78/20

March 1849, #5

Insurance

Solomon Robbins

vs

Alton Marine + Fire Ins. Co.

} damages

to recover value of quantity of iron water pipe.

State of Missouri }
County of St Louis } ss. Be it remembered that heretofore to wit: on the twenty eighth day of December one thousand eight hundred and forty Six there was filed in the office of the Clerk of the Saint Louis Court of Common Pleas within and for the County aforesaid a transcript from the St Louis Circuit Court in the words and figures following to wit:

State of Missouri County of St Louis ss.

Be it remembered that heretofore to wit on the first day of November in the year one thousand eight hundred and forty five there was filed in the office of the Clerk of the St Louis Circuit Court a declaration in the words and figures following to wit

State of Missouri. County of St Louis ss.

In the Circuit Court November Term A. D. 1845

Declaration

The Atlas Marine and Fire Insurance Company plaintiffs in this Suit by Junius Hall their attorney complain of Solomon H. Robbins defendant in this Suit in a plea of trespass on the case upon promises For that whereas the Said defendant heretofore to wit on the first day of January in the year of our Lord one thousand eight hundred and forty five at Said County was indebted unto Said plaintiffs in the Sum of Six hundred Dollars for the work and labor care and diligence of the Said plaintiffs by the Said plaintiffs before that time done performed and bestowed in and about the business of the Said defendant and for the Said defendant and at his Special instance and request, and also in the further Sum of Six hundred dollars of like lawful money for divers goods wares and Merchandise by the

2 Said plaintiffs before that time Sold and delivered to the Said defendant and at his like 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, and paid, laid out and expended for the Said defendant and at his like special instance and request; and also in the further Sum of Seven hundred dollars of like lawful money for other money by the Said defendant before that time had and received to and for the use of the Said plaintiffs - and also in the further Sum of Six hundred Dollars for So much money by and from Said defendant to Said plaintiffs before then due and owing and then in arrear and unpaid for and upon an account Stated between them and being So indebted the Said defendant 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 Several Sums of money in this count mentioned when the Said defendant Should be thereunto afterwards requested nevertheless the Said defendant not regarding the Said promises and undertakings, although often requested So to do has not paid to the Said plaintiffs the Said Sums of money or either of any part thereof of either of them - Whereby the Said plaintiffs have Sustained damage in the Sum of eight hundred dollars wherefore they bring Suit &c.

Junius Hall a. p. q.

Bill of Particulars

Solomon N. Robbins.

To the Alton Marine & Fire Insurance Co Dr

Feb 1845. To this amt received by you on Sale of Farm

3 Pipes to City of St Louis belonging to the C. $800.00

Upon which said declaration there was issued by the Clerk of the said Court a Summons to the said defendant which is in the words and figures following to wit:

Summons County of St Louis - ss. The State of Missouri
To the Sheriff of St Louis County Greeting

We command you to summon Solaman N. Robbins if he be found in your County that he be and appear before the Judge of our Circuit Court 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 November instant then and there to answer unto The Atlan Marine & Fire Insurance Company of a plea of trespass on the case on promises to the damage of said plaintiff eight hundred dollars and have you then there this writ - (Seal) Witness John Ruland Clerk of our said Court with the Seal thereof hereto affixed at office in the City of St Louis this first day of November in the year of our Lord eighteen hundred and forty five.

John Ruland Clerk

Upon which Summons the Sheriff made return in the words and figures following to wit:

Shff's Return Executed this writ in the County of St Louis November the 1st 1845 by leaving a true copy of it and the declaration at the residence of Solaman N Robbins the defendant with a white member of the family over the age of fifteen years -

William Smithson Sheriff
By James L. Harris Deply

And afterwards to wit on the twenty first day of November

41 in the year last aforesaid the following proceedings were in said cause to wit:

The Alton Marine and Fire Insurance Company vs Solomon N. Robbins - The defendant by his attorney this day files a plea herein -

Plea St Louis Circuit Court. Circuit Term 1845

Solomon N. Robbins ads The Alton Marine and Fire Insurance Company - and the said defendant by Primm & Taylor his attorneys comes and defends the wrong & injury when &c and says he did not undertake or promise in manner and form as the said plaintiff has above thereof complained against him and of this he the said defendant puts himself upon the Country &c.

Primm & Taylor p. d.

and afterwards to wit on the fifteenth day of December in the year one thousand eight hundred and forty Six the following further proceedings were had in said cause to wit:

Change of Venue The Alton Marine & Fire Insurance Company vs Solomon N Robbins - assumpsit.

Now at this day comes the plaintiffs by their attorneys and upon their motion, the Judge of this Court being interested in the event of this Suit it is ordered that the venue of this cause be changed to the St Louis Court of Common Pleas, there to be proceeded in according to law -

State of Missouri
County of St Louis. ss. I John Ruland Clerk of the Circuit Court within and for the County aforesaid certify that the foregoing is a true and complete transcript of the record and proceedings in the above cause of The Alton Marine and Fire

5 Insurance Company as fully as the Same re=
=mains of record and on file in my office -
Seal In Testimony whereof I have hereunto
Set my hand and affixed the Seal of Said Court
at office in the City of St Louis this twenty
eighth day of December eighteen hundred and
forty Six. John Ruland Clerk.
And afterwards the following proceedings were had
herein in the St Louis Court of Common Pleas to wit
September Term 1847. December 4th 1847.

Leave to file Statutory plea Genl issue

The Alton Marine & Fire Ins. Co. v Solomon H.
Robbins - On motion of the Said defendant by attorney
leave is given him to file the Statutory plea herein which
is filed -
The following is the plea.

Plea

And now by leave of Court comes the defendant
by Primm & Whittlesey his attorneys & defends the demand
of the plaintiff &c.
Primm & Whittlesey attys for Deft.
And afterwards the following proceedings were had herein viz
September Term 1847 - December 6th 1847.

Plea stricken out.

On motion of the plaintiff by attorney it is ordered
that the Statutory plea filed herein by leave of
Court be Stricken out.
And afterwards the following proceedings were had herein
viz. September Term 1848. November 17th 1848.

Judgment

Now at this day come the parties by their attorneys
and thereupon come also a Jury Henry L. Patterson, Thomas
G. Reyburn, Jacob Rudolph, Benjamin H. Randolph
Enoch Price, M. H. Stickney, Nathaniel Paschall, C. C. Archer
T. J. Albright, T. J. Albright, E. E. Adams David Adams
and Charles Keiser twelve good and lawful men who being
duly elected tried and Sworn well and truly to try the issue

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joined between the parties aforesaid upon their oaths afore=
=said find said issue in favor of the plaintiff and assess
his damages sustained by reason of the non-performance
of the premises and undertakings in its declaration men=
=tioned at the sum of seven hundred and twenty six
dollars and thirty four cents. It is therefore considered
by the Court that said plaintiff recover of said
defendant the damages aforesaid in form aforesaid
by the Jury assessed and also his costs and charges
herein expended and have thereof execution —

And afterwards the following proceedings were had
herein viz: September Term 1848. November 21st 1848.

Leave to file add.l Reason for new trial

On motion of the defendant by attorney leave is
given him to file an additional reason for a new
trial herein and thereupon the same is filed and an
affidavit in support thereof

And afterwards the following proceedings were had herein
viz: September Term 1848. December 13th 1848.

Remittitur & new trial refused

Now at this day come the parties by their attornies
and the plaintiff enters a remittitur of his judgment
herein for the sum of twenty dollars and thereupon
the motion of said defendant for a new trial herein
being heard and the Court being fully advised of and
concerning the premises it is ordered that said motion
be overruled and thereupon said defendant files a Bill
of Exceptions herein —

Bill of Exceptions

The following is the Bill of Exceptions
Be it remembered that this cause came on for trial
in the St Louis Court of Common Pleas on the 17th
day of November A. D. 1848 and the plaintiff to
maintain the issue on its part proved the plaintiff to
be an incorporated Company under and by virtue
of the laws of Illinois and further to maintain the

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issue on the part of the plaintiff called John M. Krum as a witness who being duly Sworn testified

Wits Krum.

that the policy of Insurance Shown to him was underwritten by the plaintiff through its agent and that the receipt on the back of the policy was drawn by witness and Signed by John Stacker of the firm of Woods Stacker & Co. –

Policy

By the Alton Marine and Fire Insurance Company

No 330. This Policy of Insurance Witnesseth that the Alton Marine and Fire Insurance Company do by these presents cause Mess Woods Stacker & Co. to be assured lost or not lost in the Sum of Ten Thousand dollars in open policy on Iron Castings and Pig Metal to be Shipped on Board of Steamboat Companion at the mouth of Ohio to Saint Louis Mo during the months of November & December premium to be paid on amount of Invoices not to exceed the above Sum — whereof is master for the present voyage — or by whatever other name or names the Said Steamboat or the master afore=said is or Shall be named or called: beginning the adventure upon the Said Iron & Castings on the day of Shipment and to continue and endure the voyage and until the Same Shall ~~and may~~ be safely landed at Saint Louis aforesaid and it shall and may be lawful for the Said Steamboat during said voyages to proceed to, Touch and Stay at any intermediate ports or places, if thereunto obliged by Stress of weather or other unavoidable accidents or if the Same be convenient, for the transaction of any lawful business without prejudice to this assurance Touching the adventures and perils which the Said Insurance Company are contented to bear and take upon themselves in the premises, they are of the Seas

8 Rivers Fires Enemies Pirates Rovers Assailing Thieves and all other perils, losses and misfortunes which shall come to the ~~knowledge~~ ~~are could be to bear and take upon themselves in the~~ damage of the said Iron & Castings ~~premises they are the said Iron & Castings~~ according to the true intent and meaning of this policy as herein expressed (excepting all losses on money, bullion, pro=missory notes and other evidences of debt). And the amount to be paid by this Insurance Company in case of loss shall be such proportion thereof as the sum herein insured is to the whole sum ~~of~~ at risk –

And in case of any loss or misfortune aforesaid it shall be lawful, and it shall be the duty of the assured, their factors, servants and assigns to sue labor and travel for, in and about the defence safe=guard and recovery of the said Iron & Castings without prejudice to this assurance to the charges whereof, of the said Insurance Company will contribute, in proportion as the sum assured is to the whole sum at risk –

And so the Insurance Company aforesaid are con=tented and do hereby bind the Capital Stock and other common property of the said Alton Marine and Fire Insurance Company to the assured their heirs, executors, administrators and assigns for the true performance of the premises, confessing them=selves paid, the consideration due unto them for this assurance, by the assured, at and after the rate of One per centum on $100

And it is hereby agreed, that if the assured shall have made any other assurance upon the said Iron & Castings prior in date to this policy then the said Alton Marine and Fire Company shall be answerable for so much only as the amount of such prior

9 assurance may be deficient towards fully covering the property at risk - But in no case whatever of double assurance, shall there be any return of premium. It is further agreed that this Policy shall become void upon any assignment thereof unless notice of the same be forthwith given to this Company.-

Conditions

And in case of loss the assured is to abate two and a half per cent on the sum insured, and such loss shall be paid in Sixty days after proof of loss and proof of interest the amount of the premium note, if unpaid, and all other debts, dues and demands of said Company against the said assured being first deducted - and the parties further agree, that the assurers are not liable for any partial loss, nor for any general or particular average unless said loss or average shall amount to ten per cent of the value insured - In Witness Whereof the said Alton Marine and Fire Insurance Company have affixed their Seal to these presents and caused the same to be signed by their President and attested by their Secretary at their office in the town of Alton, in the State of Illinois - But this Policy shall not be valid until countersigned by John W. Ruel Esq. agent for for this Company St Louis Mo

S S

B. I. Gilman President

E. Marsh Secretary.

Countersigned at Saint Louis Dec.r 3.d 1835 } John W. Ruel Agt.

Receipt Received from the Alton Marine and Fire Insurance Company Six thousand eight hundred and Ninety Seven Dollars & fifty four cents in full

of all damages & losses specified & provided for in the within policy. April 21. 1836.

Woods Stacker & Co.

Exceptions Contd

A loss happened under the policy. Witness was a director in the Said Company at the time & was Solicitor for the Company and as such adjusted the loss with the Said John Stacker one of the immed firm of Woods Stacker & Co. The property was abandoned and accepted by the Company. The Insurance was on property Shipped on the Steam Boat New Companion Soon after the loss and payment by the Company N B. Dickinson made a proposition to the Company to raise the cargo of the New Companion and was referred to me, the proposition of Dickinson was to raise the pig metal and pipe an agreement was made with Dickinson to raise the pipe and when raised Dickinson was to have two thirds and the plaintiff one third. The Company made an advance to Dickinson of about $200. to enable him to proceed. and the Company was to have control of the pipe until the advance was paid. The agreement Signed by Dickinson now Shown to me is the agreement under which the advance by the plaintiff was made.

Agreement

In case of the cargo of N.B. New Companion it is agreed that for any monies paid to N. B. Dickinson by the Alton M. & F. Ins Co or advanced to him or on his drafts on Said Co that Said Alton M & F. Ins. Co are to be paid the monies So advanced or paid out of the cargo of Said Boat & 12 per cent Int on Same before division of cargo or proceeds between the

11 parties according to agreement between the Same
Alton June 23. 1842.
N. B. Dickinson
Draft now Signed Shown to me was Signed by
Dickinson
Draft. $200 — St Louis June 24th 1842.
Ninety days after date please pay to E & A.
Tracy or order Two hundred Dollars for value
received and charge to a/c of Jours &c
To N. B. Dickinson
Alton Marine & Fire
Ins. Compy. Alton Ills.
(Endorsements) E & A. Tracy
Recd pay W. G. Clay
This draft was accepted and paid by the Company
the money was paid by the Company and I under=
=Stand from Mr Dickinson that the pipe was
in the possession of E. & A Tracy -
Cross. Examined - Witness Said that records of the
proceedings of the Company were kept, is under the
impression that the abandonment of the pig metal
& pipe insured was in writing, but am not certain
of that fact. here Witness was Shown affidavit of
Stacker Says that the affidavit Shown to him was
received by the Company as evidence of the loss -
Dickenson was employed to raise the pipe after
the loss accrued & was paid. It was a lot of ten
inch water pipes - I Saw part of the pipe at
the yard of N. W. Davis & Co.
The plaintiff then called Edward Tracy who tes=
=tified that Dickinson made a contract with the
plaintiff to raise the pipe Sunk and the new Com=
=panion - Dickinson was to have two thirds and the

12 Company one third of the pipe raised - Dickenson went down to the wreck but soon came back & said he must have some money to go on with - and ap=plied to the Company for an advance - Dickenson wrote to Marsh the Secretary of the Company who came down to St Louis and agreed to make advances & did advance $200: under the agreement that E & A. Tracy were to take all the pipe & hold them as Security on the advances made he was to hold the pipe as agents for the Company under this arrangement Dickenson raised a large portion of the pipe & put them into the possession of E & A Tracy - Dickenson & Marsh were both present when the agreement was made - Dickenson assented to the arrangement - The pipe was placed on a lot in the lower part of the City in our charge but whether put there by Dickenson or by E. & A. Tracy, cannot say but was in possession of them - The pipe was to have been sold by E & A. Tracy if possible to the City for the use of the Water Works - afterwards Mr Marsh and the witness went to the lot where the pipe had been placed and they were gone but was after=wards seen upon a lot in the upper part of the City - Witness understood upon a lot of R. N. Moore on Collins Street - Witness never saw them again - Witness never knew Robbins in the matter at all - Witness said he did not recollect the quantity of pipe - it was ten inch water pipe

Cross Examined - Witness said he never saw the pipe after they were removed from the lot down town -

Wits Smythe Isaac Smythe was then produced and testified that

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he Knew the parties to this Suit - that Mr Marsh Secty requested him to call upon Mr Robbins about the pipe in question - I saw Mr Robbins he Said he had the pipe, bought them of Dickenson for a debt that Dickenson owed him this was about four or five years ago perhaps in 1804 - Cross Examined he Said they were the Same pipe that Mr Tracy had possession of. Mr Robbins Said he did not Know the Insurance Company at all in the matter, he took them of Dickenson for an old debt -

Witness Kruse

Judge Kruse was then recalled on the part of the plaintiff and testified that he conversed with Robbins twice before Suit brought by the plaintiffs in this case - Robbins Said he had got the pipe of Dickenson at the first conversation - Witness Said that he explained to Robbins the position of Dickenson with the Company Some of the pipe perhaps Eighty or a hundred had got into the possession of N. N. Davis & Co, I asked them to deliver the pipe but they refused they claimed a lien for freight, a Suit was about being brought in replevin, Dickenson and myself called upon Robbins to go Security in the Replevin bond but he refused to do So - I think a Suit was commenced but whether in the name of Dickenson I cannot remember but think it was - I am Sure it was for by his death the Suit abated - Robbins told me that he had the pipe and I am under the impression that he told me he had Sold them to the City but of this I am not certain - Robbins Said he claimed the pipe because he had advanced money to Dickenson and Dickenson had turned

over to him, the first conversation was in the fall of 1842 as I now think, at any rate it was at the time I commenced Suit for Dickenson to recover a part of the pipe. It was at the first conversation with Robbins that I told him of the Situation of the property

Cross Examined. He Said he did not distinctly remember in whose name the replevin Suit was brought the record would Show but think it was in the name of Dickenson. Robbins refused to go Security, he Said he had advanced enough to Dickenson. The pipe that got into the possession of Davis the Company never got.

Witness Brooks

Peter Brooks was then called and testified that he was Superintendent of Water Works in the City of St Louis and as Such purchased from the Defendant a quantity of pipe for the City of St Louis, the pipe that I purchased lay at the time upon Collins Street. I bought of Robbins for the City 40.945 pounds at 2½ cents per pound amounting to $1023.$\frac{62}{100}$ as appears from the bill Shown to me.

Bill allowance & Receipt

The City of St Louis

1845 — Dr. To S. H Robbins

For Iron Pipe — Water Works

Augt. 13. for 54 - Ten inch Pipe 40.945

@ 2½ $1023.63

$1023.63

I certify to the correctness of the above account and request the Auditor to issue his warrants on the Treasurer in favor of S. H. Robbins for the above Sum of One thousand and twenty three $\frac{63}{100}$ Dollars and charge Water Works appropriation

15 (See Ordinance No 1537)

P. Brooks Supt. W. W.

August 30. 1845. This account allowed $1023.63

Richd B. Dallam Aud^r.

Received St Louis this third day of October 1845 Warrants No 100 for the ten hundred & twenty three $\frac{63}{100}$ Dollars in full of the above account $1023.$\frac{63}{100}$ -

L. A. Benoist & Co.

Signed Duplicates

Witness further stated that the audited account shown him is for the same pipe sold by him to Robbins. The pipe bought by me for the City of Robbins were ten inch water pipe, do not know where they came from - Robbins brought them ~~from~~ to the reservoir, they lay on a lot on Collins Street but do not know that they were the same pipe that was in possession of Tracy's. Do not know where they were cast and cannot tell whether they had been sunk or not - They were bought for the City of Robbins and the account seems to have been allowed of my own knowledge; I do not know that Robbins ever received pay for the pipe but the City was then and still is solvent -

The plaintiff also proved that Benoist & Co. received Warrants from the City for the amount of the pipe (Bill, Warrant & Benoist & Co's receipt inserted above).

The plaintiff closed his case.

The defendant then asked the Court to instruct the Jury that on the evidence the case the plaintiff was not entitled to recover which the Court refused & to which refusal the defendant by his Counsel did then & there except.

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Deft's Instruction Given

The Court then on motion of the defendant through his Counsel gave the following instruction

"Unless the Jury believe from the evidence that Robbins received the money on the Sale of the pipe spoken of to the City they will find for defendant".

And ~~on motion~~ afterwards and on the 18th day of November the Defendant filed his motion for a new trial in the words and figures following

Motion for a new trial

"And now comes the defendant by his Counsel and moves the Court to set aside the verdict and judgment in this cause and to grant him a new trial for the reasons following:

1. The verdict is against evidence –
2. It is against the weight of evidence
3. It is against law & instructions of the Court
4. It is against law & evidence.
5. The Court illegally refused the instruction asked by the defendant.
6. The Damages are excessive

Krum & Whittlesey attys p.d.

And afterwards and on the 21st day of November the Defendant by leave of the Court filed his further reasons and affidavit in support of his motion for a new trial –

Further reasons for a new trial & affidavit

The defendant as a further reason for setting aside the verdict and granting a new trial in this assigns the following that he was taken by surprise by the testimony of Edward Tracy & John M. Krum and also the facts set forth in the following affidavit

Whittlesey atty p.d.

County of St Louis. Set. Solomon H Robbins

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being Sworn upon his oath Says that the pipes Spoken of by the witnesses or So much thereof as came into his possession and Sold to the City of St Louis was bought by this defendant of Horace B. Dickenson who raised the Same from the wreck of the Steamboat, that this affiant advanced the freight on Said pipe from the wreck to this City and took possession of the Same while they were lieing on the wharf in the City of St Louis and removed them thence by the order of the Harbor Master of the City of St Louis to a lot in the lower part of the City belonging to Titus Hale and afterwards removed them to a lot of his own on Market Street where they remained until he Sold the Same to the City of St Louis

Affiant further States that at the time of the purchase of Said pipe from Horace B. Dickenson he Knew nothing of the claim of Said Insurance Company to Said pipe nor did he Know that they claimed a lien upon the Same for advances that he bought and took possession of Said pipe very Shortly after their arrival in this City as above Stated – Your affiant was therefore taken entirely by Surprise at the testimony of Edward Tracy in testifying that the pipe were placed in the possession of E & A. Tracy for Said Company by the Said Dickenson and that they were removed from the wharf by the Said E & A. Tracy or by the Said Dickenson, whereas they were not removed by either but were removed by this affiant as above Stated – Your affiant was therefore taken entirely by Surprise by the testi

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=mony of the Said Edward Tracy which testimony he believes to have been mistaken and the State=ment there made erroneous and it may be that the Said Tracy Spoke of the pipe which were in the possession of N. W. Davis & Co. as testified by John M. Krum and with which pipe this de=fendant had nothing to do as they never came into his possession neither does he know what became of them — Your affiant further States that he is also entirely taken by Surprise by the testi=mony of John M. Krum in Stating that this defendant knew of the arrangement between the Said plaintiff and the Said Dickenson before this affiant took possession of the pipe after=ward Sold to the City by him as above Stated affiant States that the Said John M. Krum was mistaken in Said Statement about the time of this defendant learning the fact that the plain=tiff had any interest in Said pipe as that fact did not come to the knowledge of this defendant until after the Sale of Said pipe to the City by Said defendant. This affiant States that he has no recollection of having any conversation with Mr Krum about the matter although it may have been the case but this affiant most expressly denies all knowledge of the claim of the Said Company at the time this defendant bought ~~and~~ Said pipe and took them into possession and most expressly denies that the pipe that came to this affiant's possession ever were in the actual possession of Said E & A. Tracy as agents for the plaintiff but on the contrary Said pipe were in the possession of this defendant as stated

19 above and before that time were legally in the possession of Dickenson who had by law a right to sell same — Affiant further states that the case made out by plaintiff turned out so differently from what he expected and from what he had told his counsel would be proved that he was taken entirely by surprise by the testimony offered as affecting him with notice of facts of which he avers he had no knowledge. Affiant expects to prove if a new trial be granted that the conversation referred to if any such occurred took place long after the defendant was in possession of the pipe bought by him of said Dickenson and he further expects to prove if a new trial be granted him that at the time of the purchase of the pipe by this defendant the plaintiff was not in possession as above stated and that this defendant had no notice of the claim of the plaintiff at the time of his purchase and taking possession of said pipe and that the pipe spoken of by some of the witnesses was never in possession of this affiant — Affiant states further that in a contest between two innocent parties, who shall bear the loss arising from the acts of a third, that in this whole matter he has acted uprightly & justly without notice of the equities of the plaintiff or his rights at law and that the damages are excessive beyond the amount claimed in the Bill of particulars and unjust.

Defendant further states that until the trial of the cause developed the facts he was entirely ignorant, that it would be necessary for

20. him to show the want of notice by this defendant and that the plaintiff never was in possession as he had no notice or idea that such facts would be attempted to be proved at all but supposed on the contrary that the plaintiffs claim was founded entirely on the abandonment under the policy and that the defence would be under the possession of Dickenson as Salvor with a lien for the costs expenses and Salvage and this defendant expected to set up said defence and so informed his Counsel who was as much surprised as this defendant at the evidence offered

Defendant expects if a new trial be granted him to produce evidence to show that plaintiff was not in possession of the pipe that came to this defendant and that defendant had no notice of plaintiffs claim at the time of his the defendants purchase and possession as aforesaid nor until sale by this defendant - He therefore prays that a new trial be granted him not only for the reasons stated in the motion already filed but also for the reasons stated herein &c. Defendant also says that he is informed that Mr. Krum at the time of the trial was an interested witness as this affiant believes being a Stockholder in the Insurance Co & that from ignorance of this fact he did not inform his Counsel of it so as to object at the trial

For this reason also defendant prays a new trial &c.

S. H Robbins

Sworn to and subscribed this 21st day of November 1848. P. Tispett Clk

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which motion for a new trial the Court afterwards on the 13th day of December 1848. overruled to which overruling the defendant by his Counsel excepted at the time and prays that this his bill of Exceptions may be Signed & made part of the record in this cause which is done. Done at St Louis Dec. 13th 1848.

M. Blair Judge

The following affidavit for appeal was filed December 14th 1848.

Affidavit for appeal

Solomon H. Robbins being Sworn upon his oath says, that the appeal prayed for in this case is not made for vexation or delay but because he believes himself aggrieved by the Judgment of this Court.

S. H. Robbins

Sworn to and Subscribed this 14th Decr 1848.

P. Tippett clk

and the following further proceedings were had herein viz: September Term 1848. December 14th 1848.

Appeal

Recognizance

Now at this day come the defendant by attorney and file an affidavit herein and on his motion an appeal is granted him from the decision herein to the Supreme Court. Whereupon Solomon H. Robbins as principal and Henry Holmes and Robert McO'Blenis as Securities Severally acknowledge themselves indebted to the Alton Marine and Fire Insurance Company in the Sum of twelve hundred dollars to be levied of their respective goods and chattels lands and tenements. Yet upon condition that Solomon H Robbins shall prosecute his appeal now taken with due diligence to a decision in the Supreme Court, that if the judgment appealed from

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is affirmed or his appeal dismissed he will pay the damages and costs that have been recovered against him by the judgment of the St Louis Court of Common Pleas together with interest that shall grow due thereon, and that he will also pay all costs and damages that may be adjudged against him in the Supreme Court upon his appeal then this recognizance to be void otherwise to be and remain in full force and virtue.

State of Missouri
County of St Louis } ss.

I, Philip Tippett Clerk of the Saint Louis Court of Common Pleas within and for the County aforesaid certify the foregoing to a true and complete transcript of the record and proceedings in the case of "The Altow Marine and Fire Insurance Company against Solomon N. Robbins as the same remain in my office

In Testimony whereof I hereto set my hand and affix the Seal of said Court at office in the City of St Louis this Sixth day of February Eighteen hundred and forty nine

P. Tippett Clk

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Madison T. 1849

The Alton Marine &
Fire Insurance Co.
vs } Transcript
Solomon H. Robbins
apt.

Filed Feby 13. 1849.
H. L. Boon clk.

$300 paid by E. S. Robbins

Solomon H. Robbins pltff. in Error
vs
The Alton Marine & Fire Ins. Co
Deft. in Error } In Sup. Court

This action was brought by the Alton M. & F. Insurance Company to recover the value of a quantity of Iron Water pipes. - The declaration contained the general counts including a count for money had and recieved
Plea Gen. Issue -

On the trial of this case on the part of the plaintiff below, it was proved, that the Alton Marine & Fire Insurance Company insured a quantity of Iron pipe, shipped on the Steam Boat New Companion, that by the sinking of the Boat the pipe was lost, and that Woods Stacker & Co. the owners abandoned the pipe to the Company and recieved the amount of the insurance. Soon after the abandonment of the pipe to the Company H. B. Dickerson agreed with the Company, to raise the pipe, and when raised Dickerson was to have 2/3rds of the pipe and the Company one third, after this arrangement was made with Dickerson, to raise the pipe, he applied to the Insurance Company for an advance of money to enable him to proceed: the Insurance Comp. advanced to Dickerson ~~to~~ two hundred dollars to enable him to proceed to raise the pipe, under an agreement, that all the pipe raised should be placed in the hand of Mes. E. H. Tracy, who were to hold them for, for security to the Company for such advance, under such arrangement Dickerson raised a quantity of pipe, which were placed in the possession of E. H. Tracy with a request from both Dickerson & the Company, to sell them to the City. The pipe were placed on a lot in the lower part of the City, and some time after Mr. E. Tracy and the Secretary of the Company went down to look for them but they were gone, after the Company ascertained that the plaintiff in Error had got the pipe, they sent an agent to him

and he admitted that he had the pipe, and said that he took them of Dickenson for an old debt. I did not know that the Alton M. & F. Company had anything to do with these - The plaintiff below also proved that Robbins ~~said~~ sold the same water pipe to the city, for the sum of $1023.62 and that a ~~[illegible]~~ warrant for that amount was issued to him and paid on account of such sale: upon this case the Counsel for the plff. in Error asked the Court below to instruct the Jury, that under the evidence, the Deft. in Error could not recover which was refused. - The Counsel for the plaintiff in Error then asked and the Court gave the following instruction

"Unless the Jury believe from the "evidence, that Robbins recieved the money "on the sale of the pipe, spoken of, to the city, they "will find for Deft"

The Jury found a verdict in favor of the plaintiff below for the sum of $726.34/100 - Robbins then filed a motion for a new trial, which was mainly founded upon an affidavit made by the plaintiff in Error, in which he sets forth substantially, that he bought the pipe in question of H. B. Dickenson, and sold them to the city, that he Robbins advanced freight upon the pipe, that they were placed on a lot in the lower part of the city, and afterwards removed to a lot belonging to him on Market Street, & lay there until sold to the city; that he did not know of the claim of the Company upon the pipe at the time he took them, That he was taken by surprize by the testimony of E. Tracy & Judge Krum, that Krum was mistaken in his testimony - That the case turned out in proof entirely different from what he supposed it would, that he expected to prove if he could get a new trial a different case from the one made that he has acted justly and upright ly, and without notice of any of the Equities of the plaintiff: that the damages are excessive, &c. that he had no idea that such a state of facts would be proved

as was proved. and that he had marked out a different line of defence, that he expected to prove that Judge Krum was interested at the time he swore &c — The Company after verdict, remitted $20. of the damages - a new trial was denied & the plaintiff in Error comes here on appeal

The Defendant in Error submits.

I. The verdict was right & is supported by the law & the evidence —
— The case seems a naked one —

II. The only question raised, by the instruction asked in the court below was, that the Ins. Co. could not recover unless the Jury found that Robbins recd. the Money from the City on the sale of the pipe.
The Jury found as a Matter of fact that Robbins did recieve the Money, & the finding of a Jury upon a Matter of fact will not be disturbed by this Court

Dooley v. Jennings 6. Mo. 63
Todd Sal v. Boone Co. 8. " 437
Folkerson v. Ballinger 9. " 838

III. The affidavit upon which the plff. in Error relies is wholly insufficient in any point of view - Either of surprise or of newly discovered evidence —

1. To entitle a party to relief on the ground of surprise there must be merits; and the surprise must be such as care and prudence could not provide against it.

Bell v. Thompson 2. Chitty 144
4. Johnson N. Y. Rep. 77
1. Wilson 98
Graham on New trials 174.

2. It is a well settled rule that a new trial will not be granted, because the party came to trial unprepared.

Cook v. Berry 1. Wilson 98
4. John. N. Y. Rep. 77
2 Caines " " 129
8 Cowen " " 273
Graham on New trials 176

3. The Court will not regard the statement of the plaintiff in error, that he was surprized by the testimony of Judge Hunn & Ed. Nacy

Because no evidence was called to contradict or impeach them.

Bell v. Thompson 2. Chitty, Rep 194

Because if he shows a surprise he does not show how he was injured by it.

1. Aiken

Blake v. Hon 1st Aikens Vt. Rep 306 —

Because he does not even pretend, that if a new trial was granted to him, he could either impeach or contradict their testimony in any particular, nor will a new trial ever be granted to ~~enable~~ enable a party to impeach a witness on the ground of his interest

subsequently discovered
Turner v. Pearte 1. Term. 717
Graham on New trials 228

4. A new trial will never be granted to enable a party to produce evidence, which he might have produced at the trial by using ordinary diligence

5. Wendell 127
1. Wilson 98

The plaintiff in error was fully apprized of the nature of the demand against a bill of particulars was furnished, and he was bound to have prepared his case, and produced his witnesses if he had any.

1. Strange 691
Graham on new trials 196. 198. & cases there cited

5. It is a novel application to a court of law to apply for a new trial because the case turned out in proof different from what the defendant expected; and that if a new trial should be granted the party expected to prove a different case from the one made.
See opinion in the case of Shepard v. Citizens Ins. Co. 8. Mw. 275 —

The plaintiff in error does not even tell us, how he expects to make a different case, nor by what witnesses, nor what witnesses will swear to. he should not only show this

court in what particulars he expects to make a different case but should produce the affidavits of witnesses by whom he expects to prove the ~~diffe~~ different case so that this court can see from their statement what the plaintiff in error can prove to vary the case made

Graham on New trials 463 et seq. & cases there cited

6. The plaintiff in Error has not even ventured to make an affidavit of merits which by law it is necessary for him to make

Meechum v. Judy 4. Mo. 363.
Elliott v. Leak " " 543

That he has acted uprightly and without notice of the rights of the Deft. in error does not help him, nor does it amount to an affidavit of merits. Nor has he shown diligence.
Smith v. Matheus 6. Mo. 600.

7. The Deft. in Error remitted of $20. of the damages complained of.

Leslie Wood

Salomon H. Robbins
Pltff in Error

vs.

The Aetna M. & Fire
Insurance Company
Deft. in Error

Points & Brief for
Deft.

Leslie Hord
for Deft. in Error

Solomon H Robbins
v
Alton M. & F. Ins. Co

Supreme Court
March Term 1849

The facts of this case present three questions, for the decision of the Court, upon the first two of which turn the error of the decision of the Court below, in refusing the instruction asked by defendant, and upon the third the error in refusing to grant a new trial

1st. It appears by the facts of the case that by the agreement between Dickenson & the Co. that D. was to have two thirds of the pipe for his compensation for wrecking them. He was therefore tenant in common with the Company, and having sold the pipe to Robbins as appears by the testimony, Robbins became entitled at least to the two thirds of Dickenson and ~~was~~ became tenant in common with the Company, owning two thirds himself and the company one-third. Upon this state of facts, we take the position, that one tenant in common cannot sue his co-tenant at law in assumpsit. The only case in which one cotenant can sue the other, is where one has destroyed the chattel, and then the other may have an action on the case for destruction or conversion. ~~The only~~ With this exception, the only remedy one tenant in common has against the other is an action of account or his suit in chancery. The rule that joint owners of a chattel cannot sue each other at law is well established, ~~as~~ for example, the owners of a ship or vessel, partners in trade, and the only exception is that given above, of an action on the case where the property has been destroyed. This rule is well illustrated by the rule, that all tenants in common, or joint owners must sue jointly. In proof of the above propositions see 1 Chit Pl. 91. Thompson & Price v Elliot 5 Mo R. 118 Smoot v Wathen Admr 8 Mo R 525 Even in trover, one tenant in common cannot sue another unless the chattel is destroyed, and a sale as it conveys only the vendors own right is no destruction Fennings v Ld Grenville 1 Taunt R. 241. In Heath v Hubbard 4 East R. 121. the court decided that the sale of a chattel was not equivalent to its destruction and that trover would not lie, and the same point was decided in

Danforth v Webb 1 Day R 301. See also Holliday v Camsell 1 Ten R. 658 Cubit v Porter 8 Bob. 257. ~~Farr v~~ Emmons et al 9 Wend 338 Wheeler v Horne Willes 209. If one tenant in common make repairs he cannot sue in a pumpsit without demand and refusal to repair Mumford v Brown 6 Cow R. 475. One tenant in common cannot sue the other for portion of rent Sherman v Ballou 8 Cow 304. One partner cannot sue the other at law until accounts are settled Beach v Hotchkiss 2 Conn R. 425 Webster v Everson 1 Wend R 552. Murray v Bogert 14 J R. 318.

2nd. The plaintiff & Dickenson having been tenants in common & Dickenson having sold to Robbins in payment of a preexisting debt, and the Company having sued in a pumpsit, such suit is a ratification of the sale by Dickenson, and all the consequences of such sale are therefore ratified. Besides it appears by the evidence that Dickenson was authorised by Tracy the agent of the company to make a sale, it was therefore on that supposition a valid sale. At any rate they cannot be allowed to blow hot and cold to say that the defendant has illegally taken their property and at the same time sue him in a pumpsit for property he has bought of their colenant. By suing in this form of action they have declared the sale by their colenant a valid sale and must therefore look to his estate for any conversion ~~that~~ of which he may have been guilty of. See on this point Smith v Hodson 4 T. R. 211. Wilson v Poulter 2 Strange 859 Billon v Hyde 1 Atk. 128 Birch v Wright 1 T. R. 378 Brewer v Spanow 7 Bob. 310 Thorpe v Thorpe 3 B. & Adol 580 Hovil v Pack 7 E. R. 164. Ferguson v Carrington 9 Bob. 59 Selway v Fogg 5 Mee & Wels 83 Butler v Gable 1 Watts & S. 108 Butler v Hildreth 5 Met. R. 49. Benoist v Darby decided last October Term. affirming the decision of Smith v Hodson.

3rd The court below erred in refusing a new trial to the new trial. The affidavit of defendant showed that he was entirely surprised by the evidence offered and the case made by the plaintiff. It was a case which he had not expected, of which he was not informed either by the declaration, or by the bill of particulars, and the affidavit shows that if ~~he~~ a new trial ~~were~~ granted that he could disprove the greater part if not the whole of the plaintiffs case. He came prepared to meet one case, and found on trial one of an entirely different character. He was surprised. That surprise is a good ground for a new trial, see Hite v Senhart 7 Mo R. 22. For the case he had expected to meet, he had made every preparation & found on trial that all his preparations were useless, that he was not prepared for the proof offered. ~~On the groun~~ See Edie v East India Co. 1 Wm Bl. 298 2 Burr. 1216 S.C. Roufrenoy v Peale. 3 Taunt. R 484 3 B & Ad. 328 5 B & A. 9. 1 Burr. 352

The court should also have granted a new trial because the damages were excessive. The plaintiffs at best were only entitled to one-third of the amount for the defendant sold the pipe, being himself the owner of the other two-thirds by purchase from Dickenson, and there was no proof at all to show that he knew any thing of the mortgage of Dickenson to the Company at the time he purchased. He knew Dickenson only as the owner, as it appears from the testimony of Krum, the agent and solicitor of the company that Dickenson brought suit for the pipe in his own name, as if he was the sole owner

~~Danforth v Webb 1 Day Rep. 301. One tenant in common cannot maintain trover against another. Holliday v Camsell 1 J.R. 658 Tenant in common cannot maintain a pumpset against his coteneur Sherman v Ballou 8 Cow R. 304 for a portion of rent received. Mumford v Brown 6 Cow R. 445. The doctrine that one tenant cannot, except in trover for destruction of chattel, sue his coteneur will also be found~~

and so recognized by the company. The damages were also excessive as exceeding the amount claimed in the bill of particulars, in which no interest is claimed.

For these reasons the Appellant claims that the judgment of the court below should be reversed as erroneous.

Whittelsey
Counsel for Appt.

Supreme Court
March Term 1849

Solomon H. Robbins
v
Alton Marine & F. Ins Co

Appellants Brief

Whittelsey
Counsel for Appt.

Supreme Court

Solomon H Robbins } March Term 1849

vs

Allow M & F. Ins Co } This was an action for money had and received as stated in the bill of particulars. To maintain the action the plaintiff showed a policy of insurance upon iron pipe shipped on a steamboat, and an adjustment & settlement of the loss. Then that one H.B. Dickenson made a contract with the Co, to wreck and raise the pipe for which he was to have two thirds of the pipe. For an advance made by the Company to Dickenson his share of the pipe were to be held by the company. The pipe were raised by Dickenson & brought to St Louis, and as testified by Mr Tracy were delivered on the levee to E. & A. Tracy as agents for the plaintiff. They were afterwards removed to a lot in the lower part of the City, but by whom it is not shown, or known. They were again removed from that lot, but by whom is not shown or known. The defendant Robbins sold some pipe of a similar description with those raised by ~~the~~ Dickenson to the City, but there was no proof that he ever received any payment from the City. The only proof upon that subject was a receipt of S.A Benoist and Co for a warrant on the treasurer at the foot of the bill of pipe sold to the City by Robbins.

Robbins claimed that he bought the pipe from Dickenson, & that he did not know ~~Robinson~~ the company or the transaction. Robbins was also called upon before this suit was brought, ~~for~~ the pipe but always claimed that he had bought them of Dickenson. There was no proof that at the time Robbins bought the pipe that he knew any thing of the claim of the Company or of their claim upon Dickensons share of the pipe. He was informed of it before this suit was bought. It was also shown that Dickenson brought suit in his own name for some pipe that were raised from the wreck, ~~but not of the~~

In the affidavit of the defendant in support of the motion for new trial, he alleged that he was taken entirely by surprise by the character of the claim, and the evidence, that he came prepared for a different case, and that if a new trial

were allowed him, he expected & would be able to disprove the case made by the plaintiff &c.

The instruction asked by the defendant. That upon the evidence offered by the plaintiff he was not entitled to recover," was refused by the court as was also the motion for a new trial. & thereupon the defendant appealed

Statement of Case

Supreme Court
March Term 1849

Robbins
&
Alton M. & F. Ins. Co
Statement of case

Solomon H Robbins
v
Alton M. & F. Ins. Co

Supreme Court
March Term 1849

And now comes the appellant and assigns for error that the Court below, erred

1st In refusing the instructions asked by the defendant below

2nd In the instruction given by the Court

3rd In refusing to grant a new trial for the reasons assigned in the motion of defendant.

Whitlesey
Counsel for Appt.

Supreme Court
March Term 1849

Solomon H. Robbins

vs

Alton Marine & Fire Ins. Co.

Assignment of Errors

Whittelsey
Counsel for Appelt.

Filed March 22. 1849.
H. L. Boon Clk p.t.

Solomon H. Robbins Pltff in Error
vs
The Alton Marine & Fire Insurance Company Deftt in Error } In Sup. Court -

And the said Alton Marine & Fire Insurance Company by their attorney, comes and says, that there is no Error either in the record and proceedings aforesaid, or in giving the Judgement aforesaid, and prays, that the judgement aforesaid in form aforesaid given, may be in all things affirmed &c

Leslie Ward
Attys for Deftt. in Error

28.

In Sup. Court

Salomon H. Robbins
vs. Plff. in Error

The Alton Marine & Fire
Insurance Company
Defts in Error

Joinder in Error
(in nullo Est erratum)

Leslie Ward
Attys. for Defts in Error

Filed March 22. 1849
H. L. Boon clk. p. t.

Robbins
vs
The Alton M. & F. Ins. Co.

By the sinking of a steam Boat, the Alton Marine and Fire Insurance Company became the owners, by abandonment, of a quantity of Iron Water Pipe. Shortly afterwards one Dickinson entered into an agreement with the Company, the substance of which was, as finally concluded, that the Company was to advance him two hundred dollars to enable him to proceed with the enterprise of raising the Pipe, and that when it was effected, he was to have two thirds and the Company one third of it — the whole, however, to be placed in the hands of E. & A. Tracy, who were to hold it as security for reimbursing to the Company the money thus advanced, together with twelve per centum interest upon it, as allowed by the law of Illinois. The money being advanced, and Dickinson having succeeded in raising a portion of the pipe, it was placed in the possession of the Messrs Tracy, with a request from both Dickinson and the Company that they should sell it to the City of St. Louis. It was subsequently removed from the lot upon which it had been placed in the possession of the Tracy's — whether before, at the time or after its sale by Dickinson to the defendant it is deemed unnecessary to enquire, as it is not pretended that either

the Tracy's or the Company had any agency in doing it. Robbins afterwards sold the pipe to the Corporate authorities of the City for the sum of ten hundred and twenty three dollars and sixty two cents, and received, in the ordinary manner, its official order and warrant for the money. As neither the testimony which has been preserved, nor the affidavit for a new trial, suggests any doubt respecting the proper redemption of the warrant in question, and as it is moreover proven that the Treasury of the City was solvent at the time, we think the jury, who were instructed that "unless they believed from the evidence that Robbins received the money on the sale of the pipe, they would find for the defendant", were warranted in finding that he did receive it. The repeated decisions of this Court (a) refusing to disturb the finding of a jury under such circumstances, need scarcely be referred to. In addition to this, we are not without authority that "an order for the payment of money is competent evidence under a count for money had and received. (b.)

(a) 6 Mo. 63. 8 Mo. 437. 9 Mo 838.

(b.) 5 Pike, 401.

It is objected however, in the argument, but for which the point would probably have been unapparent, that the Company having sued Robbins in assumpsit, and the parties being tenants in common, the action was misconceived. How this might have been, if the possession and the title (whatever their nature) had not been vested by each party in the Tracy's, for

the specific purpose mentioned, need not here be discussed. Nor is it necessary, as it seems to us, to examine the intermediate means whereby the defendant came into the subsequent possession. Unless he purchased the interest and the lien of the company its rights remained unimpaired; and having found the defendant in the possession of a sum of money, derived from the sale of property out of which they were to have been paid a specific and proportionate part, we are unable to perceive the necessity of a resort to Chancery, or any other proceeding
(C) 15. Conn. 52. in preference to the present,(C) in order to settle with fairness and facility both the rights of the plaintiffs and the liability of the defendant. We perceive therefore no error in the Court's refusal to instruct the jury that "on the evidence in the case the plaintiff was not entitled to recover" — a mode of presenting a legal question, of which this Court but repeats its previous reprehensions, for the purpose of adding that stronger reasons must exist in the future than in the past, if a point thus raised is again entertained.

Concerning the alleged excessive damages, it is found that after adding to the sum advanced the interest which accrued upon it until the finding of the verdict of the jury, and adding to the sum of three hundred and forty one dollars and twenty cents, (which was the third part of the proceeds of the sale to the City) the interest which in like manner accrued upon it, the

aggregate sum thus produced exceeds that for which the Plaintiff took his judgment. We cannot therefore disturb the judgment on this ground.

The only remaining reason for awarding a new trial in this case is held to consist in the alleged surprise of the defendant. As this, however, when stripped of the ingenious drapery of the affidavit, resolves itself into the every day complaint of the losing party, either that he was mistaken as to the nature of his case, or in the testimony of the witnesses who swore upon it, we apprehend that even the courtesy which should at all times be cultivated between the bench and the bar, does not require of us a more specific or extended demonstration of the insufficiency of the reasons assigned.

Perceiving, then, upon a view of the whole case, no reason to justify the interposition of this Court, the judgment of the Court of Common Pleas is affirmed, with costs.

Jas H. Birch.

We concur

I concur in affirming the judgment below, entertaining the opinion that the point of the parties being tenants in common, was not properly raised in the inferior court and that that court was not called on to decide that point

John F Ryland

I concur Wm B Napton

Solomon H. Robbins,
vs } Opinion
The Alton M & F. Ins. Co.

Opinion of the Court.
Birch Judge,

March Term 1849.

Filed March 28. 1849.
H. L. Boon, clk.