on the horse for feed furnished, and also for his services in training him.

Neal's answer tendered the general issue, and that of Fox contained *only* the statement of a counter-claim. It alleged that Fox was the keeper and trainer of horses; that in November, 1887, the stallion had been entrusted to his care by Neal; that, under a contract with Neal, he boarded and trained the horse, and that there was due him therefor the sum of seventy dollars and fifty cents. Judgment was then asked for that amount, and that it be enforced as a special lien against the horse. To this answer the plaintiff filed a replication. The parties went to trial on the issues thus framed, and the judgment of the court was that the plaintiff either return the horse to Fox, or pay him the sum of five hundred dollars (the value of the horse). From this judgment the plaintiff has appealed.

The plaintiff read in evidence the contract signed by him and Neal. He then introduced evidence tending to show that, at the time the contract was made, he (the plaintiff) was in possession of the horse; that Neal received the animal from him under and by virtue of the contract; that, when the suit was begun, the horse was still held by Neal under the contract and in no other way; and that Neal had failed to comply with the conditions of the contract in the manner stated in

the petition. It was disclosed by the evidence that the horse belonged to the plaintiff's minor child; that it was a gift to the child from a friend of the family, and that the plaintiff held possession of it as the natural guardian of the child, but had failed to give bond as such guardian, as required by law. The defendant Fox introduced evidence tending to prove the averments of his answer, and that the charges made by him were reasonable and customary. The plaintiff objected to all testimony in support of Fox's counter-claim, because the defendant Neal was clothed with a personal trust in respect of the care and training of the horse, which he could not delegate to another; that the evidence tended to show that Fox was aware of Neal's contract, and that, if he rendered the alleged service under a contract with Neal, he did so with the knowledge that Neal had no right to bind the plaintiff by any such agreement. The defendant Neal introduced no testimony.

The following instructions indicate the theories of the plaintiff and defendants respectively. The defendants asked, and the court gave, the following instruction: "That if the evidence in this cause shows that 'Shield' was, at the time of the institution of this suit, the property of Pansy Sherwood, a minor under the age of eighteen years, and that Thomas A. Sherwood is the father and natural guardian of his said child, and that said horse 'Shield' was not derived to said Pansy from her said father Thomas A. Sherwood, nor from her mother, and that the said Thomas A. Sherwood, natural guardian as aforesaid, had not and has not given security as guardian and curator of said minor, as other guardians and curators are in such cases by law required to do, then, in such event, the plaintiff is not entitled to recover of the defendant Fox the possession of said horse, and the issues must be found in favor of said defendant Fox."

The plaintiff asked the court to give the following instructions, which the court declined to do:

"1. That a natural guardian, such as the evidence shows the plaintiff to be, who has not given bond as required by law, and from whom the property has not been derived, who makes a contract in writing whereby he transfers the minor's property to a party, conditioned that if the conditions be not performed, that such contract shall be void and a forfeiture of all rights acquired thereunder shall occur, then, in case of non-performance of such conditions, the natural guardian may maintain replevin for such property, and the party who has received it is estopped to deny title in his grantor as aforesaid, and is estopped also to set up in a third person title or right to the possession of said property.

"2. That said contract was a special and conditional one, creating a personal trust and confidence in said Neal, and that he had no right, power or authority whatever to delegate that personal confidence and trust thus created to defendant Fox, and the act of said Neal in transferring the control of said property to said Fox, as shown by the evidence, violated the terms and conditions of said contract, and rendered the same void and of no effect."

Other instructions were asked and given, but the foregoing are sufficient for a proper understanding of the question we propose to discuss.

In the opinion of the trial judge, the plaintiff could not maintain the action against Neal for the recovery of the horse, because the horse did not come to Pansy Sherwood through her father or mother, and the action could not prevail against Fox for the additional reason that, at the date of the institution of the suit, he had a special lien on the horse for the board bill.

The plaintiff insists that the defendant's instruction is wrong, and that he, as the natural guardian of

his minor child, had a *special property* in the horse, and that under the statute (Revised Statutes, 1879, section 2560) he was entitled to the custody of the animal as against a stranger, whether he had given a bond or not. Section 2560 reads as follows: "In all cases not otherwise provided by law, the father while living, and after his death, or when there shall be no lawful father, then the mother, if living, shall be the natural guardian and curator of their children, and have the custody and care of their persons, education and estates; and when such estate is not derived from the parent acting as guardian and curator, such parent shall give security, and account as other guardians and curators; and if such parent refuse or neglect to give such bond, the probate court shall appoint some competent person as curator, to take charge of and manage such property."

The identical question, raised by the plaintiff's objection, was passed on by the supreme court in the case of *McCarty v. Rountree*, 19 Mo. 345, and, as that case is controlling authority for this court, the objection made will have to be ruled against the plaintiff. The reasoning adopted by the court in the case cited was to the effect that the common law only gave the natural guardian of a minor the control of his ward's person, and that all control lawfully exercised by such a guardian over the estate of his ward must of necessity be authorized by statutory enactment. The court, in construing the above-quoted section, ruled that the first part of the section, which by general words gave the natural guardian the custody of his ward's estate, was qualified by the latter portion of the section, which confined this right of custody to property derived from the natural guardian, unless the natural guardian should qualify as other guardians. In the more recent case of *Morris v. Railroad*, 58 Mo. 78, it was decided that the father of a minor child could not recover damages for the killing of stock belonging to the child. It must logically

follow from the interpretation thus given to this section of the law that the natural guardian of a minor has no control whatever over the property of his ward, derived from any person other than himself, unless such guardian has qualified in the manner pointed out by the statute; hence, until the guardian so qualifies, he could not ordinarily maintain a suit for the possession of such property.

But it has been earnestly argued by the plaintiff's counsel that, even though the law be as stated by us, yet the defendants cannot defeat the plaintiff's recovery in this action by showing that the horse belonged to plaintiff's minor child. As a general rule, the defendant in a replevin suit may defeat the action by showing title in a third person, but this defense is not open to a bailee at the suit of his bailor, unless the bailee can show that he on demand had surrendered the property to the true owner. The defendant Neal received the possession of the horse under the contract with plaintiff, thereby becoming a bailee for plaintiff, and, under all of the authorities examined by us, he ought to be, and is, estopped by his contract of bailment to deny plaintiff's title to the property, or his right to maintain a suit for its possession. *Pulliam v. Burlingame*, 81 Mo. 111; *The Idaho*, 93 U. S. 575; *Bates v. Stanton*, 1 Duer. 79; Bigelow on Estoppel [5 Ed.] p. 548. The relation between bailor and bailee is analogous to that of landlord and tenant.

The plaintiff gave evidence tending to show that Neal had failed to perform his contract, which evidence remained uncontroverted by Neal, and would have authorized a finding against him. The finding in his favor was wholly unwarranted.

The only remaining question is, does Fox occupy a different and better position? We think not. It is stated in the bill of exceptions that the evidence tended to prove that Fox had knowledge of the contract between the plaintiff and Neal. This contract imposed

on Neal a personal trust in respect of the care and custody of the animal, and this duty could not be delegated to another without plaintiff's consent; therefore, the contract between Fox and Neal concerning the horse was wrongful and absolutely in violation of the terms of the agreement between Neal and the plaintiff. Fox knew that the horse belonged to the plaintiff, and that the possession of Neal was that of an agent or bailee under a special contract; hence it was his duty under the law to know the extent of Neal's authority, and whether it was broad enough to authorize the contract made by him with Neal. *Hagerman v. Sutton*, 91 Mo., *loc. cit.* 533; *Wheeler, etc., Co. v. Givan*, 65 Mo. 89; *Ayres v. Milroy*, 53 Mo. 516. Neal had no right to part with the possession of the horse, and his act in delivering it to Fox was not only unauthorized, but was actually wrongful. Fox knew this; his knowledge constituted him a wrongdoer, and this ought to, and does, destroy all idea of a lien in his favor for boarding and training the horse. *Johnson v. Hill*, 3 Starkie's Rep. 172. This would be the natural result of the present evidence, and would authorize us to order judgment here, if the facts were agreed on and not simply stated as evidence by testimony tending to show.

Upon the record now before us, we can only reverse the judgment and remand the cause with directions to the trial court to enter a judgment in favor of plaintiff for possession of the horse, if upon a retrial of the cause the facts, which plaintiff's evidence according to the present record tends to show, are established. We cannot see in any event how either Fox or Neal can establish a lien against the horse, while one who is admittedly its true owner is not before the court. The judgment in this case will, therefore, be reversed, and the cause remanded with directions to the trial court to proceed in conformity with this opinion. It is so ordered. All the judges concur.

41 426
61 475

ST. LOUIS STEAM-HEATING AND VENTILATING COMPANY, Respondent, v. D. R. BISSELL *et al.*, Executors of JAMES R. BISSELL, Dec'd, Appellants.

St. Louis Court of Appeals, May 13, 1890.

1. **Law and Fact.** Whether a provision in a written contract for the time of the completion of the work contracted for is one of essence to the contract is a question of law.

2. **Practice, Trial:** REVIEW OF REPORT OF REFEREE. The rule that findings of fact of a referee in certain cases are equivalent to a special verdict and conclusive, if supported by substantial evidence, is not applicable to the trial court; that court is in no case bound by the referee's findings of fact.

3. **Contracts:** STIPULATION AS TO TIME. The right of recovery for work under a written contract will not be construed to be conditional upon compliance with a stipulation for the completion of the work by a fixed time, unless there is an express agreement to that effect, or unless from a fair construction of the language employed, the nature of the contract and the attendant circumstances, it is apparent that the parties so intended. And *held*, that compliance with such a stipulation was not a condition precedent in the case at bar, which was a suit for heating apparatus supplied to a building, there being no express provision making it so, and the heating apparatus being designed not for a particular occasion and not for a temporary but for a continual use.

Pleading: WAIVER. Under an allegation of the performance of all the conditions of a contract, proof of the waiver of compliance is admissible.

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

AFFIRMED.

H. A. Clover, for appellants.

Rowell & Ferris and *J. H. Zumbalen*, for respondent.

BIGGS, J.—This is an action to enforce a mechanic's lien for the value of work done and material furnished by plaintiff in the improvement of a business house, located on the northeast corner of Chestnut street and Broadway, in the city of St. Louis. The property belonged to James R. Bissell, deceased. The work was performed during the lifetime of the deceased, under the following written proposition made by the plaintiff:

"ST. LOUIS, September 21, 1885.

"*James R. Bissell, Esq.*

"DEAR SIR:—We propose to furnish and erect a steam-heating apparatus and connections in the "law building" on the northeast corner of Chestnut street and Broadway, in St. Louis, according to plans submitted and in compliance with the specifications signed by us for the sum of sixteen hundred and fifty dollars, complete, and to complete the same *with all possible speed.* Payment to be made in installments of three hundred dollars each, at intervals of one month, the last payment to be four hundred and fifty dollars. First payment to be made one month after completion of the work. We agree to place radiators where the owners direct.

"[Signed.] ST. LOUIS S. H. & V. Co.
"JOHN D. RIPLEY, Sec'y.

"Accepted.

"E. J. WHITE,

"For JAS. R. BISSELL."

The plaintiff's petition contained but one count, and for a cause of action it was therein alleged that the work was done under the foregoing bid, according to the written specifications accompanying it; that plaintiff proceeded with the work with all possible speed, and finally completed it on the twenty-third day of April, 1886, at which time the deceased accepted the work, and that the same has been used continuously in the building

since that date. The petition also contained an averment that the work done and materials furnished were reasonably worth the sum of sixteen hundred and fifty dollars, the amount sued for. It was then alleged that a mechanic's lien was filed as required by law, and that the defendants had failed to pay for the work, although demand therefor had been made.

The answer of the defendants admitted the contract, but denied that the plaintiff completed the work according to its terms. The defendants also denied that the plaintiff did the work with all possible speed, and alleged that, on the contrary, the plaintiff could easily, and it was possible for it to, have completed the work by the first day of October, 1885. The defendants then set forth several counter-claims against the plaintiff growing out of the plaintiff's alleged failure to complete the work in some unimportant particulars, and among them the defendants made claim for loss of rents from the time the work ought to have been completed up to the twenty-third day of April, 1886.

The case was sent to a referee, and he reported that the work had been substantially performed in accordance with the specifications, save in one or two minor particulars, but he decided that the plaintiff had violated the contract by failing to complete the work "with all possible speed." The referee was of the opinion that the work could have been fully completed by the first day of December, 1885, whereas the plaintiff did not finally finish it until the twenty-third day of April, 1886. He decided, as a matter of law, that time was of the essence of the contract, and that the completion of the work within the time prescribed was a condition precedent to plaintiff's right to recover on the contract. He found, as a fact, that the work had been fully completed by the plaintiff, and that it had been accepted by the defendants, and that it was reasonably worth the contract price, but, in his (the referee's) opinion, the plaintiff could not recover under the then state of the

pleadings, for the reason that the plaintiff had finished the work out of time and had, therefore, failed in the performance of its contract. The finding was against the plaintiff, but the referee recommended that it be allowed to amend its petition, in order that it might proceed upon a *quantum meruit*. The referee also found in favor of the defendants for small amounts on one or two of the counter-claims.

The plaintiff filed exceptions to the referee's report, and the circuit court was of the opinion that time was not of the essence of the contract, and that the plaintiff's failure to complete the work was not a condition precedent to its right to recover thereunder; that, if the defendants had been damaged by the delay in the completion of the work, the remedy was by recoupment of the damage (if any) thus sustained, from the contract price. The court thereupon sustained the exceptions in so far as the referee denied the plaintiff's right of recovery, and, as the referee had found that the defendants had not been damaged by the delay, except in a small amount found to be due on one of the counter-claims, judgment was rendered in favor of the plaintiff for the contract price, less the amounts found by the referee to be due on the counter-claims. From this judgment the defendants have appealed.

The only question presented by the record for our determination is the correctness of the ruling of the circuit court in sustaining this exception to the report of the referee. In the first place it is insisted that the referee's report, to the effect that time was of the essence of plaintiff's contract, was equivalent to a special verdict of a jury, and was, therefore, conclusive on the circuit court, provided the finding was supported by substantial evidence. In certain cases this is the rule in appellate courts, but never in the circuit court which reviews the weight of the evidence even where the finding pertains to a question of fact merely; but we do think this finding was not one of pure fact, but that, on

the contrary, the conclusion of the referee was one of construction of a written contract and, therefore, one of law. It is well settled that the trial court is in no case bound by the referee's legal conclusions or finding of facts. The court may adopt the referee's findings of fact and enter such judgment thereon as the law warrants, or it may set them aside entirely and award a new trial. *Moniteau National Bank v. Miller*, 73 Mo. 187; *O'Neill v. Capelle*, 62 Mo. 202.

It is well understood that, when time is of the essence of a contract, the covenant is a dependent one, and must be strictly performed by the covenantor before he can maintain an action on the contract. Time is not usually of the essence of any contract, though it may be made so, in any undertaking, by express agreement. If the parties do not so expressly stipulate, the courts will not attach such a condition, unless, upon a fair construction of the language employed, and from the nature of the contract and the circumstances under which it was made, it is apparent that the parties so intended. *Russell v. Ins. Co.*, 55 Mo. 585; *Higgins v. Railroad*, 60 N. Y. 557; Bishop on Contracts, sec. 1347. If the time within which the work was to be completed is to be regarded as of the essence of the agreement between the plaintiff and the defendants, it must result from a consideration of the nature of the contract, the relation which the various covenants bore to each other and the circumstances under which the contract was made. No such conclusion can be drawn from the language employed. In the absence of express stipulation, it is sometimes difficult to determine whether a covenant in a contract is dependent or independent. We had occasion to discuss this question at this term of the court in the case of *Sawyer v. Christian*, 40 Mo. App. 295, in which we followed the rules of construction laid down by the supreme court in the case of *Turner v. Mellier*, 59 Mo. 526. That court said: "The general

rule is that where covenants on the part of the different parties are to be performed at different times, they will be considered to be independent covenants, and a breach of one can be sued for without alleging or proving the performance of the other. Another rule is that where the covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and, consequently, an action may be maintained for a breach of such covenant on the part of the defendant, without averring performance of other covenants on the part of the plaintiff." If we apply either test to the case at bar, the judgment of the circuit court must be upheld; but its correctness will become more apparent by the application of the last-mentioned rule. If the heating apparatus in defendant's building was designed for a particular occasion or temporary purpose, and was of no use afterwards, then a failure by the plaintiff to complete it in time for such special use would go to the whole consideration, and the plaintiff would be debarred from its action to recover for the work under the contract. But the very nature of the work destroys the idea that the apparatus was designed by the defendant's testator for a temporary purpose or use. It was intended to be used not for a season, but continually. This necessarily disposes of the question adversely to the defendants.

There is only one other question which we need discuss. The plaintiff alleged, in the usual way, full performance by it of all the conditions of the contract, and, in support of this averment, it was permitted to show a waiver by the defendants of the time stipulation. The defendants' contention is that it was necessary for the plaintiff to set forth in its petition the facts and circumstances on which it relied to operate as a waiver by the defendants of this covenant. The defendants are not sustained in this by the authorities.

The rule is that, under an allegation of performance, the plaintiff may introduce proof of a waiver of any condition of a contract, by the defendant. *Russell v. Ins. Co.*, 55 Mo. 585; *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278; *Okey v. Ins. Co.*, 29 Mo. App. 105; *Schultz v. Ins. Co.*, 57 Mo. 331; *Estel v. Railroad*, 56 Mo. 282.

There are other phases of the case presented and discussed in the briefs, but the view we have taken of the main question dispenses with the necessity of further discussion by us. The judgment of the circuit court will, therefore, be affirmed. All the judges concurring, it is so ordered.

41 432
106m543
41 432
132m578
41 432
83 541

THORNTON TULEY, Respondent, v. THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, Appellant.

St. Louis Court of Appeals, May 13, 1890.

1. **Railroads**: NEGLIGENCE. The presumption of negligence from the mere fact of injury to a passenger on a railroad train does not obtain, where the passenger is injured owing to his being in a part of the car where he had no right to be, and there is no evidence that the injury would have occurred, if the passenger had been in his proper place. *Held*, accordingly, that a passenger on a freight train riding on a projection or cupola several feet above the roof of a caboose, where there were no guards of any sort, and thrown therefrom by the jar caused by the coupling of a switch engine to the train, cannot recover upon mere proof that the injury was caused by such jar.

2. ——: ——: CONTRIBUTORY NEGLIGENCE. *Held*, further, by the majority of the court (THOMPSON, J., expressing no opinion) that the plaintiff was debarred from a recovery by his own contributory negligence in riding on such cupola or projection.

Appeal from the Marion Circuit Court.—HON. THOS. H. BACON, Judge.

REVERSED.

W. M. Boulware and *Strong & Mosman*, for appellant.

H. J. Drummond and *Anderson & Schofield*, for respondent.

ROMBAUER, P. J.—The plaintiff, a stock-drover in charge of two carloads of cattle, took passage on one of defendant's freight trains, at Hannibal, Missouri, for Chicago, Illinois, agreeing in a live-stock contract with the defendant to accompany and care for said stock while in transit. After the train had traveled twenty miles or more, and while it was in defendant's yards at Quincy, Illinois, a switch engine of defendant was coupled to the caboose of the freight train, which was the last car on the train and on the rear end of which the plaintiff was sitting on a projection or cupola, rising two and a half or three feet above the roof of the caboose, and having no side or back rails or guards of any sort. By the jar caused by this engine striking the caboose, the plaintiff was thrown from his seat and sustained serious injuries by the fall, for which he sues.

Defendant's answer was as follows: "For amended answer the defendant admits that, at the date alleged in the petition, defendant was and is a railroad corporation, but denies each and every allegation in plaintiff's petition contained.

"Further answering, defendant avers that the plaintiff's alleged injuries, if he suffered any such, were caused solely by the careless and negligent acts and omissions of plaintiff at the time alleged, in that he voluntarily and unnecessarily exposed himself to danger in a place on said train not provided nor intended for use by passengers thereon, and to danger which would not be incident to travel on said train, if he had been in a position and place provided for passengers.

"Defendant avers that said injuries were not occasioned by any negligence or fault of this defendant, its servants or agents thereto contributing in any manner or degree."

The plaintiff recovered judgment below, and the defendant, appealing, assigns for error that the court refused to sustain its demurrers to the evidence at the close of the plaintiff's case, and at the close of the entire testimony; that it admitted illegal evidence for the plaintiff and misdirected the jury as to the law.

It appeared by the plaintiff's own evidence that this stock was shipped upon a written contract contained on a printed form used by the defendant, and that this contract was signed by him before the cattle were loaded. The paper, a fac-simile of which is in the record, is headed in large print, "Instructions to agents and shippers." Among such instructions in plain legible type are the following: "For rules governing the passage of men in charge of live stock from the Missouri river to points on or east of the Mississippi river, see special instructions. Parties so passed must ride in the caboose attached to the train carrying the stock." It further appeared that the plaintiff had been a shipper of stock on this road for eight years; that he had during that time made five or six hundred shipments over the road; that he had in so doing signed similar contracts many times; that a caboose was attached to this train, and that the plaintiff knew this fact; that there was nothing preventing him from taking a seat in the caboose; that he was aware that a switch engine was liable to be attached to the train in Quincy; that all this transpired in broad daylight, and that, notwithstanding all these facts, the plaintiff continued sitting on top of the caboose, on a projection without railing or guard; his feet barely touching the roof of the caboose, without holding on to anything, and his face opposite to the approaching switch engine.

The court trying the case, if we can gather any intelligent theory from its subsequent instructions to the jury, seems to have refused the defendant's demurrer to the plaintiff's evidence, on the ground that, the plaintiff being a passenger, the accident was *prima facie* evidence of negligence on part of the defendant; that the printed instructions to agents and shippers, formed no part of the contract of transportation, because the real contract, although contained on the same page, was headed live-stock contract and separated from the instructions by a cross line; and that the plaintiff, against the objections of the defendant, was permitted to give evidence of a practice among shippers of stock not to ride all the time in the caboose, but, to use the phrase of plaintiff's witness, to catch on the train at any place, if the train moved before they could reach the caboose.

Touching the last of these propositions, we may say that, even if the evidence were admissible, it could have no bearing on the present controversy, as plaintiff's evidence concedes that he had ample time and opportunity to get into the caboose, if he had seen fit to do so. Touching the second proposition, we say that it is wholly immaterial whether the instruction to agents and shippers was formally part of the live-stock contract signed by the plaintiff or not. It was a reasonable regulation of the company, purporting, in express terms, to be directed to him as a shipper, of which, under the uncontroverted evidence, he was bound to take notice, and of which, unquestionably, under the facts of this case, he had actual notice. A passenger who is received on a freight train is entitled to the same rights as one on a passenger train, except that by so doing he acquiesces in the usual incidents and conduct of a freight train, managed by prudent and competent men. *McGee v. Railroad*, 92 Mo. 208. "It cannot be expected," says Judge THOMPSON, in his work on carriers, page

234, "that a company will provide its freight trains with all the conveniences and safeguards against danger which may properly be demanded of it in the construction and operation of cars designed solely for the transportation of passengers." That the *prima facie* presumption of negligence arises in these cases from the mere happening of the accident is a proposition not open to discussion. *Lemon v. Chanslor*, 68 Mo. 340; *Coudy v. Railroad*, 85 Mo. 79; *Hipsley v. Railroad*, 88 Mo. 348. But the passenger who seeks to recover on this presumption alone must show not only that he was a passenger, but, also, that, at the date of the accident, he was in a place where he had a right to be, or, at least, that the place where he was, if he was not in the right place, did not affect the result. It is the duty of a passenger, in getting on board of a car, to place himself in a safe position therein, if he is able to obtain such position, and it is no excuse for him to place himself in an unsafe one, that the persons in charge know that he is unsafe, and do not drive him therefrom, when the unsafety is equally well known to him. *Clark v. Railroad*, 36 N. Y. 135. The *prima facie* liability of the carrier, arising from the mere fact of the accident, is conditioned upon the exercise of reasonable care on the part of the passenger. *Railroad v. Jones*, 95 U. S. 439; *The Peoria, etc., Railroad v. Lane, Adm'x*, 83 Ill. 448. We concede, as claimed by plaintiff's counsel, that the presumption of due care obtains in favor of a plaintiff who seeks to recover damages for an injury sustained by him through the alleged negligence of another. This, however, is a presumption arising in the absence of positive evidence, and can be of no avail to a plaintiff whose own evidence shows a want of due care.

In the case at bar, the plaintiff's own evidence concedes that he knew that the place on top of the car was less safe than the place inside of it. That fact, indeed, seems to be so patent that a court is warranted to take

judicial notice of it without proof. Outside of the mere fact of the accident, there is nothing in plaintiff's evidence raising any presumption of negligence on part of the defendant. The fact of itself is insufficient, because his own evidence shows that he was not in the place set aside for passengers, and does not show, or tend to show, that the accident would have happened to him if he would have been in the proper place. The jar was the result of a concussion between the engine and caboose, while the former was about to be hitched to the latter in the usual course of the company's business, and there is nothing in the plaintiff's evidence tending to show that it was negligently done. We may add in this connection, although not necessary to the result arrived at, that the defendant, by numerous witnesses, proved that the coupling was done in the usual manner, that the engine was handled properly and with prudence, and that the impact was not sufficient to disturb anything inside of the caboose car.

On the other hand, if we look at the facts with a view of determining the plaintiff's contributory negligence, they are equally fatal to plaintiff's recovery. In *Harris v. Railroad*, 89 Mo. 233, the supreme court reversed a judgment in favor of plaintiff, on the sole ground that the trial court refused the following instruction asked by defendant:

"If the jury believe from the evidence that the plaintiff knew, or by the exercise of ordinary care could have known, that the train had stopped to do some switching, and by the exercise of ordinary care could have known that a part of the train was likely to be backed against the part to which the caboose was attached, and that some concussion and jar would likely be produced in the caboose, and that the plaintiff then, without thinking of the approach of the cars, and without paying any attention whether the cars were approaching or not, left his seat and stood up in the car, and was thrown down and injured, when he would not have been, had he

kept his seat, or resumed the same before the cars struck, then the plaintiff was guilty of such contributory negligence as bars his recovery, and the jury must find for the defendant."

In that case the plaintiff testified that the concussion was more violent than he ever before experienced, though he had been in the habit of riding on trains for many years, and that it threw a person sitting in a chair on the ground, and threw the chair on top of him; hence, there was some positive evidence of the company's negligence beyond the mere accident, which is wanting in the case at bar. Every fact, that is hypothetically put in the instruction above quoted, is established by the plaintiff's own evidence in the case at bar. As the uncontroverted facts fail to show any liability on part of defendant, the cause should not be remanded. All the judges concurring, the judgment is reversed.

THOMPSON, J. (*concurring*)—I concur in reversing the judgment in this case, though I am not clear that we should not remand the cause. I place my concurrence in the reversal on the ground that I see no evidence of negligence on the part of the defendant, and not on the ground that the record discloses contributory negligence on the part of the plaintiff. Undoubtedly the record raises a conclusive inference of contributory negligence on the part of the plaintiff, and shows that he was riding where he was when he received the hurt, in violation of a reasonable and known rule of the company, intended for his safety. But, under the latest decisions of the supreme court, if, notwithstanding his negligence in thus exposing himself to possible injury, the defendant's servants in charge of its switch engine saw his exposed position or might have seen it by the exercise of ordinary care, in time to have averted the injury by giving him warning, checking their speed and thus reducing the force of the impact or otherwise, and failed to do so, the defendant would be liable,—but

only on the condition that they were guilty of negligence in doing what they did. I do not find in the record any evidence that they were so guilty of negligence. I quite concur in the opinion of the court that the mere happening of the accident under the circumstances under which it took place was not of itself evidence of negligence. The record shows that the shock, which threw the plaintiff from the position where he was seated, was not unusual, and it indicates that the defendant's servants in charge of its switch engines proceeded in the matter of making the coupling in the ordinary and usual way. I do not gather anything from the evidence tending to the conclusion that, if they had observed the plaintiff in the position where he was seated, they would have been guilty of a want of ordinary or usual care in doing what they did. It does not appear that the slight shock which the caboose received from the switch engine would ordinarily throw a man down, seated as the plaintiff was. The case is entirely different from the case where a trespasser upon a railway track is run over and killed or injured. In such a case any contact between him and the engine must inevitably lead to his hurt. But here it did not at all follow as a question of probability that the plaintiff, in his situation, would be hurt by what the engineer was about to do.

41 439
44 398
41 439
47 623

THE STATE OF MISSOURI *ex rel.* THE PLANET PROPERTY AND FINANCIAL COMPANY, Appellant, v. HENRY F. HARRINGTON *et al.*, Respondents.

St. Louis Court of Appeals, May 13, 1890.

1. **Ejectment:** PRIVIES TO JUDGMENT OF OUSTER. If, during the pendency of an action in ejectment, the defendant to the suit conveys the premises sued for to a third person, who enters into possession under the title thus acquired, the latter may be ousted

under a judgment against his grantor in that action even though, subsequent to such entry by him, he may have acquired title paramount to that of either party to the ejectment suit.

2. **Damages**: FAILURE OF SHERIFF TO EXECUTE WRIT OF POSSESSION. If a sheriff wrongfully refuse to execute a writ of possession issued under a judgment in an action of ejectment, he is liable for substantial damages. *Semble* that the measure of damages in an action for the wrong is the value of the rents and profits of the premises from the date of the return of the writ to the date of the judgment in such action, subject to possible reduction depending on the principle, that a man, who is damaged by a continuing injury, must do what he reasonably can to prevent the accumulation of damages.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL D. FISHER, Judge.

REVERSED AND REMANDED.

T. J. Rowe and *H. A. Clover*, for appellant.

E. T. Farish, for respondents.

THOMPSON, J.—This is an action upon the official bond of Henry F. Harrington, late sheriff of the city of St. Louis, to recover damages for the refusal of the defendant Harrington, when so acting as sheriff, to execute a writ of possession, taken out upon a judgment in an action of ejectment, recovered by John H. Bobb on the sixteenth of December, 1884, against August F. Zelle, Sarah Watson and Michael Kinealy, which judgment became the property of the plaintiff by certain mesne assignments before the writ of possession was issued. The petition, after reciting the foregoing premises, states that the sheriff refused to obey the command of the writ and to deliver the possession of the premises to John H. Bobb, his grantees or assigns, but that, on the second of February, 1885, he returned the said writ wholly unexecuted; by reason of which the possession of the premises was lost to the plaintiff. The petition avers that the value of the rents and profits

was thirty dollars per month, and prays judgment for damages in the sum of twenty-five hundred dollars.

The answer admits the execution of the bond, the issue of the writ of possession and delivery of the same to the sheriff, and, after a general denial of other allegations of the petition, avers that, at the time the writ was delivered to the sheriff and up to the time when he returned the same, none of the defendants mentioned in the writ were in possession of the premises, but that the premises were occupied by one Mamie Williams, *alias* Mamie Moss, who was not a party defendant in said writ, nor claiming under any of the defendants in said writ, but who was holding the property as tenant of a party who claimed the same by title superior and adverse to any of the defendants in the writ; wherefore he refused to evict said tenant and deliver possession to the plaintiff in the execution, as well he might.

The plaintiff filed a reply, consisting of a general denial of the new matter contained in the answer.

There was a trial before the court sitting as a jury. The evidence was very voluminous, and, after all was heard, the court, at the request of the plaintiff, gave the following declaration of law: "The court declares that, upon the evidence, defendant has shown no defense in law to the action of plaintiff, and that plaintiff, upon the evidence, is entitled to recover." Thereupon the court took the case under advisement, and afterwards found the issues in favor of the plaintiff, assessed its damages in the sum of one dollar, and rendered judgment for that amount. To reverse this judgment, the plaintiff prosecutes the present appeal.

The facts, so far as we deem it necessary to state them in order to an understanding of the rights of the parties, were shown by the evidence adduced at the trial to be as follows: On the eighteenth of November, 1882, John H. Bobb brought an action of ejectment

against August F. Zelle and Sarah Watson, to recover the possession of the premises in controversy. They were occupied at that time by Mrs. Watson, as the tenant of Zelle. While the action was pending, to-wit, on the twenty-first day of February, 1883, Zelle conveyed by a deed of quitclaim all his right, title and interest in the premises in question to Michael Kinealy. Such proceedings were had in that action that, on December 1, 1883, Michael Kinealy came and moved the court to be admitted as an additional party defendant in the cause, on such terms as might be just, for the reason that on the evidence it appeared that the defendant Zelle had conveyed all his interest in the premises in question to Kinealy, and Kinealy desired to be admitted "to defend for himself *or his grantees*, as being the only persons interested." The only grantee of Kinealy of the premises in controversy, existing at the time, appeared to have been James F. McClendon, trustee for his wife, Sarah J. Kinealy, to whom, on the third day of March, 1883, Kinealy had conveyed all his right, title and interest in the premises in controversy to be held in trust for Mrs. Kinealy, to her sole and separate use and free from his marital rights,—the deed being in the form usually employed in such cases. This deed was recorded on the fifth of March, 1883. This motion of Kinealy to be made an additional party defendant was allowed by the court. Kinealy and Zelle filed an amended answer. Judgment by default and an inquiry of damages were had against Mrs. Watson; and such proceedings were had that, on December 18, 1884, there was a final judgment against all the defendants, namely, Zelle, Watson and Kinealy, in favor of Bobb, for the recovery of the premises, and assessing the monthly value of the rents and profits at thirty dollars.

Prior to this judgment, to-wit, on the thirtieth of October, 1884, Marcus A. Wolf executed a quitclaim deed to Sarah J. Kinealy, wife of Michael Kinealy, who

was figuring as a defendant in the action of ejectment, releasing and quitclaiming to her, and to her heirs and assigns, the premises in controversy. This deed was not filed for record until May 17, 1886, long after the sheriff had returned the writ of possession in question, with his refusal to execute the same, and his reasons therefor indorsed thereon.

Subsequently to the deed made by Kinealy to McClendon, as trustee for his wife, and before this quitclaim deed had been made by Wolf to Mrs. Kinealy, Mrs. Watson, who, it will be remembered, was in possession as tenant for Zelle, and was a defendant in the action of ejectment, abandoned the possession, and Mrs. Kinealy acquired it through a tenant named Cora Wagner on June 5, 1883. Possession was held for Mrs. Kinealy by Cora Wagner until February 5, 1884. The house was vacant for some time, but in April, 1884, it was rented to Mamie Williams, *alias* Mamie Moss, who was in possession as tenant for Mrs. Kinealy, paying to her agent for her a rental of thirty dollars per month at the time when the sheriff refused to execute the writ of possession.

Restating the foregoing facts in their chronological order, it is seen that, on November 18, 1882, the action of ejectment is begun by Bobb against Zelle and Mrs. Watson; that, on February 21, 1883, Zelle conveys the premises to Kinealy by a deed of quitclaim; that, on March 3, 1883, Kinealy conveys the premises to McClendon as trustee for the sole and separate use of his wife; that, on June 5, 1883, the action of ejectment pending, but Kinealy not yet made a party to it, Mrs. Kinealy acquires possession of the premises through her tenant Cora Wagner, which possession Mrs. Kinealy holds down to the time of the return of the writ of possession by the sheriff; that, on December 1, 1883, Kinealy files his motion to be admitted as a party in the action of ejectment; that, on October 30, 1884, Marcus

A. Wolf releases and quitclaims the premises directly to Mrs. Kinealy, without the intervention of a trustee; that, on November 14, 1884, Kinealy having been admitted as a party, upon his motion, Zelle and Kinealy file an amended answer in said action; that, on December 16, 1884, Bobb recovers a judgment in the action of ejectment against the defendants, Zelle, Watson and Kinealy; that, on the twenty-first of January, 1885, a writ of possession is issued, in conformity with the judgment, by the clerk of the court; that, on the second of February, 1885, the sheriff returns the execution, with the damages, rents and costs satisfied, but with the following return as to so much of it as commanded him to deliver possession of the premises to the plaintiff: "I further return that I declined to execute this writ by delivering possession thereunder, because I found the premises occupied by Mamie Williams, *alias* Mamie Moss, not a party defendant, nor claiming under them, or through defendants, and not in possession of the premises when the suit was instituted." On the eighteenth of January, 1888, this action is brought against the sheriff and the sureties in his official bond.

This case presents difficulties, but we do not understand upon what theory the court could rule that, upon the evidence, the defendants had shown no defense in law to the action, and that the plaintiff was entitled to recover, and then limit the recovery of the plaintiff to nominal damages. We regret that no declaration of law was given, or memorandum filed, expressing the views of the learned judge on the question of the measure of damages. We apprehend that this judgment cannot stand, unless it can be supported on the theory upon which the case has been argued in behalf of the defendants, that the plaintiff was not entitled to a judgment even for nominal damages.

As to the effect of a judgment in ejectment upon the rights of persons not parties to the action, there is

no difficulty, so far as the facts of this case are concerned, upon the decided cases. In respect of persons who were in possession at the time of the commencement of the action of ejectment, and who were not made parties to that action, the judgment in ejectment has no effect whatever, and they cannot be ousted under the writ of possession issuing thereon. *Garrison v. Savignac*, 25 Mo. 47; *Georges v. Hufschmidt*, 44 Mo. 179; *Clark v. Parkinson*, 10 Allen (Mass.) 143; s. c., 87 Am. Dec. 628. But this principle has no application to the present case, for Mrs. Kinealy was not in possession, either by herself or by her tenants, at the time of the commencement of the action of ejectment. It is laid down by a writer of reputation, as a general rule admitting of no exceptions, that, after the recovery of a judgment in favor of the plaintiff in an action of ejectment, the defendant or defendants, and all those in privity with him or them, may be dispossessed under the writ of possession issued therein. Freeman on Judgments, sec. 171; Freeman on Executions, sec. 475, citing numerous cases. Difficulty in many cases arises in determining who are to be deemed privies within the meaning of this rule; but the courts have found no difficulty in holding that those are to be considered privies who have entered under, or acquired an interest in the premises from or through, or who have entered without title by collusion with, defendants in the action of ejectment, subsequent to its commencement. All such persons are bound by the judgment, and may be dispossessed by the execution. *Satterlee v. Bliss*, 36 Cal. 489. It has also been held that tenants who enter under other tenants, on whom notice of the pendency of the action of ejectment has been served, are liable to be dispossessed under the judgment rendered therein. *Smith v. Trabue*, 1 McLean (U. S.) 87; *Long v. Neville*, 29 Cal. 131; see, also, *Walden v. Bodley*, 9 How. (U. S.) 34. By analogy to the doctrine of *lis pendens*, which

rests on grounds of public policy (*Turner v. Babb*, 60 Mo. 342), it has been likewise held in numerous cases that one who purchases the land pending an action of ejectment, and who enters under a defendant in such action, either as vendee, lessee or otherwise, is bound by the result of the judgment, and is liable to be dispossessed thereunder. *Jones v. Chiles*, 2 Dana, 25; *Jackson v. Tuttle*, 9 Cow. 233; *Wallen v. Huff*, 3 Sneed. 82; *Walden v. Bodley*, 9 How. 34; *Long v. Morton*, 2 A. K. Marsh, 40; *Hickman v. Dale*, 7 Yerg. 149; *Satterlee v. Bliss*, 36 Cal. 489; *Wattson v. Dowling*, 26 Cal. 124; *Sampson v. Ohleyer*, 22 Cal. 200; *Mayne v. Jones*, 34 Cal. 483; *Hanson v. Armstrong*, 22 Ill. 442; *Howard v. Kennedy*, 4 Ala. 592; s. c., 39 Am. Dec. 307.

If there could be any doubt whatever about this principle, it is clearly settled in this state by the decision of our supreme court in *Atkison v. Dixon*, 89 Mo. 464. There, a recovery had been had in ejectment, and, pending an appeal to the supreme court, the plaintiff had been put in possession under the judgment. While the action of ejectment was pending in the circuit court, the plaintiff's son had procured from the plaintiff a deed of quitclaim for the premises. The plaintiff's son also acquired an outstanding title from one who had purchased the land at a tax sale. The judgment in ejectment was reversed by the supreme court. After the mandate of that court went down, an execution was issued, directing the sheriff to reinstate the defendants in possession. Thereupon the son of the plaintiff in the ejectment suit filed his petition for a restoration of the premises to himself; alleging that, at the date of the ejectment, he was, and for a long time previous had been, in possession, by himself and by his tenants, claiming the premises by a title paramount to that of either his father or the defendants in the ejectment suit, by a purchase at a sale of the premises for taxes. The supreme court said: "With regard to his alleged

paramount title, if he had one, that was not affected by the judgment in the ejectment suit to which he was no party. He was, however, bound by that judgment, so far as the title he derived from John Atkison (his father, the plaintiff in the ejectment suit) *pendente lite* is concerned. * * * The only matter for determination, on that petition, was whether the petitioner was in possession under the parties to the action. The judgment is binding upon no one but 'the defendant and those claiming under him or in privity with him.' *Smith v. Pretty*, 22 Wis. 655. The writ of possession cannot be executed against one claiming under a paramount title. If it were otherwise, two persons might collude together, the one to institute his suit in ejectment against the other, and the latter, never in possession, to suffer a judgment to go against him, and, on an execution, the occupant be turned out of possession and driven to his ejectment. R. A. Atkison (the son and petitioner) was not the purchaser at the tax sale, but the assignee of the purchaser. * * * Under his title, whether good or bad, he claimed a paramount title to, and possession of, the land, and the only question left for consideration is, whether holding a quit-claim deed for a lot from R. A. Atkison (a clerical error for John Atkison, the plaintiff in the ejectment suit), but not getting possession from him under that deed, he could take an assignment of the certificate of purchase from the purchaser at the tax sale, and a deed from the sheriff, and thereby acquire a distinct title independent of that acquired from John Atkison; or must he be held to occupy the position of an owner who redeems his land from taxes, or purchases his own land at a tax sale."' The court then examined the authorities with reference to the question, whether it was possible for R. A. Atkison to acquire a title paramount to that of his father, the plaintiff in the action of ejectment, by buying up an outstanding tax title, and

it was held that it was. The opinion of the court then proceeds: "The duty of the circuit court was simply to determine, under plaintiff's petition, whether he was in possession under his quitclaim deed, or under his tax title; *and, if the latter*, then to restore him to the possession and nothing more." The judgment of the circuit court on this petition having been reversed and the cause remanded to the circuit court, that court, upon the filing of the mandate of the supreme court, proceeded to determine the question of the intervenor's title, and found that he took possession under the quitclaim deed from his father, the plaintiff in the action of ejectment, and was not, therefore, entitled to the relief prayed for by him. This judgment, on a subsequent appeal, was affirmed by the supreme court. *Atkison v. Dixon*, 96 Mo. 577. The decision of the supreme court in this case, upon these successive appeals, must be regarded as authority for the proposition that one, who acquires possession of premises, the title to which is in litigation in an action of ejectment, under a deed from a party to that action, is bound by the judgment therein rendered, and is subject to be ousted thereunder, although he may have strengthened the title so acquired by buying up an outstanding title, which is paramount to the title under which either of the parties in the action of ejectment claims. This, stating the case most strongly for her, was exactly the situation of Mrs. Kinealy in respect of the judgment under consideration. Pending the action of ejectment, and before he had been made a party to it, her husband acquired title to the property through a deed of quitclaim from Zelle, one of the defendants in the action. Thereafter her husband conveyed whatever title he had thus acquired to McClendon, as her trustee, to hold the same for her sole and separate use, free from the marital rights of her husband. Pending the action of ejectment, and under the title thus acquired from the

defendant in that action through her husband, she entered into possession. While so in possession, and before the judgment in the action of ejectment had been rendered, she attempted to strengthen her title by acquiring from Wolff a deed of quitclaim, conveying to her the same premises. Assuming that this subsequently-acquired deed would feed the estoppel created by the previous deed of her husband to her trustee, so that this subsequently-acquired title would vest in her, free from the marital rights of her husband, it nevertheless remains that, as she entered under a title acquired from one of the defendants in the action of ejectment, she could not thereafter, pending that action, free herself from privity with the same, and from the obligation of being bound by the judgment in the same, by buying up an outstanding title, any more than Zelle could have done so. It is plain to us then that the circuit court was right in holding that the evidence adduced by the defendants showed in law no defense to this action.

But we cannot accede to the view of the circuit court that the plaintiff was entitled to no more than nominal damages. He was kept, by the refusal of the sheriff to execute his writ, out of the possession of the property, the right to which possession he had acquired at the end of a long contest in the court. If it is said that he ought to have tendered the sheriff a bond of indemnity, when the sheriff found the premises in possession of a person claiming under a title paramount to any of the defendants in the action of ejectment, a good answer seems to be that the sheriff had already taken a bond of indemnity from Mrs. Kinealy. This the plaintiff offered to prove, but the court ruled the evidence out as immaterial. In view of the conclusion of the court that this was a case for nominal damages only, it seems to us that the evidence was material. It is difficult to see how the sheriff could consistently take a bond of indemnity from both parties.

But it is argued that the plaintiff might have sued out an *alias* writ. If the duty of the sheriff to execute his original writ was clear, we do not understand on what ground it lies in the mouth of the sheriff to say: "Although it was my duty to execute your original writ, yet you cannot have more than nominal damages, because you might have sued out an *alias* writ." As the sheriff, by taking a bond of indemnity from Mrs. Kinealy, had impliedly obligated himself not to execute the writ as against her tenant, it does not appear that the suing out of an *alias* writ would not have been equally futile. In what better position would the plaintiff have stood with an *alias* writ in the hands of the sheriff, the same state of facts existing as before, than he occupied when the original writ was in his hands?

Nor do we understand on what principle the sheriff can say, where his duty to execute the process of the court is clear, that he is not bound to pay substantial damages for refusing to execute it, because the plaintiff in the writ might have applied to the court for an order upon him to do his duty.

It follows from what has been said that the judgment must be reversed. In order that the expense of another trial may be in part avoided, we suggest that, under the view we have taken, the answer states no defense to the action; because, while it states that Mamie Williams, *alias* Mamie Moss, whom the sheriff found in possession was not a party defendant in the writ, nor claiming under any of the defendants therein, but, holding said property as a tenant of a party who claimed the same by title superior and adverse to any of the defendants in the writ, it fails to state the party, under whom Mamie Williams, *alias* Mamie Moss, claims, entered either prior to the commencement of the action, or entered since the commencement of its action under a title paramount to that of any of the

parties defendant therein; in other words, because it fails to negative the essential ground on which the right of Mrs. Kinealy to hold the premises, notwithstanding the judgment, alone could rest,—that, having entered pending the action, she did not enter under a title derived from a party thereto. We, therefore, remand the cause to the circuit court for the mere purpose of assessing the damages. The question of the measure of damages has not been much discussed and we do not feel called upon to go into it without the aid of counsel. We suggest, however, that the measure of damages, *prima facie*, would seem to be the value of the rents and profits of the premises, from the date of the return of the writ until the date of the judgment to be rendered herein subject to possible reduction, depending on the principle that a party who is damaged by a continuing injury must do what he reasonably can to prevent the accumulation of the damages.

The judgment will be reversed and the cause remanded, with instructions to proceed in conformity with this opinion. All the judges concur.

THE STATE OF MISSOURI, Respondent, v. GARRETT PRATHER, Appellant.

Kansas City Court of Appeals, May 19, 1890.

1. **Criminal Procedure**: VENUE. When the venue is not shown the prosecution fails.

2. **Local Option**: BOARD OF CANVASSERS: CERTIFICATE. The county clerk, upon the receipt of the poll books from the precinct judges, should call to his assistance two justices of the peace or two county judges. These three compose the board of canvassers, whose duty it is to cast up the returns, and by a certificate

41 451
44 292
41 451
46 428
41 451
48 114
41 451
110m 144
111m 237
51 304

declare the result of the local-option election. This certificate when entered upon the records of the county court is the means and the only means of showing such result and makes a *prima facie* case of the correctness of the matter therein contained. A recitation of the result in the order of the county court, directing the publication of notice of the result, avails nothing.

8. **Criminal Procedure:** SUFFICIENCY OF INDICTMENT UNDER LOCAL OPTION: EVIDENCE: DEFENSE. An indictment for selling intoxicating liquors in violation of the local-option act need allege only the substantive facts necessary to be proved, viz.: The adoption of the law and a sale of such liquor within the territory within which the law is in force. The introduction of the certificate of the board of canvassers from the county court record with proof of the publication of notice of the result once a week for four consecutive weeks and the proof of the sale makes a *prima facie* case for the state; and that the necessary antecedent steps have not been taken is matter of defense. If, however, the state in the indictment allege in detail the necessary antecedent steps and proceed with testimony to establish the same, and it appears the law has not been complied with, such defects will avail the defendant as if shown by himself.

Appeal from the Linn Circuit Court.—HON. G. D. BURGESS, Judge.

REVERSED AND REMANDED.

W. P. Taylor and *B. F. Pierce* with *D. M. Wilson*, for appellant.

(1) The indictment should have been quashed. Sess. Acts, 1887, p. 179, *et seq. First.* The indictment should refer to the statute by its title and the date of its passage; and a failure to do so, or a misrecital of the title in a material part thereof, is good ground for motion to quash. *Second.* It is not alleged that due notice of the holding of the election, or of its result, was ever given. Whart. Crim. Law [7 Rev. Ed.] sec. 263; 1 Bish. Crim. Proc. [Ed. 1866] sec. 257; *People v. Jackson*, 3 Denio, 101. Now, where time is material, dates laid in the *videlicet* will control, and if laid

insensibly will vitiate the context. The notice called for by the act is absolutely essential to the validity of the election. *State v. Tucker*, 32 Mo. App. 620; Cooley's Blackstone [2 Ed.] side p. 306, note 6; 2 Hale, 170. *Third.* There was not sufficient evidence before the grand jury on which to find the indictment. The record of the county court is silent as to notice or proof of notice of both the holding of the election and the result of the election, and the evidence of County Clerk Adams is, that no proof of notice was made or filed until June 4, 1889. The indictment was found December 5, 1888. At that time no proof of notice had been made, and without such proof the grand jury could not legally find a bill. *State v. Metzger*, 26 Mo. 65; *Shaffner v. City of St. Louis*, 31 Mo. 264; *Schell v. Leland*, 45 Mo. 289; *Ells v. Railroad*, 51 Mo. 200; *Smith v. Haworth*, 53 Mo. 88; *Railroad v. Campbell*, 62 Mo. 585; *Whitely v. Platte County*, 73 Mo. 30; *Zimmerman v. Snowden*, 88 Mo. 218; *City of St. Louis v. Gleason*, 93 Mo. 33; *Werz v. Werz*, 11 Mo. App. 26; *Morse v. Presley*, 25 N. H. 299; *Galpin v. Page*, 18 Wall. 350. (3) The county court had no power to declare the election carried against the sale of intoxicating liquors and to order the result published. R. S. 1879, sec. 319. (4) Whether the Wood local-option law is in operation in any particular county, is not a question to be determined by parol testimony. As the local-option law provides in detail how any county may put itself under the operation of that law, and confers upon the county court the supervisory control of the whole matter, the records of that court must show that every essential prerequisite of the law has been complied with. The validity of the election, so far as the question as to whether every substantial requirement of the statute has been followed, must stand or fall upon the record, and the record alone. If, therefore, the county court records fail to show as in the case

at bar, that any one essential step has been taken, the whole proceeding is *coram non judice* and void. (5) There is no evidence in the bill of exceptions showing proof of venue. It does not appear that the offense occurred in Linn county or even in this state. For this, if nothing more, the judgment must be reversed. *State v. McGinniss*, 74 Mo. 245; *State v. Hartnett*, 75 Mo. 251; *State v. Hughes*, 82 Mo. 86.

C. C. Bigger, Prosecuting Attorney, for respondent.

The motion to quash the indictment was properly overruled. (1) The title of the act of the general assembly of the state of Missouri, approved April 5, 1887, and known as the "local-option" law is sufficiently set out; the omission of the words, "for its violation," being merely clerical, is cured by the statute (R. S. 1889, sec. 4115), and was properly disregarded. *State v. McDaniel*, 94 Mo. 301. (2) The indictment alleges that due notice of the election, and of the result was given as the law directs. Sess. Acts, 1887, secs. 3, 5, p. 181; *State ex rel. v. Tucker*, 32 Mo. App. 620; *State ex rel. v. County Court*, 33 Mo. App. 635. And an imperfect statement of the dates when said notices were given, time not being of the essence of the offense, is immaterial, and the defects, if any, were cured by verdict. *State v. Houts*, 36 Mo. App. 265. (3) The records of the county court, which were read in evidence, show on their face that the petition to the county court, under which the election was ordered, was signed by one-tenth of the voters of the county, outside of cities and towns having a population of twenty-five hundred inhabitants or more. (4) The local-option law makes no provision for the filing of proof of publication of the election notice, or the notice of the result, nor is any required to be so filed. *State v. Baker*, 36 Mo. App. 58. (5) But the proofs of publication filed with the county clerk, and read in evidence, were

competent to prove the publication of the notice of the election, and the notice declaring the result. The defendant was given a fair trial and found guilty, as the evidence fully warranted, and the judgment should be affirmed.

GILL, J.—Defendant Prather was convicted, at the last December term of the Linn circuit court, of selling intoxicating liquors within the limits of said county, outside of any city containing a population of twenty-five hundred, in the alleged violation of the local-option law, and was fined three hundred dollars. From the judgment thereon said defendant appeals.

I. On an inspection of this record, it is clear that we must reverse the judgment. In the first place, there is nothing in the record brought here to show that the alleged offense was committed within the limits of Linn county, where it is claimed said local-option law is in force. All that appears in the bill of exceptions is, that "the plaintiff then offered evidence tending to show the sale of intoxicating liquors by the defendant within one year next preceding the finding of the indictment." There being no venue shown, certainly then the prosecution failed.

II. But more than this, since in our opinion there is one other matter, at least, in this record fatal to the prosecution, we deem it proper to pass on the same, with the hope thereby of saving future litigation. This *record* fails to show that Linn county ever adopted the provisions of the local-option law. Two important, indispensable facts must concur to justify Prather's conviction of the offense charged: *First.* It must be proved that Linn county, outside the limits of Brookfield (the only city or town in said county having twenty-five hundred inhabitants) had adopted the law known as the local-option law, and, *second*, that defendant had, in violation of its provisions, sold intoxicating

liquors within said Linn county, outside of Brookfield. As already stated, the record of this case fails to show the second, and, as we think, it as well fails to establish the first, proposition. As the name implies, the local-option law applies, or not, to any particular county, or city, as it may, or may not, be received or adopted in the manner provided. It remains suspended in its operations till accepted by a vote of the people to be affected thereby. Hence this acceptance or adoption by the people of any county must be shown as any other fact. *City of Hopkins v. Railroad*, 79 Mo. 98; *State v. Hays*, 78 Mo. 600; *State v. Cleveland*, 80 Mo. 108. For the adoption of this local-option law, the act prescribes an election to be called by the county court (when a certain petition therefor is presented), and then provides, that "such election shall be conducted, the returns thereof made and the results thereof ascertained and determined in accordance in all respects with the laws of this state governing general elections for county officers, and the result thereof shall be entered upon the record of such county court." Laws of 1887, sec. 1, p. 180. Then, in case the vote shall be *against* the sale of intoxicating liquors, by section 5 of the same act, the county court is required to publish the result of such election for four weeks, and then the law becomes effective. The law for *ascertaining and determining the result of the election of county officers* becomes, then, by force of the above quoted portion of section 1, the law by which the result of the election in Linn county on the adoption of the local-option law is to be ascertained and determined. This law, "governing general elections for county officers," in so far as concerns the matter now considered, is found in sections 5505 and 5506, Revised Statutes, 1879. In the case of *State v. Mackin*, *ante*, p. 99, we had occasion to announce our conclusions as to how and by whom the result of an election under these statutory provisions should be

ascertained and determined, and to save space here we now refer to the opinion in that case. To summarize, we there, in substance, held it to be the duty of the precinct judges of election to transmit to the clerk of the county court the poll books—that the clerk receiving the same should call to his assistance two justices of the peace, or two judges of the county court, and that these three compose, under the law, the body or board of canvassers, whose duty it is to cast up the returns, and by a statement or certificate declare the result of such local-option election; and that this certificate, or statement, of the result should be entered upon the records of the county court.

This is *the manner and means* pointed out by the statute, and is the *only* manner and means, for *ascertaining and determining* the result of such an election as this alleged to have been held in Linn county on the subject of local option. And it follows, therefore, that the adoption of the local-option law must be shown by the statement or certificate of this canvassing board entered upon the records of the county court, and cannot be shown in any other way. Since the *Mackin case* was decided, we have read the opinion of the St. Louis Court of Appeals in *State v. Searcy*, 39 Mo. App. 393, holding practically the same views as here announced, and we, therefore, feel encouraged, in adhering to the opinion in the *Mackin case*. This certificate or statement, showing the result of the election, carries with it a like force as a certificate of election furnished (under section 5506, *supra*) to the successful candidate for a county office. It makes a *prima facie* case of the correctness of the matters therein contained. *Zeiler v. Chapman*, 54 Mo. 505; *Barnes v. Gottschalk*, 3 Mo. App. 3. Now, in the case at bar there is nothing in the record to show that the result of this Linn county local-option election was ever "ascertained and determined" by the county clerk and assistants, as the statutes above

prescribe. It is true that, in the order by the county court, directing a publication of notice of the result, it is recited that, "*whereas*, at said election there were cast fourteen hundred and forty-three votes against the sale of intoxicating liquors, and six hundred and ninety-two votes for the sale of intoxicating liquors, resulting in a majority of seven hundred and fifty-one against the sale of intoxicating liquors," etc. However, this recital avails nothing; no more, indeed, than if stated by the publisher of the paper on his own motion, or by any one wholly disconnected with the county court. The law does not repose any authority in the county court to *ascertain or determine* the result of such election. As said in the *Searcy case*, *supra*, a solemn and formal *adjudication*, even by the county court, declaring the result of said election, would be nugatory and worthless, for the very apparent reason that the law devolves no such duty on the court. The county court has no further authority in the premises than simply to admit to record the finding, ascertainment and determination of the election as made by the canvassing board, composed of the county clerk and two county judges or two justices of the peace, and to publish said result, so ascertained by the clerk and assistants, as directed in section 5.

III. Since defendant's counsel raise some question as to the sufficiency of the indictment, we avail ourselves of this opportunity to declare our concurrence with the views expressed by the St. Louis Court of Appeals in *State v. Searcy*, as to what need be, or need not be, set out in an indictment for the violation of the provisions of the local-option law. These indictments for selling intoxicating liquors, contrary to the provisions of that act, are often cumbersome, prolix and full of unnecessary allegations. It is only the substantive facts—those facts necessary to be proved—which need be alleged. R. S. 1889, sec. 4115. We have already

said in this opinion that the certificate of declaration by the canvassing board (that is the county clerk and assistants), spread on the records of the county court, makes a *prima facie* case of the existence of the substantive fact, to-wit, that the local-option law is adopted in such county. This, of course, must be understood with the further qualification that such result must be shown to have been published once a week for four consecutive weeks, in compliance with section 5 of said act, since the law is not in operation until such publication. The allegation, then, of the adoption of the law, supported by the testimony here suggested, together with selling intoxicating liquors within the territory shown to have legally adopted the local-option law (and where the law is then in force) makes a *prima facie* case for the state; and, if the necessary antecedent steps have not been taken, as the statute prescribes, then such are matters of defense that may be shown by the accused. If, however, the state shall in the first instance set out in the indictment not only the adoption of the law, but recite in detail the necessary antecedent steps, and proceed with testimony to establish the same, and it appear therefrom that the law has not been complied with in any or all such necessary antecedents, then, of course, such defects will avail the defendant the same as if shown by him at the proper time.

Our conclusions, then, are, that the judgment herein must be reversed and the cause remanded, because, *first*, the venue of the offense charged is not shown, and, *second*, because the record submitted to us does not establish, even *prima facie*, the adoption of the local-option law. All concur.

41 460
128m187
41 460
65 116
41 460
81 109
41 460
86 316
41 460
89 154
41 460
94 s218

J. B. SMITH *et al.*, Appellants, v. MAGGIE D. BARRETT *et al.*, Respondents.

Kansas City Court of Appeals, May 19, 1890.

1. **Charter of Kansas City**: SPECIAL TAX BILL: SUIT AGAINST RECORD OWNER. Under the charter of Kansas City, suit to enforce a special tax bill must be brought against the record owner at the time of the institution of the suit and not at the time of the issuance of the tax bill.

2. ———: LIEN OF SPECIAL TAX BILL: LIMITATION TWO YEARS. The provision of such charter declaring such lien of a special tax bill shall continue for two years, but no longer, unless suit be brought to collect the same within two years from the issue thereof, etc., is not a statute of repose to bar actions, but is rather a limit to the existence of the lien; and so, where an action was commenced within two years against the owner at the time of the issue of the tax bill, and, after the expiration of two years from the date of the tax bill, the petition was amended and the owner, at the time of the institution of the suit, was made a party and brought in by summons, it is *held* that the lien was dead and could not be enforced.

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

AFFIRMED.

Lathrop, Smith & Morrow, for appellants.

(1) In action for the enforcement of a tax lien, the "owner" is the person in whom title is vested as appears by the public records. *Vance v. Corrigan*, 78 Mo. 94; *State v. Sack*, 79 Mo. 661; *Kuhleman v. Schuler*, 35 Mo. 142; *Schaeffer v. Lohman*, 34 Mo. 68. (2) The charter under which the tax bill was issued contemplates the bringing of suit against the persons who own the property at the time the lien attaches to it. Sess. Acts, 1875, p. 252. (3) This suit was

brought within the two years named in the charter, and was not barred as to defendant Donnell. Sess. Acts, 1875, p. 252; *Dougherty v. Downey*, 1 Mo. 674; *Wright v. Pratt*, 17 Mo. 43; *Gosline v. Thompson*, 61 Mo. 471.

W. C. Stewart, for respondents.

(1) Appellants in the statement of their first point assume, that suit to enforce the lien of a special tax bill must be brought against the owner of the property as a matter of law, and then affirm that the owner is the person in whom the title is vested as appears by the public records. Citing as authority: *Vance v. Corrigan*, 78 Mo. 94; *State v. Sack*, 79 Mo. 661. Respondents repeat these authorities and add *Crane v. Dameron*, 98 Mo. 567. (2) The cases of *Kuhleman v. Schuler*, 35 Mo. 142 and *Schaeffer v. Lohman*, 34 Mo. 68, referred to by appellants, are not authority in this case. These cases are based on a special law of 1856-7, relating to mechanics' liens in the city of St. Louis which declared that the parties to the contract should, and those interested in the property might, be made parties to the suit to enforce the lien. (3) The charter under which the tax bill here was issued does not contemplate the bringing of suit against the parties who own the property at the time the lien attaches as claimed by the appellants, where the record shows, or it is otherwise known, that others are the owners at the time suit is brought. But the rule is, unless it be otherwise specifically declared by statute, that the suit to take the title from one person and give it to another must always be brought against the owner of the land charged as in this case. The owner must have an opportunity to contest the validity of the proceeding as a charge upon his property, or otherwise to discharge the lien or claim if he so desire. To bring a suit against parties known not to be the owners as was done in this proceeding is a fraud. *Vance v. Corrigan*, 78 Mo. 96-7. (4) This suit was

not brought by the appellants within two years after the issuance of the tax bill within the meaning of the charter of Kansas City. The suit there contemplated is a suit legally brought, on which a valid judgment could be rendered in favor of the plaintiffs against the defendants. In this action plaintiffs could not have recovered a valid judgment against the Barretts, nor would a purchaser at a sale based on it take any title against Donnell, the then record owner. *Vance v. Corrigan*, 78 Mo. 95-96, and authority there cited. The suit as it was brought, and when it was brought, was a nullity. (5) It could not be amended. The plaintiffs, in the light of the record, had no cause of action against the defendants, the Barretts, as is shown by their own evidence. The recorded deed of Barretts to Donnell, before suit brought against Barretts, was full notice to the holder of the tax bill.

Wash. Adams and *Lathrop, Smith & Morrow*, for appellants in reply.

That Donnell, as the holder of the title, by deed recorded subsequent to the creation of the lien of the tax bill, when not made a party to the suit to collect the same, has a right of redemption and nothing more, is settled by repeated adjudications of the supreme court of the state. *Olmstead v. Tarsney*, 69 Mo. 396; *Corrigan v. Bell*, 73 Mo. 53-57; *Keating v. Craig*, 73 Mo. 507, 509; *State v. Railroad*, 77 Mo. 202, 220-221; *Stafford v. Fizer*, 82 Mo. 393, 400; *Gitchell v. Kreidler*, 84 Mo. 472; *Bank v. Grewe*, 84 Mo. 477; *Cowell v. Gray*, 85 Mo. 169; *Allen v. McCabe*, 93 Mo. 138; *Williams v. Hudson*, 93 Mo. 524. By being made a party defendant to the suit upon the tax bill, Donnell's right of redemption will be cut off if he permits the property to go to sale under the tax-bill judgment. Under any view of the case that can be taken, plaintiffs have a right to enforce the collection of the tax bill against the property described therein. The Barretts are proper parties

defendant, because Maggie D. Barrett was the record owner of the property at the time the tax bill was issued and the lien against the property created. Donnell is a proper party defendant in order that his after-acquired recorded title may be subjected to the payment of the bill and his right of redemption cut off.

GILL, J.—This is an action brought to foreclose the lien of a special tax bill for paving Grand avenue in Kansas City. The tax bill was issued on the twenty-ninth day of December, 1884. Prior to this date, to-wit, on January 4, 1883, Maggie Barrett, the former owner, had conveyed the lot charged by the tax bill to M. S. C. Donnell, but said deed was not recorded till August 10, 1885. Forty-seven days after the deed to Donnell was recorded, and on September 26, 1885, the plaintiffs commenced this suit against the said Maggie Barrett and her husband. Donnell, though then the record owner, was not sued at that time; but, subsequently, on April 13, 1887, plaintiffs amended their petition, joining Donnell as a codefendant with the Barretts. He was brought in by summons, and in his answer pleaded the expiration of two years from the issue of the tax bill as a bar to the action. Defendants Barrett simply entered a disclaimer as to the real estate charged and asked to be dismissed with their costs. The circuit court, trying the cause, gave judgment for defendants, and plaintiffs have appealed.

I. The points at issue, between these litigants, are these: *First.* Was this action (commenced in September, 1885) properly brought against *Barrett*, who was the *record owner when the tax bill was issued*, or should it not rather have been brought against *Donnell*, who was the record owner at the *institution of the suit? Second.* Admitting Donnell to have been the necessary party defendant in the first instance, was the action saved by bringing him in as a codefendant with

Barrett by an amended petition and summons on April 13, 1887, which was more than two years after the tax bill was issued? By reading the foregoing statement, it will be observed that when the tax bill was issued the record of conveyances for Jackson county showed title of the lot to be in Barrett, but when the suit was brought the same record of conveyances gave the information that Donnell was the owner, by deed from Barrett executed prior to the issue of the tax bill.

This tax bill was issued in pursuance of article 8, Kansas City charter (Laws of 1875, p. 250, *et seq.*), wherein, under certain conditions, it provided that a street may be paved, and the costs thereof charged to abutting property. Section 4 of this article prescribes how such tax bills may be enforced by suit. We quote briefly from this section: "Sec. 4. Every such tax bill shall be a lien on the property therein described, against which the same may be issued" (and from the date of issue) "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." * * * Then, after providing that suit may be brought to enforce such lien in any court of competent jurisdiction, the section continues: "No such tax bill need give the name of any party owning or interested in the land charged and bound by the lien, and, before suit, the owner of any part or severalty, or undivided interest in any land charged by any tax bill, may pay his share separately, in which case his interest shall not be further liable in case of suit; all such, or any of the owners of the land charged, or any estate or interest therein, may be made defendants, but only the right, title, interest and estate of the parties, made defendants in any suit, shall be affected or bound thereby, or by the proceedings therein. In case any owner of the ground

or of any interest therein is unknown, or a non-resident," etc., provision is made for publication, etc. Then, in prescribing nature of petition, etc., the section continues: "It shall be sufficient for the plaintiff to plead 'the issuing tax bill, assignment thereof (if assigned),' and allege that the party or parties made defendants *own or claim to own* the land charged, or some estate or interest therein as the case may be." The statute then declares the judgment, and execution thereon, shall be special—a lien and charge on the land to be enforced and executed as in other proceedings on special executions from the circuit court, and then that "any such special judgment shall bind all the right, title, interest and estate in the land that defendants, and each of them, own at the time of the lien of the tax bill commenced, or acquired afterwards, and a sale on execution thereon shall vest all of such right, title, interest and estate in the purchaser, but parties interested in the land, not made defendants, shall not be affected thereby, and if they claim through or under any parties defendant, prior to suit brought, may redeem from the purchaser, or otherwise assert their rights, according to equity and good conscience."

Now, the pivotal question is, against whom, under the terms of this statute, should plaintiffs have proceeded to enforce this tax bill against the lot in question? Should they have sued Barrett, the record owner when the bill was issued, or Donnell, the record owner when the action was commenced? Both sides concede that by *owner*, as mentioned in the statute, is meant that person whom the public records show to be vested with the title—and this, in the absence of knowledge to the contrary, is the well-settled law of this state, in actions of this nature. *Vance v. Corrigan*, 78 Mo. 94, and numerous other cases following this; 85 Mo. 169; 90 Mo. 676; 96 Mo. 546; 98 Mo. 567. After much consideration and reflection over the terms of this statute.

we yield to the contention of defendants' counsel, and hold that the action should have been brought against Donnell, who was the record owner at the commencement of this action. We are of the opinion that this rule better conforms to the words and spirit of the act, better consists with reason and justice, than as contended for by plaintiffs' able counsel. As an original proposition, and one of first impression, reason and fair dealing would suggest that if A.'s land (which he now owns) is to be charged absolutely with the payment of a sum of money—if a proceeding is to be carried through the courts, resulting in an incontestible judgment against his property—it would seem, I say, in all fairness that *he*, above all others, should have notice and the right to defend. "The chief object in having the owner brought in would seem to be to enable him to contest the validity of the proceedings as a charge on his property." 78 Mo. 96. That portion of the section, too, quoted above (and which relates to the contents of the petition to be filed) quite obviously looks to the owner when suit is brought as the necessary party defendant. It reads that the petition should "allege that the party or parties made defendants *own or claim to own* the land charged," etc. "Own," *when?* The answer is, "Now"—*own now*. Not that *when the tax bill was issued* defendants owned, but the petition must allege who are the owners *now*- at the institution of the suit. So again, referring to the foregoing section 4, the special judgment rendered in said suit shall bind all the interest that these defendants may have owned at the issue of the tax bills, or which they may have *afterwards acquired*. "Defendants" here mentioned, of necessity, means those interested in the property at the institution of the suit, and all the interest they then have, whether owned at the date of the tax bill or since acquired, is bound by the judgment. If the status of the title at the issue of the tax bill fixes the liability,

why mention title "acquired afterwards?" Suits against the "owner or owners of property" to enforce payment of general real-estate taxes, under section 6837, Revised Statutes, 1879, are uniformly held properly brought against the owner, or owners, as shown at the time by the registry of deeds. 96 Mo. 546, and cases cited. We are further strengthened in the conviction that the legislature did not intend the law as contended for by plaintiff's counsel, by reference to article 7 of the same charter act, which has to do with the opening streets and condemning private property therefor. There it was thought best to proceed against the owners who appeared such at the date of the passage of the ordinance, and the same act so expressly provides, and in these words: "It shall be sufficient to bring in the owners of property who may be such at the date of the passage of the ordinance providing for the improvement, and all parties claiming or holding through or under such owners, or any of them, shall be bound by the proceedings without being brought in." The existence of such a provision in proceedings to open streets, etc., and the absence thereof in the article relating to enforcement of liens for paving streets, tends to show that a different rule was intended.

II. It being determined, then, that Barrett was not the *owner* contemplated by the charter, and against whom suit should have been commenced, but that Donnell was the proper party defendant, as he was then the record owner, the remaining question is, was the lien preserved and the right of action saved by bringing Donnell in as defendant on April 13, 1887. We have no hesitancy in answering this question in the negative. It is provided by section 4 of the charter, as quoted in this opinion, that every such tax bill shall be a lien from the date of its issue, "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," etc. This suit was not brought against the owner, Donnell, as the statute directed, until more than two years after the issue of the tax bill. Said bill was issued in December, 1884, while Donnell was sued in April, 1887. The action pretended to be brought against Mrs. Barrett and her husband in September, 1885, was as if brought against any other party who may never have been in any manner interested in the property. The suit *contemplated by the charter* was an indispensable prerequisite to perpetuate the lien, and extend it beyond the two years' limitation. As said by the St. Louis Court of Appeals in a similar case: "The proceeding is special, and the person who claims under it must bring himself within its special provisions." The two years, after which the lien is to terminate, is not a mere statute of repose to bar actions, but is rather a *limit to the existence of the lien*, and the burden is on the plaintiff to show that he has complied with the conditions upon which the statute makes the continued existence of the lien depend. 6 Mo. App. 26. There was no suit brought within two years—the proceeding against the Barretts was a mere nullity. No suit against the owner being brought within the two years, the lien was gone. *Fary v. Boeckler*, 6 Mo. App. 24; *Dunphy v. Riddle*, 86 Ill. 22; 86 Ill. 437; 95 Ill. 580; 96 Ill. 146. The right to amend pleadings is not properly a matter of discussion here. Plaintiffs claim to have had a special tax lien against defendant Donnell's real estate, by virtue of the tax bill issued in December, 1884. It was a creature of statute creation. The law of its existence limited its life to two years, unless suit was commenced against Donnell within said two years. This was not done, and the lien is now dead, without hope of revival.

Judgment affirmed. All concur.

41 469
41 633
41 469
59 599
59 641
41 469
64 548
41 469
66 269
66 379
41 469
83 490

JOEL A. BALL, Respondent, v. THE CITY OF INDEPENDENCE, Appellant.

Kansas City Court of Appeals, May 19, 1890.

1. **Municipal Corporations:** EXCAVATION IN SIDEWALK: DUTY. Persons are entitled to travel the streets of a city at all times, and it is the city's duty to protect them at all times, while so doing, against damages arising from unguarded excavation therein. It is sufficient for the city to show the placing of proper and secure guards, and it is not liable if a wrongdoer removes them.

2. **Negligence:** WITHDRAWAL OF CASE FROM JURY. When the evidence is conflicting upon material issues in the case, it is the province of the jury to pass upon it, and where from the undisputed facts the inference cannot be drawn under the rules of law, that the defendant is not guilty of any negligence, it is a usurpation by the court of the province of the jury to withdraw the case from their consideration.

3. **Instructions.** Instructions in this case considered extremely liberal to the defendant and not fit subject of complaint.

4. **Appellate Practice:** REFUSED EVIDENCE IN RECORD. Where the trial court refused to admit certain implied admissions of the defendant, in order that the appellate court may review such action, it is necessary that the record should disclose what it was proposed to prove had been said by the witness to plaintiff, so the court can see the materiality thereof. In this case, GILL, J. (ELLISON, J., *concurring*), finding the record sufficiently discloses the offered evidence, *holds* it was material and its refusal fatal error. SMITH, P. J. (*dissenting*,) finding the record fails to disclose the offered evidence, *holds* the court cannot review the action of the trial court in refusing to admit it.

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

REVERSED AND REMANDED.

Gates & Wallace with *J. G. Paxton*, for appellant.

(1) The undisputed evidence proved that the excavation was barricaded on Saturday night when the workmen quit work. This discharged the full duty of the city. It had a right to presume that the barriers would not be removed by a stranger on Sunday. This is a question of law upon facts which are undisputed, and from which different inferences cannot be drawn. There was no negligence and the defendant is not liable. The defendant's first instruction should have been given and the case taken from the jury. *Dooly v. Town of Sullivan*, 11 West. Rep. (Ind.) 816; *Doherty v. Inhabitants of Waltham*, 4 Gray, 596; *Mullen v. Town of Rutland*, 55 Vt. 77; *Parker v. City of Cohoes*, 10 Hun. 531; s. c., affirmed in 74 N. Y. 610; *Sevester v. Mayor of New York*, 47 N. Y. Sup. Ct. 341; *Littlefield v. City of Norwich*, 40 Conn. 406; *Cuthbert v. City of Appleton*, 22 Wis. 642; *City of Centralia v. Krouse*, 64 Ill. 19; *Binicker v. Railroad*, 83 Mo. 660; *Walthers v. Railroad*, 78 Mo. 617; *Schmeikhardt v. City of St. Louis*, 2 Mo. App. 571; R. S. 1889, sec. 5482. (2) The court erred in refusing defendant's instructions numbered 4 and 6, and in giving instruction numbered 6 of its own motion. Authorities cited, point 1. (3) The court erred in excluding the testimony of the witness, J. W. Sapp, that he told plaintiff he had heard he had been using his arm, which plaintiff did not deny. This was tantamount to a charge that plaintiff had been using his arm, and, the plaintiff not having denied it, it was competent as an admission of the fact. *State v. Miller*, 49 Mo. 505; *People v. Clauson*, 2 Utah, 502; *Mix v. Osby*, 62 Ill. 193; *State v. Walker* 98 Mo. 106.

Crysler & Kenyon, for respondent.

(1) The duty to keep the streets and sidewalks in safe condition rests upon the municipal corporation, and cannot be surrendered or abdicated. It is liable for

injuries caused by open excavations made therein with its knowledge or consent, express or implied, by the adjoining lot-owner for the purpose of an area or sidewalk. And this general rule, laid down by Judge DILLON, is approved in all its phases in Missouri. 2 Dillon Mun. Corp. [3 Ed.] sec. 1027, and notes; *Blake v. City of St. Louis*, 40 Mo. 569; 45 Mo. 452; *Bowie v. Kansas City*, 51 Mo. 462; *Bassett v. St. Joseph*, 53 Mo. 290; *Hill v. City of Kansas*, 54 Mo. 598; *Oliver v. City of Kansas*, 69 Mo. 79, citing Dillon; *Beaudeau v. Cape Girardeau*, 71 Mo. 395; *Welsh v. St. Louis*, 73 Mo. 71; *Laewer v. Sedalia*, 74 Mo. 444; *Tritz v. Kansas City*, 84 Mo. 640; *Kiley v. Kansas City*, 87 Mo. 107; *Norton v. St. Louis*, 97 Mo. 541. (2) If the city knew of the defect, had notice that it existed, or that it was done by its knowledge or consent, then notice is unnecessary, and the fact that its officers and agents saw the barricades or danger signals were put up sometimes does not fulfill the duty of the city to the public. Such precaution must be maintained. 2 Thompson on Neg. [1 Ed.] 663, and notes; *Rockwell v. Railroad*, 64 Barb. 438; affirmed in 53 N. Y. 615; *McCabe v. Hammond*, 34 Wis. 590; 2 Thompson on Neg. [1 Ed.] 773, note 8. It is no defense that barriers and notice were removed by evil-disposed persons. *Brown v. Jefferson County*, 16 Iowa, 339; *Myers v. Springfield*, 112 Mass. 489. Ordinarily not, if put up at sunset each night. *Prentiss v. Boston*, 112 Mass. 43; *Doherty v. Waltham*, 4 Gray, 596; Thompson on Neg. [1 Ed.] 788. The taking away of barrier, by private wrongdoer, placed by town around excavation, will not exonerate them. *Prentiss v. Boston, supra.* (3) The case was properly submitted to the jury, in regard to the question of notice, even if there had been no direct evidence, which there was. *Carrington v. The City of St. Louis*, 89 Mo. 212. (4) The evidence of the witness Sapp is set out in full, and was properly excluded as hearsay. What some other person, not a

party to the suit, said to the witness, not in the presence of plaintiff, is clearly hearsay and incompetent. *O'Neil v. Crain*, 67 Mo. 250; *Fougen v. Burgess*, 71 Mo. 389; *Haskins v. Railroad*, 19 Mo. App. 319; *State v. Glahn*, 97 Mo. 679; 2 Howard (Miss.) 846.

SMITH, P. J.—This was a suit begun in the circuit court of Jackson county, by plaintiff against defendant to recover damages for personal injuries alleged to have been sustained at the hour of ten o'clock on September 11, 1887, by falling into an excavation in one of the streets of defendant, which it had negligently permitted to remain open and unguarded at night. The answer was a general denial supplemented with the plea of contributory negligence. There was a trial, and judgment for the plaintiff, from which defendant has appealed.

I. The first ground of the defendant's appeal is, that the circuit court erred in refusing to give its first instruction which was in the nature of a demurrer to the evidence, on the ground that it disclosed no fact from which the law would deduce the inference of negligence. A solution of this question must be made in the light of so much of the evidence as is pertinent thereto, and of which it is proper here to summarize.

R. Pendleton, a witness for plaintiff, testified that Payne & Ott had made an excavation for a cellar for a building and that it extended "clear across the sidewalk out to the curbstone," and that it looked to be eight or ten feet deep; that it had been there quite a little time before the plaintiff was injured; that plaintiff left witness' livery stable, to go home, after it was dark; that there was no signal or other lights in that part of the street where the excavation was situated, on the night plaintiff was hurt, nor were there any barricades across the sidewalks at that place at that time; that there were no barricades across the sidewalk on the day (which was Sunday) preceding the night the plaintiff

fell into the excavation; called the attention of the mayor of the city, Alderman Chesbro and the contractor in charge of the excavation, to its dangerous character. W. S. Furnish, for plaintiff, testified that he frequently passed the excavation after night, and that he never saw any signal lights there, but that there were barricades around it probably half of the time before plaintiff got hurt. William Ray, for plaintiff, testified that he passed the excavation in going to and returning from his meals each day; that there were no barricades up there on the night plaintiff fell in; that there were neither signal lights nor barricades there when he took plaintiff out of the excavation; that there had been barricades up there part of the time before plaintiff was hurt, but that he noticed none there the Saturday before plaintiff was hurt. J. N. Wood testified that he passed the excavation every day, and that he never saw any barricades on the north end of the excavation. C. S. Chesbro testified that he was a member of the board of aldermen of the city, and that he had "noticed the barricades in a casual way," and that he had "seen it down and up;" that he lived on the opposite side of the street from the excavation. Ben. Garth, for plaintiff, testified that, while the excavation was being made, he worked near it; that he had seen it "lots of times" at night when not barricaded; that, on the Sunday preceding the night of the accident, it was not barricaded; that nearly every night that he passed the excavation the barricade was down; that, on the *Saturday night before the plaintiff fell into the excavation the barricades were down.* John Weitzel, for plaintiff, testified that the excavation was right south of his shop, and prior to the time plaintiff was hurt the excavation was sometimes barricaded; that, on the Saturday evening preceding the Sunday night plaintiff was hurt, he but an old wheelbarrow on the excavation wall which extended across the sidewalk and

from twelve to eighteen inches above it; on Monday morning following, he noticed the wheelbarrow was in the excavation. The plaintiff testified that he started to walk home on the Sunday night he was injured, from the livery stable of the witness Pendleton, and that it was dark, and, there being no signal lights or barricades around the excavation, he walked into it, from which he received severe injuries, describing them. The defendant's witness, T. B. Smith, testified that he was the contractor, who made the excavation, and that on the Saturday night before the plaintiff was injured he had the barricade put up. A. R. Johnson, for defendant, testified that he was employed by contractor Smith, while making the excavation and that "it was always barricaded at night," and that he put up the barricades the Saturday night before the accident; that he securely nailed it on the outside of the sidewalk to a telegraph pole, and on the inside to the building, so strongly that a man going against it would not push it down. C. Ott, for defendant, testified that the barricade was up at six o'clock on Saturday evening before the accident. T. C. Caldwell, for defendant, testified that he was mayor of the city before and at the time plaintiff was injured, and that, after witness Pendleton had told him that the excavation was a dangerous place, he had spoken to the workmen, asking them to close it up every night, and that on every evening after that he had noticed that it was closed.

An analysis of the foregoing excerpts from the evidence discloses a palpable conflict in respect to the issue of negligence. It is made to appear from defendant's evidence that on the Saturday evening, the day preceding the Sunday night on which plaintiff was injured, that a barricade had been placed across the sidewalk on the north side of the excavation. It is made to appear by the plaintiff's evidence that no signal lights had at any time been placed, during the nighttime, at the excavation, and that a barricade had only

occasionally been placed there during the night-time, prior to plaintiff's injury; that no barricade had been put up there on the Saturday preceding the Sunday night of the plaintiff's injury, nor were there either barricades or signal lights there on the night of the injury. I should have, myself, thought that upon defendant's own evidence the case should have been submitted to the jury.

The question is, what is the duty of a person who makes an excavation in the public highway, such as he may lawfully make for temporary purposes of building and the like? The performance of the work necessarily renders the street unsafe for night travel. The danger arises from the nature of the improvement, and if it can be averted only by special precautions, such as placing guards or the lighting of the street, the corporation which has authorized the work is plainly bound to take these precautions. *Storrs v. Utica*, 17 N. Y. 104; *Grant v. Brooklyn*, 41 Barb. 381. Persons travel all hours of the night, and the obligation to warn travelers of the excavation, which they have authorized to be made, ought to continue *all the time*. It would seem that since persons are entitled to travel the streets of a city at all times, that it ought to be its duty to protect them at all times, while so doing, against damages arising from an unguarded excavation therein. But it is unnecessary to pursue this line of thought further, since the rule of decision seems to be quite uniform, that it is sufficient to show that proper signals and safe-guards were placed about an excavation on quitting work; and neither the corporation nor the contractor is liable if a wrongdoer removes the signals or barricades during the night. *Dooly v. Town of Sullivan*, 11 N. W. Rep. (Ind.) 816; *Doherty v. Waltham*, 4 Gray, 596; *Mullen v. Rutland*, 55 Vt. 77; *Parker v. Cohoes*, 10 Hun. 531; *Sevester v. Mayor*, 47 N. Y. 341; *Schmeikhardt v. St. Louis*, 2 Mo. App. 571; *Binicker v. Railroad*, 83 Mo. 660; *Walthers v. Railroad*, 78 Mo.

617. From the *undisputed facts* of the case, the inference cannot be drawn under the rule just referred to, that the defendant was guilty of no negligence. The law is, that when the evidence is conflicting upon a material issue in the case, that it is the province of the jury, and not the court, to pass upon it. *King v. Railroad*, 98 Mo. 235; *Forster v. Mfg. Co.*, 98 Mo. 391.

It is, therefore, quite plain that, if the jury believed the evidence introduced by the plaintiff, that they might very well find for him, on the issue of negligence. In a case where the evidence was so conflicting, as in this, it would have been a usurpation by the court of the province of the jury, for it to have withdrawn the case from the consideration of the jury, by the giving of the defendant's first instruction. It was a proper case for the jury.

II. No error is perceived in the action of the trial court in giving instruction number 6 of its own motion, and in refusing those numbered 4 and 6, asked by the defendant. This instruction, with others given by the court on its own motion, embody substantially the same theory as those refused for defendant. They all go to the very *ultima thule* of the principles of the rule invoked by the defendant and stated in the preceding paragraph of this opinion. The instructions of the court were extremely liberal as to defendant, and ought not to be made the subject of complaint by it. And all the instructions given, when taken in their entirety, very fairly and fully declared the law of the case, and in them we can discern no harmful error.

III. The defendant's further contention is that the trial court erred in refusing to permit the witness Sapp to testify what he had told the plaintiff he had heard what others had said about his using his arm. Admissions may be implied from acquiescence of the party to what is said or done in his hearing. 1 Greenl. Ev., sec. 196; *State v. Walker*, 98 Mo. 106; *State v.*

Miller, 49 Mo. 505; *Mix v. Osby*, 62 Ill. 502. Now, in this case, the witness Sapp made a statement to plaintiff of the things he had heard, and to which statement plaintiff made no reply. But the difficulty here is that the record does not disclose what it was that the defendant proposed to prove by this witness, that he had stated to plaintiff that he had heard others say about his use of his arm. How could the trial court, or even this court, determine whether the implied admission of plaintiff was material, unless it had been disclosed what the nature of the statement, so admitted, was? What did the plaintiff admit to be true? What did it tend to prove or disprove? The statement made by the witness to plaintiff becomes the admission of the latter and whether these were material or not could not be determined in advance of any statement of the nature of the same to the court. If the defendant had stated to the court *what* it was it proposed to prove by the witness had been said to him by plaintiff, then the court could have intelligently determined whether the implied admission of the plaintiff was or was not material evidence. This case might be reversed on the bare refusal of the court to permit an answer to this question, and, on a retrial, it might appear that the matter elicited was wholly immaterial and incompetent. This ground of the defendant's complaint must be held against it. *Jackson v. Hardin*, 83 Mo. 175; *Ault Sav. Bank v. Ault*, 80 Mo. 199; *Kraxberger v. Roiter*, 91 Mo. 404.

It results, from these considerations, that the judgment must be affirmed.

GILL, J. (ELLISON, J., *concurring*.)—I do not concur with Judge SMITH as to paragraph 3 of his opinion. In my opinion, the trial court erred in excluding the proffered testimony of witness J. W. Sapp, called by defendant. The witness was asked by defendant's

counsel as to what conversation he, witness, had with Ball after his arm was hurt. Sapp proceeded to relate the circumstances of having met Ball in a saloon at Independence, and, after stating some conversation had between the two (not important here to repeat), said: "I was talking to him about carrying his arm in a sling; during the few minutes, *I said I had heard he had been using his arm*—" Here the witness was interrupted by plaintiff's counsel, who objected to such evidence. Defendant's counsel then and there cautioned the witness to state what he (witness) then said to Ball. Witness answered: "That is what I am going to tell, just exactly what I said to him." Plaintiff's counsel then pressed the objection on the alleged ground that such testimony was mere "hearsay and incompetent." Defendant's counsel stated to the court that this remark was made by Sapp to Ball (to-wit: "That he had heard he had been using his arm"), and that it was not denied by Mr. Ball. The court sustained the objection, and excluded the evidence so offered. Whatever else, then, the witness may have further said as to what he told Ball, the evidence *offered and rejected* was this remark by Sapp to Ball: "*I have heard you* (Ball) *have been using your arm*," and this Ball did not deny. This was not hearsay evidence, but belongs to that class known as implied admissions—statements made to, and in the presence of, the party, and calling, properly and naturally, for a reply from men similarly situated, and, being acquiesced in by silence, are to be regarded as admitted. 1 Greenl. on Ev., sec. 197; *State v. Miller*, 49 Mo. 505; *State v. Walker*, 98 Mo. 106; *People v. Clauson*, 2 Utah, 502; *Mix v. Osby*, 62 Ill. 193.

The cases cited by plaintiff's counsel in nowise conflict with the rule announced in the foregoing cases. In 2 Howard (Miss.) 846, it was sought to establish an admission as against the plaintiff by detailing a conversation had in his presence relating to a circumstance of

which he knew nothing; and, of course, as he knew nothing about the matter, whether true or false, it could not be expected that he would either assent or deny. Judge SHARKEY there says: "Whenever one party speaks of a matter which must necessarily be within the knowledge of the other, the suffering the statement to remain uncontradicted may, with propriety, be considered as an admission of the fact stated. But the rule cannot be extended further. If, therefore, the matter spoken of be not within the knowledge of the party addressed, his failure to contradict the statement cannot amount to an admission of its truth." So, in case from 22 Cal. 232, the correctness of the general rule is admitted, but was refused enforcement in that case, because the statements (made in presence of the party and which he failed to deny) consisted of the testimony of a witness in court, and in the trial of the case. It was there entirely improper, as the court very well says, to impose an obligation on a party to deny, in open court, the testimony of witnesses then being heard. "A denial or contradiction under such circumstances would produce great confusion, and cause continual wrangling between the party and the witnesses. There is a certain regularity, order and decorum required in such proceedings, which precludes parties from interposing with denials and objections as they could in common conversations."

Neither is there any difficulty here to discover that the lower court, by refusing the evidence offered, excluded matter material to the issues then involved. There is no question but that "this court will not reverse a judgment for refusal of the trial court to admit evidence, if it cannot determine from the record whether the evidence is material or not." 80 Mo. 199; 83 Mo. 187; 91 Mo. 408. So that, if this record simply showed questions to witness Sapp, asking him to state any conversation he had with Ball in relation to his arm, with objection thereto, and same sustained, with nothing

further, then these cases just cited would apply, since this court would be unable to say that even an answer by the witness would furnish any matter material for the jury's consideration. But, in the case at bar, the witness Sapp was proceeding to state, and, in fact, *did* state, matter material to the issues involved. The court excluded what had been said, and refused to permit further testimony of a like kind. The evidence offered tended to reduce the extent of recovery. It tended to prove that plaintiff was feigning, or exaggerating, his injuries so as to inflate his verdict, and was clearly relevant and proper matter for the consideration of the jury. Holding these views, I am of the opinion that the judgment of the circuit court should be reversed and cause remanded for a new trial, and, with the concurrence of ELLISON, J., who is of the same opinion, it is so ordered. SMITH, P. J., dissents for reasons set out in his separate opinion to which this is appended.

---

41 480
158s 223

ELIAS SAUNER, Administrator, Respondent, v. PHŒNIX INSURANCE COMPANY OF BROOKLYN, NEW YORK, Appellant.

Kansas City Court of Appeals, May 19, 1890.

1. **Contract:** PERFORMANCE NOT EXCUSED BY INEVITABLE NECESSITY: UNLAWFUL ACT. The rule that, where a party by his own contract creates a charge upon himself, he is bound to make it good notwithstanding any accident by inevitable necessity, because he might have provided against it by contract, is subject to the qualification, among others, that, if the thing contracted for becomes unlawful, performance becomes impossible by force of law, and non-performance is excusable.

2. **Insurance:** POLICY ON BUILDING: DEFAULT ON PREMIUM NOTE: LOSS AFTER DEATH OF INSURED: EXECUTOR, TRUSTEE: ASSIGNMENT. F. in his lifetime took out a policy of insurance on his dwelling for five years, giving his note for the premium, conditioned that, if the note was not paid when due, the policy should

cease to be in force and remain null and void, until said note was paid. F. died a few months before the note became due, and the loss occurred a few days after it became due. The note was not paid by, nor ever demanded of, the administrator, or presented to the probate court for allowance. By request of the heirs of the assured there was indorsed on the policy that the property herein insured is owned by them and loss, if any, is payable to them as their interest may appear. *Held*,—

(1) The contract being personal with the assured, his executors, etc., the executor was a proper party plaintiff to maintain an action, but he was a mere trustee as distinguished from his executorship.

(2) This characteristic of the contract cannot alter the law of real property, that realty descends to the heir, and the loss in this case was the loss of the heirs and not of the estate.

(3) That the indorsement is to be looked upon in the nature of an assignment; and it was the duty of the heirs to have paid the note at maturity and, not having done so the loss occurring while they were yet in default, the company is discharged.

Appeal from the Macon Circuit Court.—HON. ANDREW ELLISON, Judge.

REVERSED.

B. R. Dysart, for appellant.

(1) The provision in the note and policy for the suspension and avoidance of the policy, on default in the payment of the note when due, was a part of the contract between the insurer and insured, and was a valid and binding provision. In such cases a recovery upon the policy is conditioned upon the payment of the note at maturity. *Dircks v. Ins. Co.*, 34 Mo. App. 31; *Barnes v. Ins. Co.*, 30 Mo. App. 539; *McClure v. Ins. Co.*, 31 Mo. App. 62; *Palmer v. Ins. Co.*, 31 Mo. App. 467, citing 65 Mo. 78; *Bussam v. Ins. Co.*, 1 Mo. App. 228; *Gaterman v. Ins. Co.*, 1 Mo. App. 300; *Moser v. Ins. Co.*, 2 Mo. App. 408; *Ashbrook v. Ins. Co.*, 94 Mo.

72; *Klein v. Ins. Co.*, 104 U. S. 88; *Thompson v. Ins. Co.*, 104 U. S. 252. (2) It is equally well settled that no notice or demand from the insurer to the insured is necessary, unless it is so provided in the contract of insurance. The law only implies the necessity of demand and notice in cases of commercial paper, as where an indorser is sought to be held, or in the case of a guarantor, or some person who is only conditionally or collaterally liable. *McIntyre v. Ins. Co.*, 13 Ins. Law Jour. 216 (Mich. Sup. Court, 1883); *Thompson v. Ins. Co.*, 104 U. S. 232, followed in case of *Ins. Co. v. Doster*, 106 U. S. 30. See also authorities cited on first point. (3) The death of the assured and appointment of an administrator did not, and could not work, any change in the contract of insurance, nor waive any of its conditions. If the personal representative succeeded to this contract, he took it with all its burdens as well as benefits. The law can neither make nor change a contract between two parties. *Conventio vincit legem.* "The administrator's rights are purely derivative, and cannot in any event be greater than those of his intestable." *McFarland, Adm'r, v. Creath*, 35 Mo. App. 112-126; 2 Woerner Am. Law of Admin., sec. 328, *et seq.*, p. 686; 2 Parsons on Contracts, 662; *Wentworth v. Cox's Adm'rs*, 10 Adolphus & Ellis, 42, by Lord DENMORE. (4) It was the duty of the administrator to take charge of and protect the property of his intestate from damage, and every kind of peril, and, hence, to pay said note and save the policy from forfeiture. R. S. 1879, secs. 100, 101; 2 Woerner's Am. Law of Admin., sec. 329, p. 690; *Cooper v. Williams*, 9 N. E. Rep. (Ind.) 917. (5) By the change in the policy and novation of parties, as well as by the law of descents and distribution, the heirs at law of the assured were the beneficiaries of the policy, and the real parties in interest. The property burned and now sued for was real estate, and the proceeds descended to the heirs.

Wyman v. Wyman, 26 N. Y. 253; *Harrison v. Harrison*, 4 Leigh (Va.) 371. (6) It is submitted further, that, even if defendant were liable, the suit should have been in the name of the heirs, the real parties in interest, and not by the administrator. (7) "But a fatal objection to the entire case set up by the plaintiff is that payment of the premium note in question has never been made or tendered at any time." "A valid excuse for not paying promptly on the particular day is a different thing from an excuse for not paying at all." *Thompson v. Ins. Co.*, 104 U. S. 252.

John F. Williams, for respondent.

(1) Every one is presumed to know the law, and to contract with the view of abiding by the law of the state in which the contract is made. Every one is presumed to contract with a view that death is likely to happen, and, when it occurs, the remedy may be deferred and changed, though the liability remains unimpaired, as in the case of one dying while owing an outstanding note, secured by a deed of trust over due. Shall the administrator be controlled by the contract, or the law? Clearly by the law, and by the law he cannot pay this claim until it is presented to the court, allowed and classified, and then he cannot pay, legally, in less than one year. *Dullard, Adm'r, v. Hardy, Adm'r*, 47 Mo. 403; *Pickler v. Harlan*, 75 Mo. 680. (2) Was no duty devolved upon defendant by the death of assured? Is defendant above the law? Upon what meat hath it fed that it has grown so great that Missouri law cannot reach it? Other people are amenable to the law. The holder, when the maker of a negotiable note is dead, must make due presentment to the administrator, and the notary's ignorance of the death of the maker is no excuse. *Frayser v. Dameron*, 6 Mo. App. 153. (3) The policy by express terms is payable, in event of loss, to the assured, his executors, administrator or assigns. Burch could not change it, and the

court so found. So that the clear question is now presented to this court of a conflict and contention between the law and a contract. (4) The authorities cited by appellant are not in point. The 31 Mo. App., 94 Mo., etc., are all cases where the assured was living and failed to comply with his contract, enunciating a legal principle that we do not controvert. Appellant cites not a single authority to support its view of this case.

ELLISON, J.—This action is on a policy of fire insurance, insuring the property of plaintiff's intestate for a period of five years, and providing that if the premium note was not paid at maturity the policy should cease to be in force during the time it remained unpaid. The assured died a few months before the note became due, and the loss occurred a few days after it became due. The note was not paid by plaintiff nor was it ever demanded or presented to the probate court for allowance by defendant. The estate is solvent and able to pay if the note was presented and allowed. The judgment below was for plaintiff and defendant appeals. The following is the provision of the policy bearing on the question: "In case the assured fails to pay the premium note, or order, at the time specified, then this policy shall cease to be in force, and remain null and void during the time said note or order remains unpaid after its maturity, and no legal action on the part of this company to enforce payment shall be construed as renewing the policy. The payment of the premium, however, revives the policy and makes it good for the balance of its term." The case presents an important question for determination and we have arrived at a conclusion with considerable difficulty. The provision of the policy making a forfeiture in case of non-payment of the premium is one that is upheld by the courts. We will, therefore, construe the contract of

insurance disembarrassed by any consideration of a disability to incorporate such provision.

Were it necessary to so decide, we might agree to the position taken by plaintiff, that since an administrator cannot pay a premium note for insurance except it be presented by the claimant and allowed by the probate court, and that it could not be paid by the administrator without such allowance, the administrator was excused from a performance of the contract. For, where a party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. *Paradine v. Jane*, 8 T. R. 267; *Harrison v. Railroad*, 74 Mo. 364; *White v. Railroad*, 19 Mo. App. 400; *Fulkerson v. Eads*, 19 Mo. App. 620. Yet this rule is qualified in some respect; among others is this: If doing the thing contracted for becomes unlawful, performance becomes impossible by force of law, and non-performance is excusable. *People v. Manning*, 8 Cowen, 297; *Wolf v. Howes*, 20 N. Y. 197; *Monsey v. Drake*, 10 Johns. 27; *Dermott v. Jones*, 2 Wall. 1, and cases cited; *Jones v. Judge*, 4 Comst. 412; *Cowan v. Ins. Co.*, 50 N. Y. 610.

II. But by the agreed statement of facts we learn that there were heirs of the deceased and that the policy was changed by indorsement therein stating, that "it is hereby understood that the property herein insured is owned by J. A. and J. W. and Laura V. Faulkner and Nancy C. Rhinehart, and loss, if any, is payable to them as their interests may appear." This was made at the request of the parties named, who are the heirs of the deceased. It was made after the death of the deceased, but without the knowledge of the plaintiff. The question is, what effect has this upon the right of the parties? Our opinion is that it discharges the company, and for these reasons: The property insured was

real estate, and on the death of the assured it went to the heirs and not to the plaintiff. The loss was the loss of the heirs. I can find no case which holds the proceeds of an insurance policy, under circumstances like this, are assets in the hands of the administrator. The contract was a personal one, and, being with the assured, "his executors, administrator and assigns," it has been determined that the executor or administrator was the proper party plaintiff to maintain an action, but that he was a mere trustee as distinguished from his executorship. Such were the cases of *Wyman v. Wyman*, 26 N. Y. 253; *Bradford v. Ins. Co.*, 8 Abb. Prac. 261; *Lappin v. Ins. Co.*, 58 Barb. 325; *Farmers' Mut. Ins. Co. v. Graybell*, 74 Pa. St. 17; *Germania Ins. Co. v. Curran*, 8 Can. 9. In England a like ruling is had. *Norris v. Harrison*, 2 Mad. 268; *Parry v. Ashley*, 3 Sim. 97. It is true that the policy of insurance is not connected with the land, nor does it go with the land as an incident thereto by conveyance or assignment: It is considered as a special agreement with the persons named (in this case the assured, his executors, administrators and assigns) and unattached to the realty. This is the substance of high authority, both in this country and in England. *Columbia Ins. Co. v. Lawrence*, 10 Peters, 507; *Carpenter v. Ins. Co.*, 16 Peters, 495; *Carter v. Rockett*, 8 Paige, 437; 3 Kent. And this, too, is doubtless the reason for holding that the administrator is the proper party plaintiff. But such characteristic of an insurance policy or such character of contract cannot alter the law of real property. That law is, that realty descends to the heir. Upon the death of the ancestor intestate, the realty becomes the absolute property of the heir, subject to the payment of debts. The loss occasioned by the burning of a house after the death of the ancestor is the loss of the heir, the administrator being a trustee of an express trust, entitled to sue for the benefit of the heir.

The distinction must not be lost sight of between the substantial rights of the administrator and the heir, when the loss is before the death of the ancestor and when *after*. If, before the death, the loss is that of the ancestor. In such case the proceeds of the policy is personalty, for it is the owner who has been insured against loss; the property, properly speaking, is not insured. If the loss is before the death of the ancestor, but payment after, such payment will be assets in the hands of the administrator. But if the loss is after the death of the ancestor, as in this case, it is, as before stated, the loss of the heir, and the proceeds of the policy, if collected by the administrator, would not be assets of the estate, but would be held by him in trust for the heir. This is shown by two illustrations which we borrow from *Wyman v. Wyman*, *supra*. If the building had been burned, through malice of a third party, the heirs would have had the action for the wrong, as they would have been the sufferers and the administrator would have had no right. Again, if the company should elect under such policy to replace the building, whose would it be? It is plain that it would belong to the heirs. Or, to make the matter plainer, suppose the loss is partial and is repaired, who is benefited?

But, it may be suggested that the policy is not subject to assignment or transfer, even to the heirs, without consent of the company. Without assenting to, or denying this, it is enough here, that it appears by the indorsement, quoted above, that the company has assented. The indorsement may be looked upon in the nature of an assignment. Applying the foregoing principle to the case, we find that, at the time the note fell due, the property insured was the property of the heirs and that the policy had, before this, been indorsed by the company, at their request, "loss, if any, payable" to them. It was their duty then to have paid the note at

maturity, and, not having done so, and the loss occurring while they were yet in default, the company is discharged, notwithstanding the suit is by the administrator, he being, as we have seen, a mere trustee of an express trust, carrying with it a right to sue. We are supported in the views herein by the case of *The Continental Ins. Co. v. Daly, Adm'r*, 38 Kan. 601, which is much like the case at bar in its essential particulars.

The judgment will be reversed.

MARY SCOTT, Defendant in Error, v. JOHN HOWARD, Plaintiff in Error.

Kansas City Court of Appeals, May 19, 1890

Appellate Practice: ABSTRACT. Where a cause was disposed of on demurrer to the petition in the trial court and the abstract fails to set out the petition, the appellate court will dismiss the writ of error.

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

WRIT DISMISSED.

A. P. Barton and *L. H. Waters*, for plaintiff in error.

J. G. Paxton, for defendant in error.

ELLISON, J.—This cause was disposed of on demurrer to the petition in the court below. The demurrer being overruled defendant appealed to this court. The petition is for an injunction, and the

demurrer is that it does not state facts to constitute a cause of action. That "on the facts stated in said petition plaintiff is entitled to no relief." The petition is not set out in the abstract as required by our rules and we, therefore, have no means of knowing what allegations the petition may contain. We have so frequently ruled on the necessity of abstracts that we need not refer to the particular authorities. We are not alone in these decisions. The supreme court makes strict enforcement of the same rule. *Craig v. Scudder*, 98 Mo. 664; *Long v. Long*, 96 Mo. 180; *Manufacturer's Sav. Bank v. Iron Co.*, 97 Mo. 38; *Flannery v. Railroad*, 97 Mo. 192. We will, therefore, dismiss the writ of error. All concur.

J. W. RICE, Respondent, v. WILLIAM MCFARLAND *et al.*, Appellants.

Kansas City Court of Appeals, May 19, 1890.

1. **Witnesses:** ONE PARTY DECEASED, THE OTHER NOT COMPETENT: HEARSAY. Under section 8918, Revised Statutes, 1889, where one of the original parties to the contract or cause of action in issue and on trial is dead, the other party to such contract or cause of action shall not be admitted to testify, either in his own favor or in favor of any party to the action claiming under him; and consequently a defendant, the maker of the note in suit, is incompetent when called by his codefendants to prove that at a certain time the administrator of the original payee of said note notified the witness that he, the administrator, then had said note in his possession, having found it among the effects of the said payee after his death, and then demanded payment of the witness. Besides, such evidence was in this case mere hearsay, and should have been excluded.

2. **Instructions:** ASSUMING CONTROVERTED FACT. An instruction should not assume as true an allegation in the petition which is controverted in the answer and to disprove which there is evidence which should be passed upon by the jury.

8. ——: WHEN FACT MAY BE ASSUMED. Where the petition and answer present an issue of fact, yet, when the testimony is clear and conclusive, an instruction may assume the truth of the fact sworn to, and it will not be reversible error.

4. **Evidence:** CONSIDERATION DUE CIRCUMSTANCES. Circumstances, those physical facts which accompany a transaction, constitute evidence by which the jury are to determine issues between litigants, and such circumstances deserve a like consideration as to the sworn statements of witnesses. Such circumstances, mute but credible witnesses, may satisfactorily and even conclusively disprove the testimony of living witnesses.

5. ——: WHEN MUST BE SUBMITTED TO JURY: CIRCUMSTANCES. Where there is such evidence of circumstances that a court would not be justified in setting aside a verdict founded on it, it should be submitted to the jury, and the circumstances developed by the record in this case are reviewed and *held* sufficient to support a verdict, and to have been erroneously taken from the jury.

6. **Points Arguendo:—**

(1) POSSESSION OF UNINDORSED NOTE: PRESUMPTION AS TO OWNERSHIP. The possession of an unindorsed note does not relieve the holder from the presumption the note still belongs to the payee.

(2) RELEASE OF MORTGAGE: PRIMA FACIE DISCHARGE. The acknowledgment of satisfaction of a mortgage is not conclusive. Yet it is *prima facie* evidence of the discharge of the incumbrance, and throws the burden on him who sets up the incumbrance.

7. **Res Adjudicata:** SECOND APPEAL. The ruling on the former appeal of this case, to the effect that defendant Morris may be discharged, yet under certain circumstances defendant McFarland's land be charged under the deed of trust, is *res adjudicata* in this case.

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

REVERSED AND REMANDED.

Buler & Timmonds, for appellants.

(1) The court erred in holding the defendant Morris to be an incompetent witness. His testimony was objected to and excluded for the reason that he was

"party to the suit, and James A. Stearns is dead, and witness was therefore incompetent." Plaintiff had already stipulated to facts which released Morris from any liability, and which removed all his interest in the suit. His testimony was offered in favor of the defendant McFarland, and not in his own favor; and he would have been a competent witness at common law. *Meier v. Thieman*, 90 Mo. 433; 1 Greenl. [Redfield's Ed.] sec. 355. The cause of action remaining in issue between Rice and McFarland was the ownership of the note, the alleged assignment by Stearns to Rice, and it is not claimed that Morris was a party to that transaction; hence, the statute (which is an enabling and not a disabling statute) does not apply. (2) The court erred in giving instruction number 2, directing a verdict for the plaintiff. This instruction assumed that each and every material fact alleged in plaintiff's petition, and controverted in defendant's answer, actually existed, whether proven or not. It has always been a rule of practice in this state that the court cannot assume, in its instructions to the jury, the existence of controverted facts, whether controverted by the pleadings or by the evidence. *Mathews v. Railroad*, 26 Mo. App. 89, and cases cited; *Wilkerson v. Thompson*, 82 Mo. 317; *Comer v. Taylor*, 82 Mo. 341; *Peck v. Ritchey*, 66 Mo. 114. The possession of an unindorsed promissory note by a person other than the payee is no evidence of ownership in the holder. *Cavitt v. Tharp*, 30 Mo. App. 131; *Dorn v. Parsons*, 56 Mo. 601; *Kelly v. Railroad*, 70 Mo. 608; *Bowers v. Johnson*, 49 N. Y. 435. While the release of a mortgage on record is not an absolute bar to foreclosure, unless there has been actual satisfaction, yet there is evidence of a high character, and throws the burden on the party seeking to foreclose, to show accident, mistake or fraud in the release, and this must be shown satisfactorily on his part. If not so shown, the release is conclusive proof of payment. *Ferguson v. Glassford*, 35 N. W. Rep. 820; *Banking*

Co. v. Woodruff, 2 N. J. Eq. 117; *Chappell v. Allen*, 38 Mo. 213. (3) Appellate courts will reconsider a case on second appeal, and reverse themselves on same points, if wrong. *Hamilton v. Marks*, 63 Mo. 167; *Keith v. Keith*, 97 Mo. 223; *Burnett v. McCluey*, 92 Mo. 230. The case of *Burnett v. McCluey* went to the supreme court three times, being reported first in 55 Mo. 128; next in 78 Mo. 676, and last in 92 Mo. 230. And although the court held the first and second times that a sheriff's deed was void, yet, when the case came up the third time, the court was unanimous in holding the same deed to be valid, and overruled its decisions rendered on the point when before them the first two times.

Burr & Burr, for respondent.

(1) Revised Statutes, 1889, section 8918, says: "* * * Provided that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead * * * the other party to such contract or cause of action shall not be admitted to testify either in his own favor, or in the favor of any party to the action claiming under him." *Chapman v. Daugherty*, 87 Mo. 617. In the case cited by the appellant, 90 Mo. 433 (*Meier v. Thieman*), the court cites Wharton's Evidence, volume 1, section 466, who says the purpose of the statute is to provide that, when one of the parties to a litigated obligation is silenced by death, the other shall be silenced by law. *Poe v. Deming*, 54 Mo. 119; *Settin v. Shipp*, 65 Mo. 296; and *Hughes v. Groel*, 73 Mo. 538. (2) No error was made by the court by giving instruction number 2. When the testimony is all one way, and there is no question in regard to the credibility of the witnesses who gave the testimony, the court may determine the case as a matter of law in favor of the plaintiff, as well as by demurrer in the defendant's favor. *Fields v. Railroad*, 80 Mo. 206; *Slayback v. Gerkhardt*, 1 Mo. App. 333; *Boland v.*

Railroad, 36 Mo. 491; *Vinton v. Schwaub*, 32 Vt. 612. (3) McFarland cannot defeat this deed of trust, even though the note had been non-negotiable from the beginning. This we say is the law of this case, for this court says in 34 Mo. App. 404, that plaintiff is the *cestui que trust*, being the holder of the note. We call the court's attention especially to *Riley v. McCord*, 21 Mo. 285. The court here says that the personal judgment on the debt and the lien of the deed of trust are two distinct judgments. The former is not a lien longer than three years, but the latter for twenty. That the personal judgment is no estate in the land, but the lien is an estate in the land lasting until the debt is satisfied.

GILL, J.—This case is here upon appeal the second time. It was reversed and remanded at the former hearing a year ago (34 Mo. App. 404), has been tried again in the circuit court, resulting in a judgment *for* defendant Morris, but against defendant McFarland for the enforcement of a lien against his land in the sum of $781.83, from which he has appealed to this court. For an understanding as to nature of the controversy we refer to *Rice v. McFarland et al.*, 34 Mo. App. 404.

I. At the trial below the defendants offered defendant Morris as a witness by whom they wished to prove that Stearn's administrator, in the year 1883, notified him (Morris) that he, said administrator, then had in his possession the note sued on in this case, and that he had found it among the papers and effects of said Stearns after his death, and that said administrator then asked him (Morris) to pay the note. To the introduction of which evidence plaintiff objected, on the ground that witness Morris was a party to the suit, etc., and said Stearns being dead said witness was disqualified from testifying in the cause. The court sustained the objection and the evidence was excluded. In this ruling the trial court was clearly correct. While our

statute has modified the common-law rule, and no longer excludes parties to the suit, or those otherwise interested in the event of the same, from testifying, yet, "where one of the original parties to the contract or cause of action in issue and on trial is dead, * * * the other party to such contract or cause of action shall not be admitted to testify, *either in his own favor or in favor of any party to the action claiming under him*," etc. R. S. 1889, sec. 8918. The italics above indicate the words inserted in the revision of 1889, as an amendment to section 4010, Revised Statutes, 1879. Morris is a party to the action, is a party, too, to the contract in issue, and whether offered as a witness in his own behalf, or in behalf of his codefendant McFarland, is subject to the exclusive words of this statute, and not a competent witness. *Meier v. Thieman*, 90 Mo. 433. Besides this the matter offered as evidence was mere hearsay, and for that reason, too, the evidence should have been excluded.

II. The court of its own motion, in addition to a direction to the jury to find for defendant Morris (which is not here complained of) gave the following in the nature of a demurrer to the evidence of defendant McFarland, to-wit: "The court further instructs the jury that their verdict must be in favor of the plaintiff for an amount equal to the joint amount of the two notes given by Stearns to Rice, principal and interest, if the same does not exceed the amount of the note sued on, and, should it exceed said amount, then only for the amount of the note, principal and interest, from Morris to Stearns and Doan; and that the said amount so found to be due is a lien on the land mentioned in the petition."

We regard the giving this instruction a serious error, and justly meriting the complaint of defendant McFarland. The vice of this direction to find for the plaintiff, as against McFarland, is that the court assumes

as true an allegation in the petition which is controverted in the answer, and to disprove which there was evidence which should have been passed upon by the jury. The substantial matter of controversy between Rice and McFarland is, whether or not Rice, in the fall of 1877, acquired from Stearns a property right in the note or debt now sought to be charged as a lien on McFarland's real estate. Rice so alleged in his petition, and McFarland in his answer denied, that Rice had any title thereto. It will be remembered that Rice claims to derive title to the Morris note and deed of trust from a transfer by Stearns as collateral security for two notes made by Stearns to Rice in September, 1877, and January, 1878. To support this claim plaintiff introduced the deposition of one Williams, who testified, in substance, that he knew of Stearns borrowing money of Rice, and that Stearns assigned the Morris note to Rice as collateral security for the payment of notes given by Stearns for such borrowed money, etc. And this was all the evidence of such alleged transfer that was offered by the plaintiff. Defendant produced no witnesses at the trial to contradict this evidence testified to by Williams, and with such a showing the question is, was the court justified in assuming the evidence of Williams as true and to so instruct the jury. Defendant's counsel insists that the trial court cannot assume, in its instructions to the jury, the existence of controverted facts—whether controverted by the *pleadings*, or by the evidence. We are not prepared to indorse this extreme view in relation to facts put at issue by the *pleadings*, though it has the support of so able a jurist as Judge ROMBAUER, in a separate opinion by him in case of *Mathews v. Railroad*, 26 Mo. App. 89. We are of the opinion that Judge THOMPSON in the same case announces, the prevailing rule in this state. We hold with him (and believe ourselves supported by the uniform decisions of the supreme court) that, even

where the petition and answer present an issue of fact, yet, "when the testimony is clear and conclusive, an instruction may assume the truth of the fact sworn to, and it will not be reversible error." *Fields v. Railroad*, 80 Mo. 206; *Boland v. Railroad*, 36 Mo. 491; *Sawyer v. Railroad*, 37 Mo. 263; *Caldwell v. Stephens*, 57 Mo. 595; *Burlington First Nat. Bank v. Hatch*, 98 Mo. 378; *Carroll v. Railroad*, 88 Mo. 239; *Slayback v. Gerkhardt*, 1 Mo. App. 333; *Price v. Haeberle*, 25 Mo. App. 205; *Clemons v. Knox*, 31 Mo. App. 197.

We do not then feel warranted in condemning the foregoing instruction (directing the jury to return a verdict for plaintiff) simply because the fact assumed was controverted by the *answer*. But said instruction meets with our disapproval, in that it assumes to decide for the jury the existence of a substantial fact in plaintiff's favor, when the same is controverted by evidence for the defense. *Circumstances*, those "physical facts" which accompany a transaction, *constitute evidence* by which the jury are to determine issues between litigants, and such circumstances deserve a like consideration as the sworn statements of witnesses. It may be, and often happens, too, that such circumstances—*mute*, but credible witnesses—satisfactorily, and even conclusively, disprove the testimony of the *living* witness. So, then, if there are any circumstances, or "physical facts," which tend to dispute the sworn statement of a witness, they stand as controverting testimony, and should be weighed by the triers of the fact. About this sworn evidence of witness Williams, there stands much to contradict it. He swears, in effect, that, before Morris paid off the note to Stearns, the payee, said Stearns had transferred the same to plaintiff Rice. He says that this assignment by Stearns to Rice occurred in September, 1877 (as "he recollects"). Now, to oppose this, defendant relies, and has the right to rely, on the significant circumstance that there appears no

indorsement on the note of Stearns, the payee, to Rice, the claimant. From the quite universal and usual manner of transferring notes by indorsement on the back thereof, the *presumption* is that here, in the absence of an indorsement, no assignment was ever made. *Bowers v. Johnson*, 49 N. Y. 435. Rice's possession of the Morris note, unindorsed, does not relieve him from the presumption that the note still belonged to Stearns. Such possession of the note, unassigned, is no evidence of ownership. Said note was payable to the order of Stearns, and, being unindorsed by him to Rice, the presumption still exists that Stearns continued owner. *Cavitt v. Tharp*, 30 Mo. App. 131; *Bowers v. Johnson*, *supra*. And, again, in December, 1878, Stearns, by deed of release, signed, acknowledged and recorded, acquits the McFarland land of any lien or charge on account of the note Morris had made to him (and which he then claimed to yet own). While it is true that this acknowledgment of satisfaction is not conclusive, it is yet *prima facie* evidence of the discharge of the incumbrance, and the burden is placed on plaintiff Rice to show that, at the date of discharge, Stearns had nothing to discharge, in so far as the note in controversy was concerned. *Trenton Banking Co. v. Woodruff*, 2 N. J. Ch. Rep. 118; *Ferguson v. Glassford*, 35 N. W. Rep. 826-7. These circumstances, together with the long delay attending the institution of this suit, the failure on Rice's part (if holder and owner of the note) to make known any claim to this mortgage lien, permitting years after maturity to pass without naming the matter to Morris or McFarland, constitute defensive evidence well worthy the consideration of the jury trying the cause. So potent, too, is the tendency of this evidence that, had the jury found for defendant on the issue, no court would be justified in disturbing the verdict. The court in the trial of this cause clearly invaded the province of the jury. As well said by

NORTON, J., in *Kelly v. Railroad*, 70 Mo. 608, "The line which marks the respective duties and functions of the court and jury is certain and well defined. It may be said that it is the duty of the judge to decide whether there is any evidence, and the legal effect of it, and that it is the province of the jury to determine the sufficiency of it. In a case where there is no evidence to sustain a material allegation, there is nothing for the jury to consider, and the court may so declare. But when the facts are disputed, or the credibility of witnesses is drawn in question, or a material fact is left in doubt, or there are inferences to be drawn from the facts proved, the case, under proper instructions, should be submitted to the jury. It is for the jury, and not the court, to pass on the weight of evidence, where there is any evidence." These words of Judge NORTON may be considered to some extent modified by later and other decisions, to the effect that, "where the evidence is of that character that the trial judge would have a plain duty to perform in setting aside the verdict as unsupported by the evidence, it is his duty and his prerogative to interfere before submission to the jury, and direct a verdict for defendant," and I would say, in a proper case, for plaintiff as well. *Jackson v. Hardin*, 83 Mo. 186, and cases cited.

However, as already explained, this does not belong to that character of case. With the substantial evidence here in favor of defendant McFarland, no court would be justified in setting aside a verdict in his favor. Hence, in our opinion, the trial court erred in arbitrarily instructing against McFarland, thereby, in effect, declaring to the jury that they should *believe* the testimony of witness Williams to be true, although contradicted, as it was, by the patent circumstances surrounding the transaction. *Bryan v. Ware*, 4 Mo. 110; *Vaulk v. Campbell*, 8 Mo. 227; *Gregory v. Chambers*, 78 Mo. 298; *Kenny v. Railroad*, 80 Mo. 578; *Carson v. Porter*, 22 Mo. App. 184.

III. Defendant's counsel, in an able and exhaustive brief and argument, urge us to review our former holding in this case, which was to the effect that, while Morris, the maker of the note, may be discharged, yet, under certain circumstances, McFarland's land may be charged by the deed of trust. This we cannot do. The point has become *res adjudicata* in this case, and we decline, therefore, to reconsider the question at this time. See *Belch v. Miller*, 37 Mo. App. 628, and cases cited.

It follows, however, from the views hereinbefore expressed, that the judgment herein must be reversed and the cause remanded for a new trial. All concur.

KANSAS CITY, FORT SCOTT AND SOUTHERN RAILWAY COMPANY, Appellant, v. BENJAMIN F. COX, Respondent.

41 499
121 m 104

Kansas City Court of Appeals, May 19, 1890.

1. **Condemnation Proceedings:** JURY TO ASSESS DAMAGES: NEW APPRAISEMENT: EXCEPTIONS. Notwithstanding the statute in regard to condemnation proceedings, the constitution provides for the trial by jury in such cases and such right is absolute on demand and does not depend on the court's ordering a new appraisement. Demand for a jury is no part of the exceptions to the action of the commissioners, but may be made orally to the court as in ordinary cases.

2. ——: VERDICT: SETTING ASIDE REPORT. The verdict of a jury on exceptions to the report, *ipso facto*, annuls or sets aside the award of the commissioners. Action on the report is not a prerequisite to a jury trial.

3. ——: WAIVER OF JURY: RULE APPLICABLE. It would seem the land-owner would by the waiver of a jury elect to have the action of the commissioners tested under the rules governing the reports of commissioners as expounded in this state and elsewhere.

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

AFFIRMED.

John W. North and *Adiel Sherwood*, for appellant.

(1) The court erred in refusing to hear the evidence offered by plaintiff to show that the report of the commissioners was just and true and that the damages assessed were adequate and sufficient. R. S. 1879, sec. 896; *Railroad v. Probate Judge*, 14 Am. & Eng. R. R. Cases, 355; *Railroad v. Voorhees*, 14 Am. & Eng. R. R. Cases, 227; *Bridge Co. v. Ring*, 58 Mo., *loc. cit.* 494. (2) The court erred in calling a jury to fix the amount of damages defendant had sustained without first having set aside the report of the commissioners. As the record stands, the award of the commissioners is in full force and effect. The court below had no jurisdiction when it proceeded with a trial by jury. The report of the commissioners must be vacated and set aside before a trial by jury can be ordered. *Railroad v. Ridge*, 57 Mo. 599.

Thomas & Hackney, for respondent.

(1) The defendant was entitled to a jury of twelve men to try his exceptions to the report of the commissioners, and to assess his damages, and, on his demanding a jury, the court properly refused to hear the testimony offered by plaintiff to the court without a jury that the award was just and reasonable. *Railroad v. Story*, 96 Mo. 620. The fact that defendant had been denied a jury to assess his damages in the first instance was in itself "good cause shown" to authorize the court to sustain the exceptions, and order the defendant's damages to be assessed by a jury. *Railroad v. Almeroth*, 13 Mo. App. 98. (2) The statement in

appellant's brief that, "as the record now stands, the award of the commissioners is in full force and effect" is incorrect. Had counsel for appellant examined the record entries made below on the trial, they would have discovered their error. The court simply tried the exceptions to the report, and the assessment of the damages as one case. On the return of the verdict of the jury finding the issues in favor of defendant, and assessing his damages at nine hundred and fifty dollars, the court entered judgment sustaining the exceptions vacating the report of the commissioners, and also rendered judgment against plaintiff for the damages assessed by the jury. Since the decision of the supreme court in *Railroad v. Story*, reported in 96 Mo. 620, this is the proper practice.

ELLISON, J.—This is a proceeding to condemn defendant's lands in Newton county for railway purposes. Three commissioners were appointed by the circuit judge. They made their report on October 12, 1887, and an award of $277.33. Exceptions to this report embodying objections to the amount of defendant's damages were filed, and a change of venue granted to Lawrence county from whence it was transferred to Jasper county by consent. When the case was called for trial on the exceptions the defendant demanded a jury; whereupon the railway company offered to introduce testimony to the court without a jury to show that the award was just and reasonable and ought not to be disturbed, which offer was refused and the company excepted. The court then granted defendant's demand and impaneled a jury; to which action the company excepted. The issue made by the exceptions was tried by a jury and a verdict had for defendant fixing his damages at nine hundred and fifty dollars. The court thereupon rendered judgment vacating the award of the commissioners and for the amount of damages so found by the jury.

I. Plaintiff's contention here is that the court should not have acceded to defendant's demand for a jury until it first set aside the report of the commissioners for good cause shown by testimony as provided in section 896, Revised Statutes, 1879; and section 2738, Revised Statutes, 1889. This point is expressly ruled against plaintiff in the case of *Kansas City, C. & S. Ry. Co. v. Story*, 96 Mo. 611, where it is held, in an opinion by SHERWOOD, J., that, notwithstanding the statute, the constitution, section 4, article 12, provides for the trial by jury in such cases; that such right is absolute on demand and does not depend upon the court ordering a new appraisement. But it is urged that in order to obtain this privilege, the defendant must have made the demand for a jury a part of his exceptions which he filed to the report. We think not. He may make his demand orally to the court as in ordinary actions before entering on the trial. The right to demand a jury is no part of the exceptions which are taken to the action of the commissioners. It results from the exceptions, but is not a part of them.

II. In our opinion the verdict of a jury on exceptions to the report, *ipso facto*, annuls or sets aside the award of the commissioners. The constitutional right to a jury is complete without regard to any action of the court on the report and may be enforced in the face of the approval of the report. Action on the report is, therefore, not a prerequisite to a trial by jury.

III. It may not be necessary to say what the rule would be in case of exceptions where a jury was waived but as counsel has cited us to the case of *City of St. Louis v. Lanigan*, 97 Mo. 175, we will state (though it is not necessary to so decide in this case) that in such case it would seem the land-owner would by the waiver elect to have the action of the commissioners tested under the rules governing the reports of commissioners, as expounded in this state and elsewhere. That is to say, if they have been properly instructed, and have not

erred the principles upon which they have made their appraisal, and have been guilty of no misconduct, the amount named by them will not be disturbed, notwithstanding witnesses may testify to a greater sum. *City of St. Louis v. Lanigan*, *supra*, and cases cited; *City of Kansas v. Street*, 36 Mo. App. 666.

The judgment will be affirmed.

STATE OF MISSOURI *ex rel.* JAMES F. DOUGHERTY, Respondent, v. WILLIAM BEYERS *et al.*, Mayor and City Council of the City of Carthage, Appellants.

41 503
57 202
41 503
155 335

Kansas City Court of Appeals, May 19, 1890.

1. **Mandamus**: PLEADING: OFFICE OF RETURN. In *mandamus* proceedings under the Missouri practice, the alternative writ is regarded as the petition and the return thereto as an answer, and, if any distinction exists, it would seem that even greater strictness is required in the fulness or completeness of the return than in the answer; it must not merely show a *prima facie* right in the respondent, but a right to refuse the writ.

2. ——: ——: WHAT RETURN SHOULD SHOW. In a *mandamus* proceeding seeking to compel the levy of a tax to pay a judgment against a city, where the return admits the existence of the judgment and seeks to avoid the levy of the tax by showing that, under the state constitution, the city can only levy fifty cents on the hundred dollars' valuation of taxable property, and that, prior to the institution of such proceeding, the city council had already levied up to that limit, and that, in said levy, there would be no sum with which to pay said judgment, and that all money which that tax would raise would be needed for the purposes levied, such return, on demurrer, is *held* bad, in that, it fails to show for what account the judgment owned by the relator was rendered, whether the indebtedness existed at the adoption of the constitution, or was created since; the exception to the limitation of taxation being contained in the same section of the constitution as the limitation itself, it rests upon those seeking the protection of the section to negative the exception, and show, as in this case, that the matter demanded is not within the exception.

Appeal from the Jasper Circuit Court.—Hon. M. G. McGregor, Judge.

AFFIRMED.

Howard Gray, for appellants.

(1) The court erred in sustaining the motion for the peremptory writ, as the return set up three good reasons why the writ should not issue: *First.* That appellants had, prior to the commencement of this cause, caused to be levied upon the taxable property in the city the full amount of taxes that the law would permit them to levy, and that in said sum so levied would be no sum with which to pay the said judgment. *State ex rel. v. Rainey*, 74 Mo. 229; *State ex rel. v. Macon County*, 68 Mo. 29. Any additional levy would have been a nullity and the tax so levied could not have been collected. *Arnold v. Hawkins*, 95 Mo. 569. *Second.* That all taxes which the city of Carthage had power to levy and collect were needed to carry on the city government and to defray the ordinary expenses of the city, and that if they were compelled to make any additional levy, or to pay this said judgment out of any tax levied, it would disorganize the city government. *State ex rel. v. Macon County*, 68 Mo. 29; *Grant v. City of Davenport*, 36 Iowa, 401; *Coffin v. City of Davenport*, 26 Iowa, 315; *French v. Burlington*, 42 Iowa, 618; *Von Hoffman v. City of Quincy*, 4 Wall. 549. *Third.* That appellants were under no special obligation to provide for the payment of said judgment (and this was admitted to be true by the motion for peremptory writ). *Hambleton v. Town of Dexter*, 89 Mo. 188; *State ex rel. v. Justices of Town of Pacific*, 61 Mo. 155. The city of Carthage being under a special charter, the court could not take judicial notice of the powers of the city council. (2) The judgment cannot stand when appellants in

their return stated that they had already caused to be levied upon the taxable property in the city a tax equal to double the amount allowed by law; it was error for the court to render a judgment that they proceed within thirty days to make an additional levy to pay this judgment. *Hambleton v. Town of Dexter*, 95 Mo. 569; *State v. Rodman*, 43 Mo. 256. (3) The motion in arrest should have been sustained, as the tax levied in obedience to the judgment could not be collected. *Hambleton v. Town of Dexter*, 95 Mo. 569.

No brief for respondent.

GILL, J.—Appellants' counsel has furnished the following, which he denominates "abstract of the record," and to which alone he must look for an understanding of this controversy: "On the third day of June, 1889, respondent filed his petition in the Jasper circuit court, asking for *mandamus*, setting up the following grounds: *First.* That a judgment had been rendered against the city of Carthage, in the circuit court of Jasper county. *Second.* That an execution had been issued and returned unsatisfied. *Third.* That the appellants were the mayor and city council of said city, and that the petitioner was the assignee for value of said judgment. Such petition duly alleged the incorporation of the city, and stated that the respondent was without any adequate remedy at law, and in all other respects was sufficient as to form. The appellants being duly served appeared in court, and, on the thirteenth day of June, filed their return, admitting the allegations in respondent's petition to be true, but set up as reasons why the peremptory writ should not issue: *First.* That the city of Carthage is a city with less than ten thousand and more than one thousand inhabitants, and is prohibited by the constitution of the state of Missouri (section 11, article 10) from levying a tax exceeding fifty cents on the hundred dollars'

assessed valuation of the property in the city for all purposes, whether general or special, for any one year, and that, on the third day of June, 1889, prior to the time appellants had been served with a process in this cause, they had, by ordinance, duly passed and approved, levied upon the taxable property of the city of Carthage, for general purposes, a tax of fifty cents on the one hundred dollars' assessed valuation, and the further tax of fifty cents on the one hundred dollars' on the said valuation for special purposes; that, in said sum so levied, as the regular annual levy of said city, for the year 1889, would be no sum with which to pay the said judgment, and that all money which the tax would raise would be needed for the purposes levied. *Second.* That the city had no power to levy a tax in excess of fifty cents on the one hundred dollars' assessed valuation of the property located in the city, and that the property within the city was one million, six hundred thousand dollars, and that all revenue that a tax of fifty cents would raise would be needed, and all sums derived from any other sources of revenue which the city had to carry on the ordinary expenses of the city government; and that if the peremptory writ issue it would disorganize the city government to to pay the said judgment out of the tax which the said city is allowed to levy. *Third.* That there was no special obligation on the part of appellants to provide for the payment of said judgment. On the same day respondent filed motion for peremptory writ (admitting the allegations in the return to be true). On the twenty-seventh day of June, the cause coming on for hearing, the court sustained the motion for peremptory writ, to which action of the court the appellants then and there excepted." After an unsuccessful motion for a new trial, defendants bring the cause here by appeal.

I. From this very meager presentation of the case, we assume that plaintiff Dougherty, the holder of a

judgment against the city of Carthage, and after an unsuccessful effort to get satisfaction by execution, applied to the court below for a writ of *mandamus* to compel defendants, the officers of said city, to levy and collect a tax sufficient to pay said judgment. In defense, and by way of return to the alternative writ, defendants, while admitting the matters charged by plaintiff, yet sought to defeat the action by a showing, in said return made, that they had already, for the year 1889, made a levy fully up to the constitutional limit, made applicable to cities of less than ten thousand, and more than one thousand, inhabitants (such as is the class to which Carthage belongs), as provided in section 11, article 10, constitution of Missouri, and that, therefore, they ought not to be compelled to make an additional levy to pay plaintiff's judgment. It seems that in the opinion of the circuit court the return was held insufficient to justify a refusal to make the levy, and in such holding we concur.

In *mandamus* proceedings, under our practice, we regard the pleadings "much after the fashion" of pleadings in ordinary cases—the alternative writ being regarded as the petition, and the return thereto corresponding to the answer. The return is an answer to the alternative writ. *State ex rel. v. Everett*, 52 Mo. 89; Wood on Mandamus, 43. If any distinction exists, it would seem that even greater strictness is required in the fulness, or completeness, of the return than in the answer. High, in his work on extraordinary legal remedies, at section 460, says: "The proper function of the return is to show, not merely what would be a *prima facie* right in the respondent, in the absence of any allegation to the contrary, but to show a right to refuse obedience to the writ in view of the allegations which it contains and if it fails to do this it is demurrable." Now, the return here is in the nature of a confession and avoidance—confessing the judgment

liability, but seeking an avoidance of the writ of *mandamus*, because within the purview of that constitutional limitation on the power to levy taxes as contained in said section 11, article 10. The return, then, should set out *all the facts necessary* to bring the defense within such section. By that section of the constitution the annual rate of taxation for city and town purposes "in cities and towns having less than ten thousand and more than one thousand inhabitants" is fixed at not to exceed fifty cents on the one hundred dollars' valuation, etc. But by an express provision of the same clause such limitation is made to apply to taxes for payment of indebtedness *thereafter* accruing, and shall *not* apply to taxes to pay valid indebtedness existing at the adoption of the constitution, or bonds which may be issued in renewal of such indebtedness. This return in question fails to show for what account the judgment, owned by the plaintiff, was rendered—whether the indebtedness existed at the adoption of the constitution (November 30, 1875), or whether since created. There is nothing on the face of this record, or within the allegations of said return, that shows to which class of indebtedness plaintiff's claim belongs. If the said judgment was for or on account of indebtedness existing at the adoption of the constitution, or for bonds given in renewal thereof, then said restriction as to taxation did not apply. Even admitting the general rule to be that a limitation or restriction is imposed on the taxing power, and that the case of prior or existing indebtedness is an exception to that general rule, yet since the exception is contained in the same section, along with the general rule, it rests upon those seeking protection under the terms of the section to negative the exception, and show, as in this case, that the matter demanded is not within the exception. *State ex rel. v. Clark*, 42 Mo. 523; *Russel v. Railroad*, 83 Mo. 511; Sedgwick on Construction of Stat. & Const. Law, 50. The return, then, failing to set

up such facts as required under section 11, article 10, *supra*, so as to excuse defendants from making the levy of taxes demanded, it was rightfully judged insufficient. The judgment, therefore, of the circuit court is affirmed. All concur.

WETZELL & GRIFFITH, Respondents, v. DANIEL WAGONER, Appellant.

41 509
60 564
41 509
64 396
41 509
68 582
41 509
73 87
41 509
79 332

Kansas City Court of Appeals, May 19, 1890.

1. **Trial Practice**: PLEADING: AMENDMENT: AFFIDAVIT. It is proper to permit an amendment of the petition, not changing the substantial issues between the parties, so as to make it conform to the facts proven, and when the defendant omits to show by affidavit wherein he was misled or prejudiced by it, he is in no situation to complain of such action of the court.

2. ——: INSTRUCTIONS TAKEN TOGETHER. Though an instruction standing by itself may be exceptionable, yet the instructions must be taken in their entirety, and if so taken they fairly embody the law of the case, they are not subject to objection.

3. **Real-Estate Agents**: WHEN ENTITLED TO COMMISSIONS: INSTRUCTION. When property is placed in the hands of a real-estate agent for sale, he is entitled to his commissions if he brings about the sale by his exertions, or if he introduces the purchaser or gives his name whereby the sale is perfected by the principal, even though the owner vary the terms from the first negotiation; and it is error to instruct the jury that, unless the sale was effected by the owner at the price the agents were directed to take, they were not entitled to commissions.

4. **Trial Practice**: INSTRUCTIONS SUBSTANTIALLY GIVEN. It is not improper to refuse instructions substantially the same as others given.

5. **Real-Estate Agents**: WHEN ENTITLED TO COMMISSIONS: INSTRUCTIONS. An instruction basing a real-estate agent's right to commission solely upon the fact whether he actually sold the property himself is erroneous.

6. **Evidence**: GRATUITOUS SERVICES: COMPENSATION. Evidence in this case is decided to show that the services were not gratuitous, but were performed under an agreement for compensation.

Appeal from the Jasper Circuit Court.—Hon. M. G. McGregor, Judge.

Affirmed.

Thomas & Hackney, for appellant.

(1) There was a total failure of proof to sustain the allegations in plaintiffs' original petition and the defendant's demurrer to the evidence should have been sustained at the close of plaintiffs' evidence. (2) The plaintiffs sought to cure this failure by filing an amended petition at the close of all the evidence. The court erred in permitting this amended petition to be filed against defendant's objections. It entirely changed the cause of action. (3) The second instruction given for plaintiffs assumes as facts: *First.* That defendant agreed to pay a certain price to plaintiffs for procuring or introducing the purchaser; *second*, that plaintiffs were his agents; and, *third*, that the defendant made the purchaser better terms that he had made to the so-called agents. The testimony was conflicting on each of these points, and it was the province of the jury to find the facts. *Peck v. Ritchey*, 66 Mo. 121. (4) The defendant's first and fifth refused instructions were to the effect that if defendant agreed to give plaintiffs a particular sum in case they sold the land at a particular price, and that plaintiffs did not sell the farm or procure a purchaser therefor at that sum they could not recover. This is the law, and the court erred in refusing the instructions. *Gaty v. Foster*, 18 Mo. App. 645; *Reiger v. Bigger*, 29 Mo. App. 427. (5) The third instruction asked by the defendant should have been given. It was based squarely on the amended petition and required the jury to find that plaintiffs sold or procured the sale under the agreement relied on by them in their petition before finding for plaintiffs. The refusal of this instruction was tantamount to saying

that plaintiffs could recover regardless of what they did or what they based their claim upon. Likewise the defendant's fourth refused instruction required the jury before rendering a verdict for plaintiffs to find that plaintiffs had performed their duties as agents of defendant. (6) The defendant's sixth and seventh refused instructions should have been given. The defendant testified that he had refused to place his farm in plaintiffs' hand for sale, and that notwithstanding this refusal, and without any request from him, plaintiffs showed his farm to Shuler—introduced Shuler to him and told him that Shuler liked his farm and wanted to buy it, and that he made the trade without the further assistance of plaintiffs. Under these circumstances plaintiffs' services were voluntary and gratuitous, and they could not exact compensation therefor, even though their services may have been a benefit to defendant. *Lynch v. Bogy*, 19 Mo. 170.

Harding & Buller, for respondent.

(1) There was no error in allowing the plaintiffs to amend their petition so as to conform it to the facts proved. Such practice is expressly sanctioned by the statute. R. S. 1879, sec. 3567; *Bennett v. McCause*, 65 Mo. 194. It was developed on the trial that the original contract was modified by a subsequent agreement, having in contemplation a reduction in the price of the farm. This did not at all change the substantial issues, and, even if it had, the defendant failed to show by affidavit wherein he was prejudiced by the amendment, and consequently he is in no situation to complain of it here. *Gaty v. Sack*, 19 Mo. App. 470. (2) The plaintiffs' second instruction should be considered in connection with the first, and when so read it does not assume anything; and the two taken together properly presented the case to the jury. Instructions are to be considered in their combination and entirety,

and not as though each separate instruction was intended to embody the whole law of the case. (3) *McKean v. Railroad*, 43 Mo. 405. (3) The court did right in modifying the defendant's first instruction. If ignored the contingency of the defendant's taking charge of the negotiations himself, after a purchaser had been found by the plaintiffs, and voluntarily accepting a less price than he had proposed to take. If the rule defendant contends for was correct, then by selling the place himself for $7,999.99, or any other sum less than eight thousand dollars, he could defraud the agents of their well-earned commission. But such is not the law. *Woods v. Stephens*, 46 Mo. 555, 557; *Beauchamp v. Higgins*, 20 Mo. App. 514. (4) Defendant's third and fourth refused instructions were mere reiterations of the proposition laid down in the instruction which they asked and which was given by the court as modified, and for that reason, even if for no other, they were properly refused. *Bell v. Kaiser*, 50 Mo. 150. Besides which the third instruction would have tended to confuse rather than to enlighten the jury. How could they tell whether the work done under the first or the last agreement was that which was effective? Moreover, if defendant agreed to pay the commission in case plaintiffs procured a purchaser, it made no difference whether he was one they already had on hand, or one that they procured afterwards. (5) The defendant's sixth instruction ignores the contract and all that took place between plaintiffs and defendant, even according to defendant's own testimony, and was equivalent to telling the jury that even though they might believe from the evidence that plaintiffs introduced a purchaser to defendant and showed him over the farm, and worked him up to the point of trading, and defendant agreed with them that if he did trade he would pay them two hundred dollars' commission, yet, if they believed that the defendant

pitched in and made the trade himself, no recovery could be had, and the seventh is to the same effect only a little stronger, making it incumbent upon the plaintiffs to actually sell the farm themselves. But this they were not required to do. The principal is liable even if he does the actual selling himself. *Bell v. Kaiser*, 50 Mo. 150; *Tyler v. Parr*, 52 Mo. 249; *Mullen v. Parker*, 31 Mo. App. 563. (6) The instructions given fairly presented the case to the jury, and the refusal of a multitude of others, even if they had been absolutely correct, would not be error. *Norton v. Moberly*, 18 Mo. App. 457; *Harris v. Lee*, 80 Mo. 420; *Nugent v. Curran*, 77 Mo. 323; *McGrugle v. Daugherty*, 71 Mo. 259.

SMITH, P. J.—This was an action brought in the circuit court of Jasper county, by the plaintiffs, who were real-estate agents, against defendant to recover the sum of two hundred and twenty-five dollars' commissions due them for selling defendant's farm. At the trial and after the evidence was in, the plaintiffs were permitted to file an amended petition, wherein they alleged a modification of the original contract sued on to the effect that the defendant agreed with them that, if they found a purchaser for his farm at about the sum of eight thousand dollars, he would pay them two hundred dollars if he effected a sale to the purchaser so found, and that defendant did sell his farm to one Shuler, a purchaser found by them, for that sum, etc. The answer was a general denial. The evidence tended to prove that plaintiffs showed the defendant's land to Shuler and subsequently introduced him to the defendant. That defendant asked eighty-five hundred dollars for his farm which Shuler declined to pay for it. That defendant afterwards, according to his own testimony, told plaintiffs to go and tell Shuler that he would take eight thousand dollars for his farm, and if such sale was

made that he would pay them two hundred dollars' commission. The witness Dietrick testified that at the request of plaintiffs he went to Shuler and told him that one of the plaintiffs, Griffith, had told him that the defendant's farm could be purchased at eight thousand dollars. A nephew of Shuler testified that shortly after Dietrick's visit the defendant met his uncle, and the purchase of the land was agreed upon at eight thousand dollars by the defendant throwing in some farm machinery valued at three hundred dollars. The circuit court instructed the jury for plaintiffs in effect: *First.* That if the defendant employed plaintiffs to sell the farm upon commission, and if plaintiffs in pursuance of such employment procured or introduced a purchaser who bought the defendant's farm, then the plaintiffs were entitled to their commission, even though defendant, after the introduction of the purchaser to him, went and hunted up some purchaser and made a different proposition from that which he authorized the plaintiffs to make, or sold to the purchaser at a less price either by throwing in personal property or otherwise; and, *second*, that if the plaintiffs showed the property to the purchaser and negotiated with him to purchase it, and introduced the purchaser to defendant, and that, in pursuance of such negotiations defendant finally sold said property to the purchaser so found and introduced, then plaintiffs were entitled to receive the price agreed to be paid them as commission on the purchase money—provided they find plaintiffs acted, in showing said farm and negotiating for its sale and introducing the purchaser to defendant, at his request; and the fact, that defendant finally made the purchaser better terms than he had proposed to said agent, would not deprive them of their right to commission, etc. The court for the defendant instructed the jury that "although they may find from the evidence that defendant placed his farm in the hands of plaintiffs for sale, and under an

agreement with them that if they sold the same to Shuler for eight thousand dollars or provided a purchaser at that sum he would pay them the commissions sued for, to-wit: Five per cent. on the first thousand dollars and two and one-half per cent. on the balance of said eight thousand dollars, yet, if plaintiffs did not sell said farm or procure or introduce a purchaser therefor, plaintiffs are not entitled to recover, and your finding should be for the defendant." There were several other instructions which need not be set forth here, but which will be referred to presently. The verdict of the jury was for plaintiffs, and after an unsuccessful motion to set the same aside judgment was rendered, to reverse which defendant prosecutes his appeal.

I. The defendant's first contention is that the trial court erred in permitting plaintiffs at the conclusion of the evidence to amend their petition. It was proper to permit the amendment of the petition so as to make it conform to the facts proved. R. S., sec. 3567; *Blair v. Railroad*, 89 Mo. 383. This amendment, not changing the substantial issues between the parties was within the limit of the statutory rule allowing amendment of pleading and besides, if it was not, the defendant omitted to show by affidavit wherein he was misled or prejudiced by it, and consequently he is in no situation to complain of that action of the court in respect to that matter. *Burnett v. McCause*, 65 Mo. 194; *Gaty v. Sack*, 19 Mo. App. 470.

II. As to the second ground of defendant's appeal, it is sufficient to say that if the plaintiffs' second instruction is considered in connection with their first, it will be seen that there is no assumption by the court of any issuable fact. The instructions must be viewed in their entirety. If thus considered, and they fairly embody the law of the case, they will not be subject to objection, though any one of them standing by itself may be exceptionable. *Railroad v. Vivian*, 33 Mo.

App. 583; *Muehlhausen v. Railroad*, 91 Mo. 332; *Bailey v. Railroad*, 94 Mo. 600.

III. The defendant's first and fifth instructions, which told the jury, in effect, that if defendant agreed to give plaintiffs a particular sum in case they sold his farm at a specified price, and that if plaintiffs did not sell it or procure a purchaser therefor *at that price*, the plaintiffs could not recover, were improper. The rule declared in these instructions was too narrow in its scope. Its effect is to ignore the well-established principle that when property is placed in the hands of a real-estate agent for sale he is entitled to his commission, if he brings about the sale by his exertion, or if he introduces the purchaser, or gives his name, whereby the sale be perfected by the principal, even though the owner vary the terms from the first negotiations. *Beauchamp v. Higgins*, 20 Mo. App. 514; *Bell v. Kaiser*, 50 Mo. 150; *Tyler v. Pane*, 52 Mo. 249; *Millan v. Porter*, 31 Mo. App. 563. In this case the plaintiffs showed the defendant's farm to the purchaser, introduced him to defendant and by his direction had offered the purchaser the farm at a price he named; the defendant after this met the purchaser and modified the proposition which he had made through his agents, so as to make it acceptable to him. These directions instructed the jury that unless the sale was effected at the price which the plaintiffs were directed to offer the farm for, they were not entitled to commission notwithstanding the defendant made the sale by taking a slightly less sum than he had directed the plaintiffs to offer the property for. It would indeed be a singular hardship on the plaintiffs if after their successful efforts in bringing about this sale they should receive no compensation, solely because the defendant agreed himself with the purchaser to take a less sum than he had offered, through the plaintiffs, his agents, to take in the first instance. It would be quite difficult to conceive of

a principle that would give sanction to such rank injustice.

IV. The defendant's third and fourth instructions were substantially the same as the one the court gave the defendant, and for that reason were not improperly refused.

V. The defendant's sixth and seventh instructions made plaintiffs' right to recover commissions for their exertions, in bringing about the sale, dependent solely upon the fact whether they actually sold the farm themselves. These instructions are obnoxious to the principle announced in the cases cited by us in noticing defendant's first and fifth instructions in a preceding paragraph of this opinion.

VI. The evidence does not tend to show, as the defendant seems to suppose, the services rendered by plaintiffs to have been voluntary and gratuitous, but on the contrary tends to show that the same were undertaken and performed under an agreement for compensation to be paid by defendant. The verdict was clearly for the right party. No error prejudicial to the defendant being perceived in the record before us, the judgment is affirmed. All concur.

41 517
47 537

EUGENE S. LOW, Cashier, Respondent, v. THOMAS R. TAYLOR *et al.*, Appellants.

Kansas City Court of Appeals, May 19, 1890.

1. **Trial Practice: FILING INSTRUMENT: ACCOUNT. It is not necessary to file anything more than the instrument sued on, so it is not necessary to file a bill of the items constituting the consideration of the note sued on.**

2. ——: PRODUCTION OF BOOKS: COURT'S DISCRETION. Where a *duces tecum* was served while the witness was on the stand, the court's discretion was not abused in refusing to send for books, under the circumstances of this case, nor was there abuse in the manner the books produced were examined.

3. **Evidence**: SUFFICIENCY OF: ADMISSIONS OF PRINCIPAL. The evidence in this case examined and found sufficient to sustain plaintiff's case, though admissions of the principal are not conclusive against the surety.

4. **Overdraft**: INCLUDES WHAT: SURETY. A bank charged a shipper exchange on carloads of stock shipped, and included it in the total of his overdrafts. *Held*, it was properly so included as against a surety of the shipper's overdrafts.

Appeal from De Kalb Circuit Court.—HON. C. H. S. GOODMAN, Judge.

AFFIRMED.

Statement by the court.

The following is the material portion of plaintiff's petition: "That on said day the defendants, under the names of E. H. Reynolds and T. R. Taylor, by their promissory note, filed with plaintiff's original petition, herein and herewith referred to, and made a part of this petition, promised, for value received, ninety days after the date thereof, to pay to the order of the cashier of the De Kalb County Bank three hundred dollars ($300), with interest at ten per cent. per annum from date till paid. That, if the interest is not annually paid, to become as principal, and bear the same rate of interest, and payable at the De Kalb County Bank. Plaintiff further states that, as a part of said contract, it was agreed and indorsed on said note the following memorandum: "This note is made for the purpose of obtaining credit, and is held as security for any overdraft made by E. H. Reynolds, and payable only to the extent of such overdraft," which said indorsement referred to credit which said Reynolds desired with the

said De Kalb County Bank, and to such overdraft as he might make upon said bank. Plaintiff further states that the said E. H. Reynolds, before the bringing of this suit, to-wit, on the fifth day of May, 1887, had overdrawn his account with said bank in the sum of three hundred and thirty dollars and twelve cents ($330.12), which was more than the amount of said note and interest up to said date. The payment of said note was demanded of the defendants on account of said overdrafts, and payment thereof refused. That, on account of the premises aforesaid, the whole amount of said note, together with interest thereon, at the rate of ten per cent. per annum, from the fifth day of February, 1887, is now due plaintiff, and unpaid."

K. B. Randolph, for appellants.

(1) The instrument which is made the basis of this suit by respondent is a guaranty. *Bloxon v. Neal*, K. B. 1832; Chitty on Bills [11 Ed.] note p. 219. 1 Rapalje and Lawrence Law Dictionary, p. 582, and cases cited; *Railroad v. Levy*, 17 Mo. App. 503; *Barnard v. Cushing*, 4 Metc. (Mass.) 230. By the terms of the contract, Taylor, the appellant, guarantees the payment of any overdraft made by E. H. Reynolds. (2) The court erred in permitting any evidence to be introduced on the part of the plaintiff over appellants' objection until a copy of the account was filed, or incorporated in plaintiff's pleadings. R. S. 1879, sec. 3547. (3) The court erred in refusing to compel the witness, Eugene S. Low, to produce in court all of the books of original entry, showing the account of E. H. Reynolds with the bank. (4) The court erred in refusing to permit counsel for appellants to take the books into his hands for the purpose of cross-examination and inspection, and in ruling that, if the counsel wanted to see the books, he could stand up by the witness and look at them. (5) The court erred in refusing declaration of law

number 1. The finding of the court should have been for the defendant Taylor. The witness Low, who was the only witness, repeatedly confessed in his testimony that he knew nothing concerning this account, of his own knowledge; that he was out of the city when most of the transactions were had. That part of the amount alleged by him to be owing was for exchange and charges per car for shipment of cattle and hogs, but what part of the account he could not tell. Such evidence is hearsay. 1 Greenleaf on Evidence [5 Ed.] secs. 99, 100. The testimony of E. S. Low would not have made the books themselves competent. *Blacksmith Co. v. Carreras*, 19 Mo. App. 162; *Hensgen v. Mullally*, 23 Mo. App. 613. If the books themselves under his testimony would not have been competent, it was certainly incompetent for him to testify concerning their contents. *Anderson v. Volmer*, 83 Mo. 404; *Cozens v. Barrett*, 23 Mo. 544; *Adm'r v. Walson*, 20 Mo. 13; *Hisrick v. McPherson*, 20 Mo. 310; *Briggs v. Henderson*, 49 Mo. 531.

J. F. Harwood, for respondent.

(1) How, then, did the case stand before the judge who tried it? *First.* The execution of the instrument sued on was admitted. *Second.* By the terms of the instrument it matured before suit was brought. *Third.* The plaintiff proved the amount of the overdraft at the maturity of the note sued on to be $270.12. *Fourth.* The defendant offered no evidence of any kind. Now, what more did the plaintiff have to do to recover? Section 3547, Revised Statutes, 1879, does not require the items of an account to be set forth in or filed with a petition except in suits founded upon an account. *Fifth.* The defendant had completely ignored the provisions of sections 3644 and 3645, Revised Statutes, 1879, and no reason is given for waiting until the witness had been sworn on the trial of the cause to ask for the

production of books. Also the manner of examining the books after they were brought into court was clearly within the discretion of the court, and nothing in the record shows any abuse of such discretion.

S. S. Brown, for respondent.

Cited: 1 Parson's Notes and Bills, 195; *Lanheim v. Wilmarding*, 55 Pa. St. 75; *Richardson v. Anderson*, 1 Cam. 43, note; *Sherman & Co. v. Gilbert*, 29 N. J. L. 521, and cases cited; *Edwards v. Jones*, 7 Car. & Payne, 633.

ELLISON, J.—The instrument declared upon in the petition is as follows:

"$300.00. MAYSVILLE, Mo., February 5, 1887.

"Ninety days after date we promise to pay to the order of cashier of the De Kalb County Bank three hundred dollars, with interest at ten per cent. per annum from date until paid. If interest is not annually paid to become as the principal and bear the same rate of interest. Payable at the De Kalb County Bank.

"E. H. REYNOLDS,
"T. R. TAYLOR."

That part written on the back of said instrument is as follows: "This note is made for the purpose of obtaining credit and is held as security for any overdraft made by E. H. Reynolds, and payable only to the extent of such overdraft." The trial below resulted in plaintiff's favor, and defendant Taylor appeals. Taylor alone defends; his answer admits the execution of the instrument but denies there were any overdrafts.

I. It was objected at the trial that plaintiff should have filed with his petition a bill of the account showing the items thereof. It was not necessary to file anything more than the instrument sued on, which was done in this case as will be seen by reference to the petition. The fact that an account composed of items

made up the consideration of the note does not render it necessary to file such account, or to state a bill of such items.

There was no error committed in refusing to have plaintiff as a witness produce other books than those produced. The subpœna *duces tecum* was served while the witness was on the stand, and the court's discretion was not abused in refusing to send for books under such circumstances. Nor was there an abuse of the discretion of the court in its control of the manner in which the books produced were examined.

Stress is laid on what is charged to be the insufficiency of the testimony to sustain plaintiff's case, in that the witness testified, not from his knowledge, but from what he learned from the books. This objection is not well founded. The witness was cross-examined at some length as to what he knew of his own knowledge and what he learned from the books, and whether all his testimony as to the state of the account and its correctness was not based on what he learned from the books. He stated that he knew the charges were correct; "because we compared the books with E. H. Reynolds and he acknowledged the correctness of them. We compared our books all the way through." Again, on further cross-examination the witness stated: "I compared the checks and deposits with our books, and we have E. H. Reynolds' certificate that they are all right." In the absence of testimony on the part of defendants, we consider plaintiff's case was made out. Defendant Reynolds' admission was not conclusive against defendant Taylor, yet it tended to prove the case and was sufficient to base a verdict upon.

II. Objection is made as to exchange on shipments being allowed or considered by the court in making up the amount of overdrafts by Reynolds. The objection was embodied in the following instruction which the court refused: "2. The court declares as a matter of

law that an overdraft is money drawn from the bank on the check of an individual, when such individual has no money in such bank, and that charges for exchange and charges per car for shipment of cattle and hogs are not overdrafts, and cannot be charged against defendant Taylor in this case." Reynolds appears to have been engaged in shipping stock and was being furnished money by the bank. The bank charged him exchange on carloads of stock shipped and included such charges as a part of the total of his overdrafts. We are of the opinion that this came within the terms "overdraft," as used in the indorsement on the note, and, therefore, properly allowed.

The judgment is affirmed. All concur.

---

41 523
66 651
41 523
76 115
41 523
85 626
41 523
93 *567
41 523
99 * 87
172s 608

D. C. O'HOWELL, Appellant, v. THEOPHILUS KIRK, Executor, Respondent.

Kansas City Court of Appeals, May 19, 1890.

1. **Principal and Surety:** NOTICE TO SUE BY REPRESENTATIVE OF DECEASED SURETY. The executor can, by giving notice under the statute, protect the estate in his hands from a note signed by the testator as surety.

2. ——: SHOWING SURETYSHIP: KNOWLEDGE THEREOF. The relation of surety may be shown by the instrument itself or by evidence *aliunde*.

3. ——: KNOWLEDGE OF SURETYSHIP: HOLDER'S REMEDY. It is sufficient for the purpose of the surety's statutory remedy that the holder have notice of the surety's relation to the other makers of the instrument at the time he is served with notice to bring suit; and the holder can then restore the surety's obligation to its absolute quality by the proceeding as the statute requires, or by taking issue on the fact of suretyship.

Appeal from the Clinton Circuit Court.—HON. JAMES M. SANDUSKY, Judge.

AFFIRMED.

Jas. M. Riley and *Thos. J. Porter*, for appellant.

(1) An executor of a will cannot, by proceeding under sections 3896 and 3897, Revised Statutes, 1879, protect the estate from liability on a note signed by the testator. *Hickman v. Hollingsworth*, 17 Mo. 475; *Sisk v. Rosenberger*, 82 Mo. 46; *Peters v. Lindenschmidt*, 58 Mo. 464; R. S. 1879, secs. 213, 2360. (2) "In the absence of any special agreement, the relation which parties bear to each other is to be determined by the instrument to which they are parties." This is held in an action between the makers of a note for contribution. *McNully v. Patchin*, 23 Mo. 40; *McCune v. Belt*, 45 Mo. 174; *Hillegas v. Stephenson*, 75 Mo. 118. (3) In an action by the payee, before a joint maker can escape liability under the statute concerning sureties, he must show not only that he signed it as security, under a special agreement that he was to be held only as security, but also that the payee, at the time he accepted the note, had notice of such agreement. *Davenport v. King*, 63 Ind. 64; *Ward v. Ins. Co.*, 6 W. Rep. 599; *Chaffe v. Railroad*, 64 Mo. 193; *Schneider v. Scheffman*, 20 Mo. 571; *Bank v. Dunklin*, 29 Mo. App. 442.

M. B. Riley and *S. H. Corn*, for respondent.

(1) The court did not err in giving the instructions asked by the defendant, and refusing those asked by the plaintiff. The remedy afforded a surety on a note by sections 3896 and 3897, Revised Statutes 1879 (R. S. 1889, secs. 8343-4), is available to the executor or administrator for the protection of the estate. R. S. 1879, sec. 3915 (R. S. 1889, sec. 8362); R. S. 1879, sec. 194 (R. S. 1889, sec. 193); *Routon's Adm'r. v. Lacy*, 17 Mo. 399. *First.* The remedy afforded by these statutes is

a substitute for the old practice through which the release of a surety was accomplished by the aid of the court of chancery. Its object is to compel the holder of the note to proceed against the principal if he would continue to hold the surety; and it is sufficient if he proceed against the principal alone, for a notifying surety could not complain that suit was not brought against him. The omission would deprive the holder of none of his rights over against the surety; it would not avail the surety as a defense to a subsequent action against him. *Perry v. Barrett*, 18 Mo. 140, 146; *Hughes v. Gordon*, 7 Mo. 297; *Sisk v. Rosenberger*, 82 Mo. 46; *Wilcox v. Todd*, 64 Mo. 388; 1 Story's Eq. [6 Ed] sec. 327, p. 366. Suit against Thompson would have been a sufficient compliance with the statute. *Second.* Suit might have been brought against the principal and the executor of the estate jointly (Revised Statutes, 1879, section 3465), and execution upon the judgment could issue against the principal alone (*State ex rel. v. Finn*, 19 Mo. App. 557; *Prueitt v. Quarry Co.*, 32 Mo. App. 384), and, upon the return of the execution unsatisfied, the judgment and costs would be a legal and valid claim against the estate of the surety. (3) The relation of the defendant's testator to the note, and the character in which he signed it, is a question of fact, and may be proved by oral testimony. *Garrett v. Ferguson's Adm'r*, 9 Mo. 125; *Scott v. Bailey*, 23 Mo. 140; *Kuntz v. Tempel*, 48 Mo. 71; *Bank v. Wright*, 53 Mo. 153. For the purposes of this remedy it is not essential that the holder of the note should have known the relation of the notifying surety to the note at the time he took it. It is sufficient if he know it at the time the indulgence is granted. *Ins. Co. v. Hauck*, 83 Mo. 21. The notice informs him of that fact, and the statute gives him thirty days after notice to avail himself of the information. Before notice the liability of the surety is absolute; after notice, it becomes conditional, the holder may restore the obligation of the

surety to its absolute quality by proceeding as the statute requires, or he may take issue upon the fact of the suretyship of the notifying obligor. *Peters v. Lindenschmidt*, 58 Mo. 464. The court below having found from the evidence that respondent's testator was surety on the note in suit, that fact is "incontrovertible here;" the court below having been "intrusted with both law and facts," this court "will assume the facts to be as that court found them." *Hamilton v. Boggess*, 63 Mo. 233-251; *Gains v. Fender*, 82 Mo. 497-509; *O'Connor v. Theater Co.*, 17 Mo. App. 675.

SMITH, P. J.—This was an action begun in the probate court wherein plaintiff presented for allowance against the estate of defendant's testator a demand founded on a promissory note for $912.55, dated January 20, 1887, due twelve months after date, which was executed by John B. Thompson and the defendant's testator. The case was removed by appeal to the circuit court where there was a trial at which evidence was adduced tending to show that the testator was the surety of Thompson, the other maker of the note; that the defendant as executor of the testator's estate had caused notice to be served on the plaintiff requiring him to commence suit forthwith on said note against Thompson and himself as such executor; and that the plaintiff had failed to bring said suit on said note within thirty days after the service of the notice requiring him so to do. There was other evidence not material for the purpose of the consideration of the question presented for decision. The plaintiff asked these instructions, to-wit:

"1. The notice in evidence requiring O'Howell to commence suit, and his failure to do so within thirty days after the service of said notice, do not have the effect to discharge the estate of William Kirk.

"2. Thompson and Kirk were held by the note in suit as principals unless it was agreed between them

at the time the note was signed that Kirk signed the same as security, and unless it appears in evidence that there was such agreement, and that plaintiff had notice thereof at the time he received the note and parted with his money, the finding and judgment should be for the plaintiff."

These were by the court refused. The finding of the court, to which the cause was submitted without the intervention of a jury, was for the defendant. Judgment was rendered accordingly and from which plaintiff appeals.

I. The decisive question here presented is whether the defendant Kirk, who was executor of the estate of William Kirk, deceased, could protect the estate of his testator from the note which he had jointly made with Thompson to the plaintiff by giving the notice provided by sections 3896-7, Revised Statutes, 1879. This case was tried before the court, a jury having been dispensed with. The questions of fact passed upon by it are incontrovertible here. This court has only the power to review the law declared by it. *Swayze v. McBride*, 34 Mo. App. 414; *Gains v. Fender*, 82 Mo. 509. Assuming then as we must that the defendant's testator signed the note in question as surety, the single question remaining is, whether the statute which provides that "any person" bound as surety for another in any bond for the payment of money," etc., includes the executor of an estate of a deceased who had signed a note as surety in his lifetime.

This is largely a question of statutory construction. The words "any person" undoubtedly refer only to that class of persons who are bound as surety for another on bond, bill or note, etc. Is an executor, under such circumstances as the present, embraced in these terms? This statute, like others of similar import, should be construed so as to make it reasonable, practicable and just in its application. *Sisk v. Rosenberger*, 82 Mo. 46. An executor under the law is a trustee who receives

everything for the use of others. His ownership of the personal property of his testator is, under our statute, but a qualified or limited one. *Chandler v. Stevenson*, 68 Mo. 450; *Stagg v. Lennenfelser*, 59 Mo. 336; *Stagg v. Gunn*, 47 Mo. 500; *Bouggley v. Teichman*, 10 Mo. App. 257. If the testator had been living at the time of the service of the notice in this case and had given it to the payee in said note, there could be no question that his neglect to bring the suit would have had the legal effect to have discharged the testator from his liability as surety on the note. Having in view the rule of construction which has just been quoted, why is not the representative of the testator clothed with the same statutory power as the testator would be, were he living, in respect to a matter of this kind? Is it not reasonable, practicable and just that it should be so? We have made quite an extended examination of the books, and have been unable to find any authority either in those cases where, under the old practice, courts of chancery, proceeding in analogy to certain writs of the common law, denominated writs of prevention, granted, as was their custom, relief to a surety on his application for that purpose by bill of *quia timet*, nor in those when the exoneration of the surety was accomplished by a direct statutory method, which lends countenance to the contention of the plaintiff. His construction of the statutory words, "any person," is too narrow and restrictive to be reasonable. To illustrate the unreasonableness of the construction of the statute for which plaintiff contends, let us suppose an executor's testator had become surety on a note which did not fall due until after his death, and that, after it had become due, the payee took no steps to collect the same, though the amount of it is nearly or quite equal to the value of the testator's entire estate and though the principal is wasting and squandering his property and is likely to ultimately become insolvent, so that the testator's

estate will have the whole note to pay, does the statute confer upon the executor no power to protect his testator's estate in such case by giving the holder of the note the notice provided in sections 3896 and 3897, and thus compel him to bring the suit against the principal or to exonerate the testator's estate? Surely the legislature never intended by this statute to leave an executor in this helpless condition. The case of *Hickam v. Hollingsworth*, 17 Mo. 475, was where the principal himself in the note had died, and the reasons for the ruling in that case do not exist in a case like the present where the surety is dead; so that case is not a controlling authority in this.

II. As to the question whether the testator bore the relation of a surety to Thompson in the note sued on, it may be observed that this fact might have been shown in two ways: *First.* By the instrument itself, and, *second*, by evidence *aliunde* that the relation did so exist. Brandt on Sure. & Guar., sec. 18; *Garrett v. Ferguson, Adm'r*, 9 Mo. 125; *Scott v. Baily*, 23 Mo. 140; *German Sav. Ass'n v. Helmick*, 57 Mo. 100. But, as has already been said, this was a question of fact which was passed upon by the trial judge, whose finding is conclusive upon us. But it is contended that, though it did appear by extrinsic evidence that the defendant's testator was, in fact, the surety of Thompson, yet, that unless the plaintiff had notice thereof at the time he received the note and parted with his money, that such suretyship was immaterial. It was sufficient, for the purpose of this remedy, that the plaintiff had notice of the relation which the testator sustained to Thompson in respect to the note at the time he was served with the notice to bring the suit. He had knowledge of this fact from and after the service of the notice to sue, which was timely and sufficient. Brandt on Sure. & Guar., secs. 17-19; *Munoy v. Graham*, 29 Iowa, 520; *Neal v. Harding*, 2 Metcalf, 247. The

absolute liability of the surety after notice becomes conditional, but the holder may restore the obligation of the surety to its absolute quality by the proceeding the statute requires, or he may take issue upon the fact of the suretyship of the notifying obligor. *Peters v. Lindenschmidt*, 58 Mo. 464. It is thus made to appear that the circuit court did not err in rejecting the theories embraced in the instructions asked by plaintiff.

The judgment of the circuit court, with the concurrence of the other judges, is affirmed.

41 530
43 13
41 530
46 458
41 530
47 204
41 530
58 622
41 530
100 709
100 1710

HUGGINS CRACKER AND CANDY COMPANY, Respondent, v. PEOPLE'S INSURANCE COMPANY, Appellant.

Kansas City Court of Appeals, May 19, 1890.

1. **Insurance : AGENCY.** A policy-writing agent of an insurance company cannot be the agent of the insurer and the assured where their interests stand opposed.

2. **Agency : ACTS OF DUAL AGENT VOIDABLE, NOT VOID.** A contract made by one individual as agent of both parties is not void, but only voidable at the election of the principal if he come into court on timely application, and delay will be considered a waiver.

3. ——— : ——— : **PERSONAL PRIVILEGE.** The privilege of avoiding the contracts of dual agents is personal to the parties sought to be bound, and such contracts cannot be attacked by strangers.

4. **Insurance : RESCISSION OF POLICY BY DUAL AGENT : OTHER INSURER.** Plaintiff ordered G. to secure it a given amount of insurance. G., who was the agent of K. Company, wrote a thousand dollars in that company and notified the company, who ordered the policy canceled. G. noted the concellation in his books, and on the evening of the same day, to replace the K. policy, took out from the defendant in favor of plaintiff the policy in suit, which he placed in his safe to be delivered to plaintiff. That night plaintiff's property burned. The next morning G. informed plaintiff of

what he had done in reference to the two policies and plaintiff then surrendered the K. policy and took defendant's policy instead. *Held*, the cancellation of the K. policy being ratified by the parties was not the subject of assault by defendant in this suit on its policy.

5. ——— : PAYMENT OF PREMIUM. Where the custom between plaintiff's and defendant's agents was to keep mutual accounts of premiums due on policies issued for each other and to pay the difference at the end of the month, the fact that no premium was paid at the time of taking out the policy in suit, nor had been paid at the time of the loss, will not defeat the policy; the premium in effect being paid under the custom so far as the rights of the parties are concerned.

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

AFFIRMED.

Lathrop, Smith & Morrow, for appellant.

(1) "The ratification must be entire or not at all. The principal is not permitted to ratify in part." *Menkins v. Watson*, 27 Mo. 163; *Express Co. v. Palmer*, 48 Ga. 85; *Cochran v. Chitwood*, 59 Ill. 53; Meacham on Agency, secs. 174, 179, and authorities cited; *Widner v. Lane*, 14 Mich. 124; *Krider v. College*, 31 Iowa, 547; *Billings v. Morrow*, 7 Cal. 171; *Coleman v. Stark*, 1 Oregon, 115; *Loan & Trust Co. v. Walworth*, 1 N. Y. (Comst.) 433; *Bremer v. Sparrow*, 7 B & C. 310; *Fullman v. Stearns*, 30 Vt 443; *Ransom v. Wetmore*, 39 Barb. 104, also, an elaborate note citations; *Dodge v. Hopkins*, 14 Wis. 630; *Townsend v. Coming*, 25 Wend. 435; *Townsend v. Hubbard*, 3 Hill, 351; *Wallingford v. Ins. Co.*, 30 Mo. 46. (2) Instructions numbers 4, 5, 6, 8 and 10, asked by defendant, should have been given. They are the undoubted law. It is against the policy of the law and against good morals to allow an agent to act for both parties, especially without the consent of both upon full information.

But the undisputed evidence is from Mr. McGibbons himself, that the Kenton Company did not know anything of the fact that he also claimed to be acting as agent of plaintiff. Yet in the same matter of the Kenton policy, and especially in regard to the cancellation thereof, McGibbons undertook to act as agent for plaintiff and the Kenton Company. If that were a void act, it could not be ratified. McGibbons it was who received the notice of cancellation from the Kenton Company, sent to him undoubtedly as its agent, and in total ignorance of any agency on his part for plaintiff; and the only cancellation attempted was not in accordance with the provisions of the policy, but simply by a pencil memorandum in his own office and not communicated to plaintiff—a mere annotation on the record that was the official register of his dealings with his own company. *Grace v. Ins. Co.*, 109 U. S. (278) 282 and 283; *White v. Ins. Co.*, 120 Mass. (330) 333; *Hodge v. Ins. Co.*, 33 Hun. (583) 587; *Von Wein v. Ins. Co.*, 52 N. Y. (490) 494. The Kenton Insurance Company could cancel its policy only by strict compliance with the conditions of the policy relating thereto. *Runkle v. Ins. Co.*, 6 Fed. Rep. (143) 148; *Stebbins v. Ins. Co.*, 60 N. H. 65; 3 Lansing (N. Y.) 427; *Mills Co. v. Assurance Co.*, 125 Mass. 110; *De Steiger v. Hollington*, 17 Mo. App. 388; *Ritt v. Ins. Co.*, 41 Barb. 353; *Rothschild v. Ins. Co.*, 74 Mo. 44; *Ins. Co. v. Allen*, 80 Ala. 571; *Ins. Co. v. Allen*, 80 Ala. 576; *Grace v. Ins. Co.*, 109 U. S. 281; *Von Wein v. Ins. Co.*, 52 N. Y. 494; *Herman v. Ins. Co.*, 100 N. Y. 411; s. c., 53 Am. Rep. 197; *Griffey v. Ins. Co.*, 100 N. Y. 417; *Ins. Co. v. Turnbull*, 5 S. W. Rep. (Ky.) 542; *Body v. Ins. Co.*, 63 Wis. 157; *Broadwater v. Ins. Co.*, 34 Minn. 465; 26 N. W. Rep. 455; *Kohler v. New Orleans*, 23 Fed. Rep. 709; *Hermann v. Ins. Co.*, 1 Cent. Rep. 707; *Ins. Co. v. Fussell*, 3 N. E. Rep. 67; *Griffey v. Ins. Co.*, 1 Cent. Rep. 628. (3) There was no cancellation before the

fire, except the mere annotation on McGibbons' book. But that is insufficient of itself because if it were otherwise, then McGibbons would be allowed without the knowledge and consent of both parties to act as agent for both in a matter where the interests were antagonistic. The results of such agency are void, and not capable of being ratified because agreements void in their inception, on grounds of public policy, cannot be rendered good and valid by ratification. Nor can any number of subsequent promises give validity to a contract originally void by policy of the law. *Poor v. Ins. Co.*, 2 Fed. Rep. 432; Greenwood on Public Policy, 8, and cases cited; Greenwood on Public Policy, p. 302; *Ritt v. Ins. Co.*, 41 Barb. (N. Y.) 353; *Ins. Co. v. Ins. Co.*, 17 Barb. 32; *Ins. Co. v. Ins. Co.*, 20 Barb. 468. (4) When McGibbons had procured and placed the five thousand dollars' insurance, that was an end of his authority—and, without further power, had no right to procure the policy sued upon, or to undertake to cancel, or consent to have canceled, the Kenton policy. *Wilson v. Ins. Co.*, 140 Mass. (210) 212; *Hodge v. Ins. Co.*, 33 Hun. (N. Y.) (583) 588; *Stebbins v. Ins. Co.*, 60 N. H. (65) 70; *Body v. Ins. Co.*, 63 Wis. (154) 161; *Mills Co. v. W. A. Co.*, 125 Mass. 110.

Allen H. Vories, for respondent.

(1) The acts of McGibbons, as agent of the plaintiff and the Kenton Insurance Company, were not void, but only voidable at the election of one of the parties. The defendant in this action cannot avail itself of any such defense,—such contracts are voidable by the parties alone, provided they apply to the proper court in a reasonable time to have them set aside—otherwise, they are presumed to assent to them—and are as much bound by them thereafter as though they were not

affected by original infirmity, and all objections will be deemed waived. *Greenwood v. Spring*, 54 Barb. 376; *Ins. Co. v. Ins. Co.*, 20 Barb. 469-471, and cases cited; *Waddell v. Williams*, 50 Mo. 218-222; *Grayson v. Weddle*, 63 Mo. 523-539; *Ward v. Brown*, 87 Mo. 87; *Parsoll v. Chapin*, 8 Wright (Pa.) 9-13, 14-15; *Ins. Co. v. Ins. Co.*, 17 Barb. 133-7; *Fitzsimmons v. Ex. Co.*, 40 Ga. 330; 2 Am. Rep. 577; *De Steiger v. Hollington*, 17 Mo. App. 389, and cases cited; *Shelton v. Homer*, 5 Metcalf (Mass.) 467; *McCarty v. Dolfsen*, 5 Johns. 43-48; *Harrington v. Brown*, 5 Pick. 521; *Gallatin v. Cunningham*, 8 Cowen, 376-7; *Colden v. Walsh*, 14 Johns. 414-15; *Williams' Ex'r v. Marshall*, 4 Gill (Johns.) 376; *Connelly v. Hammond*, 51 Tex. 635; *Small v. Railroad*, 55 Iowa, 582; *Miller v. Land Co.*, 56 Iowa, 374; *Copeland v. Ins. Co.*, 6 Pick. 197-204; *Ins. Co. v. Ins. Co.*, 55 N. Y. 350; *Martin v. Judd*, 60 Ill. 78; *Kearney v. Vaughan*, 50 Mo. 284-7-8. Notice to the agent of defendant, when he issued the policy in suit, that McGibbons was acting as the agent of plaintiff and the Kenton Insurance Company, was notice to defendant, and the evidence fully discloses that fact. *Ins. Co. v. Ins. Co.*, 42 Mo. 456; *Combs v. Ins. Co.*, 43 Mo. 149; *Hayward v. Ins. Co.*, 52 Mo. 181; *Hereford v. Bank*, 53 Mo. 330; *Pelkington v. Ins. Co.*, 55 Mo. 173-9; *Breckinridge v. Ins. Co.*, 87 Mo. 62-71.

Lathrop, Smith & Morrow, for appellant on rehearing.

(1) The issue, then, of double agency is raised in the reply. Plaintiff's counsel seek to get rid of the Kenton policy by the exercise of an agency, which the law forbids, and which the law declares absolutely void, because against public policy. Take the double agency out of the case and the Kenton policy remains intact. *Fuller v. Dana*, 18 Pick. 472; *Spinks v. Davis*, 32

Miss. 152; Greenwood on Public Policy, p. 1; *Van Valkenburgh v. Ins. Co.*, 51 N. Y. 465; *Cooper v. Ord*, 60 Mo. 420; *Cunningham v. Snow*, 82 Mo. 587; *Lee v. Porter*, 18 Mo. App. 377. Again, the cancellation claimed to have been made by McGibbons, not being enforceable at law, but being void as against public policy, could not be ratified. No number of subsequent promises can infuse vitality into a contract originally void by the policy of the law. Greenwood on Public Policy, p. 8; *Ass'n v. Berghaus*, 13 La. Ann. (209) 210; *Negley v. Lindsay*, 67 Pa. St. (217) 227; *Shelton v. Marshall*, 16 Tex. 344; *Chamberlain v. McClurg*, 8 W. & S. Pa. 31; Greenwood on Public Policy, pp. 1-2; *Egerton v. Brownlow*, 4 H. of L. Cases, 1; Greenwood on Public Policy, p. 2, and cases cited; *Crawford v. Wick*, 18 Ohio St. 190, 204; *Stanton v. Allen*, 5 Denio, 434. And by void is meant that courts will refuse to enforce it. Then, with reference to the ratification of such contract, we refer to rule 9, which provides that no agreement, void in its inception by rule 2, can be given operative force by the ratification of the parties, even after the accomplishment of the object. Greenwood on Public Policy, p. 8, rule 4; *Skenk v. Phelps*, 6 Brad. Ill. (612) 619; *Coppell v. Hall*, 7 Wall. 538; *Thompson v. Warren*, 8 B. Mon. (Ky.) 491.

SMITH, P. J.—This suit was brought by the plaintiff against the defendant, an insurance company, to recover an amount of nine hundred and seventy-five dollars on its policy of date of November 1, 1887, covering the period of one year, on account of loss by fire consuming the stock in trade of plaintiff on the night of November 4, 1887. Said policy covers the stock destroyed. The only defense made by the answer of defendant is, that S. S. McGibbons was the agent of the Kenton Insurance Company, and, as such, issued on the twenty-sixth of October, 1887, its policy in favor

of plaintiff for one thousand dollars on the same stock of goods covered by defendant's policy, and delivered it to plaintiff, covering a period beyond the fire which destroyed plaintiff's property; that McGibbons, at the same time, took out other policies in favor of plaintiff, to place for it an additional five thousand dollars' worth of insurance, and that the risk covered and designed to be carried by the defendant company, and the policy of the defendant was intended as a substitute for the Kenton policy; that, after the delivery of the Kenton policy, but before said fire, the Kenton Company, not wishing to carry said risk, advised and directed its agent McGibbons to have the same canceled; that said Kenton policy contained the *clause*, "This policy may, at any time, at the option of the company, be canceled by giving notice in writing to the assured, or his legal representative, the company shall thereafter return a ratable proportion of the premium, etc.; and that no agent shall waive," etc.; that, at the time of said direction to cancel, the Kenton policy was, and continued to be until after said fire, in possession of plaintiff; that plaintiff had no notice of such cancellation from the Kenton Company, nor did McGibbons notify it thereof, and that no written notice was, before said fire, given by said Kenton Company to plaintiff, or its legal representative; that said McGibbons, after receipt of such notice to cancel, whilst still acting as the agent of the Kenton Company, solicited M. W. Bennett, the agent of the defendant, to issue the policy sued upon, for the express purpose of substituting the same in place of the Kenton policy, to cover and embrace the same property and risk, and for like amount as that covered by the Kenton policy, and that, for such purpose, defendant's agent issued and gave to McGibbons the policy in suit. All of which was done by said McGibbons without the knowledge or consent of plaintiff. Defendant further charged such substitution was

not made prior to the fire, and that such substitution was never made; that nothing was ever paid to or received by defendant company or its agents by way of premium for said policy; that said policy never took effect, and was never delivered to plaintiff until after the fire; that McGibbons did not undertake or make such substitution or cancellation until after said fire, at which time the loss complained of had occurred, and the property ceased to exist.

Plaintiff, for reply to defendant's answer, charged that for three years prior to the issuing of the Kenton policy, Samuel S. McGibbons had been, and was, the sole and trusted agent of plaintiff in placing and controlling all its insurance, to cancel, replace and substitute policies at his pleasure and discretion without consulting plaintiff, and said plaintiff, at all times, ratifying and confirming whatsoever he did; that, after the issuing of the Kenton policy and before said fire, said company notified said McGibbons that it would not carry said risk, and to cancel said policy; that no premium had yet been paid to said Kenton Company for its policy; that, on the third day of November, 1887, before said fire, McGibbons, as the agent of plaintiff, and in pursuance of the power and authority in him vested, in good faith and in due course of business, procured from defendant's agents, in Kansas City, Missouri, the policy of defendant company in suit, covering the same risk and amount of the Kenton policy, dated November 1, 1887, for one year, and, thereupon, received said policy, as the agent of plaintiff, in lieu of and as a substitute for said Kenton policy, and deposited the same in his safe until such time as he could deliver it to plaintiff and marked in his books under the entry of Kenton policy, "Refused to carry, and canceled;" that defendant's policy was not delivered to plaintiff until the day after the fire, when McGibbons reported that the Kenton Company had

refused to carry said risks; that he had canceled its policy, and taken that of the defendant company as a substitute therefor. All of which acts of McGibbons the plaintiff then and there approved, and delivered up said Kenton policy to said McGibbons to be delivered up to said Kenton Company. There were other matters set up in the replication which are not necessary to be stated here.

The evidence tends to show that S. S. McGibbons, who procured the policy of insurance in suit from the defendant company, had, for four or five years prior to the issue of such policy, been the general agent of plaintiff—having in charge all its insurance—placing it in such companies and amounts as he might select, and at his discretion changing policies from one company to another; canceling and substituting policies for those canceled, at his pleasure, without consulting plaintiff in reference thereto; the only restriction upon him being in reference to aggregate amounts of insurance, which plaintiff controlled, but with full power and authority to such agent to keep plaintiff's insurance full up to amount directed. Said agent paid premiums for plaintiff, received return premiums on canceled policies, giving plaintiff credit for them, keeping account of all moneys received and paid out, and from time to time making reports to plaintiff, and collecting money from it on insurance account, and during all of said time plaintiff had approved his every act. Plaintiff never knew, when it gave an order for insurance to said agent, what companies it was insured in, nor what amount each company carried until the agent reported his action to plaintiff; plaintiff leaving the whole matter of insurance to McGibbons, and whatever was done in that line was done by him. In all the time mentioned, there were but one or two departures from this mode, and that was under special circumstances when plaintiff directed that certain insurance be given to a certain

agent, of which McGibbons was informed and gave his consent. That he kept an account of all the policies of insurance in favor of plaintiff, and the time when they would expire, renewed these policies and changed insurance from one company to another, at his discretion, without ever consulting plaintiff, frequently getting from plaintiff all its policies, and examining them to see whether they were concurrent or safe, and made whatever alteration he deemed proper in description of property insured, or changed policies from one company to another, and when one policy expired or was canceled, in order to keep plaintiff's insurance full, took out others in their stead, and, when he got through with his examination, would return the policies to plaintiff. That he had explicit instructions from plaintiff to keep its "insurance full." That plaintiff had nothing to do with its insurance further than to inform McGibbons of the amount of insurance it wanted kept up on its stock, and to pay him from time to time his bills for premiums when reported. That McGibbons received an order from plaintiff, about October 26, 1887, to place five thousand dollars' additional insurance for it. That he did so, placing one thousand dollars of the amount in the Kenton Insurance Company, which he represented, and delivered the policies to plaintiff. A few days after this he received written notice from the Kenton Company, that it would not carry the risk, and to cancel the policy. His clerk, on the forenoon of November 4, 1887, from the letter received, wrote on his policy register book, under the entry of the Kenton policy: "*Risk refused—canceled.*" In the afternoon of that day, he procured from Bennett, the policy-writing agent of defendant, the policy sued on, dated back to November 1, 1887. He intended this policy to take the place of the Kenton policy, which had been canceled. That this latter policy was taken on the authority and instructions of plaintiff, in order to keep the insurance of

plaintiff full up to the amount required of five thousand dollars. That Bennett delivered the policy so issued to him for the plaintiff; nothing being said as to any payment of premium—there being mutual accounts of insurance between them, which they settled up monthly. That he then substituted this policy for the Kenton, which had been canceled. That he put this one in his safe, and that night the fire occurred. That as soon as he saw Mr. Vories, who was the secretary and treasurer of plaintiff, and who had charge of the insurance of said company, he told him what had been done, who said: "All right;" that he delivered the policy sued on to Mr. Vories, who surrendered to him, unconditionally, the Kenton policy and he returned it to the home company. That he afterwards tendered to the agent of defendant in Kansas City, Missouri, Mr. Bennett, in a short time after the fire, the premium of twenty-two dollars, who declined to receive it; saying his company had instructed him not to take the premium. This money was tendered in court, and under stipulation was not deposited. Plaintiff in two days after the fire gave notice of loss to defendant, and in due time made proof of loss, which was duly received by defendant at its home office in Pittsburg, Pennsylvania. One L. S. Baker appeared as adjuster for defendant and made out the proof of loss for defendant company, sent it to defendant, and this was returned by defendant to plaintiff with a note declining to pay the loss, nine hundred and seventy-five dollars, on the sole ground that it did not think it was liable under its policy. Plaintiff recovered judgment, from which defendant appealed to this court.

I. Numerous points have been suggested and pressed upon our consideration in this case. Indeed the ingenuity which counsel have displayed in evolving theoretical deductions from the record is only exceeded by their research in collating and citing authority in

support thereof. But after all it seems to us that the underlying and decisive question is one of agency. Whether a policy-writing agent of an insurance company may be the agent of the insurer and the assured where their interests stand opposed, is the question which we have to decide. The law which commands what is right and prohibits what is wrong, we think, does not tolerate an agency of this kind. It has laid the rigorous hand of its iron interdict upon such an agency. For one successfully to ride two horses at the same time, going in opposite directions, is a feat in equestrianism remaining yet to be performed. The authoritative declaration that no man can serve two masters has reached us sanctioned by the experience of ages. Said Chief Justice STONE in *Ins. Co. v. Allen*, 80 Ala. 571: "Such shifting use of a paid employe finds no sanction in that sturdy morality which should underlie every system of jurisprudence." In *DeSteiger v. Hollington*, 17 Mo. App. 388, it was said: "We then have Beery acting as agent for both parties, his conduct in this particular giving evidence of the deep wisdom of the law in declaring such an act fraudulent and of no effect. Agency or employment for two parties in antagonistic interests is not a worthy position to occupy. It is not possible for a man to serve two masters, with opposing interests, honestly, at the same time. The right of one or the other, or both, will necessarily suffer. The temptation for wrong is too great for ordinary human nature. So jealous is the law as to the relation between principal and agent that, in passing on questions of this character arising between them, the mere fact of the discovery of no actual fraud or bad faith does not relieve the case in the least. The cases are nearly if not quite uniform, where the double employment exists and is not known. No recovery can be had against the party kept in ignorance, and the result is not made to turn on the presence or absence of

designed duplicity and fraud, but is a consequence of established policy." In *Mercantile Ins. Co. v. Hope*, 8 Mo. App. 408, it was said that, "The antagonism which exists between the opposite parties to a bargain is generally recognized by law. Each acts and has a right to act with a view to his own interest and they deal at arm's length. Accordingly if one acts by an agent that agent should be not nominally but really in place of the principal with his self interest undisturbed by calculations as to the interest of the opposing party. This, as well as the exercise of the best skill and judgment of his agent as to the contingencies of the bargain, the principal has the right to demand. Accordingly a contrivance which reduces the two parties to one and admits an agent representing antagonistic interests to make a bargain by himself is so far against the policy of the law that the contract is held void." And this statement of the law was approved by us in *Reese v. Garth*, 36 Mo. App. 641. In *Atlee v. Fink*, 75 Mo. 100, it was declared that "one employed by another to transact business for him has no right to enter into a contract with a third person which would place it in his power to wrong his principal in the transaction of the business of the latter, and which would tempt a bad man to act in bad faith towards his employer." In the case of *Ins. Co. v. Ins. Co.*, 17 Barb. —, it was remarked *inter alia;* "The general principle that a party cannot act for himself in the same *transaction* in which he *undertakes* to act for another is well settled, and the validity of a contract in which he acts and to which he is a party as agent for a third person and also in his own behalf does not depend upon the question whether he makes an advantage by the transaction but the policy of the law, and without inquiring whether it is beneficial to the principal or into the actual good faith of the agent *declares the act void.*" In *Fuller v. Dana*, 18 Pick. 472, the court said "the law avoids contracts and

promises made with a view to place one under wrong influences; those which offer him temptation to do that which may affect injuriously the rights and interests of third persons. In *Spinks v. Davis*, 32 Miss. 152, it is said: "It is a sufficient objection to a contract on the ground of public policy that has a direct tendency to induce fraud and malpractice upon the rights of others." And to the same effect are numerous other authorities which it is unnecessary to cite here.

Now it may be conceded that McGibbons in the matter of issue of the policy to plaintiff in the Kenton Company and the subsequent cancellation thereof acted as the agent of the insurer and the insured. An agency of this kind is, as we have seen, under legal condemnation. But were the acts of such double agent void, or only voidable? In *Greenwood v. Spring*, 54 Barb. 375, it was said that, "A contract made by one individual as agent of both parties *is not void, but only voidable* at the election of the principal if he come into court on timely application. *The rule seems to be founded on the danger of imposition;* and such agreements are regarded as constructively fraudulent. It is not necessary for a party seeking to avoid such a contract to show that any improper advantage has been gained over him; it is at his option to repudiate or affirm the contract, irrespective of any proof of actual fraud. But unless application be made within a reasonable time to set it aside a valid title will pass, if it be upheld by a sufficient consideration and proper forms have been observed. If application to set it aside be not made within a reasonable time, the delay will be considered a waiver." This doctrine is fully supported in other well-considered cases. *N. Y. C. Ins. Co. v. N. P. Ins. Co.*, 20 Barb. 469; *Parsoll v. Chapin*, 8 Wright (Pa.) 9; *Waddell v. Williams*, 50 Mo. 218; *Allen v. Ransom*, 44 Mo. 263; *Grayson v. Weddle*, 63 Mo. 523; *Thornton v. Quinn*, 43 Mo. 153; *Wand v. Brown*, 87 Mo. 468; *Red-*

dic v. Garneau, 49 Mo. 389. The acts of such double agents are not *ipso jure* or *per se* void. *Jackson v. Walsh*, 14 John. 406.

If the agreements of McGibbons in his character of dual agent were only voidable the question is, who could take advantage thereof? This is a privilege which is solely personal to the principal. As a defense it has been likened to that of usury and the statute of limitations which is not available to either trustees, assignees or creditors. *Kearney v. Vaughan*, 50 Mo. 284; *Greenwood v. Spring, supra; McCarty v. Van Dolfson*, 5 John. 4, 3; *Harrington v. Brown*, 5 Peck. 519; *Connelly v. Hammond*, 50 Tex. 635; *Gallatin v. Cunningham*, 8 Cow. 376; *Martin v. Judd*, 60 Ill. 78; *Shelton v. Homer*, 5 Metc. 467; *Copelan v. Ins. Co.*, 6 Peck. 197. The cases in this state cited in the preceding paragraph also fully sustain this view. The term "void" is often used loosely and indefinitely both in statutes and by courts and does not usually mean that the act or proceeding is an absolute nullity. "Many things are called void which are not absolutely so, and as to mankind generally are treated as valid. They can only be called relatively void. Conveyances, assignments, etc., in fraud of creditors are declared by statute to be void as to such creditors, yet they become perfectly good unless attacked by such creditors." A thing is void which is done against law at the very time of doing it and where no person is bound by the act; but a thing is voidable which is done by a person who ought not to have done it but nevertheless cannot avoid it himself after it is done." *Kearney v. Vaughan*, 50 Mo. 284. So that in cases within and without this state where this term is used in relation to the acts of dual agents it is not to be understood as implying that his acts are absolute nullities. It is used interchangeably with the term "voidable." It must needs follow from what has been stated that the acts of McGibbons in and

about the cancellation of the Kenton policy were at most but voidable, and subject, under the rule which has already been quoted, to be repudiated by the parties whom it was sought to bind, but that it was not the subject of attack by strangers. If the rescission of the policy in the Kenton Company was voidable on account of the double agency of McGibbons, yet as the parties thereto ratified the same it stands as if it had been accomplished by the parties themselves instead of through the double agency of McGibbons. The policy of the plaintiff in the Kenton Company was, then, as to this defendant, properly canceled. The mode or manner of the cancellation of the Kenton policy was a matter that concerned only the parties to it and it was not subject of assault by the defendant in this suit.

When the policy sued on was issued by the defendant to the plaintiff, the policy which had been issued to it for a like amount in the Kenton Company was not then in force having previously been canceled. The plaintiff had then no policy in force in the Kenton Company. The defendant issued its policy to the plaintiff to take the place of the Kenton policy. The procurement of this policy by the plaintiff's agent, McGibbons, completed the execution of the plaintiff's order for five thousand dollars' additional insurance.

All the previous and contemporaneous conversations and negotiations between McGibbons, the agent of plaintiff, and the agent of defendant, in respect to the issue of the policy in the defendant company were merged in that policy. It was delivered to plaintiff's agent before the fire, and whether the premium was actually paid or not was not essential to the validity of the policy. *Keim v. Ins. Co.*, 42 Mo. 38; *Baldwin v. Ins. Co.*, 56 Mo. 151; *Kohn v. Ins. Co.*, 1 Wash. C. C. 93; *C. M. M. Ins. Co. v. Ins. Co.*, 19 How. 318.

And especially is this so under the custom existing between McGibbons and Bennett, the defendant's agent,

of keeping mutual accounts for premiums due on policies issued for each other and paying the difference at the end of each month. Under this existing custom the premium was paid, or it was paid in effect so far as the rights of the parties to this controversy are to be affected by it. We are compelled to think that at the time of the fire all the conditions existed which were requisite to the validity and efficacy of the policy in the defendant company.

We cannot discover in the view which we have taken of the case that the question of ratification arises at all. The procurement of the policy in the defendant's company was within the previous authority conferred upon McGibbons by plaintiff as its agent. Being unable to discover any errors in the record before us which materially affect the merits, it results that the judgment must be affirmed. All concur.

---

41 546
43 12

41 546
50 88

41 546
54 156

41 546
124m376
58 410

41 546
64 272

41 546
69 204

41 546
187 393
87 395

ADAM BECRAFT and Wife, Appellants, v. GREEN A. LEWIS, Public Administrator, Respondent.

Kansas City Court of Appeals, May 19, 1890.

1. **Administration:** SITUS OF ASSETS: PUBLIC ADMINISTRATOR. Where the payor of a note resides in a county in this state, the *situs* of the asset is there, notwithstanding the note itself is in another state, and where the probate court, upon such note being brought into this state for administration, found, on an investigation, that it was liable to be wasted, injured or lost, and that deceased left no widow or heir in this state capable of administering, good cause existed for ordering the public administrator to take charge of the same.

2 ——— : WILL: PASSING TITLE TO PERSONALTY: NON-RESIDENT TESTATOR. The administrator takes the title to personalty, while the heir takes the title to real estate, but the heir or devisee of personalty can only secure the title thereto through administration, and

the fact that the testator resided and died in another state, and that the legatee resided there, makes no difference in the application of the rule (there having been no administration in such other state). SMITH, P. J. (*dissenting*), *holds*, the title to the note in question in this case, in passing from the deceased to the representative, by operation of law, was intercepted and cut off by the bequest in the will, which passed the title to the legatee.

3. ——: NO DEBTS. In this case, the suggestion that there are no debts owing by the estate should have little weight.

4. ——: RIGHT OF RELATIVES. Where it appears that the only relatives of the deceased (married daughters) are incapable of administering, their right may be considered relinquished.

Appeal from the Schuyler Circuit Court.—HON. ANDREW ELLISON, Judge.

AFFIRMED.

Shelton & Dysart and *C. C. Fogle*, for respondents.

(1) The estate involved in this controversy is not of that character, mentioned or contemplated by law, which authorizes the public administrator to take charge of. Our statutes provide just what estates the public administrator shall take charge of; the law provides what conditions said estates shall possess, and, when any estate is wanting in any condition precedent, then the public administrator has no authority to take charge of it; and the probate court cannot authorize him to take charge of it. Because it is settled law that, though probate courts possess a certain original jurisdiction, as regards matters of administrations, yet that jurisdiction can only be exercised in the manner prescribed by the statutes. *Powers v. Blakely*, 16 Mo. 437; *Lake v. Meier*, 42 Mo. 389; *Coil v. Pitman, Adm'r*, 46 Mo. 51; *Baldwin v. Whitcomb*, 71 Mo. 651; *Jefferson County v. Cowan*, 54 Mo. 234; *Riggs v. Cragg*, 89 N. Y. 479; *Davidsburg v. Ins. Co.*, 90 N. Y. 526; *Friesler v. Shepherd*, 92 N. Y. 251; *Elliott's Estate v. Wilson*, 27

Mo. App. 218; R. S. 1889, sec. 299. (2) The public administrator has no authority outside of the statute, because of the rule, *Expressio unis, exclusio est alterius. Matthews v. Skinker*, 62 Mo. 329; *Maguire v. Savings Ass'n*, 62 Mo. 344; *Ex parte Snyder*, 64 Mo. 58; *Dyer v. Branch*, 2 Mo. App. 432. (3) J. W. Anthony died in Davis county, Iowa, leaving a last will, whereby his widow is made tenant for life of his realty, and sole legatee, with absolute ownership as to all personalty. He left no debts in Iowa, nor elsewhere. An absolute title to the personalty vested in the widow immediately, and she and all parties in interest have so treated it. Mrs. Anthony is the absolute owner of the note or indebtedness involved in this administration, and she alone is competent to maintain an action in regard thereto. *Moreton v. Hatch*, 54 Mo. 408; *Trecothic v. Austin*, 4 Mason, 16; *Goebel v. Foster*, 8 Mo. App. 443–445. (4) If an administration is warranted in this case at all, then the kindred of deceased Anthony, or those entitled to distribution in the estate, were entitled to preference. There was no citation issued by the probate court, no renunciation filed, nor was there any proof taken on the proposition as to whether any one resided in the state entitled to preference under sections 7, 8 and 9, Revised Statutes, 1879. *Skelly v. Veerkamp*, 30 Mo. App. 49; *Mulanphy v. County Court*, 6 Mo. 291. But two things give jurisdiction, person and property. In this case, the person was a non-resident of this state, and the note was held by him without the state, and never within the state until brought here for the purpose of this administration. By the terms of the will of Anthony, the personalty was given absolutely to the widow, and if we admit that the public administrator is legally in charge of his estate, still, this note, being the absolute property of a living person, by the terms of Anthony's will, is not subject for administration, nor of inventory among the

assets of Anthony's estate. Woerner's Am. Law of Admin., sec. 205, p. 441; *Beers, Ex'r, v. Shannon*, 73 N. Y. 292; *Goodlett v. Anderson*, 7 Lea, 286, 289; *Shakespeare v. Fidelity Co.*, 97 Pa. St. 172; *Speed v. Kelly*, 59 Miss. 47; *McCabe v. Lewis*, 76 Mo. 296; *Goebel v. Foster*, 8 Mo. App. 443-445.

Edward Higbee, for respondent.

(1) Becraft's note is assets in this state, and can only be collected by an administrator appointed in this state. *McCarty v. Hall*, 13 Mo. 480, 484; *Naylor's Adm'r v. Moffat*, 29 Mo. 126; *Wood v. Matthews*, 73 Mo. 477, 483; *Parsons v. Lyman*, 20 N. Y. 112, 113, 117; *State ex rel. v. Moore*, 18 Mo. App. 406. (2) Letters may be granted in any county in this state, upon the death of a non-resident. R. S. 1879, sec. 4, last clause of section. (3) By the order directing the public administrator to take charge of the estate of deceased, it was judicially ascertained that there were no persons in this state entitled to priority in administering. The deceased left two married daughters in this state, who are the only persons in this state entitled to distribution. They are not entitled to administer, and it was not necessary to issue citation to them. R. S. 1879, secs. 6, 7, 8. (4) It is no objection to granting letters of administration in Missouri, that there have been none granted in Iowa, the domicil of the deceased. *Spraddling v. Pipkin*, 15 Mo. 118; *Wood v. Matthews*, 73 Mo. 477, 483. (5) Nor is it an objection that the deceased owed no debts. *Naylor's Adm'r v. Moffat*, 29 Mo. 126, end of op.; *Parsons v. Lyman*, 20 N. Y. 103, 117, 119; *Wilkins v. Ellett, Adm'r*, 9 Wall. 740. (6) There having been no administration in Iowa, Mrs. Anthony, the legatee, cannot enforce collection of Anthony's note on Becraft, by suit in this state, without the intervention of an administrator. *State ex rel. v. Moore*, 18 Mo. App. 406, and cases cited. (7) There

had been no administration upon Anthony's estate. Hence it was clearly within the discretion of the probate court to direct the public administrator to take charge of Anthony's estate, under section 306, Revised Statutes, amended 1885, page 28. See clause 8. *Callahan v. Griswold*, 9 Mo. 775, 782; *Headlee v. Cloud*, 51 Mo. 301, 302. The case of *McCabe v. Lewis*, 76 Mo. 296, is wholly unlike this case. See 4 syl., p. 296, and p. 304.

ELLISON, J.—This proceeding is to revoke the authority of the defendant, the public administrator of Schuyler county, to administer on the estate of J. W. Anthony, deceased, late of Davis county, Iowa. It was begun on the motion of plaintiffs in the probate court. The motion was overruled and appealed to the circuit court where it was again denied and the plaintiffs appeal. At the trial it was admitted that defendant Lewis was ordered by the probate court of Schuyler county to take charge of the estate of J. W. Anthony, deceased, and is assuming to act as the administrator of the estate of said J. W. Anthony, deceased. That said Anthony at the date of his death in 1885, and for many years theretofore resided in Davis county, Iowa. That he died at his home in Davis county, Iowa, leaving a will whereby he gave his widow, who is now living in Davis county, Iowa, all his personalty, absolutely, with life-estate in his realty with remainder in his children and their descendants. That said Anthony, at his death and for many years prior thereto, had two sons-in-law, residents of Schuyler county, Missouri, who have ever since been residents of Schuyler county, Missouri, and have large families by their wives, daughters of said Anthony, and that said Anthony had no other kin in this county. That at said Anthony's death he held a note purporting to have been executed by plaintiff, Adam Becraft, whereby it appears said Becraft owed him about six hundred dollars, which note is the subject of the administration of

defendant Lewis. The said note at the time of said Anthony's death was held and owned by him in Davis county, Iowa, and was never in the state of Missouri until brought here for the purposes of the administration by defendant. That defendant is public administrator of Schuyler county, Missouri. That no one applied under sections 7 and 8 of the Revised Statutes for letters on the estate of said Anthony. R. CAYWOOD, probate judge of Schuyler county, Missouri, testified as follows: "I am probate judge of Schuyler county, Missouri, and was when defendant was ordered to take charge of and administer upon the estate of J. W. Anthony, deceased. There was no notice or citation issued to either of the two daughters, or to either of their husbands, or to any one else before granting letters to defendant. That there was no renunciation of preference in the right to administer filed with the court. That there was no proof taken at or before granting letters to defendant as to whether any one resided within the state, who, under the law, was preferred in the administration of the estate. That defendant proceeded in the administration under the order of the probate court, and not of his own motion, and it was agreed that there had been no administration of said estate in Davis county, Iowa, the home of deceased, and that his widow had taken charge of all his personalty under the will, and is using and disposing of it as her own, and that Anthony left no debts."

The payor of the note resided in Schuyler county, Missouri, and, therefore, the *situs* of the asset was in this state notwithstanding the note itself was in Iowa. *McCarty v. Hall*, 13 Mo. 480; *Partnership Estate of Henry Ames & Co.*, 52 Mo. 290. The note was brought or sent into this state for the purpose of administration. We have, then, property or assets in this state, and the probate court believing it became the duty of the public administrator to take charge of the estate entered the following order: "It appearing to the court that John

W. Anthony, deceased, late a resident and citizen of the county of Davis and state of Iowa, died on or about December, 1885, leaving an estate in Schuyler county, Missouri, consisting of personalty, choses in action and real estate, that is liable to be wasted, injured or lost; that said deceased left no widow or heir in this state capable of administering, and no person has administered on said estate; and, it further appearing to the court that it is necessary and desirable that an administration should be had upon said estate in this state, it is therefore ordered that Green A. Lewis, public administrator in and for said county of Schuyler, take possession of and administer upon the estate of said deceased in this county." Whether the court thought itself justified in making the order by either subdivision four, five or six of section 306, Revised Statutes, 1879, we need not consider. We regard it as quite clear that as there were assets in Schuyler county of an unadministered estate, which, as the probate court has found, were liable to be wasted, "injured or lost," "good cause" existed for ordering the public administrator to take charge of the same, as provided by that section.

The discussion of this case has brought up the question of the rights of Mrs. Anthony, the widow, to whom the deceased willed the note in question, it being contended, that she took the title under the will and that there was, therefore, nothing belonging to the estate upon which to administer. It is fundamental law, *first*, that on the death of any one leaving property, the administrator takes the *title* to personalty, while the heir takes the title to real estate; *second*, the heir or devisee of personal property can only secure the title through administration. And this is true though there are no debts, and the heir be the sole distributee. These propositions are sustained by the following authorities: *State ex rel. Hounsom v. Moore*, 18 Mo. App. 406; *Weeks v. Jewett*, 45 N. H. 540; *Wood v. Bagley*, 13

Wend. 453; *Marshall v. King*, 24 Miss. 85; *Allen v. Simmons*, 1 Curtis, 122; *Short v. Farmer*, 4 Dev. & Batt. 122; *Whit v. Ray*, 4 Ind. 14; *Miller v. Eastman*, 11 Ala. 609; *Murphy v. Hanrahan*, 50 Wis. 485; *Bradford v. Felder*, 2 McCord Ch. 168; *Naylor v. Moffat*, 29 Mo. 127 and 129. The case of *Morton v. Hatch*, 54 Mo. 408, does not hold differently from these views; for, in that case the question was, "did the bequest in the will of Morton made and probated in the state of Kentucky, *after his estate had been fully administered and settled*, have the effect to vest the title to the demand in plaintiff?" It being admitted that there were no debts in Missouri, thereby making it unnecessary to retain the property to pay debts to our citizens, it was held that the devisee could sue and recover in her own right. But it will be observed that her title had become perfected by administration in Kentucky. Such administration being a necessary prerequisite to the title of an heir or devisee of personal property. Authorities, *supra*. The will of the personalty being executed according to the laws of Kentucky and administration having been had and closed there, the title became perfect in the devisee but subject to be retained here by force of our *statute* for the benefit of any creditors who were citizens of this state. I do not consider the case in any way conflicting with the position we have taken.

The fact that the deceased resided and died in Iowa and that the legatee resided there makes no difference in the application of the rule. There was no administration in Iowa, and consequently, as we have seen, no title vested in Mrs. Anthony even under the case of *Morton v. Hatch*. The asset, then, was an asset of the estate, the title to which vested in the administrator, and administration is justifiable if for no other reason than to transfer the title. The administrator's right to the property is exclusive of "distributees and of all

oers w homsoever." *Naylor v. Moffat*, 29 Mo. 126. This is not only demonstrated by the authorities cited above, but is the result to be deduced from an unbroken line of decisions of our own courts. In *Smith v. Denny*, 37 Mo. 20, it is held that the title to personalty passes to the administrator and that the heirs cannot sue for an injury thereto; and that there must be administration before there can be adjudication in court. This was affirmed in *Hellman v. Wellenkamp*, 71 Mo. 407.

The suggestion that there were no debts owing by the estate should have little weight. I know of no way, short of the period of limitation, by which it can be definitely known that there are no debts left by a deceased person. And if we can dispense with administration simply by offering proof that no debts are *known* to exist (which is all that testimony could show) we would make much confusion and overturn well-recognized modes of procedure.

Generally, the relatives of a deceased, who are mentioned by the statute, are entitled to administer and must be notified before their right is considered relinquished. R. S. 1879, secs. 7, 8. But, in this case the only relatives were two married daughters who are incapable of administering (section 6, Revised Statutes, 1879), and so the probate court has found.

The authorities above cited show (the principle being approved everywhere) that this debt cannot be collected, except through an administrator appointed in this state; the necessity, therefore, becomes apparent, without further illustration, for the order appointing the public administrator. It would be a singular spectacle to have this plaintiff, who is the debtor, escape his debt by sustaining his motion to disable any one from suing him. There is no question in our minds as to the power of the probate court under section 306, Revised Statutes, to order the estate into the hands of the public administrator when in its judgment good

cause exists to prevent its being "injured, wasted, purloined or lost." *Headlee v. Cloud*, 51 Mo. 301; *Callahan v. Griswold*, 9 Mo. 784.

It will be readily seen that authority asserting the right of a devisee of *real estate* or "*immovables*" to sell such property without letters of administration is not at all applicable to the point here. Nor is authority applicable which holds that an executor with power of sale of *real estate* may sell without administration, he in such case being a trustee under the will, as we decided in *Compton v. McMahan*, 19 Mo. App. 494.

The judgment, with the concurrence of GILL, J., will be affirmed; SMITH, P. J., dissents.

SMITH, P. J. (*dissenting*).—I am constrained by my convictions of the law to dissent from the opinion of the majority for the reason that it is conceded that Anthony died in the state of Iowa where his domicile then was and for many years theretofore had been; that he left a will whereby he gave to his widow "all his personal property absolutely," and that she had taken charge of the same as her own under the will, and that the deceased left no debts. The terms "personal property," when not limited in their operation by other words, are broad enough to include choses in action, and so a bequest of all one's personal estate passes his notes and other choses in action. *Cuchter v. Syms*, 3 Atk. 61; *Speed v. Kelly*, 59 Miss. 47. The bequest in Anthony's will passed the title to the Becraft note to his widow. Under the law of this state the real estate of a decedent goes to the heir while the personal estate goes to the representative. The title to the Becraft note in passing from deceased to the representative by operation of law was intercepted and cut off by the bequest in the will. *Morton v. Hatch*, 54 Mo. 408; *Trecotlick v. Austin*, 4 Mason C. C. 151; *Walworth v. Root*, 40 Fed. Rep. 723; *De Forest v. Thompson*, 40 Fed. Rep.

375; *Lewis v. McFarland*, 9 Cranch, 151; Story on Confl. of Laws, sec. 509. It is quite obvious, therefore, that none of the existing conditions are here found which authorized the exercise of the jurisdiction of the probate court in making the order in question. The Becraft note being the property of Mrs. Anthony and not of the administrator when appointed, there was no basis upon which the jurisdiction could rest. *Senis v. McCabe*, 76 Mo. 296 and 307. I think, therefore, that the judgment of the circuit court should be reversed, and the cause remanded with directions that such orders be made on motion to the probate court as will revoke the authority of the public administrator in respect to the estate of Anthony, the deceased.

---

41 556
52 127
53 50
41 556
56 462

PICKNEY L. POWERS, Appellant, v. GEORGE L. BRALEY, Respondent.

St. Louis Court of Appeals, May 20, 1890.

1. **Partnership**: EFFECT OF LEVY ON FIRM ASSETS UNDER EXECUTION AGAINST ONE MEMBER FOR DEBT OF THE FIRM. If judgment be obtained against one member of a copartnership upon indebtedness of the firm, and property of the copartnership be duly levied upon and sold under the execution issued on such judgment, the purchaser at that sale acquires all the title of the copartnership, and not merely the interest of such member, to such property.

2. **Justices of the Peace**: CERTIFICATE AS EVIDENCE OF HIS OFFICIAL CHARACTER. If a copy of a justice's docket be certified by another person, who claims to be the successor of such justice, and who has in his possession and custody the books and papers of such justice, the certificate of such person, that he is the successor of such justice, is *prima facie* evidence of the fact so certified, and renders the certified copy admissible without extraneous evidence of his official character.

3. **Constables: OFFICERS DE FACTO: VALIDITY OF OFFICIAL ACTS.** If one be the acting constable of a township, and not a mere intruder, the fact that he has not given bond as constable will not invalidate a levy and sale made by him.

4. **Replevin: EQUITABLE RIGHTS.** *Semble* that, after the dissolution of a copartnership composed of two members, of whom one has contributed the entire capital of the firm, and the other has received all the profits of its business and has no beneficial interest in its remaining assets, the former may by suit in replevin recover personal property of the partnership in the possession of the latter, notwithstanding that there has not been an accounting between the two partners.

Appeal from the Stoddard Circuit Court.—HON. JOHN G. WEAR, Judge.

REVERSED AND REMANDED.

Houck & Keaton, for appellant.

(1) Plaintiff had the general property in the mill and was entitled to the immediate and exclusive possession thereof according to the evidence. Story on Part., secs. 90, 94, 97 and 101; *Fleming v. Clarke*, 22 Mo. App. 218; *Phelps v. McNeely*, 66 Mo. 554. (2) Plaintiff purchased from Kelly, who purchased the property under a sale to pay a partnership debt, and his possession thereunder for two years entitled plaintiff to recover. *Weak v. Elter*, 81 Mo. 375, and cases cited; *Phillips v. Schall*, 21 Mo. App. 38, 42; *Andrews v. Costigan*, 30 Mo. App. 29; *Phelps v. McNeely*, *supra*. (3) Notice to one partner, or service on one member of a firm is sufficient to authorize a judgment to sell partnership property to pay a partnership debt, and confer a title on stranger to such judgment. *Bank v. Altheimer*, 91 Mo. 190; Story on Part., sec. 263; *Hagar v. Graves*, 25 Mo. App. 165. (4) Each partner can dispose of the partnership effects for the purpose of paying its debts, and so by law, sale under execution

for a firm debt against one member, transfers the property of the firm. *Weil v. Simmons*, 66 Mo. 517; *Bank v. Brenneisen*, 97 Mo. 145. (5) The firm debt is a lien on the firm property, and its sale to pay such debt conveys title to firm property. *Priest v. Chouteau*, 85 Mo. 398.

J. L. Fort, for respondent.

BIGGS, J.—This action of replevin was instituted for the recovery of the possession of a sawmill and appurtenances and two pieces of steamboat pipe. The suit was begun in the circuit court, and plaintiff's petition was in the usual form. The defendant filed an answer, in which he admitted that the property was in his possession and that he detained it from the plaintiff, but he denied the plaintiff's right to its exclusive possession, and consequently his right to maintain the action, for the reason that the plaintiff and the defendant owned the property sued for as tenants in common. The cause was submitted to the court sitting as a jury, and the finding and judgment were for the defendant. The plaintiff, being dissatisfied with the result, has appealed the case to this court.

The evidence in the case tended to show that the property in dispute, except the two pieces of steamboat pipe, formerly belonged to the firm of J. L. Powers & Co., composed of the plaintiff, the defendant and one J. W. Evans; that the sawmill and other property used in connection with it were purchased by the firm in July, 1884, and that, on the seventh day of January, 1885, the defendant bought the interest of Evans in the firm, and thereupon the partnership was dissolved and ceased to do business; that, in February, 1885, Allison & Co. instituted a suit before a justice of the peace in Wayne county against the members of the firm upon a firm obligation (the original summons which was read

in evidence showed that the plaintiff *only* was served with notice of the suit; it appears, however, from an inspection of the copy of the docket entries of the justice offered in evidence by the plaintiff, but excluded by the court, that judgment was rendered against all the members of the firm); that the property in controversy was, on the fourth day of April, 1885, sold under an execution issued upon this judgment, and one Samuel R. Kelly became purchaser; that, on the fifth day of June, 1885, the plaintiff purchased the property from Kelly and continued thereafter in the possession of the same until the fifteenth day of October, 1887, when it was taken by some one from the plaintiff's premises in Wayne county and removed to Stoddard county, where it was shortly afterwards found in the possession of the defendant.

Upon this state of the proof the court gave the following declaration of law: "The court declares the law to be that, if the return of the constable on the summons issued by W. A. Davis, justice of the peace, in the suit of W. S. Allison & Co. against J. L. Powers, G. R. Braley and J. W. Evans, only shows service on J. L. Powers, then the judgment and execution thereon was void as to G. R. Braley and J. W. Evans, and the sale of the property under said execution was void and did not affect any interest the defendant G. R. Braley had in said property."

If the judgment before the justice was, as a matter of fact, entered without notice to the defendant and Evans, it is a nullity as to them, but is good as to Powers, who was properly served with notice; therefore the instruction of the court, in so far as it declared the judgment to be void as to the defendant, was correct. But we cannot yield our assent to the further conclusion that the sale of the partnership property under the execution against Powers in no way affected the defendant's title thereto. This question is one of

first impression in this state, so far as we are now advised, but we think that both reason and authority sustain us in the conclusion that, where a judgment has been obtained against one partner only on an unquestioned firm obligation, and personal property belonging to the firm is levied upon and sold to satisfy such judgment, the sale will pass to the purchaser the entire title. This conclusion is not unreasonable, but it is in harmony with the law governing partnerships. It is well settled that one partner can sell, in the regular course of business, all the goods of his firm; he may bind the other members as makers or indorsers of negotiable securities, provided the transactions are within the scope of the partnership business; he can pledge or mortgage the personal assets of the firm to secure the payment of a partnership debt; he has authority to sell to a firm creditor the firm assets to pay a partnership liability, and, therefore, when a judgment is obtained against a single partner upon a partnership obligation, and the personal assets of the firm are taken on execution to satisfy the judgment, such levy must be regarded as an application by the partner, through legal process, of the joint fund to the satisfaction of a joint debt. And it would make no difference whether the judgment against the partner was involuntary or by confession; the result would be the same. This position in no way militates against the well-known doctrine that one partner cannot confess a judgment against his copartners, because such judgment would bind the separate estate of the members, and this would be beyond the scope of partnership authority. But this principle is not violated by permitting a judgment against a single partner for a firm obligation to be satisfied by the sale of partnership property. In such cases the court would restrain the execution to partnership effects and to the separate estate of the partner personally bound. *Ross v. Howell*, 84 Pa. St. 129;

Harper v. Fox, 7 Watts and Serg. 142; *Taylor v. Henderson*, 17 Serg. & Rawle, 456; *Tapley v. Butterfield*, 1 Met. (Mass.) 515; *Dubois' Appeal*, 38 Pa. St. 231; *Brinkerhoff v. Marvin*, 5 John. Ch. 320; *Whittemore v. Elliott*, 7 Hun. 518.

Our conclusion necessarily leads to the condemnation of the theory upon which the circuit court proceeded. That court was of the opinion that the sale to Kelly could not convey the defendant's interest or title to the property sold, and that the purchase only made Kelly the owner of the plaintiff's undivided interest and constituted him a tenant in common with the defendant. Treating the plaintiff as a purchaser from Kelly of this undivided interest, the court applied the general rule that replevin will not lie at the suit of one tenant in common against another, because the one is not entitled to the exclusive possession of the joint property as against the other. Our conclusion is that, if there was a valid judgment against the plaintiff based on an unquestioned firm obligation, and the sale was properly conducted, Kelly obtained by his purchase the full title of the firm, and, if the plaintiff afterwards became the owner of the property by purchase from Kelly, he must be regarded as its sole owner and entitled to its possession as against the defendant.

There are some other minor questions involved, concerning which we ought to indicate our opinion, as the same matters are likely to occur on another trial. The plaintiff offered in evidence a copy of the docket entries in the case of Allison & Co. *v.* Powers & Co. The copy was made and certified by a justice of the peace, who claimed to be the successor in office of the justice rendering the judgment, and who had in his possession and custody the books and papers of his predecessor. The court held that the copy was not properly certified, and excluded it. In this we think

the court committed error. Section 2325, Revised Statutes, 1879, is as follows: "Copies of proceedings had before a justice of the peace, where such justice is out of office, certified by the justice who is in possession of the docket and papers of such justice, or by him in whose lawful custody they are, shall be received in evidence in any court in this state." The objection made was that the certificate by the justice that he was the successor in office of the justice, who rendered the judgment, was no evidence of that fact. This identical objection was raised and passed on by the supreme court in the case of *Linderman v. Edson*, 25 Mo. 105. The court, in substance, decided that the fact that the justice certifies the papers officially raises a presumption that he is lawfully possessed of them, and that such presumption would continue until the contrary was shown. To the same effect is the case of *Kronski v. Railroad*, 77 Mo. 362.

There was some question raised on the trial, and it has been argued here, concerning the validity of the levy and sale made by C. C. Wills, acting constable of the township. The evidence was to the effect that he was acting constable both before and after the sale, but had not given bond. It nowhere appears that he was a mere intruder; therefore, we must conclude that he was an officer *de facto*, as his official acts were publicly recognized. The acts of a *de facto* official, whether judicial or ministerial, are valid so far as the public and third parties are concerned. *Ex parte Snyder*, 64 Mo. 58; *Fleming v. Mulhall*, 9 Mo. App. 71; *State ex rel. v. McCann*, 11 Mo. App. 596. The objection made by the defendant, that a justice of the peace has no authority to appoint a third person to serve final process, goes for nothing, because it nowhere appears in the record that Wills was especially deputized by the justice to make the levy and sale.

But, if it be conceded that the sale by Wills was invalid, yet, under the evidence as preserved in the

record, we are of opinion that the plaintiff's right of recovery ought not to be defeated by reason of the fact that there had been no formal settlement of the partnership affairs of J. L. Powers & Co. The plaintiff testified, and there is no proof to the contrary, that the firm was dissolved in January, 1885; that Kelly bought and received the possession of the property in April, 1885; that the defendant offered to buy the property from Kelly, thereby admitting the validity of the purchase by him, and that he (plaintiff) held the property for two years, as a purchaser from Kelly, and not as a member of the firm. And the plaintiff also testified that he furnished all the money to pay for the mill in the first instance, and that the defendant received all the profits of the partnership business. The circuit court seems to have treated this evidence as irrelevant to the issues, and to have held that it could only be admissible in a chancery proceeding to adjust the copartnership accounts. Courts deal, or at least ought to deal, with the substance of things and not their mere form. Why should the law permit the defendant to seize upon this property in the hands of the plaintiff, and then defend and justify his act and his subsequent conduct upon the sole ground, that there had been no adjustment of the partnership business, when the record shows (without contradiction) that the defendant as a member of the firm could have no beneficial interest in the property. Why should the plaintiff be turned out of court and driven to another form of action to obtain his property? Since the case of *Dilworth v. McKelvy*, 30 Mo. 149, our replevin statute has received a liberal interpretation, and it has been held to possess sufficient flexibility to adjust all equities arising in the action. *Dougherty v. Cooper*, 77 Mo. 535; *Lewis v. Mason*, 94 Mo. 558; *Gillham v. Kerone*, 45 Mo. 487; *Boutell v. Warne*, 62 Mo. 350. We are not prepared to say that the doctrine of the cases cited can be so extended in replevin suits as to

authorize, in ordinary cases, the adjustment of partnership accounts in order to settle the rights of contending partners to the possession of partnership property. But, under the facts of the present case, we can imagine no reason for driving the plaintiff to his equitable action to regain possession of his property, since under the evidence the defendant had no interest therein. However, this view of the case would only become of practical importance on a retrial, in the event the sale of the constable should be deemed invalid.

Our conclusion necessarily requires a retrial of the case. The judgment will, therefore, be reversed and the cause remanded. All the judges concur.

---

41 564
71 539

HAUGHEY LIVERY AND UNDERTAKING COMPANY, Respondent, v. JOHN G. JOYCE *et al.*, Appellants.

St. Louis Court of Appeals, May 20, 1890.

1. **Pleadings:** WAIVER BY ANSWER. An objection to a petition on the ground that the suit was brought directly in the name of a person as plaintiff, instead of being brought in the name of the city of St. Louis to the use of such person, is waived by answer to the petition, notwithstanding that a demurrer to the petition on that ground was previously filed by the defendant and overruled by the court. A defendant can only preserve such an objection by standing on a demurrer assigning it.

2. **Practice, Trial:** VARIANCE. If a petition alleges that plaintiff was about to erect a building on a lot of land and employed the defendant, a city surveyor, to survey the lot for the purpose of ascertaining the boundary lines thereof, and its depth below the grade of the street, and the proof shows that the defendant was employed to furnish plaintiff with a conventional grade in use for the erection of buildings, to-wit, a grade nine inches above that of the street, this constitutes simply a variance, and not a failure of proof.

Appeal from the St. Louis County Circuit Court.
HON. W. W. EDWARDS, Judge.

AFFIRMED.

Martin, Laughlin & Kern, for appellants.

J. J. McCann, for respondent.

BIGGS, J.—This is an action on the official bond of the defendant John G. Joyce, one of the surveyors for the city of St. Louis. The other defendants signed the bond as sureties. The bond is for the penal sum of fifteen thousand dollars, and was made payable to the city of St. Louis, and conditioned for the faithful discharge by Joyce of the duties imposed upon him by law as such surveyor. The petition, after stating the appointment of Joyce, as one of the city surveyors, and the terms and conditions of the bond, alleged his employment by the plaintiff in the following language: "And plaintiff for its cause of action states that in October, 1886, aforementioned, being about to erect a large and costly stable building on its lot of ground on the south side of Easton avenue east of Sarah street in city block number 3732 of said city of St. Louis, plaintiff, through its chief officer Mr. Haughey, whom it authorized for that purpose, employed defendant Joyce to survey said lot for the purpose of ascertaining east, west, north and south line thereof, and its depth below the grade of Easton avenue, on which the lot fronted. * * * That, through his (Joyce's) negligence, incompetency and misconduct, he located the east line of the lot two inches west of its true location in the front of the lot, and eleven and one-half inches east of its true location in the rear end of the lot; that he located the west line of the same three and one-half inches west of its true location in the front, and five inches east of its

true location in the rear end of the lot; that through his further negligence, incompetency and misconduct he mislocated the depth of said lot below the grade of Easton avenue on which it fronted, to the extent of ten inches, by which plaintiff was led to believe its lot was ten inches higher than was the fact." The plaintiff then averred that he erected a two-story, brick building in conformity with the survey, by reason of which it was greatly damaged.

The defendants demurred to the petition on the ground that it failed to state a cause of action. The court overruled the demurrer and the defendants filed an answer tendering the general issue. The cause was submitted to the court without the aid of a jury, and the finding was for the plaintiff in the sum of five hundred dollars, and judgment was entered accordingly. From that judgment the defendants have prosecuted this appeal.

At the close of the evidence the court, at the instance of the plaintiff, gave the following instruction:

"The court instructs the jury that, if they find and believe from the evidence that defendant Joyce was, during the month of October, 1886, a qualified and acting city surveyor of the city of St. Louis, and that he and defendants Higgins, Slattery and John P. Mullaly, since deceased, executed the bond mentioned in the petition; that in the said month of October, 1886, defendant Joyce, as such surveyor, was employed by plaintiff or its duly authorized officer to survey and plat the lot mentioned in the petition for plaintiff, to ascertain the true boundaries and proper grade of said lot, for the purpose of building thereon; that said Joyce accepted said employment, and that, in making said survey, either by himself or another person appointed by him to act for him, [he] so negligently or unskilfully made said survey as to mislocate the east and west boundary lines of said lot, and to designate materially

incorrect and erroneous grades for the north line of said lot at its eastern and western corners, and that plaintiff, relying on said survey and the plat thereof, made by said Joyce and given in evidence, erected its buildings, following the boundary lines and grades given in said plat, and that, thereby, plaintiff, relying on said plat, erected said buildings partially on lands not owned by plaintiff, both on the east and west of its own land, and and further erected said buildings below the proper grade of said lot; and if it further appear that in consequence thereof the said buildings were rendered wholly or partially valueless to plaintiff for the purposes for which they were erected, or that they are so located and built in consequence thereof as to be wholly and partially unfitted for the purposes for which they were erected, and could not be changed to adapt them to such purposes without great time, trouble or expense to plaintiff, then the jury must find for the plaintiff against all of the defendants, provided they further find from the evidence that John G. Mullaly, one of the parties to the bond sued on, has died since the execution thereof, and that defendants Clardy and Halpin are his executors, and shall award such damages as they find and believe plaintiff has suffered."

The defendants duly excepted to this declaration of law.

At the instance of the defendants the court gave the following declarations of law:

"1. The court, acting as a jury, declares that, before the plaintiff can recover in this action, it must prove to the satisfaction of the court that defendant Joyce was city surveyor when the survey in question was made; that said Joyce made said survey or that he superintended the making of it, or authorized the making of it as his survey; that said survey was erroneous and was so because of the neglect, incompetency or misconduct of defendant Joyce, or his representative, in

making such survey. And the court further instructs the jury, that if such error in respect to said survey was the result of an honest mistake, and was not due to the negligence, incompetency or misconduct of said Joyce, or his representative, such mistake will not entitle the plaintiff to recovery in this action.

"2. If the court, acting as a jury, believe from the evidence that the building erected by the plaintiff was not located upon the survey made by the defendant or his deputy for plaintiff, or was not constructed in respect to location or grade according to the survey furnished by defendant Joyce, then its finding must be for defendant.

"3. If the court, acting as a jury, find for the plaintiff, they (it) should allow and assess only actual damages suffered by plaintiff, and such damages must have happened in consequence of an erroneous survey made or authorized by defendant, as indicated in instruction number 1, given for defendant."

I. The first contention of the defendants is that the action was improperly brought in the name of the plaintiff. The ground of the objection is to be found in section 43 of the charter of the city of St. Louis (Revised Statutes, 1889, section 43, page 2110), which provides that all city officials, when so required by law or ordinance, shall give bond to the city, in such sum as shall be designated, for the faithful performance of their respective duties. For any breach of the conditions of such official bonds, the charter provides that "suit may be instituted thereon by the city, or by any person in the name of the city of St. Louis for the use of such person or persons." This alleged defect of parties was raised by the defendants on their demurrer. The demurrer was overruled, and the defendants filed an answer and went to trial on the merits. The question is whether this action amounted to a waiver of the objection. The rule is that, if the defect of parties is

patent on the face of the petition, it can only be taken advantage of by demurrer. If the demurrer in such a case is overruled, and the defendant desires to test the question on appeal or writ of error, he must stand on his demurrer. If he answers over, he thereby waives the point, and cannot raise it again in any manner. *State to use, etc., v. Sappington*, 68 Mo. 454; *Ware v. Johnson*, 55 Mo. 500; *Highley v. Noell*, 51 Mo. 145; *Ely v. Porter*, 58 Mo. 158; *Mississippi Planing Mill v. Church*, 54 Mo. 520. The defendants are, therefore, precluded from insisting on the objection in this court. But it may not be amiss for us to say that we think the suit was properly brought, without entering into a discussion of the provisions of the "Scheme and Charter," and the act of the legislature, approved March 25, 1872, concerning the appointment of city surveyors, and the remedies afforded private individuals for damages sustained by reason of negligence or malfeasance in office of such officials. We will, therefore, rule this objection against the defendants.

II. It is now claimed by the defendants that the plaintiff sued on one cause of action, and the court permitted it to recover upon an entirely different cause of action, in this, that the petition alleged the employment of Joyce to survey plaintiff's lot for the purpose of ascertaining its depth below the grade of Easton avenue, whereas on the trial the plaintiff attempted to prove that Joyce was employed to furnish it with a conventional grade about nine inches above the grade of the avenue, which builders had adopted as a suitable and necessary elevation for the erection of buildings. The defendants urge that this departure in the evidence from the allegations in the petition was not a simple variance, but must be regarded as an absolute failure of proof. Section 3702, Revised Statutes, 1879, reads as follows: "Where the allegation of the cause of action or defense to which proof is directed is unproved, not

in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance, but a failure of proof." We will assume that the plaintiff introduced substantial evidence in proof of the fact that Joyce was employed to survey the particular lot mentioned in the petition, and to ascertain for the plaintiff the depth of the lot below the customary builder's grade. The petition averred that he was to ascertain the depth of the lot below the grade of the avenue. Would this variance amount to a failure to prove plaintiff's cause of action in its entire scope and meaning? We think not. If the proof had shown the actual survey of a different lot from that mentioned in the petition, then there would have been an entire failure of proof within the meaning of the statute. We have several decisions by the supreme court and this court, construing and illustrating this statute. When a petition avers the sale of goods, a recovery cannot be had on a state of facts, which would constitute a trespass *de bonis asportatis*. *Link v. Vaughn*, 17 Mo. 585. If a party sues for obstructing the flow of surface water, he cannot recover for the obstruction of a running stream of water. *Field v. Railroad*, 76 Mo. 614. Many other cases could be cited, but we deem those referred to sufficient to indicate the true meaning and purport of this statute, as contradistinguished from a case of simple variance between the allegation and the proofs. The plaintiff's instructions directed a recovery, if Joyce had failed to ascertain the proper grade for building purposes, meaning by "proper grade," the "customary builder's grade." This instruction is correct, provided there was substantial evidence adduced that Joyce was employed for that purpose. We gather from the evidence of Mr. Haughey, the plaintiff's manager, that he told Joyce that the plaintiff intended to build a livery stable, and that he wished him to ascertain the grade of the lot for that purpose

The testimony of Mr. Haughey bearing directly on the subject is as follows: "*Q.* Do you say you employed Mr. Joyce to survey the lot? *A.* I do.

"*Q.* What did you tell him was your object? *A.* I told him I wanted to build a stable on the property.

"*Q.* And what were the particulars of the employment? What were the services to be rendered by him? *A.* The service was to survey my lot, give me the corners and proper grade to build on.

"*Q.* Did Mr. Joyce proceed to do that? *A.* Yes, sir.

"*Q.* Did he render you the result in any form? *A.* He did; he gave me a plat of the survey. * * *."

After the building was completed, and it was ascertained that it was below the builder's grade, Haughey had an interview with Joyce, concerning which Haughey testified as follows: "Well, I went there to Mr. Joyce and told him I would like him to send some person out there to see who was at fault. I think this young man behind you went out there, and told me the survey was all right, and the curb-stone line was all right. I wanted to know how I was so low; he said possibly they had raised the street. I asked him to ascertain the fact; he took his level in the street and told me they had raised the center of the street six inches, and he went off. I saw that I could get no satisfaction, as Mr. Joyce told me the next day that the city had raised the grade, or changed the grade, and that the easiest way was to have them lower the curb-stone in the front, and it would be the easiest for me. I afterwards employed Mr. Pitzman to find out where the fault really was, and my attorney notified Mr. Joyce of the fact that I had it surveyed and found I was not only below grade, but that I wasn't on my own lot. Mr. Joyce sent the little gentleman behind you, if I mistake not, to come out and make another survey, and in the course of the

survey he admitted to me there had been a mistake made, that he couldn't account for it, how it was done," etc.

This evidence shows that Haughey understood that Joyce was to furnish him with a suitable grade for building purposes, and his subsequent interview with Joyce tends to prove that Joyce himself so understood his employment, because he undertook to account for the fact that the plaintiff's building was below a proper grade by asserting that the city had changed the grade of the street. The plaintiff's instruction is challenged on no other ground; no complaint is made because it fails to furnish a proper rule for ascertaining the damages. We will have to decide the question presented by this assignment adversely to the defendants.

III. The court instructed that Joyce was not responsible for an honest mistake. The defendants, by their instructions, submitted this question to the court sitting as a jury as one of fact, but what state of facts would constitute an honest mistake by Joyce is nowhere stated in the instructions. The court evidently found that the mistake was not an honest one, but just upon what theory it arrived at this conclusion is a matter of conjecture. The defendants, however, contend that there is no evidence that the mistake was not an honest one. Joyce testified that he was only employed to ascertain the depth of the lot below the grade of the avenue. He claims to have done this, and to have marked on the plat, which he made and gave to the plaintiff, the fill necessary to bring the lot up to the required grade. An inspection of the plat indicates the depth of the lot below the grade, and the fill necessary to bring the lot to grade, but there is nothing on the map by which it can be determined whether street grade or builder's grade was meant. On the other hand, Haughey swears that he told Joyce at the time he employed him that the plaintiff intended to build a

livery stable on the lot, and that he wished him to survey the lot and ascertain the proper grade to build on. If Haughey's testimony is to be credited, then the finding of the court that Joyce's failure to perform the work according to contract was attributable to negligence rather than to an honest mistake must be upheld. We will have to rule this assignment likewise against the defendants.

IV. The view taken of the foregoing assignments dispenses with the consideration by us of the fourth and last point made in defendant's brief, except that it may be stated that the evidence tended to prove the averments in the petition concerning the erroneous survey of the boundaries of the lot. Plaintiff also introduced evidence to the effect that the building was located according to the stakes of the Joyce survey, and that, after the building was erected, it was ascertained that portions of it extended, at different places, on the adjoining lots. We recognize the fact that perfect accuracy in measurements is not usually attained, and ought not to be expected in any case, but in this case, if the plaintiff's livery stable was constructed according to the survey, we would not be authorized to hold that Joyce was not at fault for negligence in locating the boundaries of plaintiff's lot.

The judgment of the circuit court will be affirmed. All the judges concurring, it is so ordered.

---

41 573
110m 282

JOHN L. DOWDY, Guardian of GEORGE R. HARRIS, *et al.* v. JOSEPH WOMBLE *et al.*, Respondents.

St. Louis Court of Appeals, May 20, 1890.

1. **Justices of the Peace: REPLEVIN: AMENDMENT.** The omission to allege a jurisdictional fact in an action of replevin commenced before a justice of the peace cannot be rectified by amendment, under Revised Statutes, 1879, section 3060, in the circuit court on the appeal of the cause, but necessitates a dismissal of the suit.

Held, accordingly, that the plaintiff's omission to allege in the statement of his cause of action in such a suit, that the property sued for was detained by the defendant, cannot be cured by amendment under said section.

Per Thompson, J., dissenting:

2. ——— : ——— : ———. The amendment sought to be made in the case at bar (the nature of which was to supply the omission above mentioned) would not have changed the plaintiff's cause of action, and should, therefore, have been permitted; the omission to make a jurisdictional averment may be cured by amendment under said section 3060 in actions of replevin commenced before a justice of the peace equally as well as in other actions.

Appeal from the Stoddard Circuit Court.—HON. JOHN G. WEAR, Judge.

AFFIRMED (*and certified to the Supreme Court*).

BIGGS, J.—This action of replevin originated before a justice of the peace, where the plaintiff recovered a judgment. The defendants appealed to the circuit court, and on their motion the cause was dismissed on account of the insufficiency of the statement. Before the defendants' motion to dismiss was passed on, the plaintiff asked leave to amend the statement, which the circuit court denied upon the ground that the statement failed to state a jurisdictional fact, and was, therefore, fatally defective. The plaintiff has appealed, and the correctness of this ruling is the only question for our consideration.

The statement failed to allege that the property was detained *by the defendant* at the county *of Stoddard*. The italicized words were omitted. It is conceded by the plaintiff that the statement is defective, and not in conformity with the requirements of sections 2882 and 2883 of the Revised Statutes of 1879. It is also conceded that the averment, that the property was "*detained by the defendant*," was jurisdictional, but

it is argued that section 3060 of the Revised Statutes, 1879, authorized the amendment. This section reads as follows: "In all cases of appeal the bill of items of the account sued on, or filed as a counter-claim or set-off, or the statement of the plaintiff's cause of action, or of defendant's counter-claim or set-off, or other ground of defense, filed before the justice, may be amended upon appeal in the appellate court to supply any deficiency or omission therein, when by such amendment substantial justice will be promoted; but no new item or cause of action, not embraced or intended to be included in the original account or statement, shall be added by such amendment." If the question presented were one of first impression we would be inclined to hold that section 3060 was intended to reach by amendment such defects and omissions as are found in plaintiff's statement. It would better comport with the policy of our law to rule that, in all cases originating before a justice of the peace, the circuit courts should disregard all defects and omissions in the statement of the cause of action, whether jurisdictional or not, where the averments are sufficient to clearly indicate the cause of action *intended* to be stated. But in actions of replevin the supreme court has held the law to be otherwise, and this, of itself, is a good and sufficient reason for this court to rule likewise. The supreme court in the case of *Gist v. Loring*, 60 Mo. 487, in discussing the right of amendment in replevin cases, said: "In ordinary cases before justices, we have uniformly upheld the power and duty of the circuit court to allow amendments where the cause of action before the justice is not substantially changed. But the statement filed with the justice in this case, under the first section of article 3, omits two of the six clauses expressly required to be verified by affidavit before an order could be issued to the constable for seizing and delivering the property. The amended petition filed in the circuit

court is, therefore, substantially a new action, and affords no justification for the exercise of the power confided to the justice upon special grounds carefully set forth in the act." This case was decided before the enactment of section 3060, but, under the view entertained by the supreme court of the nature of an action of replevin, this section could in no manner change the rule. The theory of the *Gist case* is that a justice of the peace, in an action of replevin, acquires no jurisdiction of the subject-matter of the action, unless all jurisdictional facts mentioned in section 2882 are set forth in the complaint, and verified by the plaintiff's affidavit or that of his agent. Therefore, the issue of process in such a case, based on a statement which does not contain the requisite jurisdictional averments, cannot be regarded as the erroneous exercise by the justice of a rightful jurisdiction, but the entire proceedings must fall to the ground for *want of jurisdiction*. It follows logically that, if the justice in the present action had no jurisdiction of the subject-matter, none could be acquired by the circuit court on appeal; hence the latter court could only dismiss the cause for want of jurisdiction. *Fletcher v. Keyte*, 66 Mo. 285; *Babb v. Bruere*, 23 Mo. App. 604. The doctrine of the case of *Gist v. Loring*, *supra*, has been expressly affirmed by the supreme court in the cases of *Madkins v. Trice*, 65 Mo. 656, and *Dollman v. Munson*, 90 Mo. 85, and it has been recognized as controlling authority in the cases of *Reigert v. Voelker*, 6 Mo. App. 53; *Crawshaw v. Wright*, 5 Mo. App. 577; *Frederick v. Tiffin*, 22 Mo. App. 443; *Fisher v. Davis*, 27 Mo. App. 321; *Crum v. Elliston*, 33 Mo. App. 591. In the cases of *Reigert v. Voelker*, and *Crawshaw v. Wright*, *supra*, the statements, as in the case at bar, failed to allege that the property was detained *by the defendant*. In each case the circuit court held the statement to be fatally defective and dismissed the action.

Under the foregoing authorities the circuit court could not do otherwise than dismiss plaintiff's action. We will, therefore, affirm its judgment. Judge ROMBAUER concurs; Judge THOMPSON being of opinion that this decision is in conflict with decisions of the supreme court, subsequent to the decision in the case of *Gist v. Loring*, *supra*, the case will be certified to the supreme court for final determination. So ordered.

THOMPSON, J. (*dissenting*)—In this case the question for decision is, whether the circuit court erred in refusing to allow the plaintiff to amend a statement in an action of replevin, commenced before a justice of the peace, which statement was defective in this: That, while it alleged that the chattels were wrongfully detained from the plaintiff, it omitted to allege that they were thus detained from him *by the defendant*, as required by the statute. The observation of Judge NAPTON in *Gist v. Loring*, 60 Mo. 487, 489, where the statement omitted *two* grounds prescribed by the statute, characterizing the amended petition as "substantially a new action," should be regarded as merely the reasoning of the judge who wrote the opinion of the court, and not as furnishing authority for the conclusion that the amendment of a statement before a justice, in replevin, so as to supply a defect such as was omitted in the statement before us, is an amendment changing the cause of action. The slightest attention to the subject is sufficient to make it appear that it is not so. The action, with the amendment as before, is an action to recover the same chattel. The relief which is sought under the amendment is precisely the same which is sought before the amendment. The same evidence must be adduced in order to entitle the plaintiff to relief after the amendment, as before. So far from the amendment introducing a new cause of action, the petition in this case is defective in a respect, in which it

would be cured by verdict under the rules of common-law procedure.

But the chief ground on which I rest my dissent from the conclusion of the majority of the court is that the Revised Statutes of 1879, section 3060, introduced a new rule on the subject of amendments in cases appealed from justices of the peace, under which it has been the constant and uniform practice of the supreme court and of this court to allow amendments of jurisdictional defects, which do not change the cause of action. That section is as follows: "In all cases of appeal the bill of items of the account sued on, or filed as a counter-claim or set-off, or the statement of the plaintiff's cause of action, or of defendant's counter-claim or set-off, or other ground of defense filed before the justice, may be amended upon appeal in the appellate court to supply any deficiency or omission therein, when by such amendment substantial justice will be promoted; but no new item or cause of action, not embraced or intended to be included in the original account or statement, shall be added by such amendment. Such amendment shall be allowed upon such terms as to costs as the court may deem just and proper." R. S. 1889, sec. 6347. Prior to the adoption of this statute, it was the rule that amendments could not be made in the circuit court in causes appealed from justices, for the purpose of supplying jurisdictional defects. On the contrary, the rule was, as it now is in the case where the record is removed by *certiorari*, to which this statute does not apply, that, unless the statement is so drawn as to show affirmatively that the justice of the peace had jurisdiction, the circuit court acquires no jurisdiction by the appeal, and the suit must be dismissed. *McQuoid v. Lamb*, 19 Mo. App. 153. An examination of the cases shows that the supreme court and this court have held that the statute extends to the amendment of jurisdictional defects in the statutory action before justices of the peace against railway companies for double damages for killing cattle, which have

got on their track at places where it is not fenced, as required by statute. *King v. Railroad*, 79 Mo. 328; *Schulte v. Railroad*, 76 Mo. 324; *Mitchell v. Railroad*, 82 Mo. 106; *Kitchen v. Railroad*, 82 Mo. 686; *Dryden v. Smith*, 79 Mo. 525; *Manz v. Railroad*, 87 Mo. 278; *Minter v. Railroad*, 82 Mo. 128; *Rowland v. Railroad*, 73 Mo. 619 (on a cause of action arising prior to the statute). This court applied the same principle in the same class of actions in *Vaughn v. Railroad*, 17 Mo. App. 4, and in *Keltenbaugh v. Railroad*, 34 Mo. App. 147, 150. In *McKinney v. Harral*, 31 Mo. App. 41, we applied it in a case of forcible entry and detainer, citing *Vaughn v. Railroad*, *supra*, and *Mitchell v. Railroad*, *supra*. That decision came before the court on a second appeal, after the amendment thus permitted had been made, and the principle was reaffirmed by this court, as the law of the case. *McKinney v. Harral*, 36 Mo. App. 337. In *Branahl v. Watson*, 11 Mo. App. 587 (s. c. on second appeal, 13 Mo. App. 596), we applied it so as to allow an amendment by a constable of his return to an attachment by garnishment, showing that he had levied upon the goods and chattels, rights and credits of the defendant, in the hands of the garnishee, without which statement the justice possessed no jurisdiction over the *res*, under the settled rule of the supreme court. In so holding we followed the earlier decisions of this court in *Keane v. Bartholow*, 4 Mo. App. 507, and *Brecht v. Corby*, 7 Mo. App. 300. Nearly all the foregoing decisions either distinctly state or recognize the fact that the statute has introduced a new rule upon this subject. For instance, prior to the adoption of the statute the supreme court decided the case of *Madkins v. Trice*, 65 Mo. 656, reaffirming and applying the rule in *Gist v. Loring*, 60 Mo. 487, upon which a majority of the court in the present case base their decision. Judge HOUGH wrote the opinion. The same judge wrote the opinion of the supreme court in the subsequent case of *King v. Railroad*, 79 Mo. 328, which was a statutory action,

commenced before a justice of the peace for double damages for killing domestic animals of the plaintiff by the defendant, a railway company. Now, it had always been the settled rule that, under the statute authorizing such actions to be brought in justices' courts, the statements must show that the injury complained of occurred in the township where the justice before whom the suit is instituted resides, and that this was a jurisdictional fact which must affirmatively appear from the statement, otherwise the justice would have no jurisdiction in the first instance, and the circuit court would acquire none by the appeal, and the suit must be dismissed. *Hansberger v. Railroad*, 43 Mo. 196, 200; *Haggard v. Railroad*, 63 Mo. 302. But in *King v. Railroad*, 79 Mo. 328, which arose subsequently to the act of 1879, and was governed by it, Judge HOUGH, who delivered the opinion of the court, held that the circuit court rightfully allowed this defect to be supplied by an amendment under the statute. The learned judge said: "It has repeatedly been held by this court that statements, like that filed with the justice in this case, could not be amended in the circuit court; but those rulings were made in cases where the cause was tried by the circuit court before the Revised Statutes of 1879 took effect. By section 3060 of the Revised Statutes, it is provided that, on appeal from a judgment of a justice of the peace, the statement filed before the justice may be amended in the appellate court so as to supply any deficiency or omission therein, when, by such amendment, substantial justice will be promoted; provided no cause of action not intended to be included in the original statement shall be added by such amendment. This section, which is a new one, authorizes the amendment made in this case." In *Mitchell v. Railroad*, 82 Mo. 106, the supreme court commission took the same view, and upon the same ground. The opinion delivered by Mr. Commissioner PHILIPS contains this

language, every word of which, in my opinion, is applicable to the case now before us: "This section was added by the legislature for a purpose. Its language is too plain to admit of much doubt that it meets a case like this, and authorized the amendment permitted by the appellate court below. The only defect in the statement filed with the justice was in not alleging that Sugar Creek township was an adjoining township to Union township. This was certainly a 'deficiency or omission therein.' If so, by the express terms of said section the statement may be amended in appellate court to supply such deficiency or omission, when substantial justice would thereby be promoted. The only limitation upon this right of amendment imposed by said section is that no 'cause of action not embraced or intended to be included in the original statement shall be added.' The cause of action in this case remained precisely the same after the amendment as before. The averment added was merely of the additional fact that the justice before whom the action was brought was of the adjoining township. The amendment certainly tended to promote substantial justice. It took away no substantial right of the defendant, nor added any new burden to his proper defense. The proofs, as to the cause of action, the subject-matter of litigation, were the same, both as to the injury and the liability. Had the amendment not been made in the lower court, and the cause had been reversed on account of the omission in the original statement, under the views now entertained by this court of the scope and object of said section 3060, we would remand the cause with leave to plaintiff to so amend his statement."

The statute has, therefore, introduced a new rule applicable to all cases appealed from justices of the peace. We simply disobey the mandate of the statute when we attempt to revive the contrary rule in respect of actions of replevin, which was in force prior to this

enactment. It is highly important that the rules of procedure should be uniform, and that, in respect of the subject of amendments, we should not have one rule for attachments, for double-damage cases, and for ordinary actions commenced before justices of the peace, and another rule for actions of replevin. Against the obvious reading of the statute, and against the great mass of authority above cited, we have nothing but the isolated observation of Judge NAPTON in *Gist v. Loring*, 60 Mo. 487, to the effect that, where the statement in an action of replevin before a justice fails to allege that the property was detained by the defendant, and also fails to allege that it has not been seized under any process, execution or attachment, etc., an amendment in the circuit court supplying these allegations creates substantially a new cause of action. It is a settled limitation of the rule of *stare decisis* that it extends only to what the court *decides*, and not to the observations made by the judge who writes the opinion, not necessary to the decision of the case. It was wholly unnecessary to the decision of that case for Judge NAPTON to say that such an amendment introduced substantially a new cause of action, which was obviously not the fact. The true ground of that decision was that the statute, under which we now proceed, had not then been enacted, and that it was the settled practice to disallow amendments in appeals from justices of the peace intended to supply jurisdictional defects. But, it is said, we must now hold that an amendment supplying the words "by the defendant" operates to change the cause of action, because Judge NAPTON said so in that case. If we extract from particular cases the isolated observations of the judges, who have delivered the opinions of the supreme court, and hold ourselves bound to follow them, into what state of chaos, will our jurisprudence not drift? Scarcely a principle has been the subject of much discussion in

our reports, concerning which contrary and conflicting observations cannot be extracted from the language employed by judges in their opinions.

My view is that, since the enactment of the statute, there are but two limitations upon the power of amendment possessed by the circuit court in civil cases appealed from justices of the peace. One is, where *no statement* was filed before the justice, or where the statement which was filed is so radically defective as to mean nothing, so that it is equivalent to no statement. In either of these cases there could be no amendment in the circuit court, because there is nothing to amend. Any amendment would be tantamount to commencing the action in the first instance in the circuit court, because it would be tantamount to filing a statement there for the first time, none having existed before. In such a case it could not be told what, if any, cause of action was prosecuted before the justice, and it could not be told whether the statement filed in the circuit court was or was not the same cause of action which was prosecuted before the justice. The other limitation on the power of amendment is where a statement has been filed before the justice which shows that a certain cause of action was litigated there, and where it is sought to amend the statement in the circuit court so as to allow a different cause of action to be litigated there. To illustrate what I mean: If the cause of action litigated before the justice as shown by the statement was an action of replevin for a chattel, it could not be charged by amendment in the circuit court so as to make it merely an action on an account for the value of the hire or use of the chattel, while had or detained by the defendant. So, if the action, as shown by the statement before the justice, was brought to recover an indebtedness arising on a particular contract, it could not be so changed by amendment in the circuit court as to make it an action to recover another indebtedness

arising on another contract. But where the action seeks, both before as well as after the amendment, to recover the same specific chattel or chattels, and the statutory damages for their detention, it is too plain for any discussion that the amendment does not change the cause of action. The object of the suit remains the same, and the evidence necessary to support the plaintiff's contention must in both cases be substantially the same.

My conclusion is that the decision of the majority of the court is contrary to the rulings of the supreme court in the following cases, and that the cause should hence be certified to the supreme court for final determination. *Rowland v. Railroad*, 73 Mo. 619; *Schulte v. Railroad*, 76 Mo. 324; *King v. Railroad*, 79 Mo. 328; *Dryden v. Smith*, 79 Mo. 525; *Mitchell v. Railroad*, 82 Mo. 106; *Minter v. Railroad*, 82 Mo. 128; *Kitchen v. Railroad*, 82 Mo. 686; *Manz v. Railroad*, 87 Mo. 278.

---

41 584
79 116
41 584
87 328

JOSEPH SCHNAIDER'S BREWING COMPANY, Respondent, v. JOSEPH Y. LEVVIE, Appellant.

St. Louis Court of Appeals, April 1, and May 20, 1890.

1. **Practice, Appellate:** AFFIRMANCE FOR FAILURE TO FILE TRANSCRIPT. When an appellant has failed to file a transcript of the record within the prescribed time, and a motion is made by appellee for an affirmance of the judgment on that ground, the fact that the appellant at the time of the motion presents such transcript, or that he has such transcript on file when the motion is made, is not in itself ground for the overruling of the motion.

2. ———: WRIT OF ERROR AFTER AFFIRMANCE ON APPEAL. When a judgment has been affirmed on an appeal therefrom, it cannot thereafter be reviewed upon a writ of error; and this is so, though

the affirmance was made for the failure of the appellant to file a transcript within the prescribed time, and, therefore, without a hearing of the appeal on its merits.

8. **Appeal:** ATTACHMENT SUIT. A judgment upon a plea in abatement in attachment proceedings can only be reviewed upon an appeal taken within the time prescribed by the special statutory provisions on that subject.

Appeal from the St. Charles Circuit Court.—HON. W. W. EDWARDS, Judge.

AFFIRMED.

John R. Warfield and *O. J. Mudd*, for appellant.

Zach. J. Mitchell and *H. A. Haeussler*, for respondent.

ROMBAUER, P. J.—The plaintiff, respondent, produces a certificate of the clerk of the circuit court, from which it appears that judgment was rendered in its favor in the court below on December 20, 1889, and that, on the thirtieth of the same month, an appeal was granted to the defendant to this court. The plaintiff alleges that no transcript was filed by appellant in this court as required by law, and moves for an affirmance of the judgment.

The defendant now produces a transcript and asks leave to file it, supporting his motion with affidavits purporting to show cause why the transcript was not filed in time. Affidavits in opposition are filed by the plaintiff.

The fact that the appellant has on file, or presents a copy of the transcript, when a motion to affirm is made, is, under rule 22 of this court, of itself, no good cause why the judgment should not be affirmed, and we are satisfied from a careful examination of all the affidavits, that the defendant might, by the exercise of reasonable diligence, have filed a transcript in due time in this

court. The case has been repeatedly tried below with the same result. The appellant has failed to show good cause why the judgment should not be affirmed. All the judges concurring, it is affirmed.

OPINION ON MOTION FOR WRIT OF ERROR.

THOMPSON, J.—The defendant presents a certified transcript of the record of the circuit court of St. Charles county, and moves this court to grant him a writ of error and an order of *supersedeas*. The same transcript was filed in this court on February 28, and on April 1 this court, on motion of the respondent, affirmed the judgment of the circuit court, for the failure of the appellant to prosecute his appeal within the time prescribed by law.

I. The first question which we have to consider upon this motion is, whether a writ of error will lie at all in a case of this kind. The statute under which the judgment was affirmed reads as follows: "The appellant shall perfect his appeal in the manner and within the time prescribed in the next succeeding section, and if he fails so to do, and the respondent shall produce in court the certificate of the clerk of the court in which such appeal was granted, stating therein the title of the cause, the date and amount of the judgment appealed from, against whom the same was rendered, the name of the party in whose favor the appeal was granted, and the time when the appeal was granted, such certificate shall be *prima facie* evidence of the matters therein stated, and shall be a sufficient basis for a motion in the appellate court to affirm the judgment so appealed from, *and the court shall affirm the judgment*, unless good cause to the contrary be shown." R. S. 1889, sec. 2252. We assume that the statute, thus requiring the appellate court to affirm the judgment in the case therein stated, unless good cause to the contrary be shown, means what it says, and that, when the judgment is thus affirmed, no further proceeding to reverse

it in an appellate tribunal will lie. We know of no decisions in this state on the precise point. The only one which has been cited to us in behalf of the defendant, who makes this motion, is the case of *Brill v. Meek*, 20 Mo. 358. What is cited to us from that case is the remark made in the opinion of the court by Judge SCOTT, that "when an appeal has been once granted, the power over the subject is *functus officio*, and cannot be exercised a second time. This has been the uniform practice. After a party, from any cause, has lost the benefit of his appeal, he is driven to his writ of error." But the court was there speaking with reference to a case where a former appeal had been dismissed, and not where the court had already affirmed the judgment, acting under a statutory power. The observation of the court that a writ of error lies where a party has, "*from any cause*," lost his appeal is, therefore, no authority, in so far as it went beyond the scope of the question before the court. That this conclusion is unavoidable will appear on a moment's further reflection. Suppose we were to grant a writ of error in this case, and, on the hearing of the same, should reverse the judgment of the circuit court. This anomaly would then exist, that the same judgment has been both affirmed and reversed by the same appellate court. Which would be the operative judgment in such a case, our judgment of affirmance or our judgment of reversal?

This view is enforced by the opinion of this court in the unreported case of *Cowan v. Shepley*, decided in the year 1881, and abstracted in 9 Mo. App. 594. In that case a judgment was rendered for the plaintiff in the circuit court, whereupon the defendants brought the case to this court by writ of error, and the judgment was here affirmed for failure to assign errors. Afterwards the defendant sued out another writ of error, upon which the record was again brought to this court. The defendant in error moved the court to

quash the writ of error, because of the final adjudication already made. This motion was resisted by the plaintiffs in error, on the grounds that there had been no hearing of the cause on the merits, and that a party should not be forever cut off from such a hearing by an affirmance upon a mere technicality. This court ruled upon the question thus presented in an opinion given by Judge LEWIS, as follows: "A judgment in this court, of affirmance or reversal, on appeal or writ of error, makes an end of the controversy, so far as this court is concerned. While it stands, we have no authority to subject the parties to a reopening of the litigation. If the first writ of error had been simply dismissed, the same difficulty would not lie in the way of another writ. But in final judgments of affirmance or reversal, we know of no distinction between those which are reached in due course of law after a full hearing, and such as result, also in due course of law, from the conditions and requirements of a positive statute. The motion to quash must be sustained, and the cause dismissed. All the judges concur." This decision is an authority conclusive of the question before us.

These observations dispose of the motion; but, beyond this, it may be more satisfactory to the parties to observe that the only contention seems to be as to the propriety of the judgment for the plaintiff on the defendant's plea in abatement to the attachment. It was held by this court in *Duncan v. Forgey*, 25 Mo. App. 310, that such a judgment cannot be reviewed on writ of error sued out after the expiration of the time allowed for prosecuting an appeal, but that it can only be reviewed upon the appeal given by the statute. R. S. 1879, sec. 439; R. S. 1889, sec. 562.

The motion will be denied. It is so ordered. All the judges concur.

In the Matter of THE PETITION OF G. M. GARDNER *et al.* FOR A PUBLIC ROAD.

St. Louis Court of Appeals, May 20, 1890.

1. **Practice, Appellate:** ABSENCE OF MOTION FOR NEW TRIAL IN PROCEEDINGS TO OPEN COUNTY ROADS. The rule that, in the absence of a motion for a new trial, only such questions can be raised in this court as are presented by the record proper is applicable to proceedings for the opening of a county road; the jurisdiction of the county court, and consequently of the circuit court on appeal, may, in such a case, be contested on the record proper, but not the question, whether the proposed road is a public necessity.

2. **Proceedings to Open County Roads.** The petition in a proceeding for the opening of a county road is not required to specify the width of the proposed road, nor need the report of the road commissioner or the record of the proceeding show that an attempt was made with land-owners refusing to relinquish the right of way to agree as to the amount of compensation.

3. ——: AVERMENT IN RECORD OF NOTICE OF APPLICATION. A mere recital in the records of the county court of the proceedings for the opening of a county road, that it was "proven to the satisfaction of the court that due legal notice has been given of the intended application to this court for said road," is insufficient in a direct proceeding, such as an appeal from an order for the opening of the road, to establish the jurisdiction of the county court.

4. ——: AMENDMENT NUNC PRO TUNC OF RECORDS OF COUNTY COURT AFTER LAPSE OF TERM. The county court may, after an appeal from its order opening a county road, and, after the lapse of the term at which such order was made, correct its records by a *nunc pro tunc* entry, so as to show jurisdictional facts, if there is a sufficient memorandum on the minutes and records of the court, showing the facts appearing from such amendment.

Error to the Marion Circuit Court.—HON. THOS. H. BACON, Judge.

AFFIRMED.

H. J. Drummond, for plaintiffs in error.

(1) The court erred in overruling the motion to quash and dismiss the proceeding, because the road is not a public necessity. Laws, 1887, sec. 7, p. 246; *Leslie v. Railroad*, 2 Mo. App. 115; *Leslie v. St. Louis*, 47 Mo. 474. It is not enough to justify a court in exercising the right of eminent domain, that the use is convenient, useful or even essential. It can only be done on grounds of absolute necessity. *Leslie v. St. Louis*, *supra*; *County Court v. Griswold*, 58 Mo. 175, 193; Mills on Eminent Domain, secs. 10, 12, pp. 94-96. And this is a jurisdictional fact. *People v. Town of Seward*, 27 Barb. 94; *Wilson v. Witsell*, 24 Ind. 306; Road Laws, 1887, sec. 9. (2) There was no such notice given of the intended application to the county court for the road as the law requires. The record, before the amended *nunc pro tunc* entries, did not show how the notice was given. That it was "due legal notice" is not sufficient. Acts, 1887, sec. 6, p. 246; *Railroad v. Young*, 96 Mo. 39, and cases cited. The notice was signed by only four of the petitioners. There should have been twelve. The notice did not contain the description of any land. This was necessary to inform the owners how they were to be affected. *State v. Elizabeth*, 32 N. J. L. 357; Mills on Em. Dom., sec. 100, p. 253; *Railroad v. Kellogg*, 54 Mo. 334. (3) The width of the road was not determined by the county court. This authority is in the court exclusively. Session Acts, 1887, sec. 2, p. 246; *Jefferson County v. Cowan*, 54 Mo. 236. The width of the road was not referred to in the petition, notice or any order made by the court, but was determined by the road commissioner. He had no authority to do it. Acts, 1887, sec. 2, p. 246; *Butler v. Barr*, 18 Mo. 357. (4) Neither the record nor report of the county road commissioner shows that there was any attempt made to

agree with plaintiffs in error as to the amount of damages or compensation they demanded for their lands, nor that there was any negotiations or conference with them on the subject, nor what was done in regard to the matter between them. This the record must show affirmatively. Nothing should be left to inference. *Railroad v. Young, supra; Lind v. Clemens*, 44 Mo. 540; *Leslie v. St. Louis, supra; Ellis v. Railroad*, 51 Mo. 200-203; *Moses v. Dock Co.*, 84 Mo. 245; *Cunningham v. Railroad*, 61 Mo. 33; *Railroad v. Campbell*, 62 Mo. 585; *Graff v. St. Louis*, 8 Mo. App. 562; Mills on Em. Dom., sec. 107, pp. 259 and 260. The law (Acts, 1887, sec. 6, p. 246, amended) required that this should be done, and the county court ordered it. The purpose of this is that the amount demanded being known, the petitioners or the county court may pay it, and all further proceedings are ended. And, until this is done, there is no authority, no jurisdiction, in the court to do anything further. *Railroad v. Young, supra; Ellis v. Railroad*, 51 Mo. 203; *Whitney v. County Court*, 73 Mo. 30; *Railroad v. Campbell, supra; Cunningham v. Railroad*, 61 Mo. 35; *Rogers v. St. Charles County*, 3 Mo. App. 41 and 599; Mills on Em. Dom., secs. 105, 207, 259, 108, 261. Nor did the claim for damages waive the failure to obtain jurisdiction. *Johns v. Marion County*, 4 Oregon, 46; Mills on Em. Dom., sec. 388, p. 522. (5) The report of the three freeholders does not describe the tract of land on which they assessed the damage. This the law required. Acts, 1887, sec. 8, p. 247. (6) The county court had no power or authority to correct its record, by entries *nunc pro tunc*, showing that plaintiffs in error were in court when the petition was filed. It requires no citation of authorities on the point that jurisdiction cannot be given by consent. But the record could not be supplied in this way in this class of cases. *Anderson v. Pemberton*, 89 Mo. 61; *Blize v. Castlio*, 8 Mo. App. 294-5. There

was no memorandum or paper to correct by. *State ex rel. v. Primm*, 61 Mo. 166; *Robertson v. Neal*, 60 Mo. 575.

W. M. Boulware, for defendants in error.

THOMPSON, J.—This was a proceeding in the county court of Marion county to open a public road. An appeal was taken to the circuit court where the appellants filed a motion to quash the proceedings, which motion the court overruled. This motion, and the ruling of the court thereon, are shown by a bill of exceptions. The court tried the cause without a jury, and rendered final judgment therein. No motion for new trial and no motion in arrest of judgment were filed. The cause is now brought to this court by a writ of error, and the error assigned is the overruling of the motion to quash the proceedings.

Although the bill of exceptions recites this motion, and shows that the court overruled it, and that the plaintiffs in error excepted to the ruling; yet, as they did not renew their exceptions in a motion for a new trial, they are lost. *Bevin v. Powell*, 11 Mo. App. 216, and cases cited; *Lionberger v. Baker*, 14 Mo. App. 353, 357; *Rankin v. Lawton*, 17 Mo. App. 574; *McLaughlin v. Schawacker*, 31 Mo. App. 375; *McCullom v. Hedges*, 20 Mo. App. 688; *Mockler v. Skellett*, 36 Mo. App. 174; *Gruen v. Bamberger*, 25 Mo. App. 89.

We cannot, in such a case, look beyond what appears on the face of the record proper. The motion to quash and the rulings thereon are no part of such record, but are matters of exception within the rule of the cases above cited. This has been often held in respect of motions to quash indictments. *State v. Fortune*, 10 Mo. 313; *State v. Batchelor*, 15 Mo. 207; *State v. Wall*, 15 Mo. 208; *State v. Gee*, 79 Mo. 313. The reason given by the supreme court is that indictments may sometimes be quashed for matters not appearing on

their face. The same reason applies, and with stronger force, to a case where the motion is to *quash proceedings* in a case appealed from an inferior judicatory, like the county court, to the circuit court.

But, while the motion to quash in itself raises no question which we can consider, it is competent for the plaintiff in error to assign for error, upon the record proper, that the county court had no jurisdiction. *State v. Lawrence*, 45 Mo. 492; *Ellis v. Railroad*, 51 Mo. 203; *Rogers v. City of St. Charles*, 3 Mo. App. 41; *Kansas City, etc., Railroad v. Campbell*, 62 Mo. 588. As the printed argument of the appellant is chiefly directed to jurisdictional questions we shall treat it as an assignment of error, on the record proper, that the county court had no jurisdiction.

But, in dealing with this question, it must be remembered that this is not a *certiorari*, the object of which is to quash the proceedings and judgment of the county court, but that it is a statutory appeal, in which the circuit court proceeds to hear and determine the controversy anew, with the single exception that it cannot appoint a new commissioner (Laws of 1887, p. 248), which we understand to mean that the circuit court cannot direct a resurvey of the road, but that the proceedings prescribed by the seventh section of the statute to be taken by the road commissioner in surveying the road, taking the relinquishments of land-owners, etc., must be taken in substantial compliance with the statute, in order to give the circuit court jurisdiction to proceed. If, therefore, the county court had what we may term *initial jurisdiction*, that is, jurisdiction to hear and determine the petition for the establishment of the road, and if the road commissioner proceeded in substantial conformity with the statute in taking the relinquishments of land-owners, etc., the circuit court had jurisdiction to hear and determine it *de novo*. The

county court had such jurisdiction, provided the petition, which was presented to it, was such a petition as is required by section 5 of the general road law (Laws of 1887, sec. 5, p. 246), and provided the notice required by section 6 of the same act was given; and provided the steps provided by the seventh section of the statute were taken. That section provides: "The court shall, when such a petition is presented and publicly read, and upon proof of notice having been given as required by the next preceding section, hear the remonstrance of twelve or more freeholders residing in the township or townships through which the proposed road may run, and such witnesses as the respective parties may produce, in regard to the public necessity and the practicability of the proposed road or change of road, and, if the court shall be of the opinion that the facts in the case justify it, may make an order of record requiring the county road commissioner to view, survey and mark out such road." On the other hand, if the petition for the establishment of the road was not such a petition as is prescribed by the statute, and if the statutory notice was not given, and if the commissioners did not comply with the provisions of section 7 of the act, then the county court had no jurisdiction to establish the road (*Daugherty v. Brown*, 91 Mo. 26; *Anderson v. Pemberton*, 89 Mo. 61), and hence the circuit court acquired no jurisdiction by the appeal. With these preliminary observations we shall proceed to consider the points insisted upon in argument by the plaintiffs in error.

I. The first of these points is that the court erred in overruling the motion to quash the proceedings, because the proposed road is not a *public necessity*. It seems to be a sufficient answer to this to say that whether the proposed road was a public necessity was a question which, by the terms of the statute (Laws of 1887, sec. 7, p. 247), the county court was required to

determine and decide upon the hearing of *evidence*. It was not, therefore, a jurisdictional question, in the sense that its erroneous decision would prevent the circuit court from acquiring jurisdiction by the appeal to determine it rightly upon the hearing *de novo*. It is evident from the language of section 10 of the road law which gives an appeal from the judgment of the county court, "assessing damages, or for *opening*, changing or vacating any road," and which provides that "the circuit court shall be possessed of the *cause*, and shall proceed to hear and determine the same anew," that it was intended by the legislature that the circuit court should have jurisdiction on the appeal to retry the question of the necessity of the road.

II. The same observations may be made upon the point made in argument by the counsel for the plaintiffs in error that the width of the proposed road was not fixed by the county court, as required by the statute, but was left to be fixed by the county surveyor acting as road commissioner. This point does not seem to be borne out by the record, when the orders of the county court are read together. It is to be collected from the report of the surveyor, which shows that he laid out a road sixty feet wide, from the order of the county court directing commissioners to assess damages for a strip of land sixty feet wide, from the report of the commissioners, which shows that damages were assessed for the taking of a strip of land sixty feet wide, and from the order of the county court establishing "*said* road," that the road which was established was a road sixty feet wide.

Nor is it a sound argument that the omission of the petition to state the width of the proposed road is the omission of the statement of a jurisdictional fact, because section 5 of the act, which prescribes what the petition shall state, provides merely that it shall specify "the proposed beginning, course and termination" of

the road, and does not require that it shall specify its width.

III. The fourth point made by the plaintiffs in error in their argument is, that neither the record nor the report of the road commissioner shows that any attempt was made to agree with the plaintiffs in error as to the amount of damages or compensation to be paid them for their lands, etc. We find no provision in the statute authorizing the road commissioner to endeavor to agree with the land-owners as to the amount of compensation which they shall receive. The seventh section of the statute (Laws of 1887, p. 247) authorizes him to take the relinquishment of the right of way of all persons, who may give such, and to state in his report the names of those who fail or refuse to give the right of way, and the amount which they demand therefor, etc. It was held in *Chicago, etc., Ry. Co. v. Young*, 96 Mo. 39, 43, that it is only upon failure of a land-owner or land-owners to relinquish, as provided for in section 6938 of the Revised Statutes of 1879, which was similar in its terms to the eighth section of the act of 1887, that the county court has any authority to appoint three freeholders to view the premises and assess the damages; and the court said that the failure of the owner to relinquish was a jurisdictional fact. Applying this principle to the record before us, we are of opinion that the commissioners' report, as recited in the record of the county court, sufficiently shows the facts required by the statute. It appears from those recitals that "all persons have relinquished the right of way for said road, except the heirs of the John Taylor estate, viz.: William J. Taylor, Frank Sherman and Dr. D. W. Tindall, and that said heirs of said estate, viz.: William J. Taylor, Frank Sherman and Dr. D. W. Tindall, through whose lands said proposed road shall run, still refuse to relinquish the right of way for the same." The order of the court then proceeds to appoint commissioners to view the premises and

assess the damages of the persons named who refused to relinquish the right of way.

IV. The second and seventh points made in argument by the counsel for the plaintiffs in error present less difficulty, and will be considered together. These are: *First.* That the record of the county court, originally sent up to the circuit court, did not show that a notice had been given of the application to the county court for the proposed road, as required by section 6 of the act of 1887, and, *second*, that this defect in the record of the county court could not be supplied by amending its record *nunc pro tunc*, while the appeal was pending in the circuit court. The record of the county court, as originally sent up to the circuit court, contained a recital running in this language: "And it being proven to the satisfaction of the court that due legal notice has been given of the intended application to this court for said road." In the circuit court the appellees moved for a *certiorari* to the county court to send up a more perfect record, which order was granted. The county court, in obedience to the *certiorari*, returned an amended record, the recitals of which showed that, after the appeal had been taken from the county court to the circuit court, the petitioners for the proposed road appeared in the county court, and moved to have the court make certain amendments of its record in respect of the proposed road, *nunc pro tunc*, a portion of which amendments the court ordered to be made, and another portion of which the court refused, reciting the following reason: "There being no mark, minute or memorandum among the records of said court to authorize the other entries prayed for in said motion." Among the amendments thus made was one showing the *manner* in which the notice of the application for the proposed road had been given. The statement of the manner in which the notice had been given was prefixed with the recital: "There being sufficient memorandum on the minutes and record of the court to show the

fact." It then set out the fact of the notice of the presentation of the petition for the proposed road, showing that it was signed by four persons. It also set out the affidavit of one of these persons, George W. Gardner, to the effect that on the eleventh day of April, 1888, he put up two copies of the notice in the municipal township of Fabius, in Marion county, one of them at the beginning of the proposed road, on a certain bridge named, said bridge being a public place, and the other upon a certain blacksmith's shop described, the same being a public place in said township. It also set out the affidavit of Edward W. Gardner, to the effect that he put a copy of the notice, on the twelfth day of April, 1888, at the proposed termination of the road, upon a certain telephone tower, described in the notice, the same being a public place and within the townships of Fabius, etc.

The record returned by the county court, in obedience to the *certiorari*, also showed that the motion to amend its record *nunc pro tunc* was sustained "in this, to-wit: H. J. Drummond, attorney for the contestants Daniel W. Tindall, William J. Taylor and Frank Sherman, appearing and admitting the fact that the said contestants, in their own proper persons, as well as by attorney, did appear in court at the time of the filing of the petition and notice, and objected to the establishment of said road and to any action by the court thereon, it is, therefore, ordered and adjudged that, immediately after the word 'petition' in the fourth line of the record of the proceedings in said case, on page 107, of book O, of the county court record, the following be inserted *nunc pro tunc:* 'Also come Daniel W. Tindall, William J. Taylor and Frank Sherman in their own proper person, as well as by their attorney, H. J. Drummond.'"

The record does not disclose the fact that any exception was taken to the order of the circuit court in

sending its *certiorari* to the county court to send up a more perfect record, nor to the filing in the circuit court of the amended record returned by the county court in obedience to the *certiorari*. We only know that such proceedings were had by that portion of the record outside the bill of exceptions. Indeed, the bill of exceptions relates only to the action of the circuit court in overruling the motion to quash the proceedings of the county court, and this motion to quash does not challenge in any way the record which the county court returned in obedience to the *certiorari*, as being the proper record of that court. On the other hand, the motion and order for a *certiorari* were subsequent in point of time to the filing of the motion to quash, and were no doubt produced by that motion.

We have, therefore, to consider whether we are precluded from considering so much of the record of the county court as is shown by that record itself, as returned in obedience to the *certiorari* of the circuit court, to have been made by amendments *nunc pro tunc* after the lapse of the term at which the original record was made. The proposition of the plaintiffs in error on this point is that, after the lapse of its term, the county court had no power to amend its record. It was held by this court in *Blize v. Castlio*, 8 Mo. App. 290, in a well-considered opinion by Judge BAKEWELL, that the county court in a proceeding under a road law (in that case the act of 1877, page 393), to open a new road, cannot, after the lapse of the term, correct its record by a *nunc pro tunc* entry, so as to show jurisdictional facts, without some memorandum, entry or paper in the case to amend by. This, as shown by the citations in the opinion, and by many decisions of the supreme court and of this court before and since, is also the rule in regard to the amendment of the records of the circuit court. This rule is undoubtedly sound, but it does not apply to the present case; for here it

does appear from the recitals in the record of the county court, that, in so far as the amendment related to the posting of the statutory notices, there was "sufficient memorandum on the minutes and records of the court to show the fact." The fact that an appeal to the circuit court was pending did not deprive the county court of jurisdiction to amend its own record. It has been frequently held that an appeal from a judgment of the circuit court to the supreme court or to this court does not deprive the circuit court of the power of correcting its record. In such a case the circuit court loses jurisdiction of *the case*, but not of *its records*. *DeKalb County v. Hixon*, 44 Mo. 341; *Jones v. Ins. Co.*, 55 Mo. 342; *Gamble v. Daugherty*, 71 Mo. 599.

Next, as to the sufficiency of the record, as amended, on the jurisdictional point of notice. Our successive road laws appear to have been substantially the same, in so far as containing a provision requiring notice of the intended petition for a road to be posted in a certain manner. In *Blize v. Castlio*, *supra*, the jurisdiction of the county court was challenged on the ground that the record did not show a petition stating the necessary jurisdictional facts, but it was not challenged on the ground that it did not show that notice had been given in the prescribed manner. There, the recital was, as in the original record before us: "And it being proven to the satisfaction of the court that due legal notice has been given of the intended application to this court for such road." In *Daugherty v. Brown*, 91 Mo. 26, the proceeding was to enjoin the establishment of the proposed road on the ground of want of jurisdiction, and the jurisdiction was challenged on the ground, among others, that it did not appear that notice had been given in compliance with section 6936 of the Revised Statutes of 1879. The record of the county court recited, as did the original petition in this case, "that it had been proved, to the satisfaction of the

court, that due legal notice had been given" of the intended application. The court held that the proceedings were "regular enough," and distinguished the case of *Whiteley v. Platte County*, 73 Mo. 30, and others like it, on the ground that it did not appear in those cases that the required notice had been given. But in the later case of *Chicago, etc., Ry. Co. v. Young*, 96 Mo. 39, 43, a distinction was taken between a recital necessary to uphold the record upon a collateral attack and one which is necessary on a *certiorari*. The court said that "the writ of *certiorari* is in the nature of a writ of error, and operates in a similar way. By it, errors which might not be fatal in a collateral proceeding may be the basis of redress." In that case, which was a proceeding by *certiorari*, the court held that it must affirmatively appear by the record of the county court that notice of the intended application for the road had been given by handbills, etc., for twenty days, etc., as required by the then governing statute (Revised Statutes, 1879, sec. 6936). The court added: "The statement in the order reciting the fact of the filing of the petition, that due legal notice of the intended application was proved, does not meet the requirements of the statute, nor cause the necessary facts to *affirmatively appear*." As this is a matter that is essential to show the jurisdiction of the county court to proceed at all, the rule must be the same on appeal as on a *certiorari*. We must assume, therefore, that, by the record of the county court, as originally returned to the circuit court, this jurisdictional fact did not affirmatively appear; but, as it was made affirmatively to appear by the amended record as returned in obedience to the *certiorari*, the rule of the supreme court thus laid down has been complied with.

Then as to so much of the amended record above set out as recited the fact of the appearance of the remonstrants (plaintiffs in error) in the county court

in their proper persons, as well as by attorney, at the time of the filing of the petition and notice, etc., we take it that this was not the recital of a jurisdictional fact at all. If it could be regarded as the recital of a jurisdictional fact, the jurisdiction was not the jurisdiction of the subject-matter, but rather of the person, which jurisdiction may be waived or conferred by consent, and hence shown by consent.

We are, therefore, of opinion that the judgment of the circuit court ought to be affirmed. It is so ordered. All the judges concur.

---

41 602
44 365
41 602
a83 353

JACOB STRAUS, Appellant, v. ISAAC ROTHAN *et al.*, Defendants; HENRY F. HARRINGTON, Respondent.

St. Louis Court of Appeals, May 22, 1890.

Executions: ATTACHMENT FOR UNPAID PURCHASE MONEY. The statute (Revised Statutes, 1879, sec. 2353), which provides that personal property shall be subject to execution on a judgment against the purchaser for the purchase price thereof, and shall in no case be exempt from judgment and execution, except in the hands of an innocent purchaser for value and without notice, should not be extended beyond its terms, and, therefore, does not entitle a levy on personal property under a writ of attachment for the unpaid purchase price thereof to priority over a previous levy on such property under another writ of attachment.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL D. FISHER, Judge.

REVERSED AND REMANDED.

F. A. Wislizenus, for appellant.

Mills & Flitcraft, for respondent.

THOMPSON, J.—The plaintiff sued out an attachment against Isaac L. Rothan and Isaac Rothan, Jr., composing the mercantile firm of Rothan & Co., on various grounds, which need not be stated, and caused the same to be levied on the stock and fixtures of the defendants on the thirtieth of August, 1888. Soon thereafter several other creditors of Rothan & Co. sued out attachments against them, and pointed out to the sheriff specific property on which this plaintiff's attachment had already been levied, and directed the sheriff to make special levies on such property, as being property which these attaching creditors had sold to Rothan & Co., and which had not been paid for by the latter. The property was subsequently sold by the sheriff, and the plaintiff, having prosecuted his demand to judgment, made a motion for a rule on the sheriff requiring him to pay over the proceeds of the sale to the plaintiff as a prior attaching creditor. This motion was resisted by the subsequent attaching creditors, by whose direction the sheriff had made the special levies for unpaid purchase money, and, on the hearing of it, they offered to show, in substance, that the goods on which the special levies had been made by their direction, were part of a larger lot of goods which had been sold by them to Rothan & Co., and that the purchase price therefor had not been paid. The court admitted this evidence, and the plaintiff excepted. Thereupon the court overruled the plaintiff's motion, deciding that the special levies for unpaid purchase money, though subsequent in date to the plaintiff's levy, were superior to it in right. From this ruling the plaintiff prosecutes this appeal. The case was argued at the last term of court, and, after much consideration, we filed an opinion reversing the judgment, and remanding the cause, holding that, in order to bring a creditor within the terms of the statute whose protection the interpleaders invoke in this case (Revised Statutes, 1879, sec.

2353), two things must concur: "*First.* He must have a *judgment* and *execution*. *Second.* His judgment must have been for unpaid purchase money, which we understand to mean that it must have been *entirely* for unpaid purchase money." On the second ground we proceeded upon the view taken by the supreme court of New York in *Hickox v. Fay*, 36 Barb. (N. Y.) 9, and by the supreme judicial court of Maine in *Holmes v. Farris*, 63 Me. 318, and we quoted, as the ground of our decision, the following language from the opinion in the Maine case: "The principle to be deduced from the cases is, that when a creditor has two classes of claims against his debtor, by uniting them in one suit and obtaining judgment, he reduces that in which his rights are superior to a level with that in which they are inferior." After our decision was rendered, a motion for rehearing was filed on behalf of the interpleaders, and an able written argument was presented in support of it. An examination of this argument and a recurrence to the record convinces us that we were wrong in the application of the second principle, on which we had proceeded, to the facts of the particular case. We found, on looking more closely at the record, that each of the interpleaders was proceeding to recover the price "of *a certain bill* of goods," sold by such interpleader to Rothan & Co., and that the special levy made by each interpleader was a levy upon such goods of the bill of goods thus sold to Rothan & Co., as could be found in their store in St. Louis, not resold by them. We concluded that, upon these facts, the principle above stated, in regard to mingling together a demand which was privileged, so to speak, with one which was not privileged, could have no application, but that, where the creditor was suing to recover the price of a single bill of goods sold and delivered to the defendant, he would not be divested of the privilege given him by the statute, if otherwise entitled to it, in respect of such

goods as he might find in the hands of the debtor unsold, from the mere fact that the debtor had succeeded in selling and placing beyond his reach a portion of them. Satisfied that we were wrong upon this ground, and being in much doubt upon the other ground, we concluded to grant a rehearing and give the cause such a reconsideration as we could before finally deciding it.

We have now gone over the matter again. All the members of the court still feel much doubt upon the question, and, in view of the great importance to a commercial community of having the question definitely and speedily settled by the only tribunal which can finally settle it, whether this statute is a statute of priorities among creditors or a mere statute of exemption in the case where a creditor has obtained a judgment and execution, we have concluded that we exercise our powers most wisely by adhering to our former decision, stating again the grounds thereof, and by certifying the case to the supreme court for final determination, in pursuance of the constitutional mandate.

The ruling of the circuit court appears to have been based upon the view which the court took of the proper interpretation of section 2353 of the Revised Statutes of 1879. This statute reads as follows: "Personal property shall, in all cases, be subject to execution on a judgment against the purchaser for the purchase price thereof, and shall in no case be exempt from such judgment and execution, except in the hands of an innocent purchaser, for value, without notice of the existence of such prior claim for the purchase money." The learned judge took a view which appears to have been influenced by the following *dictum* of Mr. Justice NORTON in *Parker v. Rodes*, 79 Mo. 91: "Under this statute the vendor of personal property, *who had obtained a judgment against the vendee*, might seize the property on execution in the hands of a purchaser thereof with

notice that the purchase price had not been paid, and it would probably authorize the vendor, under circumstances justifying a suit of attachment against the vendee, to seize such property in the hands of a third person purchasing with notice that the property had not been paid for." In *State to use v. Mason*, 96 Mo. 132, this *dictum* is repeated. But, beyond this, we discover nothing in the opinion which furnishes us with a guide to the decision of the present case.

The decision of the Kansas City Court of Appeals in *Bolckow Mill Co. v. Turner*, 23 Mo. App. 103, was professedly rendered in deference to the foregoing *dictum* of the supreme court. In that case there were several attaching creditors, the junior one of whom, a manufacturing corporation, claimed the property over the others, on the ground that its demand was for the unpaid purchase money of the specific goods levied upon. But this junior attaching creditor had prosecuted its demand *to judgment*, and the question was whether it could have execution, by reason of its supposed priority as an unpaid vendor, over the prior attachment, and the court held that it could. The difficulty that the property was already *in custodia legis* in the actions of the prior attaching creditors, when it was first seized under the attachment of the unpaid vendor, was one which the court thought must yield, in order to give scope to the enforcement of the right which the court understood to be given by the statute. The court said: "We hold that personal property held under an attachment can be seized under an execution on a judgment against the purchaser for the purchase price of the property, unless, indeed, the attaching creditor can be held to be an innocent purchaser for value. The statute makes only one exception, that of an innocent purchaser for value, without notice of the existence of the claim for the purchase money. Creditors are not named in the exception. We cannot enlarge

this exception. Creditors are not innocent purchasers." The court also conceded that it could not be said that the statute confers upon the vendor of personal property a *lien* for the purchase price thereof; but it observed that the right conferred by the statute may, in some cases, partake of the character of a vendor's lien.

If the present case stood before us as the above case stood before the Kansas City Court of Appeals, we should decide it in the same way. We have given anxious care to the subject of this statute, in this case and also in the case of *Boyd v. Ward Furniture, etc., Co.*, 38 Mo. App. 210, just decided, and have come to the conclusion that whatever our views may be of its policy or of the mischiefs which it is likely to create, it is our duty to administer it according to its terms, and not to attempt to fritter it away by interpretation, or to graft exceptions upon it.

But we are unwilling to go beyond its terms. It cannot escape attention that it reverses what had hitherto been the policy of the law in this state. That policy has been steadily opposed to rights in the nature of secret liens upon personal property, and to secret titles in unpaid vendors where the property has passed into the possession of the vendee. This is clearly shown by the second clause of section 2505, Revised Statutes of 1879, and by section 2507 of the same statute. The first of these statutes invalidates conditional sales where the goods are delivered to the vendee, except where the condition is evidenced by writing executed, acknowledged and recorded, as in the case of chattel mortgages. The second, enacted in 1877, was manifestly intended to invalidate numerous devices which had sprung up for the evasion of the latter, such as the pretense of leasing, renting or hiring the property, where the real transaction was a sale on the plan of the vendee receiving possession and paying the purchase price in instalments. As was said by the supreme court in *Coover v. Johnson*,

86 Mo. 533, this last statute was intended to prevent secret and unrecorded contracts of sale from being used to the detriment of unsuspecting creditors or purchasers from the vendee. Under the former of these statutes (section 2505) it is manifest that an unpaid vendor cannot reserve a right of priority over other creditors by any species of contract with his vendee, unless the same is acknowledged and recorded, as in the case of chattel mortgages. Under the second (section 2507), he cannot reserve *title* in himself by any device of leasing, renting or hiring, where possession is actually delivered to the assumed lessee, tenant or bailee, unless the contract is in like manner acknowledged and recorded, as in the case of chattel mortgages. But, by the terms of section 2353, the same result is reached, so far as striking down the rights of other creditors is concerned. The unpaid vendor cannot, indeed, reclaim the property in specie, but, under the construction contended for by the respondent, his junior attachment of it is superior to the senior attachment of other creditors; and, although it may be *in custodia legis* under their attachments, the execution under his judgment, when recovered, will vacate their liens and wrest the property from the custody in which their attachments have placed it.

Aside from this, the policy of our statute law has always been to make the actual possession of goods and chattels *prima facie* evidence of ownership; and to this end it has invalidated sales of goods and chattels, unaccompanied by the delivery of actual possession within a reasonable time, regard being had to the situation of the property. R. S. 1879, sec. 2505. The courts of this state have always given the fullest effect to this statute as a rule of public policy, and (except in the one case of *Worley v. Watson*, 22 Mo. App. 546), without reference to the question whether the person challenging the sale was a prior or subsequent creditor or purchaser. *Knoop v. Distilling Co.*, 26 Mo. App. 303, and cases cited.

This policy, so important in upholding that system of credits without which our modern commerce could not subsist, is undoubtedly greatly infringed by section 2353, Revised Statutes. It is probable that nearly all the seasonable goods in the mercantile stocks in this state are purchased on longer or shorter credits, and that every wholesale and retail store is, to a large extent, filled with goods the purchase price of which has not been paid. The possessors of the goods, by means of their possession, trade actively and acquire credits. A banker, seeing a merchant in the possession of a large stock of seasonable goods, doing an active and apparently lucrative trade, extends credit to him by discounting his paper. Suddenly grounds of attachment are discovered, and the banker attaches the goods to save his debt. He finds that he has got nothing. The goods, although in the possession of the owner as a stock in trade,—the stake held out by him to the world on which he secured credit,—are all held by distant creditors by means of secret strings which they are at liberty to pull at any time.

Our conclusion is that, while we cannot yield to the argument *ab inconvenienti*, and set aside the distinct terms of the statute, we ought, nevertheless, to refuse to extend a statute, so fraught with mischief to commerce, beyond its strict terms. In thus holding that the statute applies to the case of a judgment and execution, according to its language, and is not to be extended by a remedial construction to the case of an attachment, so as to interfere with the priority of an earlier attaching creditor, we do not introduce any novel conception in the interpretation of the statute law relating to attachments and executions. Several distinctions in respect of rights where the proceeding is by attachment, and where it is by execution, have been discovered in our statute law, and recognized by our courts. Thus in *State to use v. Knott*, 19 Mo. App. 151, this court held

that the fact that the defendant in an execution is about to remove from the state will not justify the levy of an execution upon his property, exempt by the terms of the statute relating to executions, although the statute relating to attachments (Revised Statutes, 1879, sec. 416) provides in terms that no property or wages declared by statute to be exempt from execution shall be attached, *except* in the case of a non-resident defendant or of a defendant who is about to move out of the state with intent to change his domicile. It was argued that the statutes were to be construed *in pari materia*, and that the qualification that the exemption privilege annexed to the statute relating to attachments should be extended to the statute relating to executions. But this court held that the claim was untenable, using the following language: "Whatever may have actuated the legislature to discriminate between property subject to seizure on *mesne* and final process, it has unquestionably made such discrimination, not only in this instance, but in numerous others; and it is not for the courts to substitute their discretion for that of the legislature." Again, under section 2525, Revised Statutes, 1879, third persons may interplead as to property *attached* in the hands of a garnishee, while, in the case of property thus taken in execution, there is no such right. *Wymer v. Pritchartt*, 16 Mo. 252. We allude to these decisions to show that the statute law has created distinctions between cases where the proceeding is by attachment and where it is by execution, which the courts have not felt at liberty to disregard, as we are asked to do in this instance, by building up a liberal construction of the statute under consideration, creating for it an "equity," so to speak, so as to extend its benefits to a party whose case is not within its terms. We are, therefore, of opinion, for the foregoing reasons, that such a construction ought not to be extended to this statute, and the judgment, with the concurrence of all the judges, will be reversed, and the cause remanded.

As, however, it is desirable that the question litigated should be finally put at rest by the only tribunal that can thus put it at rest, and as one of the judges of the court is of opinion that the decision herein rendered is opposed to the decision of the supreme court in *State to use v. Mason*, 96 Mo. 132, it is ordered that the cause be certified to the supreme court for final determination.

PATRICK J. SMITH, Respondent, v. MARGARET HALEY *et al.*, Appellants.

St. Louis Court of Appeals, May 29, 1890.

1. **Practice, Trial:** COMPULSORY REFERENCE: LONG ACCOUNT. If in an action arising under a contract for the erection of a building and for the enforcement of a mechanics' lien for the amount claimed, the account sued upon contains fifteen items of charges and credits, and the answer presents five counter-claims arising out of the performance of the contract, and involving together thirteen items of counter-charge, so that the pleadings as a whole present twenty-eight items, which are the subject of controversy, the court is warranted in ordering without the consent of the parties a reference of the cause on the ground that the examination of a long account is necessary.

2. ———: EXCEPTIONS TO RULINGS OF A REFEREE ON THE ADMISSION OR EXCLUSION OF EVIDENCE. In order that a party to a cause which has been tried before a referee may demand a review of rulings of the referee on the admission or exclusion of evidence he must, in the exceptions filed by him under the statute on the filing of the referee's report, specifically point out the rulings of which he complains. A general exception by defendants that "the referee admitted illegal and improper evidence for the plaintiff, and excluded legal and proper evidence for the defendants," is insufficient.

3. **Pleading:** WAIVER. Under an allegation of performance, a waiver may be shown, and where the contract, which is the foundation of the action, requires performance to be made in a particular way, it may be shown that the defendant accepted performance in a different way.

41 611
46 402

41 611
48 309

41 611
49 330

41 611
61 475

On motion for rehearing.

4. **Mechanics' Liens:** FILING OF ACCOUNT. An account filed as the basis of a mechanic's lien is insufficient to sustain the lien, if it consists of one item for the entire cost of the erection of a building; and this is so, though the building was erected under a written contract fixing its cost at the amount named in the account, and though the lien be filed by the original contractor for the erection of the building.

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

REVERSED AND REMANDED.

Thomas A. Russell, for appellants.

Rowe & Morris, for respondent.

THOMPSON, J.—The plaintiff, as an original contractor, brings this action upon a building contract, to recover a balance alleged to be due thereon, for building a house for Mrs. Haley, one of the defendants, and also seeks to enforce a mechanic's lien upon the house and lot for the balance claimed to be due. The cause was referred to a member of the bar against the objection of the defendant to try all the issues. He heard the evidence of the parties and filed a report, recommending a judgment in favor of the plaintiff in the sum of two hundred and nine dollars and twenty cents, and that the same should be charged as a mechanic's lien on the property. Within four days the defendants excepted to this report; their exceptions were overruled; judgment was entered thereon in accordance with its recommendations; they, within four days, filed a motion for a new trial, and this being overruled, they appeal to this court.

I. The first error which they assign is the action of the court on sending the case to a referee. Waiving the question whether this proposition has been properly

presented for review, in view of the fact that no exception was saved to the ruling of the court on this point until the motion for new trial, the court is of opinion that the assignment is untenable. An inspection of the pleadings leaves no doubt in our minds that the issues required the examination of a *long account* on both sides; and the statute authorizes the court to refer the cause without the consent of the parties, "where the trial of an issue of fact shall require the examination of a long account on either side." R. S. 1889, sec. 2138. The account sued on contains no less than *fifteen* items of charges and credits. The answer embraces *five* distinct counter-claims, each one demanding damages for a failure of the plaintiff to complete the work as required by the contract in certain particulars named. The fifth of these counter-claims contains *nine* separate and distict specifications of such failure, in addition to those set up in the other four counter-claims. There are, therefore, on the face of the pleadings, at least twenty-eight distinct items which are the subjects of contestation. We have no difficulty in holding that such a state of the pleadings presents the case of a long account, within the meaning of the statute.

II. Another assignment of error is that the referee erred in permitting the plaintiff to show that the plans and specifications, under which the house was built, were changed before the signature of the contract. An examination of the testimony, returned by the referee with his report, shows that numerous objections were made to evidence, some of which were sustained and some overruled; but the record does not show that any of these objections were renewed in a distinct form in the exceptions to the referee's report. It is a fundamental rule of procedure that exceptions to the admission or the rejection of evidence must be taken in every judicial trial at the time when the evidence is offered and when the ruling upon the objection is made.

Hannibal & St. Joseph Ry. Co. v. Moore, 37 Mo. 338; *Shaler v. Van Wormer*, 33 Mo. 386. Citing these and other cases, it was held by this court in *Hill v. Bailey*, 8 Mo. App. 85, 88, that objections to the introduction of evidence before a referee come too late when made for the first time upon exceptions to the referee's report. But, while an objection must be taken before the referee, yet, as he has no power to sign a bill of exceptions, it does not seem necessary for him to note in his report of the evidence that exceptions were taken; but it seems to be the proper practice for him to note the objections in his report of the evidence and his rulings thereon. If the party excepting to the report desires to have the court review any of those rulings, he must, on well-settled principles of procedure, point out specifically the rulings of which he complains. A general exception that the referee admitted illegal and improper evidence, against the objection of the party complaining, will not avail. Here the exceptions to the referee's rulings upon evidence, which were made in the form of exceptions to his report, are of the most general character, and do not put the exceptor's finger upon any particular ruling. The only exception is in the following words: "The referee admitted illegal and improper evidence for the plaintiff, and excluded legal and proper evidence for defendants." This is certainly not an exception to rulings upon evidence, of that specific character which is essential to bring such rulings to the attention of an appellate court in accordance with the rules of appellate procedure. If the evidence returned by the referee with his report, upon which he has acted judicially and based his findings and recommendations, are to be treated as a mere deposition, then, in excepting to his rulings upon the admission or rejection of evidence, the exceptor must, upon any theory of legal procedure, be as specific in the manner of taking his exception, as he would be in excepting to a deposition taken out of

court to be read in court upon a trial. An exception to a deposition so taken, which merely averred that the notary or other officer taking the deposition admitted illegal and improper evidence for one party, and excluded legal and proper evidence for the other party, would not enable the court to know what portion of the deposition the exceptor desired to have excluded, or what portion excluded by the officer he desired retained, and it, therefore, would not be sufficiently specific to enable the court to act upon it.

It thus appears that nowhere in the record, prior to the entry of judgment, was any distinct exception saved to any distinct item of evidence admitted or excluded. There is, therefore, clearly nothing for review in this court under this head.

III. The next assignment of error which we shall notice is that the court erred in allowing the plaintiff a lien for the old stairs, which were attached to a building separated from the one on which the lien was filed. The court is of opinion that this assignment of error is well taken, but as the amount of this non-lienable item was but fifteen dollars, it can be cured by a *remittitur*.

IV. The next assignment of error which we shall notice is in the form of a proposition, that the plaintiff could secure no lien on the defendant's property because he failed to file an itemized account, as required by the statute. We find that he filed an itemized account, stating the amount which, by the terms of the contract, was the agreed contract price for the building, to-wit, the sum of thirty-nine hundred and ninety dollars, and also containing eight specific charges for extras growing out of changes in the contract by the parties thereto, and amounting in the aggregate to eighty-five dollars and thirty cents. We do not see that any objection was taken to this account upon this or any other ground, when it was offered in evidence, either before the referee or in the form of exceptions to the

referee's report; nor do we see that such an objection was called to the attention of the court in the motion for new trial. We do not understand, therefore, that there is anything under this assignment of error which we could review, if we regarded the objection as sufficient.

V. The last assignment of error presents some difficulty. It is that this is an action on a special contract and that the plaintiff is recovering upon a *quantum meruit*. There is some difficulty in determining whether this objection has been properly saved for review in this court, growing out of the very general manner in which exceptions to the referee's report were taken and renewed in the motion for new trial. The motion for new trial contains the usual assignment that the judgment is against the evidence and the weight of the evidence; and it also assigns, as a reason why a new trial should be granted, that the finding of the referee and the judgment of the court are contrary to the law and the evidence. We assume that, if an action has been commenced on a special contract, and a recovery has been had upon the mere proof of the rendition of services at the instance and request of the defendant, and upon evidence of the reasonable value of such services, the case presented is one where the petition is unsupported by the evidence in its entire scope and meaning, and that, in such a case, there can be no recovery. It is well settled, by numerous decisions in this state, that, where an action is brought upon a special contract, there can be no recovery upon what is called a *quantum meruit*. *Eyerman v. Mt. Sinai Cem. Ass'n*, 61 Mo. 489; *Davis v. Brown*, 67 Mo. 313; *Lewis v. Slack*, 27 Mo. App. 119; *Halpin v. Manny*, 33 Mo. App. 388; *Warson v. McElroy*, 33 Mo. App. 553. There is often much difficulty in applying the rule in the case of building contracts, having extensive specifications. The cases which have been before this court

show that the specifications in such contracts are seldom complied with throughout, as originally drawn, but are generally departed from more or less, by the subsequent acts of the parties, to meet changes dictated by motives of economy or taste. To afford room for these deviations, such contracts generally provide that they may be made, and state the manner in which they shall be made. It would seem that the written contract, which was the foundation of the action in the present case, was drawn for the parties by an architect, and that it was, in this respect, in the form in general use among architects and builders in St. Louis. It contemplated, as these contracts usually do, that the work should be directed by a superintendent. These building superintendents are, it is well known, generally architects,—in most cases the particular architect who makes the plan and draws the specifications. This architect, in his character of superintendent, acts as the agent of the owner; and, to guard against the possibility of fraud, unfounded claims, misunderstandings and disputes, such contracts generally provide that deviations from the original plans and specifications shall be made in writing, and that the writing shall be signed by the architect or superintendent. Such a provision was contained in this contract. It provided that the plaintiff should "erect, build, finish and complete, in a good, sound, workmanlike manner, to the perfect satisfaction and approbation of the superintendent, the aforesaid buildings and works, according to the specification, drawings, dimensions and explanations and observations thereon, or herein stated, described or implied, or incident thereto, which may become necessary to the true intent or meaning thereof, although not specially and specifically stated, or described by the aforesaid drawings and specifications." It further provided as follows: "And should it appear that any of the works hereby intended to be done, or matters relating thereto,

are not fully detailed or explained in the said specifications and drawings, the said party of the second part shall apply to the superintendent for such further detailed explanations, and perform his orders as part of this contract. The superintendent shall be at liberty to make any deviation from, or alteration in, the plan, form, construction, detail and execution, described by the drawings and specifications, without invalidating or rendering void this contract; and, in case of any difference in the expense, an addition to or abatement from the contract price shall be made, and the same shall be determined, by the architect. And in case any such alteration or change shall be made or directed by the said superintendent as aforesaid in the plans, drawings, construction of the aforesaid building, and in case of any omission or addition of said buildings being required by said superintendent, the cost and expense thereof is to be agreed upon in writing, and such agreement is to be signed by the said party of the second part and superintendent before the same is done, or before any allowance therefor can be claimed; and in case of any failure so to agree, the same shall be completed upon the original plan."

The difficulty with the execution of this contract in strict accordance with its terms, including any subsequent deviations, was, that *there was no superintendent.* The evidence of both parties shows that Haley and wife undertook to be their own superintendents. In fact, they began to change the contract by parol agreements with the plaintiff, after he had made the bid and before the contract had been formally signed. A very essential change in the plan of the house was thus made after the plaintiff's bid was accepted, but before the contract was signed. It consisted in changing the west wall from a nine-inch to a thirteen-inch wall, and, according to the plaintiff's testimony, it was agreed, in order to keep the work within the bid, to counteract this increase of

expense by taking off three feet of the length of the building, and by taking out the sanitaries in the water closets. Numerous other changes were made in the course of the work, at the dictation of Haley and wife. The expense of these changes was not agreed upon in writing, in accordance with the provisions of the contract above set out. The work in many details, when finished, differed from the specifications of the contract. This is shown by the testimony adduced in favor of both parties, and is not disputed. Indeed, it is not claimed that the house was built in strict accordance with the plans or specifications; but the evidence leaves it equally clear that the parties throughout regarded the contract as fixing the general character and price of the work.

The petition counts upon the contract, as in ordinary cases of action upon written contracts, and avers performance according to the terms of the contract. We understand it to be the rule that under an allegation of performance, a *waiver* may be shown, and that, where the contract, which is the foundation of the action, requires performance to be made in a particular way, it may be shown that the defendant accepted performance in a different way.

The referee, in his report, finds that the contract was changed in respect of eight different matters, of the aggregate value, properly chargeable to the defendants, of eighty-five dollars and thirty cents. He also allows them, on their counter-claims for certain deviations from the specifications of the contract as executed, the sum of one hundred and two dollars and ten cents. Giving the defendants credit for the amount which they have paid under the contract, he arrives at the balance due the plaintiff of two hundred and nine dollars and twenty cents. With the exception of the non-lienable item of fifteen dollars, it seems that the referee has worked the matter out as well as it would probably

be done on another trial, and as well as it would be done if the plaintiff were nonsuited and driven to an action on a *quantum meruit*. There is much difficulty in dealing with the case, owing to the numerous deviations between the contract as made and the contract as executed; but the evidence satisfies us that most of these deviations were due to the dictation of the defendants, who undertook the task of acting for themselves as superintendents of the work. We do not see that the ends of justice would be subserved by another trial, or by a reversal of this judgment without remanding the cause, thus driving the plaintiff to an action on a *quantum meruit*. If the plaintiff will, within one week from the filing of this opinion, remit fifteen dollars of the judgment recovered, it will be affirmed as to the residue, otherwise it will be reversed and the cause remanded. In either event, the appellant will recover the costs of the appeal. It is so ordered. All the judges concur.

OPINION ON MOTION FOR REHEARING.

THOMPSON, J.—We see no reason for granting the rehearing which is asked for in this cause; but the argument which has been presented to us in support of the motion calls our attention to the recent decision of the supreme court in *Rude v. Mitchell*, 97 Mo. 365. That case holds that, where the account filed as the basis of a mechanic's lien, in a case between the original contractor and the owner, states the whole contract price of the building in one item, it is not the "just and true account" required by the statute, but is worthless as the basis of a lien, and that, where the builder files such an account, he acquires no lien. This is contrary to what this court has hitherto supposed to be the law on this subject. We have hitherto proceeded upon the idea that, where the original parties to the

contract have agreed on a round sum for the price of the building, all that the builder can do in drawing his account is to state such round sum as the first item; though our understanding has been that the rule is different in the case of the lien of a sub-contractor. We have supposed that an attempt on the part of the builder to divide up this round sum arbitrarily, so as to show how much *he* regards as chargeable to the masonry, how much to the carpenter work, how much to the plastering, and the like, would be nugatory, because neither justified nor authorized by the contract, which has made no such division. But now that the supreme court has decided that this must be done, even as between the original parties to the building contract, it is our duty to conform our judgment to their view of the law. There can be no possible distinction in this respect between the lien account in *Rude v. Mitchell*, 97 Mo. 365, and that in the case at bar. Here the first item of the account is, "To building, complete, one two-story house with mock-mansard roof, situated at number 2819, Sheridan avenue, for contract price, thirty-nine hundred and ninety dollars." As this defect rendered the entire lien void, the question is sufficiently saved for review by the exception to the referee's report (renewed in the motion for new trial), that the finding is against the evidence.

Our conclusion is that the judgment of the circuit court must be reversed, and the cause remanded, with directions to enter judgment for the sum recommended by the referee, and to enter judgment for the defendants in respect of the claim for a mechanic's lien. It is so ordered. All the judges concur.

41 622
45 420
41 622
76 399

In re LYDIA BLACKBURN, An Infant.

Kansas City Court of Appeals, June 2, 1890.

1. **Parent and Child:** CUSTODY OF CHILD: ITS WELL-BEING. The custody of children cannot be awarded by any fixed and inflexible rules, as may be done where mere rights of property are involved. The discretion of the court will be exercised in the light of some general rules, and yet in many cases these rules seem ignored in the effort of the courts to do the best thing possible for helpless children, whose well-being is the *polar star* by which the courts are guided on the way to decisions.

2. ——: EFFECT OF DIVORCE: DEATH OF SUCCESSFUL PARTY. A decree of divorce in favor of the wife, and awarding her the custody of the infant daughter, had the effect to destroy the priority of the father's right to such custody and invest the same in the mother, while she lived; but, on her death, the father's right was relieved of that paramount right of the mother; and the decree does not operate as a conclusive bar to the father's right.

3. ——: ——: CUSTODY NOT TRANSMITTED. While the decree of divorce gave the custody to the mother, such trust could not be by her transmitted at her death to another, even by contract.

4. **Evidence:** DECREE OF DIVORCE AND CONDUCT. The record and judgment for divorce is as between others than the parties thereto conclusive evidence only as to the matrimonial status of the parties; still such record and proceedings together with the conduct of the parties may amount to an admission of the facts charged in such record.

5. **Parent and Child:** CUSTODY OF CHILD: REVIEW OF EVIDENCE. The evidence in this case reviewed and found such as to warrant the court in regarding any present change in the custody of a little girl left by a divorced mother at her death in the custody of her maternal grandparents, as an experiment, and to admonish the court to "let well enough alone."

Original Proceeding by Habeas Corpus.

INFANT REMANDED.

Samuel Boyd and *Anderson & Sebree*, for appellant.

(1) None of the evidence relative to the request of the deceased, Lizzie Blackburn, to her parents to keep her child after her death is admissible. Such request is irrelevant, as any arrangement of that kind under our law is void. In the cases where such arrangements have been admitted in evidence, the reason for their admission is that the arrangement was made by the parent who was a party to the suit, and is relevant on the ground that it is a circumstance touching his affection for the child, which is entitled to be considered with other circumstances of the case. In this case, the arrangement was not made with Marshall Blackburn, the petitioner, and hence it can have no bearing in the case. (2) The decree of divorce, in which the custody of the child was awarded to the mother, only had force and effect during her life. As between Marshall Blackburn, the petitioner, and anyone else than his wife, there was no adjudication. The mother of the child is now dead, and the question, therefore, is a new one, so far as that decree is concerned, the contest now being between the petitioner and the respondent. *State v. Reuff*, 29 W. Va. 751; s. c., 6 Am. St. Rep. 462; *Miller v. Wallace*, 76 Ga. 479; s. c., 2 Am. St. Rep. 48; *Bryan v. Lyon*, 104 Ind. (54 Am. Rep.) 227; *Gilley v. Gilley*, 79 Maine, 292. (3) In a contest by the father for the possession of his infant child, "it is the duty of the court to award the person of the infant to the custody of the father, unless it is made manifest to the court that the father, for some reason, is unfit or incompetent to take charge of it; or unless the welfare of the child itself, for some special or extraordinary reason, demands a different disposition of it at the hands of the court." *In the Matter of Scarritt*, 76 Mo. 565; *Weir v. Marley*, 12 S. W. Rep. 798, s. c., 99 Mo. 484.

(4) The presumption of law is that the interest of the child is to be in the custody of the parent. The statute of this state recognizes this presumption. R. S., sec. 5279. And under the statute, before another can be substituted in the place of the father as guardian of the child, the father must first be adjudged to be incompetent or unfit for the duties of guardianship. R. S., sec. 5281. (5) Such being the law, the claim of the respondent for the custody of this child must fail. By nature and by law there rests upon the father the duty to care for, support and nurture this child; such duty rests on no one else. We submit that while this child is yet in its early infancy, and before its affections have become strongly fixed, it ought to be placed with its father whose duty and inclination, whose age and situation, fit him to care for, cherish and love it, to watch over and rear it better than any other.

Dean D. Duggins and *Karnes, Holmes & Krauthoff*, for respondent.

(1) The divorce decree is a bar to any claim by the petitioner to the custody of the infant in question. Where a decree of divorce is granted for the cruel treatment of the husband, giving the custody of the infant child absolutely to its mother, it takes away *ipso facto* all control of the father over the child. It nullifies, or at least neutralizes, the rule of the common law, and takes from the father all power thereafter over the child. By the decree, the infant is no longer the child of the divorced father, but is entirely under the control of the mother until it arrives at the age of majority. The wife at her death has the right to commit the child to a competent guardian, whose right of custody will be upheld against the father. *Wilkinson v. Deming*, 80 Ill. 342; *Cocke v. Hannam*, 39 Miss. 423, 438, 439; *Miner v. Miner*, 11 Ill. 43, 50; *State v. Bechdel*, 37 Minn. 360; *Burritt v. Burritt*, 29 Barb. 124, 129;

Hewitt v. Long, 76 Ill. 399, 409; *Harvey v. Lane*, 66 Me. 536; *Husband v. Husband*, 67 Ind. 583; *Johnson v. Onstead*, 42 N. W. Rep. (Mich.) 62. The doctrine of *res adjudicata* applies in all its force to a proper order affecting the custody of a child. *Weir v. Marley*, 12 S. W. Rep. 798, 799; s. c., 99 Mo. 484; *State ex rel. v. Bratton*, 15 Am. Law Rev. (N. S.) 359, 365, 366 (Sup. Ct. Del., 1876, WALES, J.). (2) The rule is clear that on a divorce of the wife for the fault of the husband, the common-law, *prima facie* right of the husband to the custody of the children is neutralized and overcome, and will no longer be recognized. All the cases agree to this, even where the conclusive effect of the decree is not declared. *Wand v. Wand*, 14 Cal. 512, 515, 516; *Green v. Green*, 52 Iowa, 403; *Welch v. Welch*, 33 Wis. 534, 541; *Bennett v. Bennett*, 1 Deady, 299, 303, 304; *Hoffman v. Hoffman*, 15 Ohio St. 427, 436; *Cocke v. Hannam*, 39 Miss. 423, 438, 439; 2 Bish. Mar. & Div. [6 Ed.] secs. 530-546; *State v. Smith*, 6 Greenl. 400, 405; *Foster v. Alston*, 6 How. (Miss.) 406, 461; Schoul. Dom. Rel. [3 Ed.] sec. 248; *In re Pray*, 60 How. Pr. 194; Church on Habeas Corpus, sec. 441; 2 White & Tudor's Lead. Cas. Eq. [4 Am. Ed.] 1522; *People v. Brooks*, 33 Barb. 85. In any event the prevailing rule at this day attaches little importance to the so-called, common-law right of the father. "The welfare of the child, and not the technical legal right, is the criterion by which to determine to whom the custody of a child belongs. * * * The paramount consideration is, what is best for the welfare and happiness of the child itself." *In re Scarritt*, 76 Mo. 565, 584, 586; 2 Bish. Mar. & Div. [6 Ed.] sec. 526; Schouler Dom. Rel. [3 Ed.] secs. 248, 251; Church on Habeas Corpus, secs. 446-448; *Hewitt v. Long*, 76 Ill. 399, 418. It is to be remembered that the same general rules govern this question, whether it arises as incident to a divorce suit, in equity or on a *habeas corpus* proceeding. Even if the rules already

quoted do not completely bar the claim of the petitioner, the most that can be accorded to him is to leave his claims and rights upon equal grounds with those of respondent. They certainly can be no higher, in view of the neutralizing effect of the divorce decree. "A parent's right to the custody of a child is not like the right of property, an absolute and uncontrollable right." *Chapsky v. Wood*, 26 Kan. 650, 652; *United States v. Greene*, 3 Mason, 482, 485 (STORY, J.); *Foster v. Alston*, 6 How. (Miss.) 406, 461; *Mercien v. People*, 25 Wend. 64, 92, *et seq.*; *Clark v. Boyer*, 32 Ohio St. 299, 305. Even if there were room for doubt, the court will not change an existing satisfactory custody, the rule in such cases being widely different from the one governing cases where the father has the custody and is sought to be deprived of it. Church on Habeas Corpus, sec. 426; *Chapsky v. Wood*, 26 Kan. 650, 656; *Commonwealth v. Drummond*, 34 Am. Rep. 699; *Coffee v. Black*, 82 Va. 567, 572. Will the best interests of the child be subserved by changing its custody? In case of doubt, the court will not experiment on a change. *Duke of Beaufort v. Berty*, 1 P. Wms. 703; Schouler Dom. Rel. [3 Ed.] sec. 248, p. 339, note 1; *In re Pray*, 60 How. Pr. 194; *Drumb v. Keen*, 57 Iowa, 435; *In re Waldron*, 13 Johns. 417, 419; *Wand v. Wand*, 14 Cal. 512, 515, 516; *McShan v. McShan*, 56 Miss. 413, 416, 417, 418; *Cocke v. Hannam*, 39 Miss. 423, 440, 441, 442; *Gradenhire v. Hinds*, 1 Head, 402, 410; *McKim v. McKim*, 12 R. I. 462, 463, 464; *People v. Porter*, 23 Ill. 196; *Washaw v. Gimble*, 50 Ark. 351, 355; *In the Matter of O'Neal*, 3 Am. Law Rev. 578, 579, 580; *Pool v. Gott*, quoted, 76 Mo. 590; *In the Matter of Bort*, 25 Kan. 308, 311; *Chapsky v. Wood*, 26 Kan. 650, 653; *In re Beckwith*, 23 Pac. Rep. 164; *In re Bullen*, 28 Kan. 781, 787; *In re Stockman*, 38 N. W. Rep. 876, 880; *Merritt v. Swinley*, 82 Va. 433, 437, *et seq.*; *Jones v. Darnall*, 103 Ind. 569, 573, 574; *Sturtevant v. State*, 15 Neb. 459; *Corrie v. Corrie*, 42

Mich. 509; *Lyons v. Blenkin*, 1 Jacobs Ch. 245, 262; *Lusk v. Lusk*, 28 Mo. 91, 93; *Richards v. Collins*, 45 N. J. Eq. 283, 287, 288; *Sheens v. Stern*, 43 N. W. Rep. 728; *Hewitt v. Long*, 76 Ill. 399, 403; *Miner v. Miner*, 11 Ill. 43, 51; *State v. Libbey*, 44 N. H. 321.

GILL, J.—This is a proceeding by writ of *habeas corpus*, instituted by Marshall Blackburn to recover the possession of his child Lydia, now in the custody of Carroll Logsdon and wife, who are the maternal grandparents of the said Lydia. In August, 1884, Marshall Blackburn and Lizzie Logsdon were married. This union resulted in the birth of Lydia (the subject of this unhappy controversy) in September, 1885. The young couple continued to live together as husband and wife, at or near the town of Blackburn, Saline county, Missouri, till in January, 1887, when a temporary separation occurred. After an absence of ten days, however, Mrs. Blackburn returned and resided with her husband until the month of May following, when a second separation transpired, Mrs. Blackburn, with her infant child going back to her father's home some few miles distant. This final separation took place, as already stated, May, 1887. In January, 1888, the wife commenced an action for divorce, alleging cruel and barbarous treatment, such as to endanger her life, and to render her condition intolerable. Mr. Blackburn, in due season, filed his answer, consisting of a general denial of the charges made. The cause was heard by the circuit court at the October term, 1888, and judgment for divorce in favor of the wife rendered, giving her, too, the custody of her infant child, and fixing the alimony at five hundred dollars. It may be as well to state here that Blackburn made no active opposition at the trial of the cause, and that the amount of the alimony was fixed by agreement. In January, 1890, Mrs. Blackburn, the divorced wife, died at her father's house in Saline county, where she

had continued to live as a member of Mr. Logsdon's family from the day she left Blackburn, in May, 1887. During all this time this divorced mother and infant child had been cared for and supported by Mr. and Mrs. Logsdon, without any assistance whatever from the father who now seeks the custody of the little girl, the one of all most interested in this contest. For the present this appears all that it is necessary to state, as regards the facts giving rise to this controversy. Other matters will be mentioned later on.

II. Contests of this nature are the most embarrassing with which courts have to deal. This comes not alone because they have to do with ties of relationship and intimate association, but because as well the judge must, to some extent, realize a partial and painful responsibility for the future course of a human being. Cases of this kind, too, rest, more than all others, upon the facts and circumstances of each particular controversy. Custody of children cannot be awarded by any fixed and inflexible rules, as may be done where mere rights of property are involved. The discretion of the court, it is true, will be exercised in the light of some general rules, and yet in may cases these seem ignored in the efforts of courts to do the best thing possible for helpless children. For example, it is well understood that the father is entitled to the custody and control of his infant children, and yet, if a dissolution of the marriage is brought about, the courts, if for the best interests of such children, do not hesitate to award the same to the mother, or, in case of her unfitness, will even give the children over to the keeping of third parties. Hence it is said that the *polar star*, by which the courts are guided on the way to decisions in this character of cases, is the well-being of the infant. So, then, we may say that, primarily, the right to the possession of little Lydia Blackburn is with her fater. He has a *prima facie* right to her custody, based upon the reasonable

ground, that, being bound in law for her support and education, he should also have possession and control in order to carry out this obligation to maintain, rear and educate her. Respondent Logsdon (Lydia's grandfather) bases his claim to continue in the care and custody of the child on the grounds: *First.* That, by the decree of divorce, granted in case of *Blackburn v. Blackburn*, in 1888, the father, Marshall Blackburn, was forever barred of any further right or claim of custody, and that, as the divorced mother on her death bed intrusted the child's keeping with Mr. and Mrs. Logsdon, the petitioner father has no rightful claim which he can now enforce; and, *second*, it is claimed that Mr. Blackburn is an unfit person to rear, educate and control his own child.

Counsel seem to agree (and we think rightfully) that during the lifetime of Lydia's mother, after the divorce in 1888 to her death in January, 1890, she, the mother, was entitled to the exclusive custody of the child, that is, that by the decree of divorce, and custody awarded to the mother, Mr. Blackburn's paramount right as father was postponed to that of Mrs. Blackburn. But respondent's counsel go further, and insist that this divorce, for fault of the husband, *ipso facto*, abrogated, or annulled Blackburn's right of custody for all time, even after death of the divorced wife; and that he now occupies no more favorable status than any stranger in blood, or one in nowise connected with the child's existence. We cannot give our approval to this position. Section 4505, Revised Statutes, 1889, provides that, "When a divorce shall be adjudged, the court shall make such order touching * * * the care, custody and maintenance of the children, or any of them, as, from the circumstances of the parties and the nature of the case, shall be reasonable," etc. By authority of this statute, the court, awarding the care and custody of the infant Lydia (then perhaps scarcely

weaned from its mother's breast), doubtless considered as between husband and wife the father's paramount right should yield to "the circumstances of the parties and the nature of the case," and, therefore (if for no other reason), made the order referred to. This judgment for custody of the child had relation only to the circumstances as they then were. It was not the object of that decree to part forever the father and child, or, as expressed by the court in a case cited, it was not intended "to bastardize" the infant. *Taylor v. Jeter*, 33 Ga. 195; *Bryan v. Lyon*, 104 Ind. 234; *State ex rel. v. Reuff*, 29 W. Va. 751. We hold, then, that the judgment of the court in the divorce case does not operate as a conclusive bar to the petitioner's rights, as father, to the custody of the infant Lydia. It had only that effect as between Blackburn and his divorced wife, while she lived. By the rules of common law this father's right of custody was paramount to that of the mother, but the divorce judgment destroyed this priority of right in the father and invested the same in the mother. She is now dead, and the father's right of custody has been relieved of that paramount right of the mother. His is the only claim (as parent) now to be considered. In arriving at a conclusion on this branch of the case we are not unmindful of the respectable authority tending to sustain respondent's contention, prominent among which may be named the case from Delaware (*Lynch v. Bratton*, 15 Am. L. Rev. 359). However, in quite all the cases cited (with perhaps the exception only of *Lynch v. Bratton*, *supra*), the controversy was between the divorced father and mother (both living), and there the integrity of the former decree of divorce, with award of custody of the children, was maintained, and held to be a conclusive bar to the father's common-law rights. In some of such cases the judges do say that the divorce of the wife *for the fault of the husband abrogates* and *annuls* his former superior right of custody of his children. But I apprehend

this only means to declare, in such an event, a superior right in the mother during her life, not a total extinguishment of the father's paternal authority in case of the mother's death. While the judgment in divorce gave the guardianship of the child in controversy to Mrs. Blackburn during her life, it is yet quite obvious that this trust could not be by her transmitted at her death to another. *Taylor v. Jeter, supra.* Hence the request of the dying mother that the child should remain in the keeping of her father and mother, and should not be intrusted to Mr. Blackburn, cannot be used to strengthen the claim now made by respondent Logsdon. Regarded even in the light of an agreement, or contract, between Mrs. Blackburn, the legal custodian at the time, and Mr. Logsdon, it would not be enforced, as repeatedly ruled in this state. *In re Scarritt*, 76 Mo. 565; *Weir v. Marley*, 12 S. W. Rep. (Mo. Sup. Ct.) 798; s. c., 99 Mo. 484.

II. Conceding now a *prima facie* right of custody in the father, the next and most important inquiry is, are we justified, in view of the circumstances, in taking this little girl from the care and possession of respondent, and giving it over to petitioner. This right of the father is not absolute, but is only such as must yield to the future well-being of the child. It is not the personal gratification of a parent or grandparents that we are here to serve. We seek, in the light of the information at our command, the greatest good for this lovely, helpless infant. We find her now (where she has been continuously for three years) in the care and keeping of most estimable people. Mr. and Mrs. Logsdon come into this court with characters, apparently without blemish, popular with their neighbors, and very warmly attached to this little one. They seem not only well to do financially, but equipped with every disposition and means to serve the future rearing of the child. Indeed, Lydia has now a model home, where every substantial

comfort is found and where the earnest care and solicitude of loving, fond relationship awaits her. The child has, through years of an intimate companionship, become as one of the Logsdon family, and to her the father, Blackburn, is an entire stranger. She has no knowledge of him. He has never visited her, or paid any attention to her support or training. Likely this grows out of an estrangement existing between the Logsdons and Blackburn. Still so it is, and we must now accept that situation as we find it. As to Blackburn, respondent's counsel have, in their zeal for their client, brought forward matters intended to shade his character, which we think scarcely deserve to be used against him. Courts do not award a father's children to the custody of third parties because of his religious convictions (or for *want* of religious convictions), nor is it proper to determine here as to whether or not Mr. Blackburn was at fault in swearing at times, or did wrong engaging in an occasional game with friends where money was at stake. If, by reason of habitual gambling, his family was neglected, then such neglect might be urged against him as a fit person as guardian of his child. Mr. Blackburn is at present engaged in a small mercantile business at his town. He comes, it seems, from a most respectable parentage. His widowed mother (a refined and cultured lady, and with whom he lives) comes indorsed as one fit to rear and educate the child in question (and she expresses a willingness so to do). Mr. Blackburn is, too, regarded by his neighbors as a gentleman of honor and fair dealing. We are bound, however, to find, in the light of the testimony adduced, that he is possessed of a most ungovernable temper, that he treated the mother of this child in a very cruel and barbarous manner whilst they lived together as husband and wife; that such treatment began shortly after their marriage and was repeated from time to time till their final separation in May, 1887, when the girl wife sought

refuge in the home of her father. Evidence of these facts abounds in the depositions produced. When, in January, 1887, the wife and mother first separated from him, he admitted the charges preferred and promised reformation if the wife would return to him, and, it seems, entered into a written agreement to that effect. The wife returned to him, but the cruel treatment was repeated until she fled the second and last time, and sought protection of Mr. Logsdon. Shortly thereafter Mrs. Blackburn instituted a divorce proceeding, charging in detail this extreme cruelty and abuse, and when the cause was called for trial he walked from the court room, and permitted the wife to make proof of all the charges thus made (and of which he was fully advised) without uttering one word in defense. While this record and judgment for divorce is as between others than the parties thereto conclusive evidence only as to the *matrimonial status* of Mr. and Mrs. Blackburn, and not of all the matters therein recited (1 Greenl. Ev., secs. 525, 538, *et seq.*; 3 Gray, 387), still the record and proceedings of that suit, attended by Blackburn's conduct, may be regarded in the nature of an admission of the facts there charged. 1 Greenl. Ev., secs. 527, 195, 196, 197; 33 Wis. 542; 55 Mo. 523; 33 Me. 374; and *Ball v. Independence*, lately decided by us, *ante*, p. 469. We care not here to mention in detail the charges made, and (in the court's judgment) sustained in that divorce proceeding. It is sufficient to say, however, that the trial court was apparently justified in finding and declaring that Blackburn's conduct towards his wife was so cruel and barbarous as to endanger her life and such as to render her condition, as such wife, intolerable. Whatever, then, may be the merits of Mr. Blackburn as to integrity and just dealing with his neighbors, his conduct towards the mother of this child was such as to impeach his fitness as its custodian, or at least to cast suspicion upon the propriety of a change in its

present relations and surroundings. A cruel and brutal husband might easily develop into a like unfeeling and unfaithful father. As at present situated this little girl has about her everything that tends to develop the little life into honored and useful womanhood. Proper support and education are within easy reach. Loving, considerate care attends her wants. This father has no home of his own, but must rely on his mother, to whom the child is a stranger. We must be understood, however, to cast no possible reflection on the good name of the elder Mrs. Blackburn. She is beyond question a most excellent lady. Yet there are no ties of companionship between her and her son's child, while, as between Mr. and Mrs. Logsdon and little Lydia, the warmest affection (grown up from continual contact since the separation of father and mother) exists. In short, we regard any present change in the custody of Lydia as an experiment, to some extent. "Let well enough alone," said Judge BREWER in a similar case. 26 Kan. 656. And quoting from the apt words of another court, we must say of the subject of this controversy, "She is happy now and all her surroundings are suitable and safe, and *all is assured.* The proposed change is but an experiment, which seems in no way to promise a better life, or in any wise to be to the welfare of the child." 82 Va. 572. We decline, therefore, to disturb the present status, and remand the infant child Lydia to the care and custody of respondent Logsdon. The other judges concur.

CASES DETERMINED

IN THE

ST. LOUIS AND THE KANSAS CITY

COURTS OF APPEALS.

41 635
47 263
41 635
53 22

OCTOBER TERM, 1890.

HENRY LINK, Respondent, v. HENRY F. HARRINGTON, Appellant.

St. Louis Court of Appeals, October 28, 1890.

1. **Sales:** DELIVERY AS AGAINST CREDITORS. If a sale of chattels be constructively fraudulent as against the creditors of the vendor, the invalidity of the sale is not cured by an actual delivery of the chattels to the vendee prior to a levy thereon; the rule that actual delivery purges a mortgage of chattels of constructive fraud is not applicable, by parity of reason, to the case of a sale.

2. **Fraudulent Conveyances:** CONVERSION OF BILL OF SALE INTO MORTGAGE AS AGAINST CREDITORS. A bill of sale, absolute upon its face, cannot, as against creditors of the apparent vendor, be shown to be a mortgage by reason of a secret understanding between the parties thereto.

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

REVERSED AND REMANDED.

Sale & Sale, for appellant.

(1) The testimony of plaintiff, so far as it is against himself, constitutes an admission binding on him. *Shirts v. Overjohn*, 60 Mo. 305. (2) His testimony showed that the purpose of Alexe in making the transfers was to hinder and delay his creditors, and that plaintiff not only was aware of that purpose but also, by a pretended claim to ownership of goods belonging to Alexe, actively assisted Alexe in carrying out that purpose. Such a transfer is fraudulent and void as to creditors. *Shelley v. Boothe*, 73 Mo. 74; *McNichols v. Rubelman*, 13 Mo. App. 515; *Kuykendall v. McDonald*, 15 Mo. 416; *Potter v. McDowell*, 31 Mo. 62; *Arnholt v. Hartwig*, 73 Mo. 485. (3) Plaintiff's testimony further shows that in the conveyances to him a use was reserved to the grantor Alexe. It was agreed that any surplus after paying the Schnaider Brewing Company's debt was to be paid to Alexe; also that, notwithstanding the transfer, if Alexe could find a purchaser, plaintiff would turn over the property to such purchaser and pay Alexe a commission. These agreements constituted a use in the grantor and rendered the transfer void. R. S. 1889, sec. 5169; *Smith v. Craft*, 12 Fed. Rep. 856; *State to use v. Jacob*, 2 Mo. App. 183; *Bullene v. Barrett*, 87 Mo. 185; *Hisey v. Goodwin*, 90 Mo. 366; *Mfg. Co. v. Steele*, 36 Mo. App. 496; *State to use v. Bell*, 2 Mo. App. 102; *Sibley v. Hood*, 3 Mo. 206. The absence of an actual delivery for six days rendered the transfer void. R. S. 1889, sec. 5178; *Wright v. McCormick*, 67 Mo. 426; *Stewart v. Nelson*, 79 Mo. 524. Nor was such sale validated by delivery before the levy of the attachment writ in favor of Lapp, Goldsmith & Co. *Franklin v. Gummersell*, 9 Mo. App. 84; s. c., 11 Mo. App. 306; *Cabanne v. Bay*, 10 Mo. App. 594; *Moser v. Claes*, 23 Mo. App. 429; But see, *contra*, *McIntosh v. Smiley*, 32 Mo. App. 125.

H. A. Haeussler and *Cecil V. Scott*, for respondent.

(1) Where a mortgagee of a stock of merchandise takes actual possession of the same, prior to a levy of an attachment by another creditor of the mortgagor, for the purpose of securing a debt due him, and continues to hold the actual possession up to the time of the attachment levy, he will be protected and will hold the property against the attaching creditors, and it is immaterial that the mortgage for any reason was void, except as between the parties. *Nash v. Norment*, 5 Mo. App. 545; *Greeley v. Reading*, 74 Mo. 309; *Petring v. Chresler*, 90 Mo. 649. (2) Respondent having as the representative of the brewing company taken actual possession of the goods in question, for the purpose of securing Alexe's debt to the brewing company, and held such possession up to the time of the levy, under the attachment, it is wholly immaterial whether there were any prior mortgages or bills of sale between Alexe and the brewing company. *Greeley v. Reading, supra; Petring v. Chresler, supra.* (3) Link became the trustee of an express trust in favor of the brewing company, as respects the property in question. The surrender by Alexe was to him, and in his name, for the benefit of the brewing company. A recovery by him would bar the brewing company. A mere naked depository of the legal title, without beneficial interest, is endowed with rights, as the real party in interest, and clothed with the attributes of a trustee of an express trust. This doctrine is fully supported by the following cases. *Beattie v. Lett*, 28 Mo. 596; *Nicolay v. Fritschle*, 40 Mo. 67; *Snider v. Express Co., supra; State ex rel. v. Horn*, 94 Mo. 162; *Buddington v. Masbrook, supra.*

ROMBAUER, P. J.—An opinion was filed in this cause at the last term of court, leading to an affirmance of the judgment in favor of plaintiff rendered by the

trial court. Upon a re-examination of the question on a motion for rehearing, we entertained doubts on the proposition, whether the declaration of law made by the trial court, when applied to the facts of this case, and considered with regard to the effect upon the rights of the defendant, was not prejudicially erroneous; hence we concluded to re-examine the question, which we have done with the following result:

The facts disclosed by the record, briefly stated, are as follows: Prior to and up to November 12, 1885, one Alexe, a hotel and saloon-keeper, was indebted to the Joseph Schnaider Brewing Company (hereinafter for brevity's sake named the brewing company), on various mortgages in the sum of two thousand dollars, and more. These mortgages were duly recorded, and covered the saloon and hotel fixtures, and all other personal property in Alexe's hotel and saloon. It is substantially conceded that they were fraudulent against Alexe's creditors, as far as they affected the stock in trade, since all the testimony concedes that Alexe was to continue, and did in fact continue, to carry on the saloon and sell its wares in the usual course of trade. In other respects no serious question is raised as to their good faith, and the testimony tends to show that they were executed for full value received.

On or about November 12, 1885, Alexe became further indebted to the brewing company for moneys advanced, but the exact amount thus advanced is left in doubt by the evidence. On the last-named day he executed a note to the brewing company for seven hundred and fifty dollars, payable one day after date, and secured by a chattel mortgage on a specified lot of whiskeys, not in the saloon, and on all other personal property on the premises. He also executed a bill of sale to the plaintiff Henry Link (who, at that time, was in the employ of the brewing company), conveying to him, for a stated consideration of two hundred and fifty

dollars, the household goods and furniture on the premises, and wines and liquors in the saloon, enumerated in a schedule attached to the bill of sale, such wines and liquors forming part of the property subsequently levied on by the defendant, as sheriff, under an attachment against Alexe and in favor of Lapp, Goldsmith & Co. No open possession was taken under either of these instruments, either by the brewing company or the plaintiff, for six days after November 12, when the last of them were executed. On November 18 an execution against Alexe was levied on part of the property, and the plaintiff thereupon put his own agent in possession of the residue on the same day. On November 19, Alexe executed a further bill of sale to the plaintiff for the stated consideration of fifty dollars, conveying to the plaintiff everything in the saloon and hotel, which had already been covered by the former conveyance to him; and the plaintiff thereupon took open and notorious possession of the property. At a subsequent hour of the same day, the execution in favor of Lapp, Goldsmith & Co. was levied by the defendant sheriff upon the goods in controversy, and the brewing company thereupon instituted in plaintiff's name the present action of replevin against the defendant sheriff.

There is evidence in the record tending to show that the bill of sale of November 12 was executed for the purpose of enabling the plaintiff, on behalf of the brewing company, to take immediate possession and complete control of the property, in case of an interference with it by Alexe's creditors—in brief, that it was the understanding of the parties that, notwithstanding this bill of sale, Alexe should still carry on the saloon in the usual course of trade. Such an understanding would make the instrument fraudulent in law, as being for the grantor's use.

This being in substance all the evidence bearing on the question of law raised by the declaration of the

court, we proceed to set out the declaration complained of, which is as follows:

"The court declares the law to be that, while a debtor has the right to transfer his property, or any part thereof, to one of his creditors in payment of a just debt to the exclusion of his other creditors, yet such transfer must be made in good faith for that purpose only, and he will not be permitted in such disposition of his property to reserve to himself any benefit or secret use thereof. If, therefore, the court believes from the evidence that Frank Alexe, under pretense of preferring plaintiff as a creditor, transferred to him the goods in controversy under an agreement with plaintiff Link that, after plaintiff has paid himself or received payment out of the goods so transferred, the remainder of such goods, or the surplus left after payment of plaintiff's debt, should be turned over to said Alexe, then such transfer is altogether void, and judgment must be for the defendant, *if made on the part of Link with any intent to hinder, delay or defraud other creditors of Alexe otherwise than as a mere incident to a preference over them, or with notice or knowledge of such intent on the part of Alexe subject to the like qualification.*"

Objection is made to that part of the above declaration which is placed in italics.

It will be seen at a glance that, if this declaration means what its language seems to import, it is unquestionably erroneous. It confounds fraud in law with fraud in fact, and declares in substance that, unless the court finds that the disposition made of the property was fraudulent in fact against the vendor's creditors, it is immaterial whether or not it was fraudulent in law. A conveyance to the grantor's use is fraudulent against his creditors, regardless of the intention or motive of the parties to the transaction.

The plaintiff contends that this error was harmless, because, though all the instruments preceding in date

the one of November 19 were fraudulent to the extent of affecting goods in trade, yet, as it appears by the uncontroverted evidence that prior to the levy, under which defendant claims, a delivery of the goods to plaintiff had taken place, such delivery purged the transaction of fraud and made the plaintiff's title good. This contention loses sight of two controlling propositions. *First*, the plaintiff is bound to maintain his title, if at all, under one of the bills of sale. These are all the muniments of title he has. The antecedent mortgages to the brewing company are evidence in the case only as affecting the good faith and consideration of the subsequent bills of sale. The brewing company, and not Link, would be the proper party plaintiff in this case, if title to the goods were sought to be supported under the mortgages. It is because the bills of sale were made to Link, although made for the benefit of the brewing company, and because of that fact alone, that he is trustee of an express trust, and can maintain this action in his own name. *Next*, it is an error to suppose that the rule laid down in *Nash v. Norment*, 5 Mo. App. 545, and followed by the supreme court in *Greeley v. Reading*, 74 Mo. 309, and subsequent cases, declaring that a *mortgage* is purged of its fraud by subsequent delivery, can be extended to *sales* of personal property. Delivery and change of possession are essential ingredients of every sale when it is sought to uphold it against the creditors of the vendor, and to hold that delivery at any time prior to the seizure of the goods by the vendor's creditors is sufficient would, in effect, wholly abrogate the statute on the subject of fraudulent conveyances.

On the other hand, it is equally erroneous to suppose that the bill of sale of November 12 can be upheld on the theory that, by some secret understanding between Alexe and the plaintiff, it was in effect a mortgage only, although absolute on its face. That such cannot be

done as against the grantor's creditors, is fully demonstrated by the clear and convincing argument of Judge LEWIS in *State to use v. Bell*, 2 Mo. App. 102, and we have recently had occasion to reaffirm the proposition in *State to use v. Koch*, 40 Mo. App. 635.

It is thus shown that the defendant's complaint is just; that the declaration of law made by the court, and hereinabove recited, was erroneous and prejudicial to him,—in brief, that the court did not apply the law correctly to the hypothetical facts. Under the facts shown by the record before us, the validity of the plaintiff's title rests on the validity of the sale made November 19 as against creditors of the vendor. The validity of that sale must be determined by the fact, whether under all the circumstances it was made in good faith and supported by an independent, adequate consideration. If such consideration moved from the brewing company, and the plaintiff merely held the legal title for its benefit, he became a trustee of an express trust, and could, as such, maintain this action; hence we deem untenable the objection that the plaintiff has shown no cause of action as a matter of law.

All the judges concurring, the judgment is reversed and the cause is remanded to be proceeded with in conformity with this opinion.

---

41 642
42 553
41 642
44 495
41 642
56 139

JOHN H. BOBB, Respondent, v. SYENITE GRANITE COMPANY, Appellant.

St. Louis Court of Appeals, October 28, 1890.

1. **Injury to Land:** LANDLORD'S RIGHT OF ACTION: STATEMENT IN JUSTICES' COURTS. The landlord of realty, occupied by a tenant for a term of years, can recover for an injury to the reversion or fee through a trespass, but must in courts of record allege that the

injury is of that character. When, however, his action is instituted before a justice of the peace, he is not bound to make the allegation with the same precision as in a pleading at common law or under the code.

2. **Instructions: BASED UPON CONJECTURE.** An instruction not based upon evidence, but predicated upon matter of conjecture, is erroneous.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL D. FISHER, Judge.

REVERSED.

Leonard Wilcox, for appellant.

It was error to refuse instructions asked at the close of plaintiff's evidence, and to all the evidence as for non-suit, also defendant's instruction number 10, and to overrule the motion to exclude all evidence. 9 Bacon's Ab., p. 458, title trespass, C, 3; *Lindenbower v. Bentley*, 86 Mo. 513, 519, 520; *Garner v. McCullough*, 48 Mo. 318; *Roussen v. Benton*, 6 Mo. 392; *Anderson v. Nesmith*, 7 Mo. 167; 2 Waterman on Trespass, secs. 948 and 1058; 2 Greenl. Ev., secs. 616, 656; 1 Chitty on Plead. [16 Am. Ed.] *72, *197, *198, bot. pp. 94, 258; *Southington v. Gridley*, 20 Conn. 200; *Turner v. Williams*, 76 Mo. 617. (2) The instruction given for plaintiff was erroneous. Boone on Mortgages, sec. 102; *Holladay v. Longford*, 87 Mo. 597; *Bobb v. Graham*, 89 Mo. 200; *Hasking v. Philip*, 3 Exch. R. 166, 182; *Van Densen v. Young*, 28 N. Y. 8, 26; *Harrison v. Railroad*, 88 Mo. 625, 628; *Reyburn v. Wallace*, 93 Mo. 326; 2 Greenl. Ev., sec. 616. (3) It was error to refuse to instruct the jury to give only nominal damages. See defendant's instruction number 9. *Sheedy v. Brick Works*, 25 Mo. App. 527, 531; Boone on Mortgages, sec. 102. (4) Plaintiff is estopped from maintaining this action because he did not set up the claim in the suit on the special tax bill. *Gates v. Preston*, 41

N. Y. 113; *St. Louis v. Allen*, 53 Mo. 52, 53, 55; Charter, art. 6, sec. 25; 2 R. S. 1889, p. 2125. (5) It was error to refuse defendant's instructions numbers 6 and 7. *Julia B. Ass'n v. Tel. Co.*, 88 Mo. 267.

T. J. Rowe, for respondent.

ROMBAUER, P. J.—This action was commenced before a justice of the peace to recover damages for breaking and destroying a sidewalk consisting of stone flagging in front of certain premises in the city of St. Louis, described as numbers 717 and 719 Walnut street, of which it is alleged that the plaintiff was the owner. A trial before a jury in the circuit court resulted in a verdict in favor of the plaintiff for the sum of thirty-five dollars, and the defendant prosecutes this appeal.

Upon a former hearing we reversed the judgment of the trial court rendered upon this verdict, with directions to enter judgment for the plaintiff for nominal damages only. A re-examination of the cause has satisfied us that our conclusions of law upon the record were correct, even though we were mistaken in our finding that the plaintiff was not the exclusive owner of the reversion at the date of the alleged trespass.

It appeared in evidence at the trial that, in the year 1884, the title to the premises was vested in the plaintiff in fee. It also appeared that the premises known as 717 Walnut street were occupied by a tenant under a lease for three years, about two years of which term were unexpired. It further appeared that the premises known as number 719 were occupied by a tenant from month to month. It moreover appeared that there was a private alley between the two houses, and that the damage which was done to the pavement was done to that portion of the pavement in front of house number 717, and to that portion which was laid across the alley. The title to this alley was vested in the plaintiff in like manner as that to the two houses.

There was also evidence to the effect that, subsequently to the doing of the damage complained of, and prior to the commencement of the action, the plaintiff conveyed his interest in the premises to one Siegel, and that he had never been in possession of the premises from the time of the damage until the trial.

The evidence further tended to show that the defendant, in that year, had a contract with the city of St. Louis for the paving of Walnut street with granite blocks, and that the defendant used the sidewalk for the piling of paving blocks, and so piled the blocks and threw them on the sidewalk, as to break and injure the flagging stones.

I. The first assignment of error is that the court should have excluded all evidence under the statement, and should have given, at the close of the case, an instruction which was tendered by the defendant, to the effect that, if the plaintiff was not in actual possession of the house, when the damage was done, the jury should find for the defendant. The theory of the defendant is that, if this is an action of *trespass* to land, the plaintiff cannot recover, under numerous decisions in this state, because he was not in possession when the alleged trespass was committed; and that, if it is an action for *waste*, he cannot recover for the same reason, because, it is argued, in an action for *permissive waste*, the landlord has an action against the tenant for the full amount of the damage done, and the tenant has an action over against the trespasser by whom the damage was done.

The law in this state is settled by numerous decisions, in conformity with the principles of the common law, that an action for a trespass on land cannot be maintained by a plaintiff not in actual or constructive possession of the land. It has also been reasoned in a decision of our supreme court that an action for permissive waste can be maintained by the landlord against

the tenant, where the tenancy is for a term of years, though it cannot be maintained where the tenancy is a mere tenancy at will or on sufferance. *Coale v. Railroad*, 60 Mo. 227, 234. But it has never been decided in this state that the landlord cannot have an action against a trespasser for an injury to the reversion. That the owner of the reversion, who is out of possession, where the actual possession is in a tenant for life or for years, has such an action is settled by numerous decisions, running back so far that the beginning of them probably cannot be found. *Mayor, etc., of Cartersville v. Lyon*, 69 Ga. 577; *Aycock v. Railroad*, 89 N. C. 321; *Jesser v. Gifford*, 4 Burr. 2141. The only exception to this rule seems to be that the technical common-law action of *trespass* cannot be thus maintained by the landlord or reversioner out of possession, but that his action must be an action of trespass in the *case*, where the common-law distinctions as to the forms of action are maintained (Taylor, Landlord & Tenant, sec. 173), a distinction which is unimportant under our code of procedure. On the other hand, where the injury is not to the reversion, but merely to the possessory rights of the tenant, the landlord or reversioner cannot maintain the action. *Baxter v. Taylor*, 4 Barn & Ad. 72; *French v. Fuller*, 23 Pick. 104; *Little v. Palister*, 3 Me. 6.

It is also true, in respect to actions of this nature commenced in superior courts of record, that the plaintiff must not only allege (*Jackson v. Pesked*, 1 Maul. & S. 234), but must also prove (*Geer v. Fleming*, 110 Mass. 39), that the injury for which he sues is an injury to the reversion, and not merely an injury to the possessory rights of the tenant. But, while he must undoubtedly prove this in an action commenced before a justice of the peace, yet the rules of pleading in actions instituted in those popular tribunals are so liberal, that we are of opinion that it is not necessary for him to allege it with the precision required in a declaration

at common law, or in a petition in an action in the circuit court under our practice act; and we hold that, in this respect, the statement upon which this action was commenced before the justice of the peace was sufficient.

II. At the request of the plaintiff, the court instructed the jury:

"That if they believe, from the evidence that the defendant, during the months of June and July, 1884, in a careless and negligent manner, threw and piled granite blocks on the pavement or sidewalk in front of the premises of 717 and 719 Walnut street, in the city of St. Louis, Missouri, and thereby broke and injured the stone flagging in front of said premises, and that John H. Bobb, at the time said stone was piled on said pavement, if it was so piled, was the owner of said premises, 717 and 719 Walnut street, then your verdict should be for plaintiff for a sum sufficient to repair the damage done to said pavement."

And upon the request of the defendant the court instructed the jury:

"The burden of proof rests upon the plaintiff, and, therefore, even if you should find a verdict for plaintiff, yet if the evidence is such that you are not satisfied, or cannot determine from it, what the damage is which the plaintiff may have sustained, if any, then your verdict must be for a mere nominal sum."

Complaint is made of the instruction given on plaintiff's behalf on the ground that there was no evidence in the case showing or tending to show the cost of repairing the damage done to said pavement, and, therefore, to that extent the instruction had no evidence to support it. Complaint is also made that the verdict and judgment are directly opposed to the instruction on the question of damages, given to the jury on defendant's behalf.

Both these complaints are just. The only evidence which we find in the record, having even a remote

bearing on this question, is some evidence tending to show what an entirely new pavement, of a wholly different material, in front of the entire premises would cost. From these data the jury could not possibly ascertain, except by the barest conjecture, what the repair of this pavement would have cost, all the more so since all the evidence conceded that only a part of the flagging was injured, and even that to no serious extent, as the pavement remained in constant use without repair from the date of the injury in 1884 until the date of the trial in 1889.

As a verdict based on mere conjecture cannot stand, these errors necessarially lead to a reversal of the judgment. And, as the purposes of justice would not be subserved by remanding the cause for a new trial, the expense of which would necessarily exceed any amount which the plaintiff could possibly recover under the conceded facts, we deem it proper to direct such judgment now as the lower court upon the trial should have rendered, which is a judgment in favor of plaintiff for nominal damages.

The judgment will be reversed and the cause remanded with directions to enter judgment in favor of plaintiff for nominal damages. All the judges concur.

41 648
53 51

CITY OF ST. LOUIS at the relation and to the use of W. J. POWELL, Respondent, v. JOHN BAMBRICK *et al.*, Appellants.

St. Louis Court of Appeals, October 28, 1890.

Practice, Appellate: RETURN TERM. In the computation of time, in order to determine to what term of this court an appeal thereto is returnable, the day on which the appeal was taken is to be excluded and the first day of the next succeeding term of this court is to be included, and the appeal is returnable to such next succeeding term, if, on such computation, it was taken exactly thirty days before the first day of that term.

Appeal from the St. Louis County Circuit Court.
HON. W. W. EDWARDS, Judge.

AFFIRMED.

ROMBAUER, P. J.—The plaintiff produces the certificate of the clerk of the circuit court of St. Louis county, from which it appears that, on December 10, 1889, a judgment was rendered in his favor by said court, and that, on February 1, 1890, an appeal was granted to the defendant to this court. The plaintiff asks for an affirmance of this judgment because no transcript of the record, nor in lieu thereof a certified copy of the record entry, was filed in this court fifteen days before the first day of the March term, 1890, as required by section 2253 of the Revised Statutes of 1889.

The appellant's counsel resists the motion on two grounds: *First.* That the appeal being taken February 1, 1890, and the first day of the March term of this court falling on March 3, 1890, the appeal was not returnable to the March term but to the October term; and, *next*, that he was guilty of no negligence in prosecuting the appeal, because the signing and filing of the bill of exceptions was delayed by the conduct of plaintiff's counsel in not returning to him the bill of exceptions, until it was too late to file a transcript thereof fifteen days before the beginning of the March term, 1890. On the question of fact thus raised, affidavits in opposition to the motion and in support thereof have been filed, which we have carefully examined, arriving at the result that the appellant has failed to show good cause against the affirmance as far as the same depends on questions of fact. Unless, therefore, the appeal under the conceded facts was returnable to the October term, 1890, the plaintiff's motion to affirm must prevail.

The statute provides: "All appeals taken thirty days before the first day of the next term of the

supreme court or either of the courts of appeals shall be returnable to such next term, and all appeals taken less than thirty days before the first day of such next term shall be returnable to the second term thereafter." R. S. 1889, sec. 2252.

The defendant's counsel contends that the use of the word *before* contemplates appeals which are taken more than thirty days before the first day of the term, and that, in the computation of the time, both the day on which the appeal is taken, and the first day of the next term of the appellate court, should be excluded. On the other hand the plaintiff's counsel contends that there is nothing in the phraseology of the section, which would take its provisions out of the general rule stated in *State ex rel. v. Gasconade County Court*, 33 Mo. 102; that in the computation of time, where the computation is to be made from an act done, the day, when such such act was done, is to be included. We conclude that the latter view is the correct one. It is evident that, if the word "*before*" referred to appeals taken more than thirty days before the return term, the word *less*, used in the statute *a fortiori* means exactly what it says, and the section would make no provisions whatever for appeals, where the intervening space is exactly thirty days.

The statute referring to the construction of laws provides: "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." R. S. 1889, sec. 6570. We are of opinion that this statute is intended to furnish a general rule, plain and comprehensible, for the computation of the time mentioned in all statutes, unless the terms used therein make such construction inadmissible.

As the rule hereinabove stated is the only sound one, it would meet our approval even in the absence of an express decision on the subject, but we may add

that the Kansas City Court of Appeals in the case of *Deere, Mansur & Co. v. Hucht*, 32 Mo. App. 153, which is identical in its features with the case before us, arrived at the same result. As it is important, that on questions of practice, equally applicable to all appellate courts, the rule adopted by all such courts in the same state should be uniform, that fact furnishes an additional reason for adhering to the rule hereinabove stated.

It results from the foregoing that the plaintiff's motion must prevail, and with the concurrence of all the judges the judgment of the trial court is hereby affirmed.

JOHN O. F. DELANEY, Respondent, v. C. M. FLANAGAN *et al.*, Appellants.

St. Louis Court of Appeals, October 28, 1890.

1. **Landlord and Tenant:** ORAL LETTINGS. The statute of 1869 (Revised Statutes, 1879, sec. 3078), providing that oral lettings of stores, shops, houses, tenements or other buildings in cities, towns and villages should be held to be tenancies from month to month, is applicable only where a building is let *eo nomine*, or is the essential object of the letting. *Held*, accordingly, that it does not apply to the case of an oral letting of land, the buildings on which belong to the tenant.

2. ——: ——. In cases not governed by that statute, a parol lease, though by the statute of frauds declared to be a tenancy at will, has the effect of creating a tenancy from year to year; and, when a tenant for years holds over with the consent of his landlord, his tenancy, if not governed by that statute, will be one from year to year, or for a shorter period, according to the intention of the parties, which is to be determined as a question of fact.

Appeal from the St. Louis City Circuit Court.—HON. JACOB KLEIN, Judge.

AFFIRMED.

Upton M. Young and *Alexander Young*, for appellants.

Both the lease and the sale were in the language of the statute "contracts for the leasing," etc., of buildings, tenements, etc., in the city of St. Louis. Flanagan & Co. were liable, if at all, after June, 1886, under an implied contract (not in writing) for the leasing of a building or tenement in the city of St. Louis. If this be true they were, under the statute, tenants from month to month, and could terminate their tenancy by giving to the landlord or his agent one month's notice, in writing, of their intention to terminate such tenancy. The recitals in the lease and deed (as to the buildings upon the premises) are not only not contradicted but are sustained by other testimony in the record. *Drey v. Doyle*, 28 Mo. App. 249.

T. K. Skinker, for respondent.

(1) The general rule is, that a parol lease for a term of years has the effect of creating a tenancy from year to year. R. S. 1879, sec. 2509; *Kerr v. Clark*, 19 Mo. 132; *Ridgely v. Stillwell*, 25 Mo. 570; *Ridgely v. Stillwell*, 28 Mo. 403; *Scully v. Murray*, 34 Mo. 420; *Winters v. Cherry*, 78 Mo. 347. (2) But even if it were granted that there was no agreement for a new term, still, inasmuch as defendants held over with plaintiff's consent, they were tenants from year to year. *Railroad v. Ludwig*, 6 Mo. App. 583; *Wilgus v. Lewis*, 8 Mo. App. 339; *Withnell v. Petzold*, 17 Mo. App. 669; *Hammon v. Douglass*, 50 Mo. 434; Taylor on Landlord and Tenant, sec. 467. (3) The mill and other improvements belonged to defendants, and were their personal chattels. *Atkison v. Dixon*, 96 Mo. 588; *Neiswanger v. Squire*, 73 Mo. 198; *Hines v. Ament*, 43 Mo. 300; *Goodman v. Railroad*, 45 Mo. 33; *Lowenberg v. Bernd*,

47 Mo. 297; *Priestly v. Johnson*, 67 Mo. 632; *Kuhlman v. Meier*, 7 Mo. App. 260; *Dryden v. Kellogg*, 2 Mo. App. 91, 92. The lease was, therefore, a letting of the ground alone, and did not include the buildings on the ground. Section 3078, Revised Statutes, 1879, relates to the letting of buildings, and, therefore, has no application to this case.

ROMBAUER, P. J.—The action is one by landlord against tenant, seeking to recover the rent for the year 1889 of certain premises in the city of St. Louis, and also the general and special taxes assessed against the property during said year, which are claimed to be due under an oral lease from year to year.

The defense interposed is that the letting was one from month to month, and not from year to year, and that the defendant determined the tenancy by one month's notice in writing, given prior to the expiration of the year 1888. No instructions were asked or given by either party, but, upon defendant's request, the court made a special finding of facts. Upon such finding the court entered judgment for the plaintiff according to the prayer of his petition, from which judgment the present appeal is prosecuted.

Errors are assigned in the admission and rejection of testimony, but the defendants' statement and brief are silent on the subject, hence there is nothing before us on these complaints for review. The only other reviewable error assigned is that the judgment is against the evidence.

The finding of facts by the court, which has ample evidence to support it, is as follows:

"The plaintiff is the owner of premises described in the petition. The defendants occupied the premises under a lease dated the sixth day of December, 1878, for a term expiring on the thirtieth day of June, 1886, and by the terms of this lease the defendants were liable to pay all the general and special taxes assessed against

the property therein and in the petition described. Said lease was made by the plaintiff to Dominic Kronenberg, who conveyed the leasehold estate to the defendants by a warranty deed dated the twenty-seventh of January, 1880, under which defendants went into possession of the premises, and thereafter paid rent according to the terms of the lease from the plaintiff to said Kronenberg down to the termination of said lease, on the thirtieth day of June, 1886. Prior to the termination of said lease, negotiations were entered upon between defendants and James M. Carpenter, the lawful agent of said plaintiff, looking to the purchase of the property by the defendants, or to a renewal of the lease for another term, but no new lease was ever executed between the parties. The defendants, however, remained in possession of the premises down to the thirty-first day of December, 1888, and paid all rent that had accrued at the rate of five hundred and twenty-five dollars ($525) per year, being the amount which the landlord demanded of them as the rent of the premises under the new lease up to the first day of January, 1889. Said rent, after the expiration of the lease, was paid as follows: The first two quarters were paid together at one time, and thereafter the rent was paid quarterly according to the terms of the lease, and at the times specified in the old lease. The court also finds that after the first day of January, 1889, under a notice served upon the defendants by the proper official of the city of St. Louis, requiring them to take down a building still standing on said premises, the defendants took down said building in the month of March, 1889, selling the materials therein to a wrecking company in the city of St. Louis. The court also finds that the defendants failed to pay the general and special taxes mentioned in the plaintiff's petition, and the plaintiff paid the amount of said taxes, as specified in the petition and at the times therein alleged. The court also finds that on the thirtieth day of November, 1888, the defendants sent a

notice by mail to James M. Carpenter, the lawful agent of plaintiff, notifying said Carpenter of their intention to vacate and surrender the premises to the plaintiff on the thirty-first day of December, 1888, and that, prior to the thirty-first day of December, 1888, they had removed from said premises all the improvements which they were entitled to remove, with the exception of a small house in the rear of the premises, being the same house subsequently removed under a notice from the city officials, in the month of March, 1889. The court also finds that the plaintiff, through James M. Carpenter, his agent, demanded of the defendants ground rent of said premises at the rate of seven dollars ($7) per front foot, amounting to five hundred and twenty-five dollars per annum, and that rent was paid, as above specified, by the defendants at that rate during the times above named. Upon these facts the court declares the law to be that the defendants are liable to plaintiff for three quarters' rent for the year 1889 at the rate of five hundred and twenty-five dollars per annum, and also for general taxes for the years 1888 and 1889, mentioned in plaintiff's petition; also for special taxes for repairs of sidewalks, and for sprinkling mentioned in plaintiff's petition; and renders judgment accordingly."

It will be seen from the foregoing, and the conclusions of law based upon it, that the court treated the defendants as tenants from year to year, and liable accordingly. That a parol lease, though by the statute of frauds declared to be a tenancy at will, has the effect of creating a tenancy from year to year has been the law of this state since the decision in *Kerr v. Clark*, 19 Mo. 132. The cases on that subject are collected and commented upon in *Withnell v. Petzold*, 17 Mo. App. 673. We had occasion to say in the case last mentioned: "Where a tenant for years holds over with the consent of his landlord, his tenancy will be one from year to year, or for a shorter period, according to the intention of the parties. Such intention should in each

case be found and determined as a question of fact, by the triers of the fact, and in so doing they may take into consideration the character of the property, and the use to which the same is to be put, as well as the periods at which the rent is to be paid." It will be thus seen that, whether we treat the evidence as showing a new parol lease, or as establishing a holding over under the old lease, the court was in either event justified in finding from the evidence that the defendants, after the expiration of the old lease, became tenants from year to year, unless the character of the property let was such as to bring it clearly within the provisions of the statute of 1869. R. S. 1879, sec. 3078.

That part of the section bearing on the present controversy is as follows: "All contracts or agreements for the leasing, renting or occupation of stores, shops, houses, tenements or other buildings in cities, towns or villages, not made in writing, signed by the parties thereto, or their agents, shall be held and taken to be tenancies from month to month, and all such tenancies may be terminated by either party thereto, or his agent, giving to the other party, or his agent, one month's notice, in writing, of his intention to terminate such tenancy."

In construing this section in *Withnell v. Petzold*, *supra*, we held that it covers those cases only, where the building is let *eo nomine*, or is the essential object of the letting. In that case the buildings were owned by the lessor, and mentioned in the lease, but the essential object of the letting was a park within the city, containing nine acres. In *Drey v. Doyle*, 28 Mo. App. 256, we reasserted the same proposition, but held the tenancy to be a monthly tenancy, because the essential object of the letting was a building. Now, in the case at bar, it is not pretended that the lessor owned the buildings at all. They were erected by Kronenberg, the first lessee, rebuilt and extended by his

successors, the defendants, and the lease was of the ground and not of the buildings, which it is conceded were the exclusive property of the lessees. Hence it is apparent that the statute of 1869 can have no application.

It results from the foregoing that neither of the errors assigned by the defendants is well assigned. All the judges concurring, the judgment is affirmed.

---

41 657
42 244
41 657
58 489
41 657
96 91
e172s 1 84
e172s 1 87

ANN KAVANAUGH, Respondent, v. MARTIN SHAUGHNESSY, Administrator of JOSEPH KELLY, Appellant.

St. Louis Court of Appeals, October 28, 1890.

1. **Practice, Appellate:** STARE DECISES: ALLOWANCE AGAINST ESTATE OF DECEDENT FOR NON-ACCRUED RENT. A ruling, which has presumably been followed for a considerable time, should not be disturbed, unless it not only is illogical, but also leads to unjust results. *Held*, accordingly, in view of the prior decision of *Traylor v. Cabanne*, 8 Mo. App. 181, that an allowance made against the estate of a decedent lessee for subsequently accruing rent, but having attached to it a proviso that the rent should be paid when due, should not be disturbed.

2. **Former Recovery:** WAIVER OF RIGHT OF OBJECTION. A debtor may waive his right to object to the splitting up of a single cause of action; and if claims for certain monthly instalments of rent accruing under a lease are presented and allowed against the estate of a decedent, and the administrator insists that the claim for each month's rent should be proven as a separate demand, the administrator is not in a position thereafter to insist that the allowances thus made debar claims for subsequent instalments of rent not included in them.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL DILLON, Judge.

AFFIRMED.

R. M. Nichols, for appellant.

Undue and unearned rent is not a demand within the sense and meaning of the use of the term in Revised Statutes, 1889, section 203, allowing undue claims to be proved against a decedent's estate. Rent is not *debitum in præsenti, solvendum in futuro;* it is a mere contingency, so strongly incident to the reversion, that the law will not separate the one from the other; it has all the contingencies of the reversion; there is no obligation until the actual use of the property, which use forms the consideration for the promise to pay rent. *Deane v. Caldwell*, 127 Mass. 243; Wood on Land. & Ten., secs. 448, 450; Taylor on Land. & Ten., secs. 369, 382; *Bordman v. Osborn*, 23 Pick. 295; *Bowditch v. Raymond*, 146 Mass. 114; *Barclay v. Pickles*, 38 Mo. 143; *Bloodworth v. Stephens, Adm'r*, 51 Miss. 475; *Wood v. Johnson*, 30 Miss. 515; *Wilcoxon v. Donnelly*, 90 N. C. 247; *Savory v. Stockton*, 4 Cush. 607; *People v. Arguello*, 37 Cal. 224; Bouvier's Law Dic., defining "demand;" *In re Estate of Swain*, 67 Cal. 637, defining "claim;" *Fallon v. Butler*, 21 Cal. 25, defining "claim." (2) If undue and unearned rent constitutes a provable demand under the statute, a debt running to a certain maturity, respondent could not split up the amount, which deceased was obligated under the contract or lease to pay, into several causes of action, but should have presented the entire amount for "adjustment" and "judgment" in one action, and, not having done so, should be estopped by prior judgment rendered upon the same cause of action. R. S. 1889, sec. 203; Woerner on Am. Law of Admin., sec. 393; *Pratt v. Lawson*, 128 Mass. 528; Freeman on Judg., sec. 240; Sutherland on Dam., p. 175, *et seq.; Grips v. Tallandie*, 4 McCord (S. C.) 20; *Bendernagle v. Cox*, 19 Wend. 207; *Gastelberry v. Forquer*, 27 Ill. 170; *Burritt v. Belfry*, 47 Conn. 323; *Fish v. Folley*,

6 Hill. 55; *Taylor v. Heitz*, 87 Mo. 660; *Pfeffer v. Suss*, 73 Mo. 254.

J. P. Vastine, for respondent.

A demand may be proved against an estate before it is due. R. S. 1879, secs. 205, 206; *Cassatt v. Vogel*, 12 Mo. App. 323; s. c., 94 Mo. 646; *Steiglider v. Railroad*, 38 Mo. App. 511; *Laine v. Frances*, 15 Mo. App. 107. Where several claims payable at different times arise out of the same contract or transaction, separate actions may be brought as each liability accrues, but, if no action is brought until more than one are due, all that are due must be included in one action. *Corby, Adm'r, v. Taylor*, 35 Mo. 447

ROMBAUER, P. J.—The plaintiff, by written lease, let certain premises to Joseph Kelly for a term of years expiring August 1, 1891. Kelly went into possession, and during his lifetime paid the rent reserved. He died in 1887, and in July of that year the defendant qualified as his administrator, and immediately thereafter gave the statutory notice of his appointment. Thereafter the plaintiff exhibited sundry demands for rent, which had accrued under the lease, in the probate court for allowance against Kelly's estate, and had the same allowed and classified. The rent under the lease was payable in monthly instalments, and the defendant insisted that the claim for each month's rent should be proved as a separate demand.

On the twenty-eighth of October, 1889, more than two years having elapsed since the granting of letters, and four months' rent being then due, the plaintiff exhibited in the probate court a demand for all the rent then due and to become due under the terms of the lease, and obtained an allowance for $2,401.74, the rent, not due, to be paid when due. To this allowance the defendant objected on the ground that part of it was for

rent which was unearned, and that rent, which was not due, was in no sense a demand within the sections of our administration law hereinafter set out. The probate court, and the circuit court upon appeal, overruled this objection, and the defendant, appealing, assigns this ruling for error. The defendant also renews the further objection, which he made in the trial court, that the various allowances made in the probate court for rent, that had already accrued, were in the nature of a former recovery, and as such a bar to this proceeding.

The Revised Statutes of 1879, which were in force at the commencement of this action, provided among other things:

Section 205: When the demand or set-off is not due at the time of trial, the court may adjust the same, and a judgment may be rendered thereon for the amount, according to the finding of the jury or judgment of the court, or, at the option of the parties, by rebating therefrom, at the rate of six per cent. per annum, from the time of trial until due.

Section 206: In case the parties do not agree to rebate the demand or set-off, as provided for in the preceding section, no execution shall issue upon any such judgment until the demand or set-off upon which the judgment was rendered shall become due and payable.

The defendant claims that the word *demand* in those sections does not and cannot include rent not due and unearned, as rent is in no sense a debt before the day on which it is covenanted to be paid. As GRAY, C. J., aptly says in *Deane v. Caldwell*, 127 Mass. 242, "it is neither *debitum* nor *solvendum*; for, if the lessee is evicted before that day, it never becomes payable. * * * It is not an existing demand, the cause of action on which depends upon a contingency, but the very existence of the demand depends upon a contingency." If the case were one of first impression, we would not hesitate to say that this objection is

well taken. It seems to us that the statute, when speaking of demands, has reference to cases of absolute liability, which, although not due when presented, are running to a certain maturity, and not to cases where the existence of the future liability is contingent and uncertain. But this court at an early day in *Traylor v. Cabanne*, 8 Mo. App. 131, 135, took a different view of the law, and it is fairly presumable that courts exercising probate jurisdiction in this state have since that time followed that ruling, and it should not be disturbed, unless such ruling not only is logically incorrect, but also leads to unjust results.

Now, while we incline to the opinion that the interpretation of the word demand contended for by the defendant is the correct one, yet it is of no practical importance, which one of the two interpretations is adopted. The judgment in this case is that the recovery should not be enforceable, until the rent becomes actually due, and the rent cannot become actually due, until it is earned. Should the tenant, or those claiming under him, be evicted by holders of a paramount title prior to the expiration of the lease, or should the beneficial enjoyment of the estate by them cease by reason of causes absolving them from the further payment of rent under the covenants of the lease, the tenant or his representative could show that fact in resisting the enforcement of the judgment with the same effect, as if the judgment *pro tanto* had been paid. The reasoning of the court in *Barclay v. Pickles*, 38 Mo. 146, leads to the conclusion that the tenant would be at liberty to do this, and we see no technical difficulties in the way. Under these circumstances we do not feel at liberty to disturb a ruling acquiesced in by the court for many years, simply because we have serious doubts of its abstract logical accuracy. It is of importance to all citizens that the law should be stable and certain.

The second point contended for by appellant is without merit. The plea of former recovery in this class of cases rests on two propositions: *First.* That all matters which were proper subjects of adjudication in a former proceeding are presumed to have been adjudged therein, and, *next*, that no one can split up an entire demand into fractions, and proceed on each fraction as an independent demand, without the consent of his debtor. Now in this case it conclusively appears from the record that the plaintiff's claim for rent accruing after July 1, 1889, has never been adjudged in any former proceeding, and it further appears that the defendant himself insisted that the claims for monthly rent should be proved up separately, as they accrued. It has never been held that the debtor could not waive his right to resist the payment or enforcement of the claim against him in fractions; on the contrary the reverse of the proposition has been expressly decided in this state. *Fourth National Bank v. Noonan*, 88 Mo. 377. It will be thus seen that, independent of the propositions contended for by the plaintiff, the claim for each month's rent is at her option a separate demand, the plea of former recovery is not substantiated by the facts shown by the record.

All the judges concurring, the judgment is affirmed.

---

41 662
75 490

41 665
98 *196

In the Matter of THE PARTNERSHIP ESTATE OF D. G. TUTT & Co.; D. G. TUTT, Appellant, v. R. G WILLIAMS, Executor of WILLIAM S. REED, Deceased, Respondent.

St. Louis Court of Appeals, October 28, 1890.

Administration: COMMISSIONS ON PARTNERSHIP ESTATE. The commissions of an administrator are governed by the law operative at the time of the rendition of his services, and not by a law passed after that time but in force when he renders his final settlement.

Held, accordingly, that the law of 1885, allowing a commission of three per cent. to a surviving partner administering upon the partnership estate, was not applicable to the case at bar, wherein the final settlement by the surviving partner as administrator was filed, and his services as administrator were accordingly performed, before said law took effect.

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

AFFIRMED.

W. C. Marshall, for appellant.

(1) The view that trustees are entitled to compensation has received the sanction of the courts and the legislatures of nearly all the states, and trustees are now entitled to compensation for their time and trouble. Perry on Trusts [3 Ed.] sec. 917; 2 American Law of Admr's, sec. 524, p. 1160. (2) Amendatory acts are sometimes viewed in the light of legislative interpretations and respected by the court as such. *State v. Dill*, 60 Mo. 433. (3) Statutes must be considered in reference to the subject-matter, and the objects which prompt and induce their enactment, and the mischief they were intended to remedy. *Neenan v. Smith*, 50 Mo. 525; *Spitler v. Young*, 63 Mo. 42; *State v. Diveling*, 66 Mo. 375.

Seddon & Blair, for respondent.

There is really but one question for the determination of this court in this case. Is D. G. Tutt, the surviving partner of the firm of D. G. Tutt & Co., entitled to any commission for his services in administering the partnership estate? We contend that inasmuch as during the time the surviving partner was rendering the services for which he now claims compensation, the law, as a matter of public policy, forbade him to charge commissions, and inasmuch as that law was not changed

by the legislature until the act of 1885, which was passed long after the services were rendered, and after the final settlement of the estate was filed in the probate court, he cannot now claim compensation. To hold otherwise would be to give a retrospective operation to the act of 1885. *Gregory v. Menefee*, 83 Mo. 413; *State v. Auditor*, 33 Mo. 290.

THOMPSON, J.—On the twelfth day of June, 1885, Dent G. Tutt exhibited in the probate court of the city of St. Louis his final settlement as surviving partner of the late firm of D. G. Tutt & Co. In that settlement he took credit for a commission of three per cent. on all moneys, which had come into his hands in the course of the administration. The probate court disallowed this credit. On appeal to the circuit court, it was likewise disallowed; and he now appeals to this court.

In 1884 the supreme court decided, in the case of *Gregory v. Menefee*, 83 Mo. 413, that a surviving partner is not entitled to compensation for his services in administering upon the partnership estate. The legislature, at its next session, namely, on the seventh of March, 1885, passed an act changing this rule, by amending section 229 of the Revised Statutes of 1879, by inserting in it this provision:

"That a surviving partner or partners in administering upon the effects of the copartnership shall be allowed a commission of three per cent. on the interest of the deceased partner for like services and trouble." Laws of 1885, p. 25. This statute had no emergency clause, and it, therefore, took effect on the twenty-third day of June, 1885, ninety days after the adjournment of the session of the legislature at which it was enacted. Const., art. 4, sec. 36.

It is perceived that the statute did not take effect until *after* the final settlement of the surviving partner had been filed. All the services in respect of which he claims commissions must, therefore, have been rendered

before its passage. It is not by its terms retrospective; and statutes are not construed as being retrospective, unless such is the plain intent of the legislature. It is an obvious suggestion of reason that the right of compensation for services, if any exists, is governed by the law in force *at the time when the services were rendered.* But the soundness of this conclusion is also shown by the decision of the supreme court in *State ex rel. v. Auditor*, 33 Mo. 287, where it was held that the right of a public officer to compensation for services accrued according to the law in force at the time when the services were rendered, and became a vested right in such a sense that the legislature could not afterwards take it away. We can understand no principle upon which such a right can be governed by the law which happens to be in force at the time when the probate court happens to take up the final account of the surviving partner for examination. If such were the rule, a *repeal* of the law giving such commissions would cut off the right to them, although the repealing statute had been enacted after the services were rendered, which, as already stated, our supreme court has held cannot be done.

This case is, therefore, plainly governed by the rule in *Gregory v. Menefee*, *supra;* the surviving partner was not entitled to the commissions claimed, and the judgment of the circuit court will accordingly be affirmed. It is so ordered. All the judges concur.

BOWMAN DAIRY COMPANY, Appellant, v. JOHN T. MOONEY, Respondent.

St. Louis Court of Appeals, October 28, 1890.

1. **Corporations: EXTENT OF POWERS.** A manufacturing or business corporation, organized under the laws of this state, has no authority to engage in a business not within the scope of its purposes, as set forth in its articles of incorporation. And *held* that

41 665
47 312
41 665
53 260
41 665
68 636
41 665
74 373

such a corporation had no power to engage in selling oysters under a charter "to buy and sell dairy products, especially milk, butter, cheese and ice cream, and to purchase, hold, mortgage or otherwise convey such real and personal property, as the purposes of the corporation shall require."

2. ——: ULTRA VIRES, DEFENSE OF. A person with whom a corporation has entered into a contract may plead, in defense to an action thereon, that the contract is *ultra vires*, as long as the contract has not been fully performed by the corporation. And *held* that the contract in the case at bar, which was a contract for the hiring of the defendant by the plaintiff corporation, had not been thus fully performed by the corporation, since the period of service contracted for had not expired at the time of the breach of the contract by the defendant.

Appeal from the St. Louis City Circuit Court.—HON. DANIEL DILLON, Judge.

AFFIRMED.

R. T. Stillwell and *L. A. Steber*, for appellant.

(1) Plaintiff was incorporated as a business corporation under the laws of Missouri and possesses all the powers granted by such laws. R. S. 1889, secs. 2508, 2768, 2770 and 2771. (2) Even if the plaintiff has exceeded its powers, by purchasing Berry & Owens' oyster business, trade and good will, and going into the business of buying and selling oysters, defendant (appellee) is in no position to complain. The state alone by a direct proceeding can interfere in such a case, for an abuse of corporate power or excess of authority assumed by plaintiff. *Hovelman v. Railroad*, 79 Mo. 632; *Broadwell v. Merrit*, 87 Mo. 95, 101; *Ragan v. McElroy*, 98 Mo. 349, 352; *Bank v. Matthews*, 98 U. S. 621, 628. If the state chooses to tolerate irregularities, it is not for individuals to question these acts, certainly not for individuals who make contracts with them. *Hotel Co. v. Hunt*, 57 Mo. 126, 129. Defendant should not be permitted to repudiate his contract on a defense

of *ultra vires*. *Bank v. Matthews*, 98 U. S. 621; *Railroad v. McCarthy*, 96 U. S. 258; *Daniels v. Tearney*, 102 U. S. 415; *Board v. Railroad*, 47 Ind. 407; *Arms Co. v. Barlow*, 63 N. Y. 62; *DeGroff v. Thread Co.*, 21 N. Y. 124; *Woolen Co. v. Lamb*, 143 Mass. 420; Morawetz on Priv. Corp., secs. 100, 693; Sedgw. Stat. and Const. Law, p. 73; 2 Herman on Estoppel, pp. 1318–19; Bishop on Con. [Ed. 1887] secs. 280 to 311. Especially after enjoying the advantages of the employment, and after having induced the plaintiff to embark in the business. See, in addition to above authorities, 2 Herman on Estoppel, sec. 1221; *Stilwell v. Aaron*, 69 Mo. 539, 545; *Given v. Corse*, 20 Mo. App. 132.

A. R. Taylor, for respondent.

Biggs, J.—The Bowman Dairy Company is a Missouri corporation, and it is authorized to carry on a dairy business in the city of St. Louis. The present action is one in equity, and was instituted by the Bowman Dairy Company, as plaintiff, to restrain the defendant from violating a certain contract alleged to have been entered into by the plaintiff and the defendant. There was a temporary injunction, which was dissolved upon a final hearing, when the plaintiff's action was dismissed. From this judgment the plaintiff has prosecuted an appeal.

In the petition the defendant was charged with the violation of the following written contract: "This agreement made this twelfth day of September, 1889, between the Bowman Dairy Company, of the first part, and ———, of the second part, both of the city of St. Louis and state of Missouri, witnesseth: That the said Bowman Dairy Company does hereby employ the said J. T. Mooney as driver of an oyster wagon, and agrees to pay him eighteen dollars per week. Said J. T. Mooney, in consideration of the above

sum of eighteen dollars per week, during his employment by the said Bowman Dairy Company, hereby agrees to drive such oyster wagon, and perform such other duties as may be assigned to him by said Bowman Dairy Company, its officers or agents; to use all diligence in his power to make and keep trade for the Bowman Dairy Company; and at no time whilst in their employ, or within two years after leaving their service, to sell oysters for himself or any other person or company to the customers of first part, or interfere with or enter into competition with their business, or in any way, directly or indirectly, divert, take away, or attempt to divert or take away, any of their custom or patronage. This contract as to the term of service may be terminated by either party giving thirty days' notice.

"(Signed.) JOHN T. MOONEY,
"BOWMAN DAIRY CO.,
"By J. R. BOWMAN,
"Secretary."

The execution of the contract was admitted. The plaintiff's evidence tended to prove that the defendant entered upon the discharge of his duties under this contract of employment, and that he worked two days, earned six dollars, collected two dollars from the company, and then quit work without any cause or excuse. The evidence also tended to show that the defendant soon thereafter commenced to sell oysters on his own account to plaintiff's customers. To prevent the continuation of this the present proceeding was begun.

In defense of the action, and on a hearing of a motion to dissolve the temporary injunction, the defendant introduced the plaintiff's articles of association, which showed that the plaintiff was incorporated under article 8, chapter 42, of the Revised Statutes of 1889, entitled "Manufacturing and business companies;" that the name adopted by the plaintiff was the

"Bowman Dairy Company;" that the purposes of the corporation were: *First.* "To buy and sell dairy products, especially milk, butter, cheese and ice cream." *Second.* "To purchase, hold, mortgage or otherwise convey such real estate and personal property, as the purposes of the corporation shall require."

The plaintiff introduced additional evidence, which had a tendency to show the following state of facts: That on the twelfth day of September, 1889, the plaintiff purchased the stock in trade of the firm of Berry & Owens, which firm had been engaged for some years in the wholesale and retail oyster business in the city of St. Louis; that said firm had built up a large and lucrative trade; that the plaintiff, in making such purchase, also bought the good will of the firm; that for several years the defendant had been in the employ of Berry & Owens, as the driver of one of their oyster wagons in a certain district in the city; that, by reason of such employment, the defendant had become well acquainted with the customers of the firm along his routes; that, before making the purchase from Berry & Owens, the plaintiff made the foregoing contract with the defendant; that they would not have made said purchase, had it not been for the contract with the defendant, and that this was known to the defendant at the time he entered into the agreement.

The doctrine of *ultra vires* was invoked by the defendant as a defense to the action. The defendant denied the plaintiff's right to the aid of a court of equity in the enforcement of the contract against him for the reason, that the plaintiff's charter confined its business to the sale of milk, butter, cheese, etc.; that it was, therefore, prohibited by law from engaging in the oyster business; and that, as the contract pertained to the latter business, it was *ultra vires* of the corporation, and, as the contract was yet *in fieri*, its enforcement would violate a rule of public policy. On the other

hand the plaintiff insisted that the law, under which it was incorporated, did not confine its business to dealings in dairy products, but that it was authorized to engage in any business "intended for pecuniary profit or gain, not otherwise especially provided for, and not inconsistent with the constitution and laws of this state." R. S. 1889, sec. 2771. The argument is, therefore, made that the proviso found in the general statute in relation to corporations (Revised Statutes, 1889, sec. 2508), to the effect that no corporation shall engage in business other than that expressly authorized by its charter, or the law under which it was organized, can in no way invalidate the plaintiff's action in the purchase of the oyster business, for the reason that such business is lawful, that it is not otherwise especially provided for, and that, as it is a business of pecuniary gain or profit, its exercise was within the powers conferred upon the plaintiff by the statute under which it was incorporated. It is further insisted that, if it be conceded that the purchase of the oyster business by the plaintiff was outside its corporate powers, yet the judgment of the court is wrong, because the evidence showed that the contract had been fully performed by the plaintiff, that the defendant had received and accepted its gains and advantages, and that consequently a court of equity should decree its enforcement. The plaintiff urges two additional arguments against the finding of the circuit court: *First.* That the defendant ought not to be heard in such a defense, for the reason that the plaintiff, on account of his contract, was induced to change its position, whereby great loss will be caused to the plaintiff, if the defendant is allowed to prevail in this action; in other words, that the defendant ought to be estopped by his contract. *Second.* That, if the plaintiff has violated its charter, the state alone can take advantage of it in a direct proceeding to declare a forfeiture. The foregoing is the

statement, as we understand them, of the theories of the respective parties concerning the law applicable to this case.

I. It is a well-established principle that all corporate acts, not expressly granted to a corporation by legislative enactments, are prohibited by the common law; therefore, when a corporation derives its authority either from a special act of the legislature, or by virtue of a general law, to prosecute a particular business, in a particular way, it is as much incapacitated from engaging in another business as if it had not been incorporated at all. Any business prosecuted by a corporation must be expressly authorized by its charter, or must in some way be necessary to the successful prosecution of the business mentioned. *Ashbury, etc., Railway Co. v. Riche*, 44 L. J. Exch. 185; *Oregon Railway and Navigation Co. v. Railroad*, 130 U. S. 1. This is elementary law. The plaintiff's articles of association expressly authorize it to engage in buying and selling dairy products, especially milk, butter, cheese and ice cream, and to purchase and hold such real and personal property as the purposes of its business may require. It must be conceded that the oyster business cannot by any possible construction be held to be in aid of, or necessary to, the successful prosecution of the dairy business. This is admitted by the plaintiff, but the argument is made that the plaintiff's articles of association and the law under which it was incorporated must be read together for the purpose of determining the corporate powers expressly conferred upon the plaintiff.

The plaintiff relies on section 2771 of the statute. This section, after mentioning various purposes for which companies may be organized, contained the following clause: "*Eleventh*, for any other purpose intended for pecuniary profit or gain, not otherwise especially provided for, and not inconsistent with the constitution and the laws of this state." Under this

last clause it is supposed that the plaintiff has authority to carry on any business for pecuniary profit, not otherwise especially provided for. This is the idea which we gather from the plaintiff's argument and brief. Such a construction is out of harmony with the other sections of the law. Section 2768 provides that each association must be incorporated under a name or title designating the business in which the proposed corporation is about to embark. This section also provides that the purposes, that is, the business of the association or company, must be stated in its articles of association. Now, if the plaintiff's idea is to prevail, how could a name be selected which would designate or indicate the business of a corporation? The plaintiff's corporate name very clearly indicates that it is engaged in buying and selling dairy products, such as milk, butter, cheese, etc., but this name would be no indication that it had authority to engage in the oyster business. Would it be a sufficient compliance with the other requirement of the section to state that the plaintiff intended to embark in *some* business for pecuniary gain, not otherwise especially provided for by the corporation law of the state? We think not. It was clearly intended that the *particular business* intended to be followed must be stated in the articles of association of each company. The meaning of section 2771 is, that all business companies, as contradistinguished from religious or benevolent societies, except railroad companies, insurance companies, banks, etc., the incorporation of which is especially provided for by other statutes, shall be incorporated under article 8, chapter 42, of the statutes. For this reason, the eleventh clause of section 2771, which is general and sweeping in its terms, was added, in order to authorize the incorporation of any business company whose proposed business was not unlawful within itself, nor prohibited by law. Our conclusion is that the plaintiff had no right to engage in the oyster business,

and that the contract with the defendant in reference thereto was *ultra vires* of the corporation.

II. The next proposition is that, although the contract was void for want of power on plaintiff's part to execute it, nevertheless, since it has been fully executed by the plaintiff, a court of equity will decree its enforcement. This rule is stated by Mr. Morawetz in his work on corporations, section 689, as follows: "After a contract entered into by a corporation has been performed by either of the contracting parties, the fact that the making of the contract involved an unauthorized exercise of corporate power on the part of the company will not constitute a defense to an action brought by the party having performed the contract to recover compensation for a breach by the other party." The principle involved in this rule has been the subject of much judicial discussion, which has resulted in some confusion in the authorities. We think that a great deal of this confusion has arisen from a misconception of the true principle upon which the rule is predicated. So long as such a contract is executory, that is, when it has not been fully performed by either party, the courts will not sustain any kind of action based upon it. The reason is that the enforcement of such a contract would be against public policy, and in direct violation of law. As was said by Judge MILLER in *Case v. Kelly*, 133 U. S. 28: "While a court might hesitate to declare the title to lands already received, and in the possession and ownership of the company, void on the principle that they had no authority to take such lands, it is very clear that it will not make itself the *active agent in behalf of the company in violating the law and enabling the company to do that which the law forbids.* See, also, *Thomas v. Railroad*, 101 U. S. 71, 86. Some authorities proceed on the idea that the rule is in some way founded on the law governing estoppels. Reasoning from this premise, it has been stated in a general

way that the defense of *ultra vires* should not prevail, when its enforcement would be inequitable, thereby losing sight of the true principle upon which the whole doctrine rests. It is from this standpoint that the plaintiff's counsel make the argument, that the contract must be considered as fully performed by the plaintiff, or that the defendant should be estopped to set up the defense of *ultra vires*. Mr. Morawetz (2 Mor. Corp. 692) says: "The rule is not based upon the doctrine of estoppel, as has sometimes been suggested. An estoppel *in pais* involves a representation of a fact upon the faith of which an *innocent party* has been induced to alter his position. The rule referred to, however, applies where both parties to the contract have notice that it was in excess of the charter powers of the corporation, and, therefore, prohibited by law. * * * Moreover, the doctrine of estoppel cannot be invoked by an individual so as to defeat the operation of a rule of law established for the benefit of the community in general. The legal prohibition against the unauthorized exercise of corporate powers is established for the benefit of the public, on general grounds of expediency, and not for the benefit of corporations, or of persons dealing with them. The effect of the prohibition upon a contract, therefore, depends wholly upon the requirements of the public policy pursuant to which the prohibition was established." If we apply the principle announced, the contract in the case at bar will not be enforced in any way against the defendant merely because it would work an injustice to the plaintiff to allow the defendant to recede from it. In order to defeat the defendant it must appear that plaintiff has fully performed the contract. If such be the case, then the infraction of the law has already taken place, which would eliminate all questions of public policy from the case, and allow the courts to deal with the contract on equitable principles. Under this view the question at the threshold is, did the defendant have the right to recede

from the contract at the time he quit work? Or, to put it in another way, was the contract at that time fully performed by the plaintiff? If the answer to this proposition is against the plaintiff, the facts and circumstances, under which the contract was entered into, and the effect of its violation by the defendant, become immaterial inquiries.

Did the defendant have the right to recede from the contract? When an individual is sued upon a contract by a corporation, he is permitted to make the defense of *ultra vires* upon the theory that, at the time of its violation by him, there was no legal obligation on the part of the corporation to comply with its part of the contract. In other words there is a want of mutuality in the contract. *Whitney Arms Co. v. Barlow*, 63 N. Y. 62. When such a contract has been fully performed by the corporation, the mutuality of the obligation becomes an immaterial question for the reason, that the defendant can have no occasion to seek its enforcement. It is upon this idea, together with other reasons heretofore mentioned by us, that courts make a distinction between executory and executed contracts, when dealing with the question of *ultra vires*. Applying what we have said to the contract in issue, it becomes quite apparent that the defendant was at liberty to repudiate it at the time he quit work. At that time the contract was *in fieri*, and the plaintiff had the undoubted right to discharge the defendant from its employment, and in such an event he would have been without a remedy. This conclusively shows that there was no mutuality of obligation existing, and it is decisive of the point in favor of the defendant. This result cannot be avoided by the argument that the consideration for the latter portion of the defendant's undertaking had passed to him. It would not comport with our ideas of the law to say to the defendant that, although he had no rights under the contract, nevertheless a court of equity would compel him to quit selling oysters on his own account by reason of the contract.

Our treatment of the questions is, we think, not only in accord with the decisions of our own courts, but also in harmony with the weight of authority in other jurisdictions. *St. Louis Drug Co. v. Robinson*, 81 Mo. 19; *Land v. Coffman*, 50 Mo. 243; *St. Louis Mfg. Co. v. Hilbert*, 24 Mo. App. 343; *St. Louis Stoneware Co. v. Partridge*, 8 Mo. App. 220; *Bradley v. Ballard*, 55 Ill. 417; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *Chambers v. City of St. Louis*, 29 Mo. 543; *Hovelman v. Railroad*, 79 Mo. 632; *Broadwell v. Merritt*, 87 Mo. 101; *Union National Bank v. Hunt*, 7 Mo. App. 45; *Shewalter v. Pirner*, 55 Mo. 218; *Pacific Railway Co. v. Seely*, 45 Mo. 212; *Dartsmouth College v. Woodward*, 4 Wheat. 518; *Gilliam v. Brown*, 43 Miss. 641; *Russell v. Wheeler*, 17 Mass. 281.

What we have said disposes of the objection that the defendant cannot avail himself of the plea of *ultra vires*. When the action is based on a contract, which is shown to be beyond the powers of the corporation, and which remains executory, we have found no case, which goes to the extent of holding that the individual cannot allege the illegality of the contract in opposition to its enforcement. The line of authorities, relied on by the plaintiff, and which hold that the question of *ultra vires* can only be raised in a direct proceeding by the state, refers only to cases where the business, in which the corporation is engaged, is not expressly nor by fair implication prohibited by the terms of the charter. *St. Louis Drug Co. v. Robinson*, 81 Mo. 18, and authorities cited. This rule is generally invoked in cases where the corporation is charged with the excessive exercise of powers conferred. *McIndoe v. St. Louis*, 10 Mo. 575; *Chambers v. St. Louis*, 29 Mo. 543; *Land v. Coffman*, 50 Mo. 243.

Our conclusion necessarily leads to an affirmance of the judgment. With the concurrence of the other judges, it will be so ordered. All the judges concur.

INDEX.

BY DAVID GOLDSMITH.

EXECUTION.

INJUNCTIONS.

PRACTICE, TRIAL.

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 for by 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 as 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 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 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:

F. C. FARR, *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 CLERKS 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 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 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 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 telegram, by letter or by written notice, and shall, on filing such motion, satisfy the Court that such 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 day, 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.