23/3

July 1843 #1240

Louis Bompart
vs

Pelagie Boyer

St. Louis County

Debt

Bompart owed Boyer's late husband

$3000

Bogy & Hunton } Atty's
Polk

State of Missouri, County of St. Louis, Set.

Be it remembered that heretofore, that is to say, on the first day of July in the year eighteen hundred and forty two, the following declaration was filed in the office of the clerk of the St. Louis Court of Common Pleas,

Declaration. towit: County of St Louis, Ss: In the St Louis Court of Common Pleas, August Term, 1842.

Pelagie Boyer, administratrix of all and singular the goods and chattels, lands and tenements of Francis Boyer, deceased, by Polk and Frémon, her attorneys, complains of Louis Bompart of a plea of trespass on the case upon promises: For that whereas the said defendant, heretofore, towit, on the first day of July in the year of our Lord eighteen hundred and forty two, towit, at the county aforesaid, was indebted to the said Francis Boyer in his life time, in the sum of three thousand dollars for so much money lent and advanced by the said Francis Boyer before that time and in his life time, to the said defendant at his special instance and request: Also, in the further sum of three thousand dollars of like lawful money, for so much money by the said Francis Boyer before that time, and in the life time of the said Francis Boyer, paid, laid out, and expended, to and for the use of the said defendant, at his like special instance and request: Also, in the further sum of three thousand dollars of like lawful money, for so much money by the said defendant before that time had and received, to and for the use of the said Francis Boyer: And also, in the further sum of three thousand dollars like lawful money, for other money by the said defendant, to the said Francis Boyer in his life time, before then due and owing, and then in arrears and unpaid, for and upon an account stated between them. And being so indebted, the said defendant in consideration thereof, afterwards, towit, on the day aforesaid, at the place aforesaid, undertook, and then and there faithfully promised the said Francis Boyer in his life time

to pay him the said several sums of money in this count mentioned, when the said defendant should be thereunto afterward requested. Nevertheless, the said defendant not regarding his said promises, and undertakings, altho often requested so to do, hath not as yet paid the said sums of money or any part thereof to the said Francis Boyer in his life time, or to the said Pelagie Boyer, administratrix as aforesaid, since the death of the said Francis Boyer, to the damage of the said plaintiff of three thousand dollars, and therefore she brings her suit &c. And the said Pelagie Boyer brings into Court here the letters of administration granted to her by the Judge of the Probate Court of the County of St Louis.

Pelagie Boyer Admx
of Francis Boyer
By Polk & Fremon, her atty

Summons

Whereupon the Clerk of said Court issued a summons which is in the words and figures following, to wit: County of St. Louis Ss. The State of Missouri. To the Sheriff of St Louis County, Greeting: We command you to summon Louis Bompart, if he be found in your county, that he be and appear before the Judge of our St Louis Court of Common Pleas, on the first day of the next Term thereof, to be held at the City of St Louis, within and for the County of St Louis, on the first Monday of August next, then and there to answer unto Pelagie Boyer, administratrix of all and singular the goods and Chattels, lands and tenements of Francis Boyer deceased, of a plea of trespass on the case upon promises, to the damage of said plaintiff of three thousand dollars: and have you then there this writ. (Seal) Witness Joseph W. Walsh, Clerk of our said Court, with the seal thereof hereto affixed, at Office, in the City of St. Louis, this first day of July in the year of our Lord One thousand eight hundred and forty two.

J. W. Walsh, Clerk.
By Jas. B. Walsh, Deputy.

Sheriff's

Upon which the Sheriff made his return, which is in the words and figures following, to wit: Executed this writ in

returns the County of St Louis on the 12th day of July 1842, by offering to read it and the declaration to Louis Bompart the defendant, all of which he refused to hear. Marshall Brotherton, Sheriff, by Benjamin Lacey, Dpt.

And afterwards, on the sixth day of August eighteen hundred and forty two, the following plea was filed in said Cause, in said Court of Common Pleas, towit:

Plea St Louis Court of Common Pleas, August Term, 1842. Pelagie Boyer vs. Louis Bompart. And the said Defendant by Bogy & Hunton, his attorneys, comes and defends the wrong and injury, when &c, and say that he did not undertake and promise in manner and form as the said plaintiff hath above thereof complained against him, and of this he puts himself upon the Country. Bogy & Hunton, Attys for Defendant.

And afterwards the following replication was filed:

Replication And the said Plaintiff doth the like. Polk & Fremon, Atty for pltff.

And afterwards, towit, at the August Term of said Court of Common Pleas for the year ~~18~~ eighteen hundred and forty two, on the twenty seventh day of August 1842, the following proceedings in said

Order for bill of particulars cause were had, towit: Pelagie Boyer vs Louis Bompart. On motion of said Defendant, ordered that said Plaintiff furnish to the defendant a bill of the particulars of his demand. ~~Sued on in this suit.~~

And afterwards, towit, at the Same Term of said Court towit, on the 13th day of October 1842, the following proceedings

Continued in said Cause were had, towit: Pelagie Boyer, Admx, &c vs. Louis Bompart. Cause continued at the plaintiff's costs. And on the same day the following bill of particulars was filed, towit:

Bill of particulars. Pelagie Boyer, Admx of Francis Boyer, vs Louis Bompart. In the St. Louis Court of Common Pleas. Bill of particulars. Louis Bompart, To Francis Boyer Dr. 1837. To Money Collected and not paid over $976.00

And afterwards, at the November Term of said Court, ~~to~~ for the year eighteen hundred and forty two, towit,

wit, on the 13th day of January 1843, the following proceedings were had,

Jury — towit: Pelagie Boyer, Administratrix of Francis Boyer, deceased, vs Louis Bompart. Assumpsit. Now at this day come the parties aforesaid, by their respective attorneys, and thereupon comes also a Jury, towit, R. B. Goodwin, Jonas Moore, Henry Pickington, Peter Higgins, Alexander Graham, Frederick Dings, Henry S. Taylor, Nathan Ranney, Louis Du Breuil, I. L. Kennedy, Samuel Ellis, and William G. Fife, twelve good and lawful men, who being duly empannelled and sworn, the issue within joined between the parties aforesaid well

Verdict — and truly to try, on their oath aforesaid do find that said defendant did undertake and promise in manner and form as the said plaintiff hath in her declaration complained, and that said plaintiff as Administratrix as aforesaid hath sustained damages by reason of the non performance of said promises and undertakings to the amount of nine hundred and seventy eight dollars and seventy

Judgment — Cents; therefore it is considered by the Court that the plaintiff do recover against said Defendant her said damages, so as aforesaid by the Jury assessed, together with her costs and charges in this behalf expended, and have thereof execution.

And afterwards, at the same term of said Court, towit, on the fourteenth day of January Eighteen hundred and forty three, the following further proceedings were had, towit:

Motion for new trial filed. — Pelagie Boyer vs Louis Bompart, Motion for a new trial filed, in the words and figures following, towit:

Motion. — Pelagie Boyer vs. Louis Bompart. St. Louis Court of Common Pleas. Afsh. And the said Defendant moves the Court for a new trial in the above entitled cause of action for the following reasons: 1. Because the verdict is against the evidence. 2. Because the verdict is against the weight of evidence. 3. Because the verdict is against law. 4. Because the verdict is against the instruction of the Court. 5. Because the Court gave erroneous instructions. 6. Because the Court refused the instructions asked by the Defendant. Bogy & Hunton for Deft.

And afterwards, towit, on the twenty first day of January Eighteen hundred and forty three, the following affidavit was filed, towit: Pelagie Boyer, vs. Louis Bompart. St Louis Court of Common Pleas, Nov. T. 1842. Louis Bompart, the defendant in the above cause, being duly sworn, upon his oath says, that since the trial of the said cause he has ascertained new and important testimony, and says if the Court will grant him a new trial that he can procure this testimony for the next Term of this Court. Louis Bompart. Sworn to and subscribed before me this 20th day of January 1843. Louis J. Labeaume, Justice of the Peace.

Affidavit

And afterwards, at the February Term of said Court, for the year Eighteen hundred and forty three, towit, on the twenty first day of February 1843, the following further proceedings were had, towit: Pelagie Boyer, Admrx of Francis Boyer deceased, vs. Louis Bompart. And now come again the parties aforesaid by their respective attorneys, whereupon the Court being now sufficiently advised concerning the motion for a new trial, in this case, doth order that the said motion be overruled, and that a new trial be refused.

Motion for new trial over-ruled.

And afterwards, upon said judgment, said Clerk issued an execution, which is in the words and figures following, to wit: County of St Louis Sct. The State of Missouri, to the Sheriff of the County of St Louis, Greeting: Whereas Pelagie Boyer, administratrix of Francis Boyer, decd, on the thirteenth day of January eighteen hundred and forty three, at our St Louis Court of Common Pleas, recovered against Louis Bompart nine hundred and seventy eight dollars and seventy cents for her damages by her sustained by reason of the non-performance of the promises and undertakings in the plaintiff's declaration mentioned, together with her costs and charges in that behalf expended, which to the said Plaintiff were adjudged, as appears to us of record. These command you, that, of the goods, chattels, and real estate of

Execution.

Said defendant you cause to be made the aforesaid damages, and Costs; and that you have the same befor the Judge of our said Court, on the third Monday of September next, to render the same to the plaintiff. And that you certify to our said Judge how you execute this writ; and have you then there this writ. (Seal) Witness, Nathaniel Paschall, Clerk of our said Court, at St Louis, the twenty fifth day of February, in the year of our Lord, one thousand eight hundred and forty three. Nathaniel Paschall, Clerk, C.C.P.

Upon which said execution are the following endorsements:

Endorsements No 46, Court of Common Pleas, September Term, 1843 — Pelagie Boyer, Administratrix of Francis Boyer dec^d vs Louis Bompart. Fifa — Judgment, 13th January, 1843 — Damages, $978.70, fees of Clerk, J. W. Walsh, 0.66, " " " John Smith, 0.84 " " " N. Paschall 4.00, " " Shff Brotherton 1.00, " " " Milburn 8.54, " " Judge Engle 1.00, Jury Fee 3.00, Atto Fremon for writ 0.50, Witness, Louis Monier 2.20 — $1000.41.

which execution is in the hands of the said sheriff.

And afterwards, towit, at the February Term of said Court, for the year eighteen hundred and forty three, towit, on the first day of April 1843, the following further proceedings were had in said cause, towit:

Bill of exceptions filed.

Pelagie Boyer, Admx, vs. Louis Bompart. Bill of exceptions filed. Which said bill of exceptions is in the words and figures following, towit:

Bill of exceptions.

St Louis Court of Common Pleas, February Term, 1843. Pelagie Boyer, admx of the estate of Francis Boyer, dec^d vs. Louis Bompart. Be it remembered that on the trial of the above entitled case, the plaintiff introduced the following witnesses. Cyprian Charleville said that in 1837 his father gave him the checks to hand to Mr Bompart, he went to Bompart and gave him the checks, some time after his father told him to call on Bompart for the money, he did so, and Bompart gave him an order on Austin for it. When this order was handed to Mrs Boyer

she said she would have nothing to do with Austin, the amount was nine hundred and seventy eight, ~~dollars and~~ $\frac{70}{100}$ dollars, in two checks, the checks were drawn in favor of his father, but does not remember who drew them, they were drawn on the State Bank of Illinois, did not remember the date of the checks — it was in May 1837 his father sent him with the checks to Bompart, and in September 1837 his father sent him to Bompart for the money, there was no time of payment mentioned in the checks, and did not know how they came to Mr Boyer, he returned the order to Bompart, & nothing was said by Bompart at the time. Mr Francois Boyer was dead at the time the checks were given to him to hand to Bompart — Cross examined by Counsel for defendant — Mr Charleville, who is his father, and defendant, are neighbors, residing a few miles from St Louis — his father gave him the checks to hand to Bompart, there were two checks, and he did not remember the amount of each — he did not know whether the checks were sent to Bompart to hand to Savage & Austin, he knew nobody else in the affair but Bompart — His father brought suit once for this money, and failed — the checks were payable to his father, but the money belonged to Mr Boyer — he never heard that Savage & Austin were to collect the money — he did not know when and where Boyer died, they lived in Natchitoches — when he presented the order to Bompart for the money, he expected to get it.

Mr Joseph Charleville Sr. said Mr Boyer was his son in law, and had authorized him to sell property at Galena, and desired him to place the money for his wife and children. As he did not speak the English, he got Mr Bompart to collect the money for him, for which he was willing to recompense him, Mr Bompart agreed to do it, in 1837 he received two checks, or drafts, it was about the beginning of May, the a-

mount was $978, 70/100 – when he received the drafts he sent them to Bompart by the man who has been examined, and who is his son – A few days afterwards he called on Bompart to ascertain if the money had been collected, Bompart told him it had not, but as soon as it would be, he would notify him of it – A few days after he again called on Bompart for it – Bompart told him to call the next day, and he would give him an order for it – he did call the next day for it, & B. told him he would come to town with him – When he got to town he was informed by Bompart that the money had not been collected, he made a great many trips for the money. Mr Bompart then went with him to Savage & Austin. Bompart and Austin conversed together in English, which he did not hear, and Mr Austin then said that the money would be collected in ten or twelve days, he said he he was satisfied in his own mind that the money was to be collected by Savage & Austin, although he had never been informed of it by Bompart. He said he told Bompart he had better be on the look-out, as Savage & Austin would perhaps fail – Bompart said he was not afraid of Austin, as this was a matter of confidence between them – He did not know when the checks were dated, but he thinks they were drawn by a man by the name of Shemon – He looked at nothing but the amount, he could not read, as they were written in English – He thought that Francis Boyer died about two years ago. Mrs Boyer is his daughter —

Cross examined by the Counsel for the defendant. —

He and Bompart were neighbors, and were good friends. He got Bompart to do this for him because he could not speak the English. He did not expect Bompart to go to Illinois for the money, and did not know how he would collect it. Bompart informed him that the drafts were perhaps at a discount; he then told Bompart ~~that~~ if they were at a discount, he wanted them returned to him. He ~~gave~~ had given a similar draft

before to Bompart to collect, amounting to six hundred and thirty seven dollars. This first draft was given about six months before, and he received the money at the store of Savage & Austin, who paid the money to Bompart, and B. handed it to him, he they having gone there with Bompart for that purpose. He did not pay Bompart for collecting the first draft, nothing was said about commission for collecting it, but intended to pay him when the whole was collected – it was payable at the House of Hempstead and Beebe. Mr Bompart said nothing about commission, he did not know his motives. Ten or twelve days after the checks were given to Bompart to collect, he went with Bompart to the store of Savage & Austin, to see if they were collected, he said that he had brought suit before for this same money, in his name, against Bompart, and had failed, his daughter, the present plaintiff, was a witness in that case. A Mr Bouis had told him that Boyer was dead. He had received a power of Attorney from Boyer in 1836 from Matamoras, authorizing him to do his business. He had never heard from Matamoras that Boyer was dead, all he knew about it is, that Mr Bouis informed him that he was dead. Examined again by the plaintiff. He believed Boyer was dead, as he had been so informed by Mr Bouis. He had never written to any one to ascertain the fact, as he did not know where he had died, and he could not write all along the river to ascertain it. He died somewhere in the southern country.

Mr Monier examined by the plaintiff – He said that all he knew about this was, that a Mr Sherman had sent a draft to Mr Charleville on the Bank of Alton. Mr Sherman afterwards sent him money for Charleville, who sent him with it, viz (one hundred and twenty dollars) to Bompart, at the time Bompart told him he was collecting the drafts for Charleville, merely to oblige Mr Charleville, who was agent for Mrs Boyer

& as he, Charleville, was an old man and could not speak the English. This was in 1837, about the first part of June. This sum of one hundred and twenty dollars was afterwards settled.

The testimony on the part of the plaintiff being through, the counsel for the defendant moved the Court to instruct the Jury to find for the defendant, which motion was by the Court overruled. The defendant then introduced William J. Austin as a witness. Mr Austin said that Mr. Bompart had handed to them, (Savage & Austin) a draft for collection, for the amount of nine hundred and seventy eight $\frac{70}{100}$ dollars, which was payable to Joseph Charleville. The collection of the draft was on the 19th ~~of~~ May 1837, the amount was placed on their books to the credit of Joseph Charleville. Another draft had been sent to them in the same way before, by Mr Bompart, in favor of the same person, and the amount, when collected, was placed to the credit of Mr Charleville, and paid to him when he called for it. When the first draft was collected, Mr Charleville told them they might keep the money until he should call for it. The amount, ~~I think~~, was, I think, six hundred and twenty seven dollars. The money was afterwards paid to Mr Charleville, it had been collected in September, and it was paid to him in October 1836. He thought Bompart wrote to them when he sent them the draft, and informed them it belonged to Charleville. Mr Charleville was informed of this, and he called on them eight or ten days afterwards, and Austin, (the witness,) told him he might get the money if he would call for it in the afternoon, and in the afternoon the money was ready for him if he had called for it, but he did not call. At that time their house, (Savage & Austin,) was in good standing. They failed on the 30th of June. If Mr Charleville had called at any time before the failure, they could have paid the money; they were receiving and paying large amounts of money every day from

Austin

the time the money was received until the 30th of June when the house failed, they received and paid out upwards of fifty thousand dollars. Mr Charleville called on him for the money after the House had failed. Mr Austin informed him they had failed, but had provided for him in the assignment. Mr Charleville ~~afterwards~~ informed Mr Austin afterwards, that he had got the amount allowed ~~him~~ by the assignees and placed in the first class. The receipt was in the possession of Mr Charleville, and he gave to Mr Charleville the receipt, and perhaps went with him to the assignee.

"Dear Sir: your fav. has just reached me, covering the draft on Alton for nine hundred and seventy eight $\frac{70}{100}$ Dollars, which we will have collected, and will use the money until Mr Charleville will want it, and will pay him the interest for same. We are working along and will be able to get through. I hope you will come in as soon as you can, as I wish to see you very much. I send you by the boy 30 ℔ & 1 doz palm leaf hats, and will try and get the Hd ~~of~~ Bacon for you. We hope you will be in shortly. I remain yr friend, Yours &c Austin. To L. Bompart, Esq. Endorsed, L. Bompart Esq, Bocage Farm. Rec.d 19 May 1837."

"Borrowed and received of Joseph Charleville nine hundred and seventy eight $\frac{70}{100}$ dollars, payable on demand, value received, St Louis 19th May 1837. Savage & Austin."

Payable in the first class. Joseph Tabor, R. D Watson, Assignees of Savage and Austin.

Cross examined by the plaintiff. Bompart had been in the employ of William H. Savage, but never in the employ of Savage & Austin. He thought Bompart was with Charleville when he called to present the claim to the assignee. He did not

remember if Charleville called in the afternoon or not, he did not remember that he had provided any funds to pay Charleville in the afternoon, but had no doubt, from the large amount of business they did afterwards, they could have paid him. This being all the testimony introduced by the defendant, the plaintiff again examined Joseph Charleville Jr. Mr Charleville said that he had never had the receipt in his possession mentioned by Mr Austin. He said that Mr Bompart once shewed it to him, and told him that he ran no risk with this paper. He never called at the house of Savage & Austin before their failure; he never called on the assignee for the proceeds of the drafts. It may be that Austin paid him the money collected for the first draft left with Savage & Austin for that purpose, but if the money was paid to him, Mr Bompart was present. Witness did not remember ever to have called at the house of Savage & Austin, unless with Bompart.

Instructions

This being all the testimony introduced by both parties, the Counsel for the defendant again moved the Court to instruct the Jury to find for the defendant, which motion was by the Court overruled. The Counsel for the defendant then asked the Court to give the following instructions to the jury:

1. If the jury shall believe from the evidence that Bompart did not act as the agent of Mr F. Boyer, the plaintiff in this suit, they will find for the defendant. 2. If the jury shall believe from the evidence that the arrangement for the collection of this money was made by Mr Joseph Charleville, with the defendant, without notifying him at the time that he was acting as the agent of Francis Boyer, and that Bompart did not know that he was acting as his agent, they will find for the defendant.

Which instructions were by the Court refused. The Court then gave the following instructions:

1 One of the principal questions for the jury to decide

in this case is, whether Savage & Austin, in collecting these checks, acted as the agent of Bompart or of Charleville.

2 If the Jury believe that Savage & Austin acted in that matter as the agent of Charleville, or as the agent of Bompart with the consent and approbation of Charleville, so as in fact to be recognized as Charlevilles agent by his subsequent conduct, or conversation, they will find for the defendant.

3 In order to find for the plaintiff, the Jury must be satisfied from the evidence, that the defendant or his agent, that is, some one acting for him, received money belonging to F. Boyer and for his use, and that said Boyer died before the commencement of this suit.

4 If the Jury believe that the agreement upon the part of Bompart was to collect this money, without charge and as a mere friendly act, he is liable only for gross negligence. That is, if the money has been lost after the use of ordinary care, skill, and prudence, on his part, he cannot be charged therewith.

5. If the understanding between the parties was, that the service was to be performed for a fee or reward, in the shape of a Commission, then the law is different. In such case the use of ordinary skill, care and prudence on his part, will not discharge him, if the money has been lost through any of his agents.

6 The Jury then retired and brought in a verdict for the plaintiff, and thereupon the Counsel for the defendant moved the Court for a new trial, for the following reasons:

Pelagie Boyer vs Louis Bompart. St Louis Court of Com~~mon~~ Pleas. Asst. And the said defendant moves the Court for a new trial in the above entitled cause, of action, for the following reasons. 1. Because the verdict is against the evidence. 2 Because the verdict is against the weight of evidence. 3. Because the verdict is against law. 4. Because the verdict is against the instructions of the Court. 5. Because

the Court gave erroneous instructions. 6. Because the Court refused the instructions asked by the defendant. Bagy & Benton for Deft.

Which motion for a new trial was by the Court overruled; to which opinions of the Court overruling the motion for a new trial, and overruling the several motions to instruct the Jury to find for the defendant, and refusing the instructions asked by the defendant's Counsel, and giving the instructions above set forth, the defendant by his Counsel excepts, and prays that this bill of exceptions may be signed, sealed, and made a part of the record.

P. H. Engle, Seal

And afterwards, at the same term, towit on the sixth day of April eighteen hundred and forty three, the following further proceedings were had, towit: Pelagie Boyer, Admx of Francis Boyer decd. Vs. Louis Bompart. Appeal to the Supreme Court.

Appeal

Now at this day comes the said defendant by his Attorney, and prays an appeal to the Supreme Court from the judgment herein rendered, and files his affidavit therefor according to law, whereupon said appeal is granted; and the said Louis Bompart as principal, and Michael S. Cerre and Thomas D. Yates his securities, come and acknowledge themselves each to owe the plaintiff the sum of fifteen hundred dollars, to be levied of their respective goods and chattels, lands and tenements, upon condition, nevertheless, that said defendant shall prosecute his appeal with diligence to a decision in the Supreme Court, and that if the judgment appealed from be affirmed, or his appeal dismissed, he will pay the damages and costs that have been recovered against him by the judgment aforesaid, together with the interest that shall grow due thereon, and also the costs and damages that may be recovered against him in the Supreme Court on his said appeal.

Affidavit for

Which affidavit above referred to is in the words and figures following, towit: St Louis Court of Common Pleas,

appeal

Feby 7. 1843. Pelagie Boyer, Admx of Francis Boyer, vs Louis Bompart. Louis Bompart, the defendant in the above case, being duly sworn, on his oath says that he does not take an appeal in this case for the purpose of vexation and delay, but because he believes that he is aggrieved by the decision of the Court. Louis Bompart.
Subscribed and Sworn to this 6th April 1843, before me,
N. Paschall, Clk C. C. P.

State of Missouri,
County of St Louis, } ss. I, Nathaniel Paschall, Clerk of the St Louis Court of Common Pleas, certify that the foregoing is a true and correct transcript of the record and proceedings in the case of Pelagie Boyer, Admx of Francis Boyer, decd. vs. Louis Bompart, as the same remain in my Office.

In Testimony whereof, I have hereto set my hand, and affixed the seal of said Court, at Office in the city of St Louis, this twelfth day of May, eighteen hundred and forty three.

N. Paschall Clk

Supreme Court. (10)
July Term 1843.

1240

Louis Bonpart, Appellant

vs } Transcript

Pelagie Boyer admx. of Francis Boyer decd. appellee

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From St Louis Court Common Pleas.

1240

Filed June 12. 1843.
M. L. Boon. clk

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Transcript, p. 50

Supreme Court. July 7. 1863

Louis Bompart — appt

vs

Pelagie Boyer — appee —

And the said appellant by his attorneys comes and ~~defends~~ says there is manifest error in the record and proceedings in the above case, to his prejudice, in this to wit —

1. The court erred in overruling the defendant's motion for a nonsuit —

2 The court erred in overruling the defendant's several motions for instructions to the jury —

3 — The court erred in its instructions to the jury.

4. The court erred in overruling the defendant's motion for a new trial

5. The court erred in rendering judgment for the plaintiff —

And the appellant prays that the judgment aforesaid may, for the errors aforesaid & for other errors, be annulled, set aside, held for nought & reversed —

Bogy & Hunton
for appellant.

And now at this day comes said appellee and says that there is no such errors in the record proceedings in this cause as is by said appellant assigned

T. Pike for Appellee

Louis Bomport – appt
vs
Pelagie Boyce – appee

Assignment of Errors

Bogy & Hunton
for appt

Filed June 12. 1843.
H. L. Boon clk

Joinder in Error filed
July 24. 1843.
H. L. Boon clk

7 254

Louis Bompart — appt
vs.
Pelagie Boyer, adms
of François Boyer — appe

} Sup. Court
July Term 1843.

This was an action of assumpsit in the St Louis Court of Common Pleas, on the trial of which verdict & judgment were rendered for the plaintiff.

The declaration contains only the common money counts alledging the promises to the plaintiffs testator in her life time.

The testimony as displayed in the bill of exceptions presents substantially these facts — That Joseph Charleville had sold land for François Boyer, the intestate, and had been directed to appropriate the proceeds of for the benefit of his Boyer's wife & children — that in 1837 he had a draft amounting to the sum of $978.70/100. the proceeds of land sold, which drafts were payable to him Charleville — that Charleville was the father of the plaintiff, and that he sent the draft to his friend & neighbor Bompart, the defendant, with a request to have it collected — Charleville did not speak the English — the defendant received the draft & placed it in the hands of Savage & Austin for collection — Savage & Austin having before that time collected for Charleville another draft growing out of the same transaction, which also had been

handed to them by Bompart for Charleville, and the proceeds of which draft had before that time been paid over by them to Charleville. Savage & Austin received the money upon this draft amounting to $978.70/100 on the 19.th of May 1837 — they were at that time merchants in good standing in St Louis, but failed on the 30.th day of June following. The proceeds of the draft were placed on the books of Savage & Austin to the credit of Joseph Charleville, as they had been directed to do by Bompart. They S. & A. could have paid the proceeds of the drafts any day after their collection, & before the 30.th day of June. Charleville was informed when he called that they would pay him the money, but he did not again return before the house closed — S. & A. made an assignment of their effects for the benefit of their creditors, & provided for the payment of the claim of Charleville on account of the draft — it was placed in the first class — It appears from the testimony of Cyprian Charleville that Boyer ~~the Boyer~~ was dead at the time Bompart received the drafts. He states the fact positively — No other witness speaks with any certainty of the time of his death.

After the assignment Joseph Charleville the father of the plaintiff and her principal witness brought suit against Bompart on account of these same drafts

verdict was rendered for the defendant, and then the father & the daughter change their characters, Mrs Boyer is converted from the Witness into the plaintiff, & Joseph Charleville from plaintiff into Witness, & the present suit was instituted.—

After the plaintiff had closed her testimony the defendant moved the court to instruct the jury that the plaintiff had failed to make out a case; which the court overruled — and the accepted.

After the whole testimony was heard the counsel for the defendant moved the court to instruct the jury (see instructions refused in bill of exceptions) which the court refused — and gave these (see instructions given in bill of exceptions) And after verdict was rendered the defendant moved the court to grant a new trial for the ~~reasons~~ following reasons (see bill of exceptions) which also was overruled.

The defendant appealed & thus bring the case to this court for reversal.

Upon the case thus presented the counsel for the appellant submit the following propositions.

1. That there should have been no recovery against Bompart because she declared ~~[illegible]~~ contains only the common money counts, and the evidence shews

that no money was received by him, and therefore if he be liable at all the proper form of action would be a special action on the case for negligence.

2 — The plaintiff as administratrix shews no right of recovery against Bompart, for the intestate was dead at the time Bompart's agency commenced, and the declaration alleges a promise to the intestate alone — the administratrix cannot maintain this suit without alleging a promise to her as administratrix — Pitman vs Foster 1. Barnewall & Cresswell R 248 (8. Sergeant & Lawder Select cases 67) — Ward & wife vs Hunter 6. Taunton 210. (1. Sergeant & Lawder Select cases 359) — 1. Saunders Pleading & Evidence 574. —

3 — There was no privity of contract between

the plaintiff, or her intestate & the defendant, he was the agent of Charleville, and liable only to him — "It is well established that there must be a privity between the parties, or the common courts will be of no avail". Chitty on Pleadings 1. vol 373 —— It seems now to be settled that in no case can the plaintiff recover under the counts for money had and received unless money has actually been received by the party sued for the use of the plaintiff" — Chitty on bills (8th Edition) 596 — Page adms vs Bank of Alexandria 7. Wheaton 35 (5. Cond Rep 222) —— Chitty on Pleadings 372 — 373 — 385 —— 387 ——

4th The court ought not to have refused the instructions asked by the counsel for the defendant — The principle contended for in these instructions is simply this — If the defendant was not the agent for the plaintiff — this suit could not be maintained

for the authorities in favor of this point the court is referred to the authorities cited under the 3.d proposition, in relation to the want of privity existing between the plaintiff & the defendant.

5— The court instructed the Jury — to the 1. 2. & 3 instructions there is no objection but the 4. & 5. are erroneous and ought not to have been given — the 4.th is inconsistent — the first part lays down the principle that if the defendant was to act as the agent of the ~~principal~~ plaintiff without fee or reward, that nothing but grop neglect could render him liable" — while the first of the instruction is believed to be correct, yet the second member of the same instruction qualifies it in such a manner as to render the above instruction erroneous viz "that if the agent exercise ordinary care skill, & prudence he is not responsible

the appellant contends that less than ordinary care will discharge an agent who is not to receive any commission, or in other words, that nothing but gross neglect will render him liable.

6.th. The fifth instruction is erroneous and ought not to have been given — the language of the instruction is as follows — "the use of ordinary care, skill & prudence on the part of an agent will not discharge him if the money has been lost through any of his agents" — So far from this being the law the counsel for the appellant contend that it is against the well & long established rule on this subject, & in support of this position refer to the following authorities viz "an agent acting in good faith is bound ~~& bound~~ to exercise ordinary attention & diligence only" Lawler vs Keaquick 1. John C. 174 (John Dig 310.) "The conduct of an agent on whom no fraud is chargeable ought to receive a liberal & favorable construction" Drummond vs Wood 2. C R 310. (John Dig 311) "an agent is liable for fraud or gross neglect, but while acting in good faith he is bound to exercise ordinary attention & diligence only" Lawler vs Keaquick 1. J. C. 174 (John Dig 311) —

"Losses occasioned by the fraud or failure of third persons to whom an agent has given credit pursuant to the regular and accustomed practice of trade are not chargeable upon him" Paley on Agency 43 & 44 – 6. Term Rep Rapsle vs Stanley page 12 — 3. Atkins 480 Knight vs Lord Plymouth —
"If the money is placed to the agent's credit the rule is apparent." Paley on agency 45."

7. Joseph Charlevile in not recovering the act of Bonpart in the selection of the house of Savage & Austin for

the transaction of the business, approved it & made the act his own — "A principal is bound to disavow the act of his agent the first moment the facts come to his knowledge, otherwise he makes the act his own" Brelin vs Albany 14. Sergent & Rawle 30 (176. Chitty on Contracts note 1.) "When the principal is informed of what has been done, he must dissent and give notice of them a reasonable time; and if he does not his assent, and a ratification will be presumed" 2. Kent 616 — Tousley vs Stevenson 1. John C 110 ——— Cairns & Lord vs Bleecker 12. John Rep 300 ——— Ennett vs Johnson 6. Mass Rep 193 ——— Throckingham vs Staley 3. ibid 70 ——— Clement vs Jones 12. ibid 60 ——— Shaw vs Studd 8. Pick Rep 9 ——— Merlin Questions de droits Tom 1. 482 ——— 6. Wendell Rep 103.

8. The testimony greatly preponderating in favor of the defendant a new trial ought to have been granted.

The Supreme Court of this State has

established the rule that when the testimony greatly preponderates in favor of the party suing ~~at~~ the ~~[illegible]~~ new trial, it is error to refuse it" Drooly & Kirkland vs Jennings 6. Mo Rep 61 — "If on the evidence the jury ought to have found for the defendant, and having found otherwise the court ought to have granted a new trial 4. Mo Rep 80. Clemens vs Morton & Laviello —

Upon a fair view of the whole case the counsel for the appellant do conceive that the ends of justice will be advanced by reversing the judgement of the court below & directing a new trial.

Lewis V. Bogy
Logan Stanton
for appt

Indy 26

Louis Bompart
vs
Pelagie Boyer.

Statement of case &
appellant's brief

Lewis V. Boggs
Logan Hunton
for appr

filed 4 Sept. 1843.
H. L. Boon Clk

Louis Bompart – appt
vs
Pélagie Boyer, adms
of François Boyer – appee

Supreme Court
July Term 1843.

This was an action of assumpsit in the St Louis Court of Common Pleas, on the trial of which verdict & judgment were rendered for the plaintiff. –

The declaration contains only the common money counts alledging the promises to the plaintiffs' intestate in his life time.

The testimony as displayed in the bill of Exceptions presents substantially these facts. — That Joseph Charleville had sold land for François Boyer, the intestate, and had been directed to appropriate the proceeds for the benefit of his Boyer's wife and children. — That in 1837 he had a draft amounting to the sum of $978.70/100 the proceeds of land sold, which draft was payable to him Charleville — That Charleville was the father of the plaintiff, and that he sent the draft to his friend and neighbor Bompart, the defendant, with a request to have it collected —. Charleville did not speak the English. The defendant received the draft and placed it in the hands of Farage & Austin for collection —. Farage and Austin having before that time collected for Charleville, another draft growing out of the same transaction, which also had been handed to them by Bompart for Charleville, and the proceeds of which draft had before that time been paid over by them to Charleville. Farage and Austin received the money upon this draft amounting to $978.70/100 on the 19th of May 1837. – They were at that time merchants in good standing in St Louis, but failed on the 30th day of June following. The proceeds of the draft were placed on the books of Farage & Austin to the credit of Joseph Charleville, as they had been directed to do by Bompart. They Farage & Austin would

been paid the proceeds of the draft any day after its collection and before the 30th day of June. Charbrille was informed when he called that they would pay him the money, but he did not again return before the house closed. Savage and Austin made an assignment of their effects for the benefit of their creditors, and provided for the payment of the claim of Charbrille on account of the draft — it was placed in the first class. It appears from the testimony of Cyprian Charbrille that Roger was dead at the time Bompart received the draft. He states the fact positively. No other witness speaks with any certainty of the time of his death.

After the assignment Joseph Charbrille, the father of the plaintiff and her principal witness, brought suit against Bompart on account of this same draft, verdict was rendered for the defendant, and then the father and the daughter change their characters, Mrs Roger is converted from the witness into the plaintiff and Joseph Charbrille from plaintiff into witness, and the present suit was instituted. —

After the plaintiff had closed her testimony the defendant moved the Court to instruct the jury that the plaintiff had failed to make out a case, which the Court overruled —

After the whole testimony was heard the counsel for the defendant moved the Court to instruct the Jury (see instructions refused in bill of exceptions) which the Court refused — and gave these (see instructions given in the bill of exceptions). And after verdict was rendered the defendant moved the Court to grant a new trial for the following reasons (see bill of Exceptions) which also was overruled.

The defendant appealed and thus brings the case to this Court for reversal.

Upon the case thus presented the counsel for the appellant submit the following reasons.

1. That there should have been no money against Bompart, because the declaration contains only the common money counts, and the evidence shows that no money was owed by him, and therefore if he be liable at all the proper form of action, would be a special action on

the case for negligence.

2. The plaintiff as administratrix shews no right of recovery against Bompart, for the intestate was dead at the time Bompart's agency commenced; & the declaration alledges a promise to the intestate alone. — The administratrix cannot maintain this suit without alleging a promise made to her as administratrix. — Pitman vs Foster. 1 Barnwell & Cresswell R. 248. (8 Sergeant & Lawler, Select cases 67). — Ward & wife — vs Hunter 6. Taunton 210 (1 Sergeant & Lawler Select cases 359) — 1 Saunders Pleading and Evidence 574. —

3. There was no privity of contract between the plaintiff, or her intestate & the defendant, he was the agent of Charleville & liable only to him — "It is well established that there must be a privity between the parties, or the common counts will be of no avail." Chitty on Pleadings 1. Vol. 373 —

"It —

seems now to be settled that in no case can the plaintiff recover under the count for money had and received unless money has actually been received by the party sued for the use of the plaintiff &c — Chitty on Bills (8th Edition 596).
Page adms — vs — Bank of Alexandria 7 Wheaton 35 (5 cond. Rep. 222) — Chitty on Pleadings 372 — 373 — 385 — 387 —

4th The court ought not to have refused the instructions — asked by the counsel for the defendant — . The principle contended for, in these instructions is simply this — if the defendant was not the agent for the plaintiff — then suit could not be maintained, for the authorities in favor of this point, the court is referred to the authorities under the 3d proposition, in relation to the want of privity existing between the plaintiff & the defendant —

5th — The court misdirected the Jury — to the 1. 2. & 3d instructions there is no objection, but the 4 & 5 are erroneous & ought not to have been given — . The 4th is inconsistent — the first part lays down the principle "that if the defendant was to act

as the agent of the plaintiff without fee or reward, that nothing but gross neglect could render him liable"— while this part of the instruction is believed to be correct, yet the second member of the same instruction qualifies it in such a manner as to render the whole instruction erroneous, viz: "that is, if the agent exercise ordinary care, skill & prudence he is not responsible" The appellant contends that less than ordinary care will discharge an agent who is not to receive any commission, or in other words, that nothing but gross neglect will render him liable.

6th. The fifth instruction is erroneous & ought not to have been given —. The language of the instruction is as follows— "The use of ordinary care, skill & prudence on the part of an agent will not discharge him if the money has been lost through any of his agents" So far from this being the law the counsel for the appellant contend, that it is against the well & long established rule on this subject, and in support of this position refer to the following authorities viz "an agent acting in good faith is bound to exercise ordinary attention and diligence only" Parker vs Kingwith — 1 John. C. 174 (John. Dig 310) "The conduct of an agent on whom no fraud is chargeable ought to receive a liberal & favorable construction" Drummond vs Wood 2 John. C. R. 310 (John. Dig 311) "an agent is liable for fraud or gross neglect, but while acting in good faith he is bound to exercise ordinary attention & diligence only" Parker vs Kingwith 1 J. C. 174 (John. Dig. 311). "Losses occasioned by the fraud or failure of third persons to whom an agent has given credit pursuant to the usages

and accustomed practice of trade are not chargeable upon him." Paley on Agency 43 & 44 — 6. Term Rep. Russell vs Hankey page 12 — 3 Atkins 480 Knight vs Lord Plymouth. —

"If the money is placed to the agent's credit the rule is different." Paley on Agency 45. —

7. Joseph Chacleville in not disavowing the act of Bompart in the selection of the house of Savage & Austin, for the transaction of the business, affirmed it & made it his own. A principal is bound to disavow the act of his agent the first moment the facts come to his knowledge, otherwise he makes it his own." Brelin vs Dubuy 14. Sergent & Rawle 30 (176. Chitty on contracts note 1) ". When the principal is informed of what has been done, he must dissent and give notice of it in a reasonable time, and if he does not, his assent and a ratification will be presumed." 2 Kent 616 — Towley vs Stevenson 1 John. C 110 — Cams & Lord vs Blucker 12 John. Rep. 300 — Errick vs Johnson 6 Mass. Rep. 193 — Frothingham vs Haley 3 ibid 70 — Clement vs Jones 12 ibid 60 — Shaw vs Nudd 8 Pick. Rep. 9 — Merlin Questions de droit Tome 1. 482 — — 6 Wendells Rep. 103

8 The testimony greatly preponderating in favor of the defendant a new trial ought to have been granted.

The Supreme Court of this State has established the rule that when the Testimony greatly preponderates in favor of the party seeking the new-trial, it is error to refuse it." Dooley & Kirkland vs Jennings 6 Mo Rep. 61 — " if on the evidence the jury ought to have found for the defendant, and having found otherwise the Court ought to have granted a new-trial 4 Mo Rep. 80 Clemens vs Morton & Laveille. —

upon a fair view of the whole case the counsel for the appellant do conceive that the ends of justice will be advanced by reversing the Judgment of the Court below and directing a new trial. —

Lewis V. Bogy
Logan Hunton
for appt

Louis Bompart.

vs

Pelagie Boyer adms.

Statement of case & appellants' brief.

Lewis V. Bogy
Logan Hunton
for appt.

filed Sept 4. 1843.
H. L. Boon clk

Louis Bompart appellant
vs
Pelagie Boyer Adm x of
Francis Boyer appellee.

Supreme Court.
July Term 1843.

This was an action brought in the St Louis Court of common Pleas to the August Term A D 1842. The declaration is in assumpsit & contains the common counts, and among these, the count for money had and received, by the appellant defendant below, to and for the use of Francis Boyer deceased the Plaintiff's intestate. The suit is by Administratrix for causes of action accruing to F. Boyer, in his life time. There was but one plea & that was non assumpsit. The Bill of Particulars, asked & filed in the cause, shows that the action was brought for an amount of money collected, but not paid over by deft. Bompart. On the trial there was a verdict & judgement for Plff Boyer for $978.70. When the testimony for Plff's closed, Defts Counsel moved the Court to instruct the jury to find for the defts, which the Court refused, [redacted]. After all the testimony had been given in, deft again made the same motion to the Court and with the same result. The Bill of Exceptions shows, that the Intestate had authorised his Father in Law, Joseph Chauveville to sell some of his land in Galena, for the benefit of Madame Boyer and family. That accordingly the land was sold & two checks of one Sherman for the above amount, were taken in part payment. These checks were placed by Chauvelles, who did not speak English into the hands of the deft for collection, with the intention of paying deft for his trouble, when the collection should be completed. The collection of the checks was actualy

made by deft, but through the House of Savage & Austin, which used the money, failed, & assigned for the benefit of Creditors, and failing to hand over the money to deft. Deft refused to pay Plff.

The deft by his Counsel moved the Court to instruct the jury. "1" That if the jury shall believe from the evidence, that Bonpart did not act as the Agent of Mr F Boyer, the Plaintiff in the suit, they will find for the deft. "2" That if the jury shall believe from the evidence, that the arrangement for the collection of the money was made by Mr Joseph Charleville with the deft without notifying him at the time, that he was acting as the Agent of Francis Boyer and that Bonpart did not know that he was acting as his Agent, they will find for the deft, which instructions were refused by the Court.

The Court gave the following instructions. One of the principal questions for the jury to decide in this case, is, whether Savage & Austin in collecting these checks, acted as the Agents of Bonpart, or Charleville. "1" If the jury believe that Savage & Austin, acted in that matter as the Agents of Charleville, or as the Agents of Bonpart with the ~~consent~~ consent and approbation of Charleville, so as in fact, to be recognized as the Agents of Charleville, by his subsequent conversation and conduct, they will find for the defendant. "2" In order to find for the Plaintiff the jury must be satisfied from the evidence, that the deft or his Agent, that is some one acting for him, received money belonging to F Boyer & for his use, and that said Boyer died before the Commencement of this suit.

3 If the Jury believe that the agreement on the part of Bompart, was to collect the money without charge and as a friendly act, he is liable for only gross negligence, that is, if the money had been lost after the use of ordinary care, skill, and prudence, on his part, he cannot be charged therewith.

4 If the understanding between the parties was, that the service was to be performed for a fee or reward, in the shape of commissions, then the law is different. In such case, the use of ordinary care, skill, and prudence on his part, will not excuse him if the money has been lost through any of his agents.

In support of the judgement below, the appellee relies on the following points.

1. The Bill of Exceptions does not show that there was any exception taken at the trial to ~~the ins~~ any of the instructions either given or refused. Whereas it is necessary that such exception should be taken at the trial. 7 Mo. Rep. 254 Consaul et al vs Liddle

2. That there was no error committed by the Court of Common Pleas in refusing the deft's motion at the close of Plff's case, and again at the close of the whole evidence, - to instruct the Jury to find for the defendant. And to this point cites, Hughes vs Ellison 5 Mo. Rep. 110 & Morton vs Rud 6 Mo 73.

3. Apellee also contends that the Court below committed no error in refusing the first instruction prayed by Deft's counsel — First — because this instruction imposes it on the jury to say what constitutes an agent. But what constitutes an agent is a question of law. And the Court in its instructions must not refer a question of law to the jury. Fugate et al vs Young 6 Ser. Rep. 267

Secondly — because this instruction asserts the proposition that the action for money had & received cant be maintained by one party against another, unless that other acted as the agent of the former. But this form of action may be maintained by a party against any person who may have his money, by whatever means it may have been obtained — and it is not necessary that there should be any privity of contract between Pltff & Deft. 1 Sel. N. P. 71 et sequentia, & authorities there cited. If then the deft had received money belonging to F. Boyer pltff's intestate, he is responsible in this form of action whether he received it as agent or not. But, thirdly, because on the subject matter of the agency the law is correctly stated by the Court in the 1st & 2nd Instructions given by it to the jury. In which instructions the Court explains to the jury what recognition of the acts of Savage & Austin by Charleville by his conduct or conversation or acquiescence, would be sufficient to constitute S & A the agents of Charleville.

4. The Court below was correct in refusing the second instruction asked by Deft's counsel — because a party who deals with an agent is responsible to the unknown principal, for all of his property in his hands. Indeed the authorities show that the rights of

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action is always in the principal, and only in the agent also, in certain particular cases, as when the agent has an interest in the shape of commission, or has a special property in the subject matter of the agency, or when the contract is made personally with the agent. And even when the right of action is in the agent, it is not by that fact taken away from the principal but still remains in him, and the principal is at liberty to interfere at any time. 1 Chit. Pl. 8-9. side-paging.

5. To the first instruction given by the Const I apprehend that there can be no well grounded objection. The matter submitted to the jury in the first part of the instruction is the question of fact whether Savage & Austin were the agents of Bonpart or of Charleville - and not whether they were agents acting in the capacity of agents (which is a question of law) as the first instruction prayed by Deft's counsel puts it. And then the latter part of the instruction requires the jury to find for the defendant unless they find that "Savage & Austin acted in the matter as the agents of Bonpart with the consent & approbation of Charleville, so as in fact to be recognized as Charleville's agent by his subsequent conversation or conduct. Thus this part of the instruction fully obviates the point made by appellant's counsel as to the recognition of Savage & Austin by Charleville as his agents.

6. I suppose that the second instruction given by the Const is as little liable to objection as the first. For it is as true in law that - qui recipit per alium recipit per se, - as it is that - qui facit per alium facit per se -.

This instruction therefore obviously neutralizes the objection insisted on in argument by appellant's counsel – that the defendant in this form of action must be shown to have received money of the Plff – Much less can the appellant be heard to object to this instruction as prejudicial to him, when it is considered that this instruction put upon the Plff the burthen of proving the death of F. Boyer, Plff's intestate, tho' there was no plea but non assumpsit. But when there is no plea in this form of action but Non Assumpsit it is not necessary for Plff suing as Adm.r to prove the d. of the intestate. Loyd vs Finlayson 2 Esp. R. 564. Thus this instruction imposed it upon the Plff below to maintain before the jury that F. Boyer was dead at the commencement of the suit, upon testimony, which as against the presumption of law that he was still alive, was uncertain & doubtful – Whereas the appellant now objects that Plff below proved that point too strongly and should not only that Boyer was dead at the commencement of the suit, but at the time the cause of action accrued.

7. The appellee maintains that the Court below did right in giving both the third & fourth instructions. It is proper to consider these two instructions together because they depend one upon another, asserting, as it were, the two opposite branches of a legal alternative. The proposition of law contained in the fourth being the counter-part of that embodied in the third. In the third instruction the Court asserts the proposition that if the deft undertook to collect the money without charge, then he was responsible for only gross negligence – that is – (pro=

cuding to explain this by pointing out the degree of diligence he must use,) he cannot be charged after the use of ordinary care skill & prudence. In the fourth instruction it is asserted, that if commission was to be paid, then, the law is different. But without mentioning what kind of negligence the deft would be responsible for, the Court proceeds to show the difference of deft's responsibility, by defining the degree of diligence he was bound to use. So that, as the Court, in the fourth, meant merely to assert the opposite of the proposition of the third instruction, which was correct, if in the explanation which it unnecessarily gave it was rather broad in the terms used, there is not much probability of the jury having been misled - especially as the language employed was stronger than was apt to convey the idea the Court itself meant to communicate. And if that language does not show error ~~in the Court~~ or ignorance of the law in the Court, we can hardly suppose it produced error in the jury.

But the law in respect to the species of Bailment brot to view in the 4th Instruction is perhaps different now from what it once was. It was certainly much stricter in the degree of diligence required, formerly, than it is laid down in this 4th instruction, see 1 Inst 89 a. b. or 3 Thomas Coke 374 & 4 Coke's Rep. 83 b. And let it be granted that it is less rigid in the degree of diligence it exacts in this kind of Bailments now, than formerly; and what does this establish, but that it is in a state of change or progression. And where is the wonder if the court in the instruction takes a stand at a point not quite up to the ~~stage~~ that has been reached - ought that circumstance of itself to be sufficient to reverse the judgment of the Court

below? I think not. It is safer to follow the decisions that have already been made than rashly & recklessly to rush in advance of them. There is wisdom in the saying of Lord Kenyon that to act on the maxim "stare super antiquas vias" is to assume the position of safety & of law. But when it is remembered that the Bailment under consideration is one that lies in *feasance* & not in custody, and that a greater degree of diligence is required in the execution of a bailment lying in *feasance*, than of one lying in custody - for which see Jones' Bailments 70, it is not admitted that the Court below went too far in this & the instruction. It went no further than Justice Powis went in the great case of Coggs vs Bernard 2 Lord Raymond 910, (cited in Appendix to Jones Bailments iii - nor further than C. J. Holt went in the same case 2 Ld. Raymond 916, (& Appendix to Jones Bailments XIV) Whatever may be the advances the Courts may have made in respect to this species of bailments now under consideration the case of Coggs vs Bernard has always been considered and the great land-mark on the subject from the principles of which they have seldom if ever departed in so far as my knowledge extends.

8. But the proof shows that the money collected by the deft in this case was used by him - or which is the same thing by his agents Savage & Austin, who after having collected it appropriated it to their own business & purposes without the knowledge or consent of the intestate F. Boyer or his agent Charlville. Now as the money when collected was to have been paid over & not used by deft or his agents, here was a violation of good faith. But the bailee is always responsible for any

losses, to the bailor, occasioned by his own want of good faith. And the bailee under certain circumstances is responsible for gross negligence, because such negligence is evidence of, or tantamount to, bad faith. Jones on Bailments 11, 24, 25 & Appendix XII, XIII

9. Further, the proof presented in the Bill of Exceptions in this case shows satisfactorily, that a demand was made by the party entitled, on Bomfort, for the money after it was collected, and it was not paid on such demand. In such case the bailee was responsible for any casualty that happened after the demand. Jones on Bailments 81

10. This is an action for money had & received - And if the defendant actually got the money into his hands, then he is of course responsible for it unless it was lost by certain inevitable casualties, such as, theft, robbery or the act of God &c, but among which in no case can be included his own insolvency - In that case there could be no room for either the 3rd or 4th instruction given by the Court, which refer to diligence &c.. So the money being received by Savage & Austin as the agents of deft, it is the same as if received by the deft himself. Now the Court, in the 1st & 2nd instructions which it gave, put the question of the agency of Savage & Austin directly to the jury and in finding a verdict for the pltff they found that they were the agents of the deft. Therefore the 4th Instruction given by the Court, as well for the reasons contained in this point, as for those advanced in the preceding points, particularly the eighth & ninth, was not warranted by the facts of the case. And could only be serviceable to

the defendant by directing the attention of the jury to matters irrelevant & immaterial to the points really in controversy. Therefore, even tho it should be conceded that that instruction might be erroneous, the Deft cannot be heard to complain.

11. The Court below committed no error in overruling the motion for a new trial. I have already attempted to show that the Court below neither gave improper instructions to the jury, nor refused to give any that were legal & applicable. And a reference to the facts preserved in the Bill of Exceptions will demonstrate that the jury did not find their verdict against the weight of evidence - which though variant & contradictory still preponderates, (it is contended) in favour of the Pff below.

There is set out on the transcript - improperly - an affidavit of the deft of the discovery of new evidence. But it is not incorporated into the Bill of Exceptions and is not therefore, properly a part of the Record. Pratt vs Rodgers 5 Mo. Rep. 51.

Again, instead of being filed within 4 days after the rendition of the verdict, it was not filed until 5 wee days after the trial.

Moreover there is no reason assigned in the motion for a new trial to which the affidavit could be applicable - which by Statute is necessary. Code of 1835 Ar. VII sect. 1.

But the affidavit does not disclose sufficient to justify the granting a new trial in any event. Graham on New Trials 462 et seq. 3 J. J. Marshall 521. 5 Serg & Raw. 11. 6 Greenleaf 479. 4 Ham. Ohio Rep 5. 1 Caine 24.

One point strenuously relied on by counsel of Appellant for the reversal of the judgement of the Court below ~~by the counsel of the appellant~~ - was, that the Pff's

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intestate F. Boyer was dead at the time the checks were handed to Deft for collection, and that therefore this judgment cannot be sustained. To this objection it is answered, in the first place, that it takes the fact of F. Boyer's death at the time of the accruing of the cause of action for granted - whereas the fact is directly the other way, as the appellee contends. But it is not perceived by appellee's counsel how this question can be made as the record in this case stands. There is no demurrer or motion in arrest of judgment (nor indeed could there be) to give rise to it. And I do not see how else it could arise, except by instructions prayed necessarily raising the point. But the instructions in the cause printed in the Bill of Ex. do not raise it. The instructions that the Court gave to the jury do not even savour of it. The motion made by deft's counsel at the close of Pltff's case & again at the close of the entire testimony, that "the Court instruct the jury to find for the deft." could not raise the point, because as we have already seen, this Court has heretofore decided that the Court below was bound to refuse that motion or instruction. It will be seen from reading them, that the other two instructions asked by deft's counsel, do not look in the direction of the question.

But on the question of fact as to the time of F. Boyer's death, the counsel of appellee contends that the weight at least, of the evidence as contained in the Bill of Ex. is, that F. Boyer was still living at the time the cause of action accrued. And when to this weight of the evidence by itself considered, is superadded the presumption of law that he is alive until the contrary is established by proof, the conclusion is irresist=

table. Accordingly the counsel of Deft preferred to go to the jury on instructions from the Court, which compelled the Pltff below to establish that F. Boyer was dead at the commencement of the suit, rather than ask instructions which would have thrown upon them the burthen of showing that he had died before the cause of action in this case accrued. They declined it seems to assume the position in the Court below which they are now striving to take in this Court.

The Bill of Excep. does not show (by omission) that there was any proof that Pltff was Admx of F. Boyer dec^d. But as the only plea was the general issue, and as this action is brought on promises made to the intestate in his life time, no objection could be taken for the want of such proof 2 Stak. Cr. Title Ex. 315 or 547.

T. Polk for Appellee

Sup. Court July T. 1843

Louis Bompart Appellant vs Pelagie Boyer Admx Appellee

Appellee's Brief
T. Polk for Appellee

Filed Sept 4. 1843
H. L. Bom Clk

~~Pelagie Bayer~~

vs

Louis Bompart } appeal from the court
vs } of Common Pleas of St
Pelagie Bayer } Louis County

Pelagie Bayer sued ~~Louis~~ Bompart in the court of Common Pleas of St Louis county where judgment being given for her Bompart appealed to this court.

Much evidence was given on each side, and two instructions asked by the appellant were refused. No exception was taken to the refusal of the court to give these instructions. The court, after the evidence was given in, gave several instructions some of which were ~~refused~~ excepted to. After the jury had brought in their verdict the defendant moved the court for a new trial for the usual reasons 1st That the verdict is against evidence & against the instructions of the court, and the court gave erroneous instructions, and refused the defendants instructions In the first place as these instructions given were not excepted to, and as the refusal to give the defendants instructions was not excepted to, ~~It is now~~

It is now ~~too late to come in and demand~~

it must not now be expected to reverse the judgment of the Court of Common pleas on that account. There was much conflicting evidence and all the instructions given by the court were hypothetical. It is impossible for this court to know what the jury believed. They might well have believed facts to justify their finding under the instructions of the court.

The verdict of the jury appearing to be supported by the evidence in the cause, and no exceptions being taken to the giving or refusing of instructions by the court of Common pleas, the judgment must be affirmed

I be concur
W. Scott

G Tompkins

62.

Bonpart
vs
Bayer

filed Sept 4. 1843.
H. L. Boon clk

STATE OF MISSOURI-----Sct. The State of Missouri----To the Sheriff of the County of St Louis — in said State-----GREETING:

Whereas, Pelagie Boyer administratrix &c

on the fourth day of September in the year eighteen hundred and forty-three at our Supreme Court for the State of Missouri aforesaid, before our Judges of said Court, recovered against Louis Bompart the sum of Ten dollars and forty eight cents for her costs and charges by her expended in a certain suit wherein the said Louis Bompart was appellant, and the said Pelagie Boyer adm'x &c was appellee: which to the said appellee were adjudged, as appears to us of record:==

Therefore, we command you, that of the goods and chattels, lands and tenements of the said Louis Bompart in your bailiwick, you cause to be made the aforesaid costs and that you have the same before the Judges of our said Supreme Court, on the Second Monday in January next, to render unto the said Pelagie Boyer adm'x &c the costs aforesaid and that you certify to our said Judges, how you execute this writ, and have you then there this writ.

Witness, Hampton L. Boon, Clerk of our said Supreme Court, at office, in the City of Jefferson the fourteenth day of November in the year of our Lord one thousand eight hundred and forty-three. with his private seal, having no seal of office yet provided.

H. L. Boon.

Received 25th November 1843 —
William Millburn
Clerk

29.

Supreme Court.
Jany. Term 1844

Pelagie Boyer admx
vs Exon
Louis Bompart.

Costs.

N. Paschall . .	5.50
H. L. Boon . .	4.98
This Exon . .	1.00
	$ 11.48
Terrer	1.00
Commission	0.20
	12.68

Satisfied ~~[illegible]~~
William Millburn Clerk
[illegible]

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