40/11

Oct 1845 #31

Steam boat

Joseph Rowe + Peter L Van Derenter

Steamboat Potosi vs

St. Louis Co.

debt

Promissory note
$ 327.42

#813

State of Missouri County of St Louis Set
Be it remembered that on the twenty first day of June in the year of our Lord Eighteen hundred and forty three there was filed a declaration in the office of the Clerk of the St Louis Court of Common Pleas within & for the County aforesaid which is in the words and figures following

State of Missouri } In the St Louis Court of Common Pleas
County of St Louis } ss
September Term A.D. 1843

Joseph Rowe & Peter L Van Deventer late Copartners under the name firm & style of Rowe & Van Deventer plaintiff Complain of Benjamin T Osborn Edward Saltmarsh Charles A Saltmarsh. Nicholas Wall, William Aite, and George Aite joint owners of the Steam Boat Potosi defendants of a plea of trespass on the Case upon promises For that whereas heretofore to wit on the twenty seventh day of July in the year of our Lord Eighteen hundred & forty two at the County aforesaid Saint Louis defendants as joint owners of said Steam Boat being indebted unto said plaintiffs then & there per procuration of Benjamin T Osborn who was then & there Clerk of said Steam Boat & thereto then & there duly authorized made their certain promissory note in writing bearing date the day & year aforesaid and which is now here to the Court produced and shewn. and thereby then & there as such owners of said Steam Boat Potosi promised to pay ninety days after the date of said promissory note to the order of said plaintiffs by the said name style & description of Rowe & Van Deventer three hundred and twenty seven dollars forty two hundredths of a dollar for value received negotiable & payable without defalcation or discount and then & there delivered the said promissory note to the said plaintiffs By reason whereof the force of the statute in such case made & provided. they the said defendants then & there became liable to pay the said plaintiffs the said sum of

money in said promissory note specified according to the tenor and effect thereof and being so liable they the said defendants in consideration thereof afterwards to wit on the day & year last aforesaid at the County aforesaid undertook & then & there faithfully promised said plaintiffs to pay them the said sum of money in said promissory note specified according to the tenor & effect thereof. Yet the said defendants not regarding their said promises & undertakings have not nor has either of them although often requested so to do, paid the said sum of money or any part thereof but on the Contrary have hitherto wholly neglected & refused and still do neglect & refuse Also For that whereas the said defendants heretofore to wit on the first day of June in the year of our Lord one thousand eight hundred and forty three at said County were indebted unto said plaintiffs in the sum of Four Hundred dollars for the work and labor Care and diligence of the said plaintiffs before that time done performed and bestowed in and about the business of the said defendants and for the said defendants and at their special instance and request: and also in the further sum of Four hundred dollar of like lawfull money for divers goods wares and merchandise by the said plaintiffs before that time sold and delivered to the said defendants and at their special instance and request: and also in the further sum of Four hundred dollars of like lawful money for money by the said plaintiffs before that time lent and advanced to & paid laid out and expended for the said defendants and at their like special instance and request. and also in the further sum of Four hundred dollar of like lawful money for money by the said defendants before that time had and received to and for the use of the said plaintiffs and being so indebted the said defendants in consideration thereof afterwards to wit on the day aforesaid at the place aforesaid undertook and then and there faithfully promised the said plaintiffs to pay them the said sums of money in this Count mentioned when

the said defendants should be thereunto afterwards requested

And whereas also said defendants afterwards to wit on the day and year and at the County last aforesaid accounted with said plaintiffs of and concerning divers other sums of money from the said defendants to the said plaintiffs before that time due and owing and then in arrear and unpaid and upon such accounting the said defendants were then and there found in arrear and indebted to the said plaintiffs in the sum of four hundred dollars like lawful money and being so found in arrear and indebted said defendants in consideration thereof afterwards to wit on the day and year last aforesaid at said County undertook and then and there promised said plaintiffs to pay them said last mentioned sum of money when they said defendants should be thereto afterwards requested. Nevertheless said defendants although often requested to do so have not as yet paid said several sums of money above mentioned or either or any part of either of them but to do so has refused and still refuse to the damage of said plaintiffs of eight hundred dollars and therefore they bring their suit &c

Truston Polk attorney for plffs

Summons

County of St Louis SS

The State of Missouri

To the sheriff of St Louis County Greeting

We command you to summon Benjamin T Osborn Edward Saltmarsh Charles H Saltmarsh, Nicholas Wall William Hite and George Hite if they be found in your County that they 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 third Monday of September next then and there to answer unto Joseph Rowe & Peter L Van Deventer of a plea of trespass on the case upon promises to the damages of said plaintiffs of eight hundred

dollars: And have you then there this writ (Seal) Witness Nathaniel Paschall Clerk of our said Court with the seal thereof hereto affixed at office in the City of St Louis this twenty first day of June in the year of our Lord one thousand eight hun=dred and forty three Nathaniel Paschall Clerk

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Return Executed this writ in the County of St Louis by offering to read it and the declaration to Benjamin T Osborne Edward Salt=marsh Charles H Saltmarsh Nicholas Wall and William Hite which they each refused to hear on the 21st day of June 1843. and further executed this writ in the County of St Louis on the 1st day of August 1843. by reading it and the declaration to George Hite William Milburn sheriff by Henry B Belt Depty

Mo for bill of Particulars filed 11 Decr 1843.

Edward & Charles H Saltmarsh et al impleaded with Benj T Osborn as Rowe & Van Deventer } Defts impleader with Benj T Osborne move for a bill of particulars in this case Todd & Krumm attys for Defts

order for bill

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and afterwards at the February Term of said Court of Common Pleas for the year Eighteen hundred and forty four to wit on the tenth day of February A D 1844 the following further proceedings were had in this cause to wit,

Rowe & Van Deventer vs Benj T Osborne et al } On motion it is ordered that the plaintiffs file a bill of the particulars of their de mand on which this action is founded

Bill of Particulars

Rowe & Van Deventer vs Benjm T Osborne et al } St Louis Court of Common Pleas And said Plaintiffs by their attorney Come & file the following bill of particulars of his demand in this cause to wit - - - - -

S B Potosi to Rowe & Van Deventer - - - - - Dr

1842 April 8th 123. fr decking 3½ - - - - - - 4 - 37

"	"	"	120 scantling 2	2 40
"	"	"	896 Pcs Inst 2/r	20 16
"	"	"	3000 1 in W Pine 2 3/4	137 50
"	"	"	Hauling the same	3 25
"	"	9	391 ft Oak Scantling 2	7 82
"	"	"	Hauling	25
"	"	11	1000 fet 3/4 in W Pine 4	40 00
"	"	"	Hauling	1 00
"	"	23.	136 ft 3/4 in W Pine 4.	5 04
"	"	"	113 1 1/4 in do 2 3/4	3 16
"	"	"	Hauling	0 25
"	"	27	343 ft 1 in W Pine 4	21 80
"	"	"	236 " 1 in do 2 3/4	7 04
"	"	"	Hauling	0 50
"	"	13.	400 ft 1 in W Pine 2 3/4	11 00
"	"	"	Hauling	25
"	"	29	375 ft 1 1/4 W Pine 4	13 00
"	"	"	120 Scantling 2	2 40
"	"	"	Hauling	25
"March	4		80 ft Oak lumber 2/r	1 80
"	"	"	500 1 in W Pine 2 3/4	13 75
"	"	"	Hauling	25
"	"	6	240 ft Scantling 2	4 80
"	"	9	Hauling worked Pine 3 loads	1 50
"	"	11	2000 ft 1 in W Pine 2 3/4	55 00
"	"	"	Hauling	1 00
"	"	"	48 ft scantling 2	00 96
"	"	"	Hauling	00 25
"	"	12	300 ft 1 1/4 W Pine 2 3/4	8 25
"	"	"	Hauling	25
"	"	13	24 ft Scantling 2	48
"	"	16	400 ft 1 1/4 W Pine 2 3/4	11 00
"	"	"	Hauling	25

"	"	17	47 ft Walnut 2	94
"	"	"	144. ft Scantling 2	2 88
"	"	"	53. ft 1/4 in W Pine 3.	1.59
"	"	"	80 ft 3/4 in do 4	3 20
"	"	"	Hauling 2 boards	.50
"	"	20	54 ft W Pine 3.	1 62
"	"	"	48 ft Scantling 2	0 96
"	"	21	28 ft 1/2 W Pine 4	1 12
"	"	"	405 ft 3/4 do 4	16 20
"	"	"	200 " 1 in do 2 3/4	5 80
"	"	"	Hauling	25
"	"	25	1000 ft 1 in W Pine 2 3/4	27 50
"	"	"	Hauling	50
"	"	30	364 ft Scantling 2 1/2	8 19
"	"	"	Hauling	25
"	June	1	77 ft 1/2 in Oak 1 3/4	1.34
"	"	"	100 ft Sheeting 1 1/4	1 25
"	"	"	Hauling	50
"	"	"	Hauling	50
"	"	3	Hauling from mill	.50
"	"	4	18 ft 1 in Oak 2 1/2	45
"	"	7	548 ft 3/4 in W Pine 2 1/2	13 70
"	"	"	63. 1/2 in do " 4	2 52
"	"	8	400 1/4 in do 4	16 00
"	"	"	115 1/4 in do 2 3/4	3 15
"	"	"	230 ft 3/4 in do 2 1/2	5 75
"	"	13.	1238. ft Oak lumber 2	25 16
"	"	"	Hauling	50
"	"	16	400 ft 3/4 in W Pine 2 1/2	10 00
"	"	"	300 dressed W Pine 4 ¢	12 00
"	"	"	Hauling	00 25
"	"	20	200 ft 1 1/4 in W Pine 1	8 00
"	"	"	200 " 3/4 " " " 2 1/2	5 00
"	"	"	200 ft dressed W Pine 4	8 00

"	"	"	36 ft scantling 2	72
"	"	"	Hauling	25
"	"	21	23. ft Maple scantling 2	46
"	"	24	102 ft 1¼ in W Pine 4	4 08
"	"	"	Hauling	25
"	"	29	19 Pieces Scantling @ 12½ ¢	2 38
"	"	"	Hauling	0 25
"	"	30	27 ft B Walnut 5	.81
"	July	7	200 " dressed W Pine 3½	7 00
"	"	"	64 " 1 in W Pine 3.	1 92
"	"	"	Hauling	.25
"	"	"	16 ft 4 by 4 Pof scantling 2	32
"	"	"	25. 3 " 4 Oak do 2	50
			Cr by Cash Sundry times.	587 42
				260 00
				327 42

added by leave of Court attest N Parshall clk

The foregoing are the particulars of demand in the common Counts of plaintiffs declaration and the cause of action in the special Count is the Promissory note therein described

T Polk P.Q

Plea filed 19 Feby 1844

Edward & Charles H Saltmarsh & others ats Rowe & Van Deventer } It St Louis Court of Common Pleas for September 1843. Plea Non Assumpsit with notice of set off

And the said Nicholas Wall Edward Saltmarsh Charles H Saltmarsh & William Hite & George Hite impleader with Benjamin T Osborne defendants in this by Todd & Krumm their attorneys come and defend the wrong and injury when &c say that they did not undertake and promise in manner and form as the said plaintiffs in this suit have above thereof declared against the said defendants and of this they put themselves upon the Country and the said plaintiffs likewise; Todd & Krumm attorney for Defendants

Please to take notice that the said defendants impleader as aforesaid at the trial of the above cause will insist upon and give in evidence under the general issue above pleaded that the said plaintiffs at the Commencement of the action aforesaid against the said defendants were and still are indebted unto them in the sum of one thousand dollars lawful money of the United of America for divers goods wares and merchandises before that time sold and delivered by the said defendants to the said Plaintiffs and at the special instance and request of the said Plaintiffs And in the further sum of one thousand dollars of like lawful money for the work and labour care and diligence of the said defendants by the said defendants and their servants before that time done performed and bestowed in and about the business of the said plaintiffs. and for the said plaintiffs and at their like request. And in the further sum of one thousand dollar of like lawful money for money before that time lent and advanced by the said defendants to the said plaintiffs and at the like request of the said plaintiffs and for other money by said defendants before that time paid laid out and expended for the said plaintiffs and at the like request of the said plaintiffs And for other money by the said plaintiffs before that time had and received to and for the use of the said defendants. And also that the said plaintiffs before the commencement of this action accounted together with the said defendants of and concerning the said demands of the said plaintiffs against the said defendants and also of and concerning divers other sums of money and accounts between the said plaintiffs and the said defendants and upon such accounting the said plaintiffs were found to be in arrear and indebted to the said defendants in the further sums of one thousand dollars of like lawful money which the said plaintiffs undertook and then and there faithfully promised the said defendants well and truly to pay unto the said defendants when the said plaintiffs should be

thereunto afterwards requested which said several sums of money or so much thereof as will be sufficient for that purpose the said defendant will set off against the demand of the said plaintiffs to be proved at the trial and have the balance certified in their fa=vor Dated the 18th day of September 1843. Yours &c

To Trusten Polk Esqr } Todd & Krumm }
Attorney for Plaintiffs } attorneys for defendants. }

Mo for bill of particulars 12 March/44

Rowe & Van Deventer } St Louis Court of Common Pleas
vs } ss Feby Term AD 1844
Benj T Osborn et al } And now at this day come said Plaintiffs by their attorney & moved the Court to order the defend=ants to furnish them with a Bill of the particulars of their set off T. Polk P. 2.

Default & Enquiry

And afterwards at the September Term of said Court for the year Eighteen hundred and forty four to wit on Saturday the 12 day of October 1844 the following further proceedings were had.

Joseph Rowe and Peter L Van Deventer } Assumpsit
vs } And now at this day
Benjamin T Osborne Edward Saltmarsh } Comes the plaintiffs by
Charles H Saltmarsh Nicholas Wall } their attorney and say
William Hite and George Hite } they will not further

prosecute their suit in this behalf as to the defendants William Hite and George Hite but voluntarily dismiss the same as to them and the defendant Benjamin T Osborne although de=manded comes not but makes default wherefore it is considered by the Court that said plaintiffs recover of said defendant. Os=borne such damages as they have sustained by reason of the non performance by said Osborne of the promises and underta=kings in their declaration mentioned. but those damages being unknown to the Court a writ of Enquiry is awarded the plaintiffs against said Osborne to the present term of this Court

And afterwards at the said & said Court to wit Monday October 14 1844 the following further proceedings were had herein

Joseph Rowe and Peter L Van Deventer
vs
Benjamin T Osborne Edward Saltmarsh Charles H Saltmarsh & Nicholas Wall

Assumpsit

And now at this day come the parties by their attorneys and thereupon come a Jury to wit W N White Frederick Jenkins. P Kelleher. I H Adams A R Chouteau R B Austin. William Curtis Thomas Colver William Carroll Frederick Cline John Arthur and P Carroll twelve good and lawful men who being duly elected tried and sworn well and truly to enquire of damages as to the defendant Benjamin T Osborne and to try the issue joined between said plaintiffs and the defendants. Edward Saltmarsh Charles H Saltmarsh and Nicholas Wall upon their oaths aforesaid do find that said defendants last aforesaid did undertake and promise in manner and form as said plaintiffs have in their declaration alleged and the jurors aforesaid do assess the damages of said plaintiffs by them sustained by reason of the non performance of said promises and undertakings to the amount of three hundred sixty six dollars and two Cents: It is therefore Considered by the Court that said plaintiffs recover of said defendants the damages aforesaid in form aforesaid by the jurors assessed together with their Costs and Charges in this behalf expended and have therefor Execution

Mo for a New trial filed 15 Oct 1844

Rowe & Van Deventer
vs
Charles H Saltmarsh and others

In Com Pleas

Said defendants come and move that this Court set aside the verdict in this Case & grant a new trial for the following reasons to wit 1 Because the verdict is against the weight of Evidence. 2 Because the verdict is against law under the evidence. 3 Because the Court instructed the Jury erroneously

4 Because the Court erroneously refused to give instructions asked for by defendants. 5 Because the verdict is against Evidence

Bates & Todd attys for Defts

Mo overruled

Afterwards at said term of said Court to wit on Saturday the 26 day of October 1844 the following further proceedings were had

Joseph Rowe and Peter L Van Deventer
vs
Benjamin T Osborne, Edward H Saltmarsh
Charles H Saltmarsh and Nicholas Wall

Assumpsit
And now at this day come the defendants by their attorney and thereupon their motion for a new trial is submitted to the Court which being heard and by the Court here fully understood It is ordered that said motion be overruled: Bill of exceptions filed

Bill of exceptions file 26 Oct 1844

Rowe & Van Deventer
vs
Edward Saltmarsh & others

In Com Pleas
Be it remembered that on the trial of this Cause Thomas H Thatch being sworn on the plaintiffs behalf testified that he knew the plaintiffs & their Copartnership which was formed in February 1842. & they composed the firm of Rowe and Van Deventer - that had been their Clerk - that plaintiffs traded in lumber - that witness sold & delivered for them - that he knows the hand writing of Benjamin T Osborne - that the signature of said Osborne to the note shown to him at the close of the plaintiffs case given in Evidence which was of the following tenor to wit "Dolls 327 42/100 Saint Louis Feb 27 1842 Ninety days after date Steam Boat Potosi & Owners promise to pay to the order of Rowe & Van Deventer three Hundred and twenty seven 42/100 Dollars for value received negotiable and payable without defalcation or discount B T Osborn Clk" Witness had seen said Osborn on Board said Boat as Clerk = was the the hand writing of said Osborne - that he did not know that said Osborn was clerk of the Steam boat Potosi only as he so understood he had seen him on the said Potosi but did not

Protested for non payment October 28th 1842 Andrew Elliott

know of his acting as clerk except in buying the lumber sued for in this suit – that said note was given for the lumber as set forth in the bill of particulars filed in this case for the said Potosi – that the body of said note was written by said Rowe – the lumber was bought by said Osborne – witness sold & delivered it all excepting a few items amounting to $8.93 this said Rowe sold – the lumber was used in making the Cabin of said Potosi which was built at Capt Cases yard – that the signature of said Osborne to the affidavit to the bill of said lumber first made out & shown to the witness is Osborne's which bill & affidavit were in the words & figures following to wit

1842 SB Potosi – To Rowe & Van Deventer Dr

April 8	123 ft decking	3½		4	37
" "	120 " Scantling	2		2	40
" "	896 " Pof Joist	2¼		20	16
" "	5600 1 in W Pine	2¾		137	50
	Hauling the same		3 25	167	68
" 9	397 ft Oak Scantling	2		7	82
" "	Hauling		25	8	07
" 11	1000 ft ¾ in W Pine	4		40	00
" "	Hauling		1 00	41	00
" 23	126 ft ¾ in W Pine	4		5	04
" "	115 " 1¼ " do	2¾		3	16
" "	Hauling		25	8	45
" 27	543 ft 1 in W Pine	4		21	80
" "	256 " 1 in " Pine	2¾		7	04
" "	Hauling		50	29	34
" 13	400 ft 1 in W Pine	2¾		11	00
" "	Hauling		25	11	25
" 29	375 1¼ in W Pine	4		15	00
" "	120 " Scantling	2		2	40
	Hauling		25	17	65
May 4	80 ft Oak Lumber	2¼			1 80

"	5	300 1 in W Pine 2 3/4	13	75	75
"	"	Hauling		25	14 00
"	6	240 ft Scantling 2			4 80
"	9	Hauling worked Pine 3 loads			1 30
"	11	2000 ft 1 in W Pine 2 3/4	35	00	
"	"	Hauling	1	00	36 00
"	"	48 ft Scantling 2		96	
"	"	Hauling		25	1 21
1	12	300 1 1/4 in W Pine 2 3/4	8	25	
"	"	Hauling		25	8 50
"	13	24 ft Scantling 2			48
"	16	400 1 1/4 in W Pine 2 3/4	11	00	
"	"	Hauling		25	11 25
"	17	47 ft walnut 2		94	
"	"	144 Scantling 2	2	88	
"	"	33 1 1/4 in W Pine 3	1	59	
"	"	80 3/4 in " do 4	3	20	
"	"	Hauling 12 loads		30	9 11
"	20	54 ft 1 in W Pine 3	1	62	
"	"	48 " Scantling 2		96	2 58
		Amt Carried Over			$394 67
		Amt forward			394 65
May	21	28 ft 1 1/2 in W Pine 4	1	12	
"	"	405 3/4 " do 4	16	20	
"	"	200 1 in " do 2 3/4	5	50	
"	"	Hauling		25	23 07
"	27	1000 ft 1 in W Pine 2 3/4	27	50	
"	"	Hauling		50	28 00
"	30	364 ft Scantling 2 1/4	8	19	
"	"	Hauling		25	8 44
June	1	77 ft 1 1/2 in Ock 1 3/4	1	34	
"	"	100 " Sheeting 1 1/4	1	25	
		Hauling		30	3 09

"	3	Hauling from Mill			30
"	4	18 ft 1 in Oak 2½			45
"	7	548 3/4 in W Pine 2½	13	70	
"	"	63 1½ in do 4	2	52	16 22
"	8	400 1¼ in do 4	16	00	
"	"	115 1¼ in do 2¾	3	13	
"	"	230 3/4 in do 2½	5	75	24 90
"	13	1258 ft Oak Lumber 2	26	16	
"	"	Hauling	50	25	66
"	16	400 ft 3/4 in W Pine 2½	10	00	
"	"	300 " dressed W Pine 4	12	00	
"	"	Hauling	25	22	35
"	20	200 ft 1¼ in W Pine 4	8	00	
"	"	200 " 3/4 do 2½	3	00	
"	"	200 dressed W Pine 4	8	00	
"	"	36 Scantling 2		72	
"	"	Hauling	25	21	97
"	21	23 ft maple Scantling 2			46
"	24	102 " 1¼ in W Pine 4	4	08	
"	"	Hauling	25	4	33
"	29	19 pieces scantling @ 12½ ¢	3	38	
"	"	Hauling	25	2	63
"	30	27 ft B Walnut 3			81
July	7	200 dressed W Pine 3½	7	00	
"	"	64 1 in W Pine	1	92	
"	"	Hauling	25	9	17
"	"	16 ft 4 by 4 pcs Scantling 2		32	
"	"	25 3 " 4 Oak do 2	50		82
		Cr By Cash Sundry times			58 74
					260 00
					$327.42

State of Illinois
County of Adams } ss I Benjamin F Osborne being duly sworn

depose and say that the within account of Rowe & Van Deven
=ter against the Steam Boat Potosi is a true just and correct
account and that the balance of three hundred and twenty seven
42/100 Dollars as appears by said bill is justly due and owing
from said Steam Boat Potosi to said Rowe & Van Deventer
so help me God B F Osborn

Subscribed & sworn to this 12th day of
November A D 1842 before me
Eben Moore J.P. Adams County Ills

Osborne engaged the lumber & paid the money credited on
the bill of particulars — dont Know who were the owners of the
said Potosi only from said Osborne — Osborne said he was
part owner, the prices set forth in said bill of lumber were
the Market prices both for that he sold & delivered & that
Crop Ex said Rowe did — On Cross examination he testified that
all he Knows of the said lumber sold by said Rowe is that
said Rowe told him, and the original Charge is in the hand
=writing of Rowe who was in the habit of selling and delivering
lumber himself — the lumber was taken to said Potosi where
she lay for completion which was at the River at St Louis op
=posite the lumber yard of the plaintiffs — he demanded pay
for the lumber of Osborne only — he never ~~xxxxx~~ demanded pay for
the note. — Osborne himself called for the Plffs Bill for the
Snyder Testimony lumber sold as aforesaid Henry M Snyder sworn on the part
of the plaintiffs testified that he Knows the Steam boat Potosi
— it was built at the yard of Capt Case — he did some Castings
& other work as a founder for her engine — he is a founder — at the
time he was doing the work in april 1842 Charles H Salt
=marsh told him he was one of the owners & his brother Edward
also — Edward in July 1842 told witness that he was one of the
owners — he then presented his account for payment to Charles &
Charles said he would show it to his brother Edward who
looked at it said it was right & directed him to go to the office

for his pay – he dont Know only by sight who was Clerk – he had seen the same person frequently on the Boat before then he had a conversation with Edward on the boat and while the Cabin was building in which he told witness he was an owner – he believes there were other owners but he dont Know who they were the Cabin was being built he thinks in June the boat lying just below the dry Dock – at the last conversation he thinks the boat Cabin was up – dont recollect when she began running but it was some time in July or August as near as he Cross Ex can recollect On Cross Examination he testified that the Boat had been running when he presented his bill – the above conversation in april took place with said Charles when they that is Charles & others were removing a portion of the Steam Boat Tide to the Patosi – the engine of the Tide was put into the Patosi – the object of the conversation was to ascertain who would pay him for his work – Charles Saltmarsh said that he & his brother were Cases – owners would pay him – Calvin Case sworn in behalf of the Testimony plaintiffs testified that he was the owner of the boat yard when the Patosi was built – he built the hull of the Patosi under a contract with Edward Saltmarsh – Edward was frequently present – he did not build the Cabin – he saw Osborn superintending the building of the Cabin & he seemed to take the management of this part of the work – he saw him frequently about the boat in company with the Saltmarshes – In January 1842 he made his contract for the hull with Edward & completed it in March or april – he heard Osborne & the Saltmarshes conversing together concerning the progress of the work but dont recollect the purport of the conversations but they had reference to the manner of doing the work . Knows Nicholas Wall & thinks he after the boat began to run said he was part owner – did Know him before . had not seen him about the building of the boat – Knows George & William Hite & thinks he has seen the Hites about the Boat while building but they said nothing about having any

Cross Ex'd

interest in the boat— On Cross Examination testified that his Boat yard was the first istablishment in St Louis & that it was Customary for persons engaged in Steamboating to Come to the yard & advance suggest & talk about how Boats should be built— Edward Paid him for building the hull except $ 150 which Charles H Saltmarsh during the building of the hull paid him saying that he had lent it to Edward for that purpose— the Patosi begun to run in July— he dont Know who was clerk at starting but Mr Wall was shortly after— he sent some Chimnies & as their was some difference about the price they left it out to athers & Osborne attended to it— the Saltmarshes have been engaged for some considerable time in Steamboating on the river— Charles H was engaged on the Rosalie till the hull of Patosi was launched, and then he left her & went to putting the Engine on board the Patosi: He seemed to be engaged in the building as much as the athers but they said Edward was the only owner. Charles H & Edward are brothers & the Conversations at the Boat yard while the hull was building was about the manner of building it but ~~it he~~ understoak that Edward was the only owner. Edward paid him he thinks about $ 8 00 for building the hull. Re examined in Chief— he cant say who was clerk of the boat before it run he Cant say whether it was just before or after the boat be-gun to run that he delivered the Chimnies. they were bar-gained for before— he talked with Edward & Charles H about them he contracted with no one for them but the Saltmarshes at first Edward objected to the price & Charles H afterwards met him upon the side walk & said they would leave ~~out~~ to athers— he cant say whether Chas H talked for himself or Edward as agent (The plaintiffs here entered a nol: Pros as to the Sites in behalf of the defence Mr O'Flaherty being

O'Flaherty testimony

sworn testified that he has known the Patosi from the first that Mr Wall was the only clerk he ever knew upon her

-he was also Clerk of the Tide - he & his partner deal in boat stores upon the levee & have sold the Potosi before & since her building boat stores. On Cross Examination testified that he did not know Osborne - that he furnished spikes to the Salt = marshes & charged them to the Steamboat Potosi - he did un = derstand that Charles A was liable for the Spikes - he was help = ing to put the Engines in & after the Potosi began running was engineer. Charles A ordered the things & so do all engi = neers in putting up works - he was surprised to see that Charles

Davidson Testimony

A was on her as engineer. Jesse Davidson sworn in behalf of the defence testified that he knew the Steam boat Tide: Osborn bought out Mr Waggoner's interest in the Tide which was one fourth Charles A Saltmarsh was not part owner of the Tide that he ever knew of - the owners of the Tide when the building of the Potosi was begun & portions of the Tide were taken to be worked into the Potosi were himself. Edward Saltmarsh & said Osborne & Wall Edward Saltmarsh Nicholas Wall Benj T Osborn & witness were the owners of the Potosi - he sold his inter = est in the Potosi to Charles A Saltmarsh & made to him a bill of sale which was in the words & figures following to wit "Know all men by by these presents that I Jesse Davidson of the first part do hereby convey grant bargain sell and allien unto Charles A Saltmarsh of the second part all my right title and Interest I had in the Steam Boat Tide being one fourth thereof free from all Incumbrances whatsoever alles my interest in all debts due and all moneys belonging to said Steam Boat Tide which may be on hand together with my right and interest in the new S.B. Potosi which was built for and has on it the Machinery of the above mentioned SB Tide. For and in consideration of five hundred and sixteen dollars and $\frac{66}{100}$ the the payments of which to be as follows. one hundred dollars on the 11th day of August 1842 and four hundred and sixteen dollars and $\frac{66}{100}$ on the 28th of October 1842. In testimony whin

=of. I have hereunto set my hand and seal this eleventh day of
Cross Ex July 184[illegible] Jesse Davidson (Seal) Witness B T Osborn. On Cross
Ex amination testified that the sale of his interest to Charles A
was as he believes of the date the bill of sale bears – as much of the Tide
was used in the Patosi as could be – Edward Saltmarsh Nicholas
Wall. & Waggoner & himself owned each one fourth of the Tide
– he did not know of the lumber being got by Osborn of the plain
=tiffs – he was sick while the Patosi was building – Mr I Jones
Jones testimony sworn on the part of the defence testified that he has known
the Patosi from the commencement of her running he became
acquainted with her through Mr Wall – he taught Mr Wall
book Keeping. Mr Wall was the Clerk of the Patosi at the
commencement of her running – dont remember the time she
began to run – he had access to the boats books as an assist
ant of Mr Wall in Keeping them – he has never known of any
Crosp Ex other Clerk of the Patosi. On Cross examination testified
that he never went on the boat only when she was in port
Knows Mr. Osborn but never knew him as Clerk of the Patosi
=he was on the boat from time to time when she in & helped
to Keep the books in order Knows that Osborn was on the boat
Peers testimony & thinks he acted as second Clerk: Henry Peers sworn for the
defence testified that he knows the Patosi – that he was em
ployed as joiner on her while building – his work was confined
to the building of the Cabin – Osborne hired him paid & discharg
-ed him when the boat was finished – he never applied to
any else for pay – Osborn formerly resided at Quincy. Osborne
told him that he had bought one fourth of the Tide & that
they were going to build the Patosi & that he was to build
the Cabin & what that cost he was to be allowed so much
in the Patosi – he was present at the building of the Cabin. off
and on from its commencement & Osborn was the only man
who gave me directions & orders & employed the hands working
upon it & no other persons employed them – he worked as

joiner
for about six weeks of the latter part of the time the Cabin was building – the Cabin was finished about the 10th of June – the Patosi started her first trip on the 17th of July N Wall was the Clerk – it was in July that he learned that Charles A Saltmarsh had bought out Davison. On Cross Examination testified that both of the Saltmarshes were on & about the boat while it was building – Neither of the plaintiffs was present when Osborne told him as aforesaid. Abram Miller sworn for the defence testified that he knows the Steam boat Patosi he helped to put up her engine – the Cabin was built while he was working on the engine the boiler were up & the engine on the Boat when Charles A Saltmarsh came to work on the boat – Osborne was building the Cabin – Knows that Osborn employed the hands for making the Cabin – dont Know if any other person employed hands on the Cabin – Edward Saltmarsh hired him to work on the engines & shafts – he is a mill-wright Osborne paid the joiners who worked on the Cabin – Knows of no one else paying them – Osborn once went up to Quincy on business & was not present on Saturday night when the pay of the hands upon the Cabin was due & the hands applied to Edward Saltmarsh who refused to pay them – saying he had nothing to do with them – Edward Saltmarsh paid him – Charles A Saltmarsh was employed as engineer on the Steam boat Rosalie till he came to work on the Patosi. On Cross examination testified that he was present at the employment & payment of the joiners upon the Cabin – Edward Saltmarsh while the hull was building was repairing the old engines of the Tide. William Rite sworn for the defence testified that he knows the Patosi – he has known her from the time she was begun to be built – the Patosi started on her first trip July 17 1842. he was on her as pilot – Nicholas Wall was Clerk of the Boat on ther first trip & continued so for two years – he dont recollect the exact date when Charles A Saltmarsh bought it.

Miller's testimony

Cross Ex

Rite's testimony

Davidson's interest but it was after she was finished he the witness became part owner of the Patosi July 18 1842 = he bought a one sixteenth of Charles H Saltmarsh who on the same day sold one other sixteenth to to Charles Chaplin it was only three or four ~~days~~ before, then that Charles H bought of Davidson— he never heard of Charles H Saltmarsh owning Crass Ex any thing of the Patosi before he bought of Davidson— On Crass examination testified that ~~that~~ the way he knows of the time when Charles H Saltmarsh bought of Davidson is be = cause he tried to buy of Davidson but there was some diffi = culty so Charles H bought & then he bought of Charles H Saltmarsh— The above was all the evidence adduced upon the trial. On behalf of the defence the Court was asked to instruct the Jury as follows to wit: "Unless the jury find from the testi = mony that Benjamin T Osborn was the agent of the other defendants named in the declaration (except the Bates) with authority from them to contract with the plaintiffs for the lumber the value of which is now sued for they will find for the defendants. "Unless the jury find from the testimony that Benjamin T Osborn at the time of making the note which is in evidence was Clerk of the Steam boat Patosi they ought not to find for the plaintiffs as to that note" "In this action the jury ought not to find against any one of the defendants unless they find that such defendant was an owner of the Steam boat Patosi & authorized the purchase of the lumber"

X If the Jury believe from the evidence that a Contract was made between Osborne & the others of the Steamboat Tide when she was broken & the building of the Patosi begun— that Osborne was to build at his own expense the Cabin & that the expense thereof was to be allowed him, towards his contributary share in the building of the Patosi & that said asborne did build the Cabin in pursuance of such Contract & that the said plaintiffs dealt with Osborne only in selling the lumber giving credit

Joseph Rowe and
Peter L Van Deventer
vs
Edward Saltmarsh
Charles H Saltmarsh
and Nicholas Wall

Assumpsit

And now at this day come Charles H Saltmarsh and Nicholas Wall for themselves and Edward Saltmarsh as principals and Thomas Lee and Thomas Martin as securities and each acknowledge themselves indebted to said plaintiffs in the sum of five hundred dollars to be levied of their respective goods and chattels land and tenements to be void upon condition that said defendants will prosecute their appeal with due diligence to a decision in the supreme Court that if the Judgment appealed from is affirmed or their appeal dismissed they will pay said Judgment and the Interest that shall grow due thereon and shall also pay the Costs and damages that shall be adjudged against them in the Supreme Court upon their appeal otherwise to remain in full force and virtue

State of Missouri } I Nathaniel Paschall Clerk of the St
County of St Louis } Louis Court of Common Pleas within & for the County aforesaid Certify that the above is a correct & complete transcript of the record & proceedings in the Case of Joseph Rowe and Peter L Van Deventer vs Benjamin F Osborn. Edward Saltmarsh Charles H Saltmarsh & Nicholas Wall as the same remains of record and on file in my office

In testimony whereof I hereto set my hand affix the seal of said Court at office in the City of St Louis this thirtieth day of November A.D. Eighteen hundred and forty four

Nathaniel Paschall Clerk

erroneously 4 Because the Court erroneously refused to give in=structions asked for by defendants 5 Because the verdict is against Evidence Bates & Todd for defts" Which motion the Court refused to grant to which decision of the Court the defendants duly ex=cepted & prayed the Court to file this their bill of exceptions in this behalf which is accordingly done M Blair

Afft for appeal

Joseph Rowe & Peter L Van Deventer
vs
Edward Saltmarsh Charles H Saltmarsh Nicholas Wall impleaded with Benjn T Osborne & others

In the St Louis Court of Common Pleas
State of Missouri } ss
County of St Louis }

Charles H Saltmarsh being duly sworn upon his oath says that he is one of the defendants in this case - that the appeal that has been taken in this case is not made of vexation or delay but because this affiant believes that the appellants are aggrieved by the judgment of the Court in this case & further says not

Charles H Saltmarsh

Sworn to before me this 29 day of October A.D. 1844 N Paschall Clk

appeal granted

Afterwards at said term of said Court to wit on October 29th 1844 the following further proceedings were had in this cause

Joseph Rowe & Peter L Van Deventer
vs
Benjamin T Osborne Edward Saltmarsh Charles H Saltmarsh & Nicholas Wall

Now at this day come the defendants and on their mo=tion an appeal is granted them from the Judgment herein to the supreme upon their entering into a recognizance with good security in the penalty of five hundred dollars conditioned according to law -

Recognizance

And afterwards at said term of said Court to wit on Tuesday November the eighth Eighteen hundred and forty four the follow further proceedings were had in this case

~~21~~ (27)

Oct. T. 45-

(28)

Rowe & Van Deventer.

apees.

vs

Saltmarsh. Wall et al

apts.

Filed Decr. 30th 1844

H. L. Boon

Clk

St Louis Co

Transcript $8.13

Edward Saltmarsh
& others
appellants
vs
Rowe & Vandeventer
appellees

In the Supreme Court
July Term AD 1845
From The St. Louis
Court of Com. Pleas

Said parties by their attorneys agree that the above entitled case be continued to the October Term AD 1845 of this Court —

A. Todd
Atty. for appellants

T. Polk for Appellees

In Sup. Court

Edward Saltmarsh &
others —
appellants
vs
Rowe & Vandeventer
appellees

Agreed that cause be
Contd. to Oct. Term 1845

A. Todd
atty. for appellants

Filed June 19th. 1845
H. L. Boon
Clk

Edward H Charles, H. Saltmarsh
& Nicholas Wall, (impleaded
with B. T. Osborne & others)
Appellants

v

Joseph Rowe &
Peter L. Vanderventer

Supreme Court, Jany. T., 45

Appeal from St Louis
Common Pleas, by E H C H
Saltmarsh & N Wall.

And the said Edward Saltmarsh & Charles H. Saltmarsh and Nicholas Wall, the appellants, come here into the Supreme Court & say that in the record & proceedings aforesaid & also in the rendition of the said judgment against them in the St Louis Court of Common Pleas, there is manifest error in this to wit:

1. That the judgment of the said Court of Common Pleas was rendered for & in favor of the said appellees, against these appellants, whereas by the law of the land, the judgment of said Court ought to have been rendered for & in favor of these appellants against the said appellees.

2. And also in this, to wit: that said Court refused to give to the jury the instructions moved by the appellants whereas said instructions were lawful & proper, & ought to have been given.

3. And also in this to wit: that said Court, of its own mere motion & against the will of these appellants, gave to the jury written instructions on the law of the case whereas said instructions were unlawful & improper, & ought not to have been given.

4. And also in this to wit: that the said Court overruled the motion of these appellants for a new trial, and refused to set aside the verdict rendered against them, whereas the said motion was a lawful & proper motion & ought to have been granted, and the said verdict

was illegal & wrong, & ought to have been set aside.

All which the said appellants are ready to verify wherefore, for the errors aforesaid, & other errors apparent on the face of the record, the said appellants pray that the said judgment may be reversed & for nought held, & that they may be restored to all that they have lost thereby &c

Todd & Bates
for appellants

Edward & Charles H Saltmarsh & Nicholas Walsh impleaded &c appellants
vs
Joseph Rowe & Peter L. Vandeventer appellees

Supreme Court
October Term 1845

& And now at this day come said appellees by their counsel & say that there are no such error in the record & proceedings in this cause as said appellants have above alledged & assigned wherefore they pray that the judgment of the Court below may be affirmed

T. Polk for appellees

94.

Edw. H. H. Saltmarsh & Nicholas Walsh appellants
vs
Rowe & Vandeventer

Assignment of Errors

Filed Jany 25. 1845
A. L. Boon clk

Joinder filed Oct 22
1845 A. L. Boon clk

Todd & Bates Attys

Edward Dallmarsh & al
vs.
Rowe and Vandeventer } appeal from the St. Louis Court of Common Pleas.

This was an action of Assumpsit instituted by the appellees Rowe & Vandeventer against the appellants Edward & Chas. H. Dall-Marsh Benj. J. Osborne, Nicholas Wall and Geo. & Wm Bide alleged owners of the Steam boat Potosi. The declaration contained a count on a promissory note charged to have been executed by the defendants per procuration and also the common counts. The defendants below prayed a bill of particulars of the plaintiffs demand under the common counts and the plaintiffs filed as such bill of particulars an account for lumber furnished, which was the consideration of the note sued on. On the plea of non assumpsit the parties went to trial, and the jury was found for the plaintiffs and their damages assessed to the amt. of $366.02 which was the amt. of the bill for the lumber furnished & interest. Before the trial the plaintiffs entered a nolle prosequi as to two of the defendants Geo. & Wm Bide & judgment by default having been taken against Osborne, the jury was found against the other defendants & damages assessed as aforesaid.

The following is the substance of the testimony in the cause: (Here the clerk will please copy the evidence as stated in A. Todd's brief beginning on the first page at Thos. H. Thatch's testimony. The defendants after the close of the evidence asked the following instructions which the court refused to give (Here copy the four instructions asked by defendants & refused by the Court which will be found at the close of the evidence on the record) To this refusal the defendants excepted. The court then gave

the following instructions, viz (here insert the instructions given) to the giving of which the defendants excepted. The court then gave the following instruction at the instance of the defendants: viz (here insert it)

A motion for a new trial having been refused the defendants appealed to this court.

The evidence in the cause warranted the court in giving the instruction to the jury, that if they believe from the testimony that one or more of the defendants were part owners of the Steam Boat Potosi at the time the plaintiffs account accrued & that the lumber therein charged was used in building the said boat, the said part-owners are liable to the plaintiffs for the same: This instruction contained as it seems to us the law applicable to the case.

It is said a ship is usually convey ed ~~to one or more~~ by bill of sale or some writing of that nature to different persons in several and distinct shares; and consequently, the several part owners thereby become tenants in common with each other of their respective shares. Abbott 68. Part-owners of a ship are tenants in common and one cannot dispose of the interest of another. But with regard to the repairs of a ship and other necessaries for the employment of it, one part-owner may by ordering these things on credit, render his companions liable to be sued for the price of them, unless their liability is expressly provided against. Ibid. 76. This is the English law and judge Story says that our own law coincides with that of England in holding all the part owners liable for repairs & necessaries furnished the ship. Not only the ships husband but all the owners are liable therefor, notwithstanding they are ordered by him. The cases of Schem-

whorn vs Loines 7 John 311 and Muldon vs Whitlock 1 Cow. 390 clearly maintain this doctrine In this last-last case stores were furnished at the instance of the ship's husbands on a credit who with others were the owners. The stores by the original entry were charged to all the owners. A few days after the sale, bills were rendered in which the ship's husbands were only charged, and after two months a note of the husbands was taken at an extended credit of 8 mos. a receipt being given for the note as in full for the stores. This note not being paid the ships husbands becoming insolvent, it was held that the other owners were not thereby discharged, but were liable for the original consideration, and that it made no difference whether those who supplied the stores, knew that there were other owners or not.

We can see no distinction between stores, necessaries &c. furnished a vessel and the materials supplied by the plaintiffs, for whatever may be the general law as to the ownership of chattels in the progress ~~of this case~~ of construction, the builders of the boat under the ~~construc~~ circumstances of this case had no claim to any property in her, consequently she must have belonged ~~to~~ entirely to the defendants: as each plank and material was added in building it became their property. Long on sales 288. Suppose a vessel should need repairs in sundry particulars & the owners should agree among themselves, that each one of them at his own cost should make a particular repair, and materials should be furnished one part owner to make the repairs he had undertaken to do, would such an agreement prevent the person furnishing the materials for the repairs from resorting to all the joint owners for the price of the materials furnished. There is no doubt

that by a special contract the liability for repairs may be restricted to a particular owner, but it devolves on the owners to show this, for as by law they are all liable they must show the facts which would exonerate any one of them. There is nothing in the evidence establishing the fact that it was agreed that Osborn one of the defendants should build a particular part of the boat, and if there was, we can find no principle of law which even in the event of such contract would restrict an individual furnishing our part owners materials for building his part, to a recourse against that part owner alone, unless it was so agreed between the part owner & him furnishing the materials, or it could be shown that the credit was given exclusively to that part owner to whom the materials were supplied, and not to any of the others.

These considerations show that the court did not err in refusing the last instruction asked by the defendants, for there was nothing in the evidence which showed that the plaintiffs extended only to give credit to Osborne & even if the contract among the part-owners supposed by the instruction did exist there is no evidence, that it was in any wise known to the plaintiffs.

It is obvious from what has been previously said, that there was no error in refusing the first instruction asked by the defendants & the third instruction may be considered in connexion with the first and is objectionable in requiring the court to tell the jury that Osborn should have been authorized by the other part-owners before he could bind them for the materials obtained by him.

No injury was sustained by the defendants in refusing their 2nd instruction which

relates to the execution of the note by Osborn. It may have contained a correct legal proposition, about which no opinion is given, but in as much as it appeared from the evidence of the plaintiffs that there was but one cause of action and that the consideration of the note described in the first count of the declaration was the price of the materials set out in the bill of particulars & as the verdict was for the price only of those materials with interest, we cannot for this cause reverse the judgment, for although an instruction may be in conformity to law, yet if this court can see that its rejection has produced no injury to the party asking it, a judgment will not therefore be reversed.

The other judges concurring the judgment will be affirmed.

N. Scott

Tallmarsh & al
vs
Rowe & Vandeventer

Opinion

note

Affirmed

Filed Oct 17. 1846
H. L. Boon clk

Edward Saltmarsh et al
appellants
vs
Joseph Rowe &
Peter L. Van Deventer
appellees

~~Edward & Charles H Saltmarsh & Nicholas Wall impleaded with Benjamin D Osborne others~~

In Sup. Court
Appeal by Edward
& Charles H. Saltmarsh &
Nicholas Wall impla.
with Benjamin D.
Osborne et al.

Statement, Brief & Points of appellants—

This was a suit in a pumpsit against Benjamin D. Osborne, Edward Saltmarsh, Charles H. Saltmarsh, Nicholas Wall, William Hite & George Hite.

The Declaration consists of one count on a note of Steamboat Potosi & owners signed by said Osborne Clerk— a count of indebitatus Apumpsit for goods wares, &c. & the money counts—

There was judgment by default against Osborne—

The other Defendants pleaded by themselves—

The Plaintiffs in the course of the trial discontinued as to the Hites. The verdict was against the Saltmarsh=es & Wall. On the Trial the plaintiffs pro=duced the following testimony.

That Testimony

Thomas H. Thath being sworn ~~on their behalf~~ testified that he knew the plaintiffs & their Copart=nership which was formed in February 1842. & they composed the firm of Rowe & Van Deventer— that ~~he~~ had been their Clerk— that plaintiffs traded in lumber— that witness sold & delivered for them— that he knows the hand writing of Benjamin D. Os=borne — that the signature of said Osborne to the note shown to him at the Close of the plaintiffs case given in evidence which was of the following tenor to wit: "Dolls. 3274/100 Saint Louis July 27. 1842. Ninety days after date Steamboat Potosi & owners

promise to pay to the order of Rowe & Van Deventer three hundred and twenty seven 42/100 Dollars for value received negotiable and payable without defalcation or discount. B. J. Osborne Clk." ~~Witness has seen said Osborne on board said Boat as clerk~~ — was the Witness has seen said Osborne on board said Boat as Clerk — hand writing of said Osborne — that he did not know that said Osborne was Clerk of the Steam Boat Potosi only as he understood he had seen him on said Potosi but did not know of his acting as Clerk except in buying the lumber sued for in this suit — that said note was given for the lumber as set forth in the bill of particulars filed in this Case for the said Potosi — that the body of said note was written by said Rowe the lumber was bought by said Osborne — Witness sold & delivered it all excepting a few items amounting to $ 8. 93, this said Rowe sold — the lumber was used in making the ~~build~~ Cabin of said Potosi which was built at Capt Leases yard — that the signature of said Osburne to the affidavit to the bill of said lumber first made out & shown to the Witness is Osborne' which bill & affidavit were in the words & figures following, to wit: (this bill Contains the same items in ~~that~~ filed as the bill of particulars in the case & at the foot of it is an affidavit of Osborne in the following words)

State of Illinois }
County of Adams } ss. I Benjamin J. Osborne being duly sworn depose and say that the within account of Rowe & Van Deventer against the Steam Boat Potosi is a true, just and correct account and that the balance of three hundred and twenty seven 42/100 Dollars as appears by said bill is justly due and owing from said Steam Boat Potosi to said Rowe & Van Deventer. so help me God.

B. F. Osborne

Subscribed & sworn to this 12th day of November A. D. 1842 before me Eben Moore J. P. Adams Cty. Ills.

Osborne engaged the lumber & paid the money credited on the Bill of particulars — dont Know who were the owners of the said Potosi only from said Os=borne — Osborne said he was part owner — the prices set forth in said bill of lumber were the Market prices both for that he sold & delivered & that said Crofs Es. Rowe died — On crofs Examination he testified that all he knows of the said lumber sold by said Rowe is that said Rowe told him. and the original Charge is in the hand writing of Rowe who was in the habit of selling & delivering lumber himself — the lumber was taken to said Potosi where she lay for com=pletion which was at the River at St. Louis opposite the lumber yard of the Plaintiffs — he demanded pay for the lumber of Osborne only — he never demanded pay for the note — Osborne himself called for the Plffts. Bill for the lumber sold as aforesaid —

Snyders Testimony Henry M. Snyder sworn on the part of plaintiffs testi=fied that he knows the Steam Boat Potosi — it was built at the yard of Capt Lease — he did some Castings & other work as a founder for her engine — he is a founder at the time he was doing the work in April 1842, Charles H. Saltmarsh told him he was one of the owners & his Brother Edward also — Edward in July 1842 told Witness that he was one of the owners — he then presented his account for payment to Charles & Charles said he would show it to his brother Edward who looked at it. said it was right & directed him to go to the office for his pay — he dont Know only by sight who was clerk he had seen the same person frequently on the boat —

before then he had a conversation with Edward on the Boat while the Cabin was building in which he told Witness he was one owner — he believes there were other owners but he dont know who they were the Cabin was being built he thinks in June the Boat lying just below the dry Dock — at the last conversation he thinks the Cabin was up — dont recollect when she began running but it was some time in July or August as near as he can recollect. An Cross Examination he testified Cross Ex. that the Boat had been running when he presented his Bill — the above conversation in April took place with said Charles when they that is Charles & other were removing a portion of the Steamboat Tide to the Potosi — the engine was put into the Potosi — the object of the conversation was to ascertain who would pay him for his work — Charles Saltmarsh said that he & his brother were the owners & would pay him. Calvin Coare sworn in behalf of the plain- Coares Testimony =tiffs testified that he was the owner of the Boat yard when the Potosi was built — he built the hull of the Potosi under a contract with Edward Saltmarsh — Edward was frequently present — he did not build the cabin — he saw Osborne superintending the building of the cabin & he seemed to take the management of this part of the work — he saw him frequently about the Boat in company with the Saltmarshes — In January 1842 he made his contract for the hull with Edward & completed it in March or April — he heard Osborne & the Saltmarshes conversing together during the pro- =gress of the work but dont recollect the purport of the conversations but they had reference to the manner of doing the work — Knows Nicholas Wall & thinks after the boat began to run he said he was part owner — did know him before — had not seen him about the build-

=ing of the boat— Knows George & William Hite & thinks he has seen the Hites about the Boat while build=ing but they said nothing about having any interest in
Cross Ex. the Boat. On cross examination testified that his Boat yard was the first establishment in St. Louis & that it was customary for persons engaged in Steamboating to come to the yard & advise suggest & talk about how Boats should be built— Edward paid him for building the hull except $150, which Charles H. Saltmarsh during the building of the hull paid him saying that he had lent it to Edward for that purpose the Potosi began to run in July— he dont know who was clerk at Starting, but Mr Wall was shortly after— he sent some chimnies & as their was some differ=ence about the price they left it out to others & Osborne at=tended to it— the Saltmarshes have been engaged for some considerable time in Steamboating on the river— Charles H. was engaged on the Rosalie till the hull of the Potosi was launched, and then he left her & went to putting the Engine on board the Potosi. He seem=ed to be engaged in the building as much as the others but they said Edward was the only owner— Charles H & Edward are brothers & the conversations at the Boat yard while the hull was building was a=bout the manner of building it. But he understood that Edward was the only owner. Edward paid him he thinks about $2800 for building the hull— Reexamined in Chief he cant say who was clerk of the boat before it run he cant say whether it was just before or after the boat began to run that he delivered the Chimnies, they were bargained for before— he talked with Edward & Charles H. about them he contracted with no one for them but the

Saltmarshes-at first Edward objected to the price & Charles H. afterwards met him upon the side walk & said they would leave out to others — he cant say whether Charles H. talked for himself or Edward as agent —

The Plaintiffs here entered a nol Pros. as to the Hites

Flaherty Testimony

in behalf of the defence Mr O. Flaherty being sworn testified that he has known the Potosi from the first that Mr Wall was the only Clerk he ever knew upon her — he was also Clerk of the Tide — he & his partner deal in boat ~~Stores~~ Hites upon the levee & have sold the Potosi before & since her building boat Stores — On cross Examination testified that he did not know Osborn — that he furnished spikes to the Saltmarshes & charged them to the Steam boat Potosi — he did understand that Charles H. was liable for the Spikes — he was helping to get the engine in & after the Potosi began running was engineer. Charles H. ordered the things & so do all engineers in getting up works — he was surprised to see that Charles H. was on her as engineer.

Davidson's Testimony

Jessee Davidson sworn in behalf of the defence testified that he knew the Steamboat Tide. Osborne bought out Mr Waggoners interest in the Tide which was one fourth Charles H. Saltmarsh was not part owner of the Tide that he ever knew of — the owners of the Tide when the building of the Potosi was begun & portions of the Tide were taken to be worked into the Potosi were himself, Edward Saltmarsh & said Osborne & Wall — Edward Saltmarsh Nicholas Wall Benj. T. Osborne & Witness were the owners of the Potosi — he sold his interest in the Potosi to Charles H. Saltmarsh & made to him a bill of Sale which was in the words & figures following to wit: "Know all men by these presents that I Jessee Davidson of the first part do hereby convey, grant bargain sell and alien unto Charles H. Saltmarsh

of the Second part all my right. title and interest I had in the Steam Boat Tide being one fourth thereof free from all incumbrances whatsoever also my interest in all debts due and monies belonging to said Steam Boat Tide which may be on hand together with my right and interest in the new S. B. Potosi which was built for and has on it the machinary of the above mentioned S. B. Tide. For and in consideration of five hundred and sixteen Dollars and &c the payments of which to be as follows. One hundred dollars on the 11th of August 1842. and four hundred and sixteen dollars and &c on the 28th of October 1842. In testimony whereof I have hereunto set my hand and seal this eleventh day of July 1842. Jesse Davidson [seal]

Cross. Es. Witness B. T. Osborne. On cross examination testified that the sale of his interest to Charles H. was as he believes of the date the bill of sale bears — as much of the Tide was used in the Potosi as could be — Edward Saltmarsh Nicholas Wall. C. Waggoner & himself owned each one fourth of the Tide — he did not know of the lumber being got by Osborne of the plaintiffs — he was sick while the Potosi was building —

Jones Testimony Mr A. Jones sworn on the part of the defence testified that he has known the Potosi from the commencement of her running he became acquainted with her through Mr Wall — he taught to Mr Wall book keeping. Mr Wall was 4th clerk of the Potosi at the commencement of her running — dont remember the time she began to run — he had access to the boats books as an assistant of Mr Wall in keeping them — he has never known of any other clerk of the Potosi —

Cross Es. On cross examination testified that he never went on the boat only when she was in port — knows Mr Osborne but never knew him as clerk of the Potosi — he was

on the boat from time to time when she was in & helped to keep the books in order - knows that Osborne was on the boat & thinks he acted as second clerk: Henry Peers sworn for the defence testified that he knows the Potosi - that he was employed as joiner on her while building - his work was confined to the building of the cabin - Osborne hired him paid & discharged him when the boat was finished - he never applied to any else for pay - Osborne formerly resided at Deiney - Osborne told him that he had bought one fourth of the Tide & that they were going to build the Potosi & that he was to build the cabin & what that cost he was to be allowed so much in the Potosi - he was present at the building of the cabin off and on from its commencement & Osborn was the only man who gave me directions & orders & employed the hands working upon it & no other persons employed them - he worked as joiner for about six weeks of the latter part of the time the Cabin was building - the cabin was finished about the 10th of June - the Potosi started her first trip on the 17th of July - N. Wall was the Clerk - it was in July that he heard that Charles H. Saltmarsh had bought out Davison. On cross examination testified that both of the Saltmarshes were on & about the boat while it was building - neither of the plaintiffs was present when Osborne told him as aforesaid. Hiram Miller sworn for the defence testified that he knows the Steam boat Potosi - he helped to put up her engine - the cabin was built while he was working on the engine the boilers were up & the engine on the boat when Charles H. Saltmarsh came to work on the boat - Osborne was building the cabin - knows that Osborne employed the hands for making the cabin - dont know if any other person employed hands on the cabin - Edward Saltmarsh hired

Peers Testimony

Miller's Testimony

him to work on the engines & shafts — he is a mill=wright —
Osborne paid the joiners who worked on the cabin —
Knows of no one else paying them — Osborne once went
up to Quincy on bussiness & was not present on Saturday
night when the pay of the hands upon the cabin was due &
the hands applied to Edward Saltmarsh who refused
to pay them saying he had nothing to do with them —
Edward Saltmarsh paid him — Charles H. Saltmarsh was
employed as engineer on the Steamboat Rosalie till he
cross Ex. came to work on the Potosi. On cross examination
testified that he was present at the employment & payment
of the joiners upon the cabin — Edward Saltmarsh while
the hull was building was repairing the old engines of the
Hites Tide — William Hite sworn for the defence testificet that
Testimony he knows the Potosi — he ~~knows~~ has known her from the
time she was begun to be built — the Potosi started on
her first trip July 17. 1842, he was on her as pilot — Nich=
olas Wall was clerk of the boat on her first trip & con=
=tinued so for two years — he dont recollect the exact date
when Charles H. Saltmarsh bought Davidson's interest
but it was after she was finished — he the Witness became
part owner of the Potosi July 18. 1842 — he bought a
one sixteenth of Charles H Saltmarsh who on the same day
sold one other sixteenth to Charles Chaplen — it was only
three or four days before then that Charles H. bought of Davidson —
he never heard of Charles H. Saltmarsh owning any thing
of the Potosi before he bought of Davidson — On cross
Cross Ex examination testified that the way he knows of the time when
Charles H. Saltmarsh bought of Davidson is because he
tried to buy of Davidson but there was some difficul=
=ty & so Charles H. bought & then he bought of Charles
H. Saltmarsh. The above was all the evidence adduced
upon the trial. On behalf of the defence the court was

Defts: rejected instructions

asked to instruct the jury as follows to wit: "Unless the jury find from the testimony that Benjamin T. Osborne was the agent of the other defendants named in the declaration (except the Sites) with authority from them to contract with the plaintiffs for the lumber the value of which is now sued for they will find for the Defendants" Unless the jury find from the testimony that Benjamin T. Osborne at the time of making the note which is in evidence was Clerk of the Steam boat Potosi they ought not to find for the plaintiffs as to that note". In this action the jury ought not to find against any one of the defendants unless they think that such defendant was an owner of the Steam Boat Potosi & authorized the purchase of the lumber." If the jury believe from the evidence that a contract was made between Osborne & the others of the Steam Boat Tide when she was broken & the building of the Potosi begun — that Osborne was to build at his own espense the cabin & that the espense thereof was to be allowed him towards his contributary share in the building of the Potosi & that said Osborne did build the cabin in pursuance of such contract & that the said plaintiffs dealt with Osborne only in selling the lumber giving credit, demanding & receiving payment until the maturity & protest of the note given by Osborne they will find for all the defendants except Osborne". All which instructions the court refused to give to which decision of the court the defendants duly excepted. The Court thereupon gave the following instructions to wit: If the jury believe from the evidence that one or more of the Defendants were part owners of the Steam Boat Potosi at the time plaintiffs account accrued & that the lumber therein charged was used in the building of the said Steam Boat the said part owners are liable to

1st Instruction given

the plaintiffs for the same. To which the defendants duly excepted". The jury will state in their verdict for
2d Instruction which of the defendants they find & against whom with the amount also any arrangements between the defen=dants as to what part of the boat any one should con=tract does not affect the plaintiffs right to recover against all who are part owners unless it be that they the plaintiffs. Know of these arrangements. to which the defendants duly excepted". The court also gave
Deft's instruction - given this instruction at the request of the defendants. "The jury ought to find for such & so many of the defendants as they shall believe from the evidence were not part owners of the Steam Boat Potosi at the time of the fur=nishing of the lumber sued for in this case - The jury found a verdict for the plaintiffs against Benja=min J. Osborne, Edward Sattmarsh & Charles H. Satt=marsh & Nicholas Wall to wit: We the jury find
verdict for the plaintiffs against Edward Sattmarsh & Charles H. Sattmarsh, Nicholas Wall & Benjamin J. Osborne & assess the damages at three hundred sixty=six dol=lars & two cents John H. Adams foreman" The defen=dants in due time filed a motion for a new trial for reasons to wit. Rowe & Van Deventer in Com. Pleas Said defendants come and move that this court set aside the verdict in this case & grant a new trial for the following reasons to wit: 1st Because the verdict is against the weight of evidence. 2d Because the verdict is against law under the evidence. 3th Because the Court instructed the jury erroneously. 4th Because the court erroneously refused to give instructions asked for by defendants. 5th Because the verdict is against evidence. Bates & Todd for Defts." Which mo=tion the Court refused to grant to which decision

of the Court the defendants duly excepted & prayed the Court to file this their bill of exceptions in this behalf which is accordingly done. M. Blair

Point 1

The Court erred in refusing to give to the jury the following instructions asked for by defendants-

1. The instruction that "Unless the jury find from the "testimony that Benjamin T. Osborne was the agent "of the other defendants named in the declaration "(except the Hales) with authority from them to "contract with the plaintiffs for the lumber "the value of which is now sued for they will "find for the defendants" ought to have been given because, unless their authorized agent therefor, his contracts could not bind only himself. For their general relations with each other with regard to this Boat were at the most those only of tenants in common & one tenant in common cannot bind his co-tenants as to third persons by any contracts of his touching the property held in common nor to himself without their express prior assent except perhaps in cases of necessity & then only on express prior request & refusal, unless before such general agent therefor exercise

3 Kent's Com. p 151 to 154 - That they are tenants in Common
6 Cowan's Rep. p 475 - That the contracts of each dont bind the rest
~~After dissolution partners~~ 8 mo. Rp. 358 - 360
Gow on Partnership p 64 & 65 - 3 Kent's Com. p 63. That partners after dissolution are tenants in common & their acts & declarations cannot bind their co-tenants except in matters happening during the partnership -
3 J. R. p. 175 - 8 mo. Rp 358 - That tenants in Common are unlike partners - Gow on Partnership p. 194. n. x. 20 J. R. 611 -

2. The instruction that Unless the jury find from the "testimony that Benjamin T. Osborne at the time "of making the note which is in evidence was "Clerk of the Steamboat Potosi, they ought not to "find for the plaintiffs as to that note" ought to

have been given because unless such clerk it is the note of Osborne alone.

Bank of Missouri vs Scott 1. Mo. Rp. p 533. of new publication - p. 744 margin -

The Court, also by letting in this note & refusing said instruction, in effect told the jury, that if they believed that Osborne was part-owner, he could bind his co-owners by any kind of contract in behalf of the Boat & by note - that he was their agent because part-owner.

3 The instruction "In this action the jury ought not "not to find against any one of the defendants "unless they think that such defendant was "an owner of the Steamboat Potosi & authorized the purchase of the lumber" ought to have been given because if an owner but not authorizing, his position & liabilities are those only of a tenant in common & therefore not liable [redacted]

4- The instruction "If the jury believe from the Evidence "that a contract was made between Osborne & the others "of the Steamboat Tide when she was broken up & the "building of the Potosi begun, that Osborne was "to build at his own expense the Cabin & that the "expense thereof was to be allowed him towards "his contributory share in the building of the Po= "tosi & that said Osborne did build the "Cabin in pursuance of such contract & that the "said plaintiffs dealt with Osborne only in selling "selling the lumber, giving credit, demanding and "receiving payment until the maturity of the note

" of the note given by Osborne they will find
" for all the defendants except Osborne" ought
to have been given because if Osborne bought
this Lumber for a purpose solely his & the plaintiffs
~~so~~ dealt with him alone, Osborne alone is lia=
ble for the Lumber –
11 Map. Rep. p 35

– Point 2 –

The Court erred in giving the two following instruc=
tions to wit:

1 "If the jury believe from the Evidence that one or more
" of the Defendants were part owners of the Steam=
" boat Potosi at the time plaintiffs account accrued
" & that the Lumber therein charged was used in
" the building of the said Steamboat ~~Potosi~~
" the said part owners are liable to the plain=
" tiffs for the same".
Because one tenant in common is not liable for
the contracts of his co-tenant touching their com=
mon property by the law of their relation –

2 – "The jury will state in their verdict for which
" of the defendants they find & against whom with
" the amount – also any arrangements between
" the defendants as to what part of the boat
" any one should construct does not affect the

"plaintiffs' right to recover against all who are
"part owners unless it be that the plaintiffs knew
"of their arrangements"-

Because ~~in such~~ under such an arrangement
each one's work is exclusively his until the
completion of the Boat & then those holding it
together hold it as tenants in common-

Point 3

The Evidence shows that the Plaintiffs below
gave the entire credit to Osborne & looked to
no further security except their lien upon the
Boat- 11 Mass. Rep. p 34

- Point 4-

The court erred in refusing to grant the
motion for a new trial-

1. ~~Because~~ Because the ver-
dict is against Evidence in this: that it
does not prove a contract to which the ap-
pellants are parties ~~are~~ at law- For the
contract proved was between appellees &
Osborne only- Appellees sold to Osborne
alone & Osborne alone bought the lum-
ber. The appellants are certainly not proved
to be express parties to the purchase- Nei-
ther can they be bound on an implied con-
tract because the lumber was put into
a boat which when completed was
property in common between Osborne &
them- Because till the lumber was
put into the Boat the appellants had
no claim in the lumber- it was Osborne's
& he could do with it as he chose,

But when put into the Boat it lost its character as Lumber & became parcel of the Boat & also its individual character of the sole property of Osborne &, becoming merged in the Boat, obtained the character of property in common between appellants & Osborne -

Isdell & Bailey
for appellants -

In Sup. Court

Ed. Saltmarsh
et al Appellants

vs

Roe & Vandeventer
Appellees

Statement & Brief
of appellants -

A. Todd
for Appellants

Edward Saltmarsh
& others ——————
vs
Rowe & Vandeventer

In Sup. Court.
January Term 1845

It is agreed between said parties that this case be continued till the next Term of this Court.

A. Todd
Atty. for appellants.
Trusten Polk
Atty. for appellees

In Sup. Court

Ed. Saltmarsh &
others

vs

Rowe & Vandewater

agrest. for Continuance

A. Todd
atty. for appellants

T. Polk
attorney for appellees

Edw.d Saltmarsh et al
appellants
vs
Rowe & Vanderventer
appellees

Supreme Court,
October Term 1845

Appellees' Brief.

This was an action of assumpsit instituted by appellees against appellants and two other defendants of the name of Hite. The declaration contained a special count upon a note charged to have been executed by Lefts per procuration of Benj. T. Osborne, and also the common counts. The defendants below prayed a Bill of the Particulars of the plaintiffs' demand, and plaintiffs filed as such Bill of Particulars the account which was the consideration of the note described in the first count of their declaration, and relied upon such account as their cause of action. Defendants below pleaded the general issue upon which the cause went to the jury. There was no controversy about the correctness of the Plaintiffs account, which was for lumber sold & delivered by them & used in the construction of the Steam Boat Potosi. The main contest seemed to be as to the liability of the other defendants besides Osborn. At the close of the plaintiffs' testimony they dismissed their suit as against the two Hites and sought a recovery against the other defendants.

The lumber was used in building the Cabin of the Steamer Potosi & was purchased through the agency of Benj. T. Osborn acting as clerk of the Boat, and charged at the time of the Sale, to the Steam Boat Potosi. Thatch, a witness for the plaintiffs proved the joint ownership of Osborn in the Boat and also that he had seen him on board the Boat as clerk:— he understood he was clerk, but had no personal knowledge of any acts done by him as clerk except in buying the lumber sued for in this action.

Calvin Case one of Plaintiffs' witnesses testified that upon difficulty arising about some chimnies he had furnished the Boat, it was left to third parties and was attended to by Osborn. Jonathan Jones a witness for Defts testified that when the Boat commenced running, which was about the month of July 1842 N. Ware was first Clerk and that Osborn was on board the Boat & acted as second Clerk.

H. Smyser a witness for Plffs testified that he did some work as a founder for the engine of the Potosi, and in a conversation he had with Charles A. Saltmarsh in order to ascertain who would pay him for his work, he told witness that himself & his brother Edward were owners of the Boat and would pay him for his work. The work was done early in April 1842. Capt. Case on part of Plffs, testified that he built the Hull of the Boat under contract with Edward Saltmarsh as one of the owners of the Boat, & completed his work in board or April. That during the progress of his work the two Saltmarshs & Osborn were frequently about the Boat conversing about her. Another witness for Plff proved that Nicholas Ware was also an owner from the first commencement of the Potosi. That portions of the old Steamer Tide were worked into the Potosi and that said Ware had been one of the owners of the Tide. On the part of the defns evidence was offered to show that Osborn had the over-sight of building the Boats Cabin & had hired & paid the joiners who did the work - and also that Nicholas Ware acted as Clerk of the boat after the commmenced running.

The Court instructed the jury as follows 1. "If the jury believe "from the evidence that one or more of the defendants were "part owners of the Steam Boat Potosi at the time Plffs' ac- "count accrued, and that the lumber therein charged was used "in the building the said Steam Boat, the said part owners are "liable to the Plffs for the same" Also 2. The jury will state in

"this verdict for which of the defts they find, & against whom,
"with the amount". Also, 3. Any arrangements between the Defts,
"as to what part of the Boat any one should construct does not
"affect the Plffs' right to recover as against all who were part-
"owners, unless it be shewn that the Plffs knew of such arrange-
"ments." "At the prayer of the defts the Court also instructed that -
"The jury ought to find for such & so many of the defts
as they shall believe from the evidence were not part owners of the
Steam Boat Potosi' at the time of the furnishing the lumber
sued for in this case"

The defts also prayed the Court to give the following instructions -
which were refused - "1. Unless the jury find from the testimony,
"that Benj. I. Osborn was the agent of the other defts named in
"the declaration (except the Hiles) with authority from them
"to contract with the Plffs for the lumber, the value of which is
"now sued for, they will find for the defts."
"2. Unless the jury find from the testimony that B. I. Osborn at the
"time of making the note in evidence was Clerk of the Steam
"Boat Potosi, they ought not to find against any one of the
"defendants for the Plffs as to that note. 3. In this action the
"jury ought not to find against any one of the defts, unless they
"find that such deft was an owner of the Steam Boat Potosi'
& authorised the purchase of the lumber, the value of which
"is now sued for. 4. If the jury believe from the evidence that a
"contract was made between Osborn & the other owners of the Steam
"Boat Tille when she was broken up & the building of the
"Potosi' began, that Osborn was to build at his own expense
"the cabin, & that the expense thereof was to be allowed him
"towards his contributory share in the building of the Potosi, and
"that said Osborn did build the cabin in pursuance of such
"contract & that the Plffs dealt with Osborn in the selling the
"lumber, giving credit, demanding & receiving payment with
"the maturity & protest of the note given by Osborn, they will
"find for the defts except Osborn. The defts' counsel excep-
ted to both the giving & refusing instructions by the Court. A

verdict was then found for Pfffs, and Lefts' counsel moved to set it aside. 1. Because it was against the weight of evidence. 2. Because it was against law under the evidence. 3. Because the Court instructed the jury erroneously. 4. Because the Court erroneously refused to give instructions asked for by defts. 5. Because the verdict was against evidence. This motion was over-ruled the defts excepted & appealed.

1. The counsel of the appellees maintains that the instructions given by the Court, are the law of this case.

To the second instruction given by the Court it is taken for granted that no objection can be reasonably raised.

1a. That the first instruction was properly given by the court, reference is made to the following authorities. Abbott on shipping 71, 72, Westerdell vs Dale 7 T.R. 306, Rich Extr vs Coe et al Cowper 636, 7 John. R. 311, 16 do 89, 1 Dallas 129

In this case the purchase was made by Osborne who acted as Clerk & who was one of the owners, and the amount was charged against the Boat & owners - It therefore fully suits the case given in Johnson's Rep. - and is much stronger than the case in Term Reports, where the owner who was sued not only did not authorise the purchase, but was not even charged with the goods

2b. That the third instruction given by the Court is correct see, Rich. Extr, vs Coe et al. Cowper 636.

2. The counsel of appellees also contends that the Court below committed no error in refusing the four instructions prayed by appellants counsel in the Court below. 7 Mo. R. 416, 1 do 505 do 1 do 68 or 97. 3 do 411, 6 do 6, 3 do 382 & 392, 7 do 128 & 430, 8 do 239,

I will consider the 1st & 3rd instructions together, as they assert substantially the same legal propositions.

I maintain the law to be that if the Lefts were owners of the Potosi at the time the Pfffs demand accrued & the property received the benefit of the Lumber sold by Pfffs, they are liable whether they authorised the sale or not. See cases

cited above. As to the 3rd instruction asked by Defendants is the converse of this proposition and therefore was rightly refused. And as to the first of Defts' instructions it may be observed that the purchase of timber was made by Osborne who was a part owner at the time one of the Defts & and therefore it is not necessary for him to act as agent of the other defendants with special authority to that effect. In his capacity of owner of the Boat he was competent to make a contract for timber to be used in her construction, that would be binding upon the other part owners and thus all considerations of agency are entirely removed & precluded from the case. It was therefore right for the Court to refuse an instruction based upon the assumption that he acted agent - and only as agent of the other defendants. See authorities cited above

In regard to the second instruction prayed by Defts' counsel I remark that the Defts below prayed a Bill of Particulars of Pltf's demand under the common Counts which was furnished - then at the trial it was proved by Thatch that the consideration of the note declared on in the first count which was given in evidence in connection with the account as a liquidation thereof, was the same lumber mentioned in the Bill of Particulars furnished. Therefore the Pltfs did not claim to recover both upon the Note & the account, but relied only on the account under the common Counts. The Court therefore, under such circumstances did the Defts no injury in refusing this second instruction even if it be granted to have been good law as an abstract proposition. This Court has decided that tho' the Court below refuse to give an instruction which is good as an abstract proposition of law but which is not applicable to the case under trial, such refusal is not error. 7 Ho. R. 416 Finny vs Allen Donohoe vs Glasgow et al 1 Do 505

The fourth instruction of Defts supposes a state of facts not warranted by the evidence. For in the first place there is no evidence that there was ever any contract whatever between Os-

born and the other owners of the Steam Boat Tide. Indeed there was no evidence that Chas. H. Saltmarsh was ever an owner of the Steamer Tide at all. Much less was there any evidence "that Osborn was to build the cabin of the Potosi at his own expense and that the expense thereof was to be allowed him towards his contributory share in the building the Potosi &c. The instruction therefore ought to have been refused for that reason — for the reason that it takes for granted — assumes a state of facts not made out by the proof. vide Coleman vs Roberts 1 Mo. R. 68, Donohoe vs Glasgow 1 Do 359 (505), O'Fallon Adm. vs Boismenu 3 Do 286 (405), Williams vs Harrison 3 Do 290 (411), Nicholas vs the State 6 Do 6. Himes vs McKinney 3 Do 382. Johnson vs Strader 3 Do 359

But the instruction is bad, because it does not allow that there was any necessity of notice to the Pffs of the contract that it supposes in spite of the evidence to have been proved.

Suppose however that there was one instruction prayed by Defts that might have been properly given by the Court, still if the instructions that the Court actually did give fairly & fully presented the law of the case to the jury (and I have attempted to show they did) then there is no error of misdirection for which this court ought to reverse the judgement of the Court below. Fugate's Adm. vs Christy 7 Mo 430. Neale vs McKinstry 7 Do 128, 8 Mo. R. 339 Williams vs Vanmeter

The Court rightfully refused to grant the motion for a new trial made by pffs below. I have endeavoured to demonstrate that the Court below committed no error either in giving or refusing. And if this be true, then the third & fourth ~~instructions~~ reasons assigned for setting the verdict aside are fully covered and require no further consideration.

The first & fifth reasons assigned were, that the verdict was against evidence & the weight of evidence. On this point, this Court has held the doctrine that the verdict

ought not to be set aside unless the evidence strongly preponderates against it. vide Singleton to use vs Mann 3 Ire. R. 326, Oldham vs Henderson 4 Do 295, Mullikin vs Greer 5 Do 493, Dooley vs Jennings 6 Do 63, & Young vs Kelly decided at the Jany T. of this Court, 1845.

But in this case I contend that the evidence not only bore out the verdict of the jury but decisively preponderated in favour of it. And for this, I refer the Court to the proof printed in the Bill of Exceptions. Moreover it is submitted that the Defts can hardly be consistent, & yet contend in the same breath on the one hand that the verdict upon the evidence, was against law, because against the instructions of the Court, & yet upon the other, that the verdict ought to be set aside because those very instructions are not law

J. Polk for Appellees

Supreme Court
October Term 1845

Saltmarsh et al. appellants
vs
Rowe & Vanderventer Appellees.

Brief for Appellees

T. Pitt for Appellees.