Graham's, James G. Adm. VS Soutler, James St. Louis CO 176/1

17

$5.085

Affirm

1

State of Missouri }
County of St Louis } Be it remembered that on the 18th day of November, 1850, there was filed in the Office of the Clerk of the Circuit Court, within and for the County aforesaid, the following papers from the Probate Court of St Louis County; which are in the words and figures following, to wit;

James J. Soutter
Robert Soutter jr.
Alexander Bell,
vs
The Estate of James. G. Graham, decd.

In the Saint Louis Probate Court of June Term, 1850.

I, James. J. Soutter, of the firm of Soutter Brothers & Co., do make affidavit and say, that the said firm of Soutter Brothers & Co., composed of James. J. Soutter, Robert Soutter jr. and Alexander Bell, have a demand against the estate of James G. Graham, late of the City of St Louis, and State of Missouri deceased, for the sum of Five Thousand and eighty five dollars and ninety three cents, being the balance of account due said firm from said Jas. G. Graham, to wit;

James. G. Graham, Exrs, decd.
In ape with Soutter Brothers & Co. Dr.

To our three Drafts on, and accepted by him, dated 1848. Drby 1. at 1 year.		$ 1695.31
" " 1 " 2 "		1695.31
" " 1 " 3 "		1695.31
		$ 5085.93

That to the best of my knowledge and belief, I have given in the above statement of the demand of the said firm, all credits to the said estate, for all payments and offsets to which it is entitled, and that the balance claimed of $ 5085.93. is justly due, Dated this 17 day, May 1850.

Jas. J. Soutter.

over

2

State of N. York }
County of N. York } ss. There personally appeared the above named James G. Soutter, and made oath to the truth of the above affidavit, by him subscribed before me.

C. L. Woodhull.
Mayor of the City of
New York.

State of New York. } to wit.
County of N. York. }

I, George W. Ribler, Clerk of the City and County of New York, do hereby certify that Caleb L. Woodhull, before whom the within affidavit was made, and who has thereunto subscribed his name, was, at the time of so doing, Mayor of the City of New York, in and for the County aforesaid, duly commissioned to administer oaths, and affirmations, - that his signature is genuine, and that his official acts, as such, are worthy of credit.

In testimony whereof, I have hereunto set my hand, and affixed the seal of the said County, this 17th May, 1851.

Geo. W. Ribler, Clk.

James G. Soutter,
Robert Soutter jr.
Alexander Bell,
as
Dubouffay Freemon
admr of the Estate of Jas. G. Graham,

In the Saint Louis
Probate Court,
September Term,
A. D. 1851.

John Wickham, attorney for the Plaintiffs, making application for an appeal from the decision of the Court in the above entitled cause, makes oath and says, that this appeal is not taken for the purpose of vexation or delay, but because the affiant believes that the appellant is aggrieved by the decision of the Court.

Sworn to and Subscribed before me
This 14th September, 1850.

John Wickham.

Peter Ferguson,
Judge of Probate.

Know all men by these presents, that we, John Wickham as principal, and John. D. Osborne, as security, are held and firmly bound to Dubouffay Freemon, administrator of the Estate of James G. Graham, decd., in the sum of One hundred dollars, to be paid to the said Freemon, his executors, administrators or asignees; to which payment, well and truly to be made, we bind ourselves jointly and severally, and our, and each of our heirs, executors, and administrators, firmly by these presents.- Sealed with our seals. Dated the fourteenth day of September, in the Year, Eighteen Hundred and Fifty.

The condition of this obligation is such- Whereas, James G. Soutter, Robert Soutter jr, and Alexander Bell, composing the firm of Soutter Bros & Co, have taken an appeal to the St Louis Circuit Court, from a decision of the Probate Court of St Louis County; Now, therefore, if the said Soutter Bros. & Co, shall prosecute their appeal, and pay all debts, damages and costs that may be adjudged against them, then this obligation to be void, or otherwise to be and remain in full force and virtue

John Wickham. (Seal)
J. D. Osborne. (Seal)

James G. Soutter, Robert Soutter jr, and Alexander Bell.

vs.

DuBouffray Freemon, admr. of the Estate of Jas. G. Graham, deceased.

Appeal from Probate Court.

Now at this day come said parties, by their Attorneys, and submit this cause to the Court, which being heard, and the Court being fully advised of and concerning the premises, the Court doth find that said DuBouffray Freemon, administrator as aforesaid, is

4 indebted to the said plaintiffs in the Sum of Five Thousand Four Hundred and Sixty Five Dollars, and twenty nine cents, and, on motion of said plaintiffs by their attorneys, it is ordered that said claim be placed in the fifth class. It is therefore considered by the Court that said Plaintiffs recover of said defendant the debt aforesaid, as found aforesaid, and also their charges and costs herein expended.

Bill of Exceptions;

Be it remembered, that in the trial of this cause, the following was all the evidence offered. Plaintiffs offered the notice given by them to Darby, Administrator. Dated 22d May. 1850, as follows;

To John B. Darby, administrator of the estate of Jas, G. Graham, late of St Louis City and County, deceased.

Please take notice that We, have a demand against said Estate, a copy of which said demand hereinafter follows, to wit;

Estate of Jas. G. Graham, of St Louis.

1849 To Soulter Bros. & Co., Dr.

Nov 1st. For J. G. Graham's 3 acceptances, each for $ 1695. 31., amounting to $ 5085. 93.

New York. Nov 1st. 1849.

Notice of which demand against said estate was given to John. B. Darby, administrator of Jas. G. Graham, on the fifteenth day of December, 1849. by serving a copy of the above account upon him, by our atty, John Wickham; and that we shall present the same for allowance at the next Term of the Probate Court of St Louis Co. to wit; at the Term to be holden in June next

Dated 22d May, 1850. Soulter Bros & Co.

By John Wickham

their Atty.

State of Missouri. }
County of St Louis. } I, John Wickham, of the City and County of Saint Louis, and State of Missouri, do make affidavit and say that I this day served on John B. Darby, admr of Jas. G. Gra-

ham, dec'd., the original notice, of which the above is a true copy, by giving it to him in hand at the County aforesaid.

John Wickham.

Sworn To and subscribed before me,
this 22d May, 1851.

Peter Ferguson.
Judge of Probate.

The three acceptances of Graham, as follows;

10356.

Exch. for $ 1695. 31. New York. Feb. 1st. 1848.

Three years after date pay to the order of ourselves Sixteen hundred and ninety five 31/100 Dollars, value received, and charge the same to account.

To payable in New York.
Mr Jas G. Graham
St Louis. Mo. Soutter Brothers & Co.
" "

4 Feby/51.

Accepted, payable in New York.
James. G. Graham.

10357.

Exch for $ 1695. 31. New York. Feby 1. 1848.

Two years after date pay to the order of ourselves, Sixteen hundred & ninety five 31/100 Dollars, value received, and charge the same to account.

To payable in New York.
Mr Jas. G. Graham
St Louis, Mo. Soutter Brothers & Co.

4 Feby. /50

Accepted, payable in New York.
James. G. Graham.

10358.

Exch for $ 1695. 31. New York. Feby 1. 1848.

One year after date pay to the order of ourselves, Sixteen hundred & ninety five 31/100 Dollars, value received, and charge the same to account.

To payable in New York.

Mr Jas G. Graham
St Louis. Mo.

Soutter Brothers & Co.

1/4 Feby /49.

Accepted, payable in New York.
James. G. Graham.

And the certified transcript of the proceedings and record in this cause in the Probate Court, which is as follows;

State of Missouri
County of St Louis } ss. At a Term of the Probate Court, begun and held at the City of St Louis, within and for the County of St Louis, in the State of Missouri, on the first Monday, being the second day of September, in the Year of our Lord, One Thousand, Eight Hundred and Fifty, were present Peter Ferguson, Judge of said Court - William F. Ferguson, Clerk - David T. McCullough, appears, and exhibits to the Court a certificate of his election as Marshal of Saint Louis, on the first Monday of August last, and a certificate of his having taken the oath of Office, and entered into bond according to law.

Court adjourned from day to day until Saturday Morning 14th September 1850

Saturday 14th September, 1850. Court met pursuant to adjournment - present same Judge.

Soutter Brothers & Co.

vs (Freemou)
DuBouffay, Administrator of James. G. Graham, decd } [6th class & appeal. $5293, 36, cents,

James T. Soutter, Robert Soutter, and Alexander Bell, partners, under the firm of Soutter Brothers & Co., appear by Mr Wickham their Attorney, and exhibit their demand against the estate of James. G. Graham, deceased, founded on three accepted drafts for Sixteen Hundred and ninety five dollars, thirty one cents, each and each, dated February first, Eighteen hundred and forty eight, payable at one, two and three years after date,

and prove that they gave notice of their intention to present said claim to the Court for allowance to John F. Darby, then Public Administrator of the County of Saint Louis, who administered the estate of said James. G. Graham, thereupon, DuBouffay Freemou, Public Administrator of the County of Saint Louis, and successor to said John. F. Darby in the administration of the Estate of said James. G. Graham, also appears, and neither party requiring a Jury, the Court examine and allow said demand, for the sum of Five Thousand and Two Hundred and Ninety Three, dollars, twenty six cents, in favor of said Claimants against said Estate, and order the same to be placed in the sixth class; and said Claimants move the Court to order said demand to be placed in the fifth class, which the Court refuse to do; thereupon, said Claimants, by their said attorney, file their affidavit and bond, and ask an appeal to the Circuit Court, for the County of Saint Louis, which is granted, and a certified transcript of the Record and proceedings, and the original papers in the case is ordered to be transmitted to the Clerk of said Circuit Court.

State of Missouri, }
County of St Louis } S. I. Peter Ferguson, Judge of Probate of the County of Saint Louis, certify that the foregoing is a true Copy of the Record and proceedings in the case, of Soutter Brothers & Co, against the Estate of James. G. Graham, deceased, as the same now remains of Record in my office.

In testimony whereof, I hereto set my hand, and affix the Seal of the Probate Court of the County of St Louis, at Office, in said County, this fifth day of November, in the Year of Our Lord, One Thousand, Eight hundred and fifty.

Peter Ferguson.
Judge of Probate.

7 These papers and transcript were certified from the Pro-

bate Court; next a copy of notice served upon Darby, Administrator of Graham, dated 15th December, 1849., which was as follows;

Estate of Jas. G. Graham of St Louis.

1849		To Soutter Bros & Co.	Dr.
Nov 1.	For J. G. Graham's 3 acceptances, each for $ 1695.31, amounting to		$ 5085.93

New York. Nov 1st. 1849.

John. G. Darby, administrator of James. G. Graham, decd.

You will please take notice that an account, of which the above is a copy, of Messrs Soutter Bros & Co. against the Estate of James. G. Graham, will be presented for allowance at the next Term of the Probate Court for St Louis County.

Dated 15th day of December A. D. 1849. — Soutter Bros & Co. By John Wickham, their atty.

State of Missouri } ss.
County of St Louis }

I. John Wickham, of the City & County of St Louis, and State of Missouri, do make affidavit and say, that I this day, 15th of Dec. 1849., served on John G. Darby, Administrator of Jas. G. Graham, Decd, the original notice, of which the above is a true copy, by giving it to him in hand, at the County aforesaid.

Sworn to and subscribed before me — John. Wickham.

In the trial this last named paper was by consent read as if legally proven. The Defendant offered no testimony.

The defendant then asked the Court, sitting as a jury, (the cause being thus submitted,) to declare the law to be as follows, in three instructions asked;

The Court, sitting as a jury, declare the law to be,

1st. That the copies of the notices given in evidence, do not entitle the demands of the plaintiffs to be classified in the fifth class of allowances, against the Estate of Graham.

2d. That the notices served on the Administrator Darby, do not contain a sufficient statement of the nature and amount of the claim presented, as required by the act upon Administrators, Article 4th. § 5 & 12., and therefore the Court must find for the Defendant.

3d. Said notices containing no copy of the instruments in writing sued upon, said claim is not legally exhibited, and therefore the Court will find for the Defendant.

Which instructions being refused by the Court, to such refusal the Defendant at the time objected & excepted. The Court rendered judgement for the Plaintiffs, and classified the same in the fifth class of allowances against the Estate of Graham.

The Defendant, afterwards, within four days from the trial, filed the following motion for a new trial.

Soutler Brothers & Co.
vs.
Freemon, Admr. &c. The Defendant moves the Court to set aside the judgement in this cause, and grant a new [trial], because 1st. the Court erred in refusing the instructions asked by Defendant; and because 2d. the judgement is against law.

G. A. Dick, Atty for Dft.

This motion, the Court overruled, to which, the Defendant, at the time, objected & excepted; and now prays the Court to sign & seal this Bill of Exceptions; which is done.

In accordance with the agreement made on the trial of this cause, this Bill of Exceptions may be signed with same effect as if done during the term, and be filed as at that time.

9 (Signed) A Hamilton Judge &c. Kasson, for Plffs. F. A. Dick for Defdt.

10 On Thursday the 8th day of May the following proceedings were had in said Circuit Court, to wit:

Soutter, Bros: & Co } Now at this day comes said defendant by his
" attorney & files herein by consent of parties as
Fremon, adr &c } of last term a Bill of Exceptions, and on his motion an appeal to the Supreme Court is granted him, from the judgment of this Court rendered at its last term.

State of Missouri. }
County of St Louis } ss. I. Michael. S. Cove, Clerk of the Circuit Court, within and for the County aforesaid, certify the foregoing to be a true and correct transcript of the Record and Proceedings in the cause of Soutter Bros & Co. against Estate of Jas. G. Graham, deceased, as fully as the same now remains in my office.

In testimony whereof, I hereunto set my hand, and affix the seal of said Court, at Office, in City of St Louis, this 28th day of July, A. D. 1851.

M. S. Cove Clerk.

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Page 1. Affidavit of James J. Soulter.
" 2. Appeal from Probate Court.
" 3. Bond given by Plffs.
" " Judgment for Plffs, in Circuit Court.
" 4. Bill of Exceptions filed.
" " Notice served on Darby;
" 5 The 3 Acceptances of Graham.
" 6. Transcript of the Record &c, in Probate Court.
" 9 Instructions asked for by Defs.
" " Defs moves a new trial, & motion overruled.

2738

(17) 86

Oct. T. 1851

James T.
Souter, Bros & Co Res
v
J. G. Graham's adv Apl.

Nov. 1850
Dec. Filed

Transcript from
St Louis Circuit Court.

for Dick.
Wickham & Kasson for Plff
Vlaty

Filed Sept. 23d. 1851
Wm. B. Clarke Clerk, by. Wm. Glanville D.C.

$4. for Transcript, by by
adv Fremm.

1

In the St Louis Circuit Court.

State of Missouri }
County of St Louis } ss. Be it remembered that
heretofore, to wit at the November Term 1850,
of the Circuit Court, within & for the County &
State aforesaid, on the twenty ninth day of
March One Thousand Eight Hundred and fifty
One the following proceedings were had.

Daniel D. Page & Henry D Bacon }
Sage O. Butler, D. J. Lackland, } ss.
and William C. Kennett. }

The Motion of
Said plaintiffs, for judgment against the
obligors in the delivery bond herein, being
heard, And the Court being fully advised
of and Concerning the premises it is ordered
that said Motion be overruled. By agree-
ment of the parties to this action leave is given
to said plaintiffs to file a Bill of Exceptions
herein during the next term of this Court.

mo overruled

And afterwards to wit, at the April Term 1851
of said Court, On the 22nd day of May 1851.
the following proceedings were had.

Daniel D Page &c }
Sage O Butler &c. } ss. Said plaintiffs by
their attorneys file
herein a motion
that this Court again hear the motion filed
herein by said plaintiffs at the last term,
which being heard and the Court being

mo overruled

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fully advised of and concerning the premises, it is ordered that it be overruled. By consent of parties and by leave of the Court, the said plaintiffs file herein a Bill of Exceptions as of the last term, of this Court.

The said Bill of Exceptions is in the words and figures following to wit.

Bill of Exceptions

Page & Bacon
vs
Page & Butler & others

In the St Louis Circuit Court.
November Term 1850.

The plaintiffs moved for judgment against the defendants on a bond for the forthcoming of property levied on by the Sheriff under an execution against said Butler. On the hearing of the motion in this case the plaintiffs produced the Execution, Sheriff's return and bond, which were as follows.

Execution

The State of Missouri:

To the Sheriff of the County of St Louis - Greeting:

Whereas Daniel D. Page and Henry D Bacon, on the 10th day of May, in the Year of our Lord, One Thousand Eight Hundred and fifty, at our Circuit Court recovered against Page & Butler the Sum of One Thousand One Hundred and twenty four dollars And Seventy five Cents for debt, together with Seven Dollars and forty cents for their Costs and charges in that suit expended. These are therefore to Command you that of the goods & chattels and real estate of the

3 Said Sage O Butler, you cause to be made the debt and costs, and that you have the same before the Judge of said Court at the third Monday of November next, to satisfy the debt and costs aforesaid; and that you certify how you execute this Writ.

Witness Michael S. Cerre, clerk of the said Court at St Louis this 15th day of May Eighteen hundred and fifty

M. S. Cerre, clerk C. C.

Sheriffs Return. By order of the plaintiffs attorneys I did on the 22d day of May 1850, at 10 minutes of one O Clock, summon in writing as garnishees, Charles Sanguinette & Louis A Benoist and also Edward Chase agent of E.W. Clark & Brothers at ten minutes of four O Clock, and, also R. S Whitney and R.N. Nisbit to appear in Court at the return day of this writ and answer on oath such interrogatories as may be exhibited against them on the part of the plaintiffs touching their indebtedness to the defendants. I did also on the 22d day of June 1850 levy upon certain personal property to wit, thirty casks of Bacon of which property the defendant was suffered to retain possession by his entering into Bond with security untill the day of sale. The property was not produced on said day of sale which said Bond is herewith returned.

Louis J. Labeaume
late Sheriff.

See page 9 for Bills Return

Service of Garnishees $ 5.00
This Writ 1.00
Bond .50
$ 6.50

Bond

Know all men by these presents that we Sage O. Butler as principal & R. J. Lackland and Wm. C Bennett ~~as principals~~ as Securities are held and firmly bound unto Daniel O. Page and Henry O. Bacon in the sum of twenty four hundred dollars for the payment whereof we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents Sealed with our seals, and dated this twenty second day of June in the year of our Lord one thousand eight hundred & fifty The condition of this obligation is such, that whereas, an execution from the Clerk's Office of the St Louis Circuit Court in

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favor of Daniel D Page and Henry D. Bacon against the said Page O. Butler has issued to the Sheriff of St Louis County, and has been by him levied on certain personal property, to Wit: Thirty Casks of Bacon. of which said property the said Page O Butler is suffered to retain the possession till the day of sale, on the execution thereof. Now if the said O Butler shall deliver said property, and every part thereof, unto the Sheriff aforesaid on the Second day of September Next at or before the hour of twelve O Clock of that day, at the Court house in the City and County of St Louis being the time and place of sale of the same, then this obligation shall be void, else it shall remain in force.

Signed sealed and delivered
in presence of
Louis J Labeaume.

O Butler (Seal)
P. L. Sackland (Seal)
Wm C Kennett (Seal)
(Seal)
(Seal)

The Plaintiff proved that the value of the property mentioned in the bond was $ 12.00.

The Defendant Kennett & Sackland who alone resisted the motion proved by L. J. Labeaume late Sheriff that at the time of the levy of the execution the property in question was in the Steamboat Tuscumbia which was about to depart for New Orleans, that Kennett claimed the property as belonging to his House that at the time of the levy Kennett agreed to execute a bond for said property if the Sheriff would not remove it from the Boat. That he (Labeaume) then left the Boat for the purpose of procuring a bond and before his return the said Boat had departed for New Orleans. That said Kennett & Sackland then executed the bond offered in evidence according to their previous agreement with the Sheriff witness telling Kennett that he did not his (Kennett's) right would be prejudiced thereby. The plaintiff objected to the admission of the testimony of said Labeaume when the same was offered for the reason that the same was

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irrelevant and incompetent and the opinion of the witness. The Court overruled the objection to which the plaintiffs then and there excepted. Said defendants then read the following proceedings or claim of property as tried by a Sheriff's Jury.

Van L. Page } Ex. No 85 to Nov Term 1850.
Page & Butler } Circuit Court.

On this thirteenth day of Nov 1850 I summoned a Jury to try the right of property on the claim filed on the 2d day of Nov 1850 by Kennett Dix & Van Tagen, to wit:

Sheriffs Jury

Owen Conway
Anderson Sappington
Benj Simonds
William D. Peters
Joseph McCullough
Defee North
Barton Lahan
Philo W. Carver
Saml Moore
Geo Buckhanan
William Dyde
Geo B. Brua.

The said Jurors having been by me sworn to try the right of ~~personal~~ property in the above case and a true verdict render according to the evidence; after hearing the evidence produced on the part of the claimant (the plffs Page & Bacon not having appeared) gave the verdict written below, and the said verdict is returned with the execution.

Verdict

Henry B Belt Sheriff.

Page & Bacon } Kennett, Dix, Van Tagen
Page & Butler } Claimants of property.

We the jury sworn in the above case as stated above do find that the property levied upon by Sheriff Labeaume in this case is the property of the Kennett, Dix Van Tagen

G. B. Brua Foreman

Plaintiffs objected to the admission of the evidence for the reason that there was no legal notice given the plaintiffs of the claim, that the claim was in fact made and tried after the forfeiture of the bond & that the trial was ex parte. The Court overruled the objection and plaintiffs excepted

Motion Overruled

said defendants then offered said Sage O Butler as witness. Plaintiffs objected because he was defendant in the execution and principal in the bond. The Court admitted the witness to testify and plaintiffs excepted. Said witness testified that on the 18th day of June 1850 he made a verbal contract with R. M Funkhouser for the purchase of the property mentioned in the bond, the same being at the time up the River. No written contract was entered into, no money or earnest paid & no part of the property then delivered. On the 19th of June 1850 the property arrived and on the next day (June 20th) witness applied to said Kennett of the house Kennett, Dix & Co for an advance on said property & obtained an advance of $2000 with the understanding that said property was to be forwarded to said Kennett, Dix & Co at New Orleans for sale to replace advance & charges. Witness paid Funkhouser with the identical money received as an advance above set forth. The property was shipped on the twentieth of June on the Steamboat Tuscumbia passing directly from the store of Funkhouser to said Steamboats where a bill of lading was given for the same. The property did not sell in New Orleans for more than enough to pay the advance and charges. The receipt given by Butler for the advance of $2000 & the bill of lading were read in evidence and are as follows: "Rec'd of W. C Kennett, Two thousand dollars as advance on 50 Casks clear sides Marked R. M. F. shipped on board of the Steamer Tuscumbia, and consigned to Kennett, Dix & Co New Orleans, for sale on my account - the same being insured by K. D. & Co for $ 2500. St Louis June 20th 1850 $ 2000. S. O Butler

Bill of lading

Shipped, in good order and condition by S. O Butler on account and risk of whom it may concern, on board of the good Steam Boat called Tuscumbia whereof S. C. Cable is Master for the present voyage, now lying at the port of St Louis and bound for New Orleans the following packages or articles marked or numbered as below, which are to be delivered, without delay, in like good order, at the port of New Orleans (the dangers of the river, and fire, only, excepted) unto Messrs Kennett, Dix & Co

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or to their assigns, he or they paying freight for said goods at the rate of 25 Cents per 100#.

In witness whereof, the Owner, Master or clerk of said Steamboat, hath affirmed to 3 bills of Lading, all of this tenor and date, one of which being accomplished the others to stand void.

Dated at St Louis, this 21 day of June 1850.

Marks	Articles	Weight
Sides R. M. F	Fifty Casks Clear Sides	44437# gross
		Chambers. Clk

Butler further stated that he never informed Funkhouser that any other person than himself was interested in the purchase of the property or that he had received any money from any person as an advance or to enable him to complete said purchase. The foregoing constituted the proof introduced by said defendants. The plaintiffs then called Funkhouser who testified that any understanding or agreement between Butler & Kennett was not communicated to him that he sold the property to Butler received the purchase money of him and knew nobody else in the transaction.

On the whole evidence the Court decided that the plaintiffs were not entitled to Judgment against Kennett & Lackland and as to them overruled the motion of the plaintiffs for Judgment on the bond. To this decision the plaintiffs excepted. The plaintiffs filed their motion and reasons for a rehearing as follows:

Sage & Bacon
Sage & others } The said plaintiffs come and move the Court for a rehearing of the motion in this case for the following reasons viz:

Motion & reasons

1st Because the Judgment of the Court is against law

2d. Because the same is against evidence

3d Because the same is against the weight of evidence

4th Because the Court admitted incompetent evidence.

Knox & Kellogg deft attys.

which motion was overruled to which Rs plaintiffs excepted and prays the Court to sign and seal this bill of exception.

A Hamilton
Judge &c.

Daniel O Page &c
Page O Butler } On motion of said plaintiffs they having filed herein a bond with H. D. Bacon as principal & S. B Kellogg as Security in the sum of five hundred Dollars Conditioned according to law, which is approved by the Court. An appeal to the Supreme Court from the decision herein is granted to them.

Page & Bacon
vs
Page O Butler } In the St Louis Circuit Court St Louis County
& others

Appeal Bond

Henry D. Bacon one of the above named plaintiffs comes and moves the Court to allow an appeal in the above cause and being duly sworn on his oath says that such appeal is not made for vexation or delay but he cause this affiant believes the said Page & Bacon, appellants are aggrieved by the decision of the Court.

H. D. Bacon

Sworn to and subscribed before me this 9th day of June 1857.

John W. Colvin Justice of the Peace St Louis County Mo.

We Henry D Bacon as principal and Sanford B. Kellogg as security are held and firmly bound unto William C. Kennett, Page O Butler and Rufus J Lackland in the sum of five Hundred Dollars which well and truly to be made we do hereby bind ourselves, our heirs, executors and administrators firmly by these presents. Witness our hands and seal this day of June 1857. The condition of this obligation is such whereas Daniel O. Page and Henry D. Bacon are about to take appeal from the Judgment of the St Louis Circuit Court in a certain cause in which the said Page & Bacon are plaintiffs and the said Butler, Kennett, Lackland are defendants. Now if the said Page & Bacon appellants shall pay all costs and damages which may be awarded against them occasioned by said appeal then this obligation shall be void otherwise to be and remain in full force and virtue.

Appl June 10. 1857
A. H.

H. D. Bacon seal
S B Kellogg. seal

Omitted, but inserted by agreement.

Page & Bacon
ps
Sage O Butler
} Execution No 85. to Nov Term 1850.
Circuit Court.

This writ was delivered to me by Louis J. Labeaume late Sheriff of St Louis County on the seventh day of September 1850. And on the second day of November 1850 William C. Kennett, Thomas J. Dix and Henry C. Von Bagen by their attorney R. M. Field, filed with me notice of claim of the property levied upon and described in the return made on said writ by said Louis J. Labeaume late Sheriff (which said notice is hereto attached) and demanded of me a trial of Right of property. And having given notice to Messrs Knox & Kellogg plaintiffs attorneys on the same day of the filing of said claim, I did on the 13th day of November 1850. summon a Jury to try said Right of property, and thereupon said Claimant appeared, but the plaintiffs in said Execution refused to appear and defend. And the said Jury having heard the evidence offered by the said claimants rendered the verdict which is hereto attached.

No goods chattels or real estate belonging to the defendant Sage O Butler found in my County since this writ came to my hands whereon to levy the same.

Henry B. Bell, Sheriff.

Nulla Bona &
Fees of Trial of Right
of property $5.50.

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2 Bill of Exceptions — Execution
3 Sheriffs Return — Bond
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5 Sheriffs Jury — Verdict — Motion overruled.
6 Butlers testimony. Bill Lading.
7 Motion for hearing and reasons
8 Appeal Bond.

State of Missouri
County of St Louis } ss

I Michael S. Cerré Clerk of the Circuit Court within and for the County and State aforesaid, do hereby Certify that the foregoing 8 pages Contain a full & Complete transcript of the record & proceedings in the Case of Daniel D Page & others, against Page O. Butler & others. As fully as the Same appears of record in my office.

Witness my hand and the Seal of said Court affixed at Office this 24th day of September 1857

M. S. Cerré Clk.

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(A)

Oct. T. 1851

Page & Bacon Appl.
vs
Sage O. Butler and others Res.
} Transcript

for Knox & Kellogg.

Filed Sept. 24th 1851
Wm. A. Clanville for Wm. B. Clarke
D.C. Clerk

$3.50. pd by K & K.

James T. Soutter et al. vs James G. Graham's Admr.

In the Supreme Court October Term 1851

And now at this day comes the Appellant and assigns the following reasons for error in the record & proceedings of the Circuit Court in this cause.

1st The Circuit Court erred in refusing the instructions asked by the Defendant,

2d The Court rendered a judgment contrary to law

F. A. Dick
Atty. for the Appellant.

In the Supreme Court
October Term 1857

James J. Soutter
claim
~~Appellant~~ Respondent

vs

James L. Graham's
Admr
Appellant

Assignment of
Errors

F. A. Dick
for Appellt.

Filed Oct. 22nd 1857
Wm B. Stuart Clerk by
Wm Glanville D.C.

James T. Lutter, Appee
vs.
James G. Graham's Adm.r, Appt.

Supr. Court of Ctd. T. 1851

Now comes the said Appellee says there is no error in the record & proceedings of said cause as is by the said Appellt. in his assignment of errors alleged.

And thereof prays judgment of this Court.

By John A. Kassen, their Attys
Geo Weckham

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Joinder in Errors

Coulter v. Graham's Admr.

Sup: Court Oct. T. 1851

Kassner, for Appellee

Filed 23rd October 1851
Wm. S. Glanville
Clerk

James T. Soutter
dcal
Respondent
vs
James G. Graham's
Adms.
Appellant

Supreme Court
October Term
1851-

Statement of the case.

This action was begun in the Probate Court for St. Louis County, to establish a demand against the Estate of James G. Graham. On the trial in the Probate Court it appeared in evidence that a notice was served upon John F. Darby, public Administrator in charge of said Estate which notice is as follows.

To John F. Darby, Administrator of the Estate of James G. Graham late of St. Louis City & County deceased.

Please take notice that we have a demand against said Estate a copy of which demand hereinafter follows, to wit,

Estate of Jas. G. Graham of St. Louis,
To Soutter Bros. & Co

1849
Nov 1st for J. G. Graham's 3 acceptances each
for $1695,31 amounting to $5085.93

New York Nov 1st 1849.

Notice of which demand against said Estate was given to John F. Darby administrator of Jas. G. Graham on the 15th day of December 1849, by serving a copy of the above account upon him by our attorney John Wickham; and that we shall present the same for allowance at the next term of the Probate Court of St. Louis Co. to wit at the term to be holden in June next.

Dated 22d May 1850 Soutter Bros. & Co
by John Wickham
their atty.

this notice was served upon the Administrator on the 22d May 1850 - next -

A notice similar to the one above set out which was served on the 15th of December 1849 - Evidence was offered showing that the first year of the Administration on this Estate had not Expired on 15 Dec 1849, but had elapsed before the Service of the notice on 22d May 1850, that is the first year of limitations against this Estate was completed between these two dates, next the trial was given in evidence the three drafts mentioned in the notice which were as follows -

Exch. for $1695.31 New York Feb. 1st 1848

Three years after date pay to the order of ourselves Sixteen Hundred and ninety five 31/100 Dollars value received and charge the same to account payable in New York

To Coulter Brothers & Co

Mr Jas. G. Graham

St. Louis Mo.

Accepted payable in New York

James G. Graham -

The other two drafts were like this one with but this difference one was payable in two years & one in one year after date - both accepted -

next was given in evidence in the Circuit Court the certified transcript of the proceedings & record in the Probate Court by which it appeared, that the first proceeding in the Probate Court was at the September Term 1850, - The record entry shows - that a

the 14 September 1850 the parties appeared in Court - that the Plaintiff Exhibits their demand founded on three accepted drafts for $1695.31 each dated

February 1st 1848 payable at one, two & three years, and prove that they gave notice of their intention to present said claim to the Court for allowance to John F. Darby then Public Administrator administering upon said Estate - at this appearance & trial the Plaintiffs appeared by their attorney, and DuBouffay Fremon, then public Admr. appeared for the Estate he having charge of it as public Administrator - The Court hears the proof, & makes an allowance against the Estate for $5293.26 and order the same to be placed in the Sixth class; The claimants move to have the same placed in the fifth class, which the Court refused to do - whereupon the Plaintiffs appeal the Case to the Circuit Court - On the trial in the Circuit Court the same Evidence was given as on the trial in the Probate Court. The Defendant asked the Court sitting as a Jury to declare the law to be as follows -

1st That the copies of the notices given in Evidence do not entitle the demands of the Plaintiffs to be classified in the fifth class of allowances against the Estate of Graham -

2d That the notices served upon the Administrator Darby do not contain a sufficient statement of the

nature and amount of the claim presented as required by the act upon Administration Article 2/th § 5 & 12 and therefore the Court must find for the Defendant,

3d Said notices containing no copy of the instruments in writing sued upon, said claim is not legally exhibited, and therefore the Court will find for the Defendant.

Which instructions being refused by the Court to such refusal the defendant at the time objected & excepted - The Court rendered judgment for the Plaintiffs & classified the same in the fifth class of allowances -

The defendant within four days filed the following motion for a new trial - The Defendant moves the Court to retain the judgment and grant a new trial because

1st The Court erred in refusing the instructions asked by the Defendant

2d Because the judgment is against law -

Which motion was overruled & the case appealed to this Court by Fremon, Administrator of Graham -

The letters of administration upon the estate of Graham were offered in evidence bearing date 5th February 1849 - The first publication of notice of grant of letters of administration was on 26th April 1849. — I agree with the foregoing statement, with this exception, first proceeding in Probate Court was had at June Term 1850, Case being continued from that, to the September Term

F. A. Dick for Appellant

Jno. Wickham for Respondents

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In the Supreme Court

James T. Soutter et al Respondents

vs

Jas. G. Graham's admr. applt.

Statement of the case.

~~Statem~~

Filed November 6th 1851
Wm. F. Glanville
Clerk

Souter Bros & Co. vs Grahams admr

In looking through the record and proceedings of the Court below in this case, we find no evidence preserved upon which the questions of law attempted to be raised in this Court, can be sustained—

There is nothing which calls for our revision—The judgment of the Circuit Court is affirmed, the other judges concurring

John F. Ryland C

Souter, Bros. & Co

vs

Graham's admr

Opinion of the Court

By Ryland Judge

Filed December 15th 1857

Wm. Y. Glanville

Clerk

Souter, Brothers Co., Respont.
vs.
J. G. Graham's Admr. Appt.

Supreme Court:
Octr: T. 1851.

Statement of case:

The Letters of Administration are dated 5th Feby. 1849.
The first publication of Notice thereof was on the 26. April 1849.
The ~~following~~ notice was served by copy upon the administrator on the 15th Decr. 1849, & within one year from the date of the Letters.

"To John F. Darby, Administrator of the Estate of James G. Graham, late of St. Louis city & County deceased: Please take notice that, we have a demand against said Estate, a copy of which demand hereinafter follows, to wit:

~~Estate of James G. Graham Esq. deceased, in account with Souter Brothers & Co.~~
~~1849. Nov. 1st. For J. G. Grahams three acceptances each for $1695.31 amounting to $5085.93~~

James G. Graham Esq., deceased, in account with Souter Brothers & Co. Dr.
~~New York, Nov. 1. 1849.~~ To our three drafts on, and accepted by him, — dated

1848	Feb. 1.	at one year	$1695.31.
"	" 1.	at 2. "	1695.31
"	" 1.	" 3. "	1695.31
			$5085.93

The notice ~~also~~ stated that it would be presented for allowance at the Probate Court, at the then next March Term 1850.

On the 22d. of May 1850, the following second notice was duly served on said Administrator; and addressed to him as such Administrator:

"Please take notice that we have a demand against said Estate, a copy of which demand hereinafter follows, to wit:

1849. Nov. 1. For J. G. Graham's 3 acceptances, each for $1695.31 amounting to $5085.93

"New York Nov. 1. 1849.

"Notice of which demand against said Estate was given to John F. Darby Administrator of Jas. G. Graham on the 15th day of December 1849 by serving a copy of the above account upon him by one Attorney John Wickham; & that we shall present the same for allowance at the next term of the Probate Court of St. Louis Co. to sit at the term to be holden in June next. Dated 22d May 1850."

"Soutter Brothers & Co. by John Wickham, their Atty."

The above mentioned claim was ~~[illegible]~~ allowed by the St. Louis Probate Court, at the September Term thereof 1850, but was placed in the 6th class; whereas the claimant urged that it ought to be placed in the 5th class. He appealed from the decision of the Probate Court to the St. Louis Circuit Court, which reversed the decision of the Probate Court, & ordered it to be placed in the 5th class. From this last decision the Administrator appeals to this Court.

There was no proof of the publication of Notice of Administration, though it is agreed the publication was made as first above stated.

1. The demand was rightly placed by the Circuit Court in the 5th class. The 1st notice, served on the 15th Decr. 1849, was sufficient to take it out of the statute of Limitations. It was a legal Exhibition of the demand.

R. S. "Administration," Art: IV. §§. 5-6.

It was the duty of the Administrator then to have "classed" the demand in the 5th class, according to the statute as above quoted, §. 6.

2. The demand was "established" under the second notice, according to the same statute, §§ 12. 13.

3. The Exhibition of the Demand, and the Establish=
=ment of the demand, are two distinct proceedings
under the statute. (Milan vs. Pemberton XII. Mo. 602, last part of Opinion.)

The first takes it out of the Statute of Limitations;
the second is the proof of it for obtaining a judgment.
All Demands "legally exhibited" within one year from
the Date of the Letters, are entitled to be placed in the
3th class (ib. Art. IV. & 1. P. fifth.)

The objection that there was no copy according
to the Statute (35) is not valid here. It was a Merchants'
account in which acceptances are charged in regular ac=
=count, & payments thereon credited. The claim was
exhibited by a copy of the account, which fully set forth
"the nature and amount of the claim"; & the account was proved
by the production of the acceptances themselves. Every object
contemplated by that requisition of the Statute was answered.
The words "instrument of writing" evidently refer to other
formal documents, & not to those current, negotiable choses
in action known in commerce, & commonly charged in
Merchants' accounts, which show their definite & full meaning.

It was a question of fact for the Circuit
Court, whether "a copy of the account upon which
the claim is founded," was exhibited & served on the
administrator within one year. And that fact was
found for the Plaintiffs, Appellees here. The finding
of the Court ought not to be disturbed, especially against
the equities of this case.

John A. Kasson, for Appellees

No. 86.

Appellants' Brief.

Soutter Bros. Co. vs. Grahams Admt.

Sup. Court. Octo. T. 1851

Kasson, for Apts.

James T. Coulter et al.
Respondents
vs
James S. Graham's Adm^r
Appellant

In Supreme Court of Missouri
October Term 1851
(Summary of points made by Respd^t)

Circuit Court committed no error in refusing
1st "First Instruction asked by appellant, for
I I Notice was given in time.

(1) Notice of the demand was served upon the Adm^r, Darby, in writing stating the nature and amount of the claim, with a copy of the account on which it is founded, within one year after the issue of letters on the estate. The claim was legally exhibited from the time of such service. R.S. of Mo. Tit. Adm^r Art. IV § 5.

(2) Demand does not depend on the time when it is presented for allowance & established, for its classification, but on the time when it is legally exhibited. Adm^r Art. IV § 1.

II II Notice was available to classify demand.

(1) The demand being legally exhibited, the adm^r should have classified & made return of it into Court at his setting terms, which was the next term following the service of the notice. Adm^r Art. IV § 6.

(2) The claim then being noted among the record of the case in Court, would be beyond the Statutory bar of limitation; for a waiver of notice on record, will take a claim out of the Stat: of limitation, a fortiori an actual notice.

Milam adm^r of Crockett vs Pemberton Ex^rs 12 Mo. R. p. 598

(3) The notice cannot be construed to be abandoned, or annuled, by failure to place the Claim on docket for trial, at next term; for Non Constat but that plffs: may have intended to try the case on a waiver of notice. (Adm^r art. IV § 14) during the term. placing Claim on the docket, would only induce the necessity of a continuance, in the event it could not be tried. & Lex Non præcepit inutilia, quia inutilis labor Stultus

(4) Nor was the effect of said notice annuled by failure to present the claim at said term, for the sec: of the act, requiring the Adm^r, to return exhibited claims into court, gives the effect of an appearance to plffs: notice, at said term: And the idea of abandonment is precluded, at the next term but one, (same term) for the case was on the docket for trial, under a 2nd notice, relating back in terms, to the first notice, & thus in effect there was no discontinuance of the suit commenced by the notice served on 15th Dec^r.

(5) Defd^t at the trial having waved all objection to the sufficiency of the 2nd notice, by failing to demur, it is fair to presume he would have done the same thing in regard to the first, had the case been tried under it, both notices being similar; And the Statutory limitation is no bar to this suit, it being the same as that commenced on the 15th Decr within the year, there having been no discontinuance.

No error was committed by the Circuit Court in refusing the

2nd Second Instruction asked by Appellant for

III III Notice given was substantially sufficient.

The objection to the sufficiency of notice & the failure to serve a copy of the instruments sued on, is waved so far as the second notice is concerned by the Defdt. appearing & pleading to the merits.

(1) The notice served within the year & relied on to exhibit the claim; contained such a statement of its nature & amount, as also a copy of the account, as would enable a person of ordinary understanding to know what was intended; and greater certainty will not be required in a notice, than in a petition in a civil action. The terms of the notice being general, the court should construe it favorably, according to the equity & truth of the case. Drew. vs. Anderson 1. Call. p. 51

(2) The acceptances of Graham were merged into an account dated 1st Novr., and it was unnecessary to specify dates, for though not all due, they were for the purpose of being allowed against the estate to which method of procedure, no objection was made by Defdt. as appears from the record, considered so; the acceptances were merely introduced to prove the account, which was done to the satisfaction of the court, sitting as a jury; a finding of fact which should not be disturbed. A variance is not fatal, if the substance of the allegation is proved. (1st Stark. Ev. 491)

(3) The effect of this notice was the same as tho: it had been most minute & circumstantial, for the order of payment was postponed by it, until its validity to classify the demand shd. be decided; and remedial Stats. must be so construed, as most effectually to meet the beneficial end in view, and prevent a failure of the remedy.

Dwarris on Stats. 718. in Law Library Vol. 7. p. 57.

3rd Third Instruction, Circuit Ct. committed no error in refusing this,

IV IV No instruments of writing were sued on, ergo no copy of them was necessary in a notice legally exhibiting the claim. The account was substituted for Grahams acceptances, & declared on by the notice, and its being proved by the acceptances ~~does not~~ is not inconsistent with, and does not alter the legal effect of, that which is alleged: the variance therefore between the allegation and the proof is immaterial 1 Stark. Ev. p. 435 & 459

The notices are in substantial compliance with the requirements of the act, so that Defdt. could not be misled in maintaining his defence upon the merits; if therefore the claim is allowed at all, it must be placed in the fifth class. for if the second notice was sufficient to establish the demand, the first was sufficient legally to exhibit it.

(1)

James T. Soutter et al.
Respondents
vs
James G. Graham's Adm'r
Appellant

Supreme Court, October Term
1851

This is a question of Classification of a demand allowed against an estate, arising on the Construction of notice. For the facts of the case, reference is made to the statement of the appel'ts. Two notices of this demand were served upon the Adm'r, one within, the other after the expiration of the year; Respondents claim the benefit of the first, to exhibit & classify the demand, R.S. Ist. Adm'r Art. IV § 5 & 6. and of the second to bring it before Court for establishment, R.S. 1st. adm'r Art. IV § 12 & 13; although the claim was allowed, this effect was denied said notices by the judgment of the Probate Court, placing the demand in the 6th class; Respondents appealed to the Circuit Court, and the decision of the Probate Court was reversed; and Claim ordered to be placed in the 5th class, Appellant excepts, and brings the case here, objecting that the Court erred in refusing the following instructions viz

1st "That the Copies of Notices served on the Adm'r do not given in evidence do not entitle the demands of the Plffs. to be classified in fifth class of allowances against the estate of Graham.

2nd "That the notices served upon the Adm'r Darby, do not contain a sufficient Statement of the nature & amount of the claim presented, as required by the act upon Administration Art. IV § 5 & 12, and therefore the Court must find for the Defendant

3rd "Said notices containing no copy of the instruments in writing sued upon, said claim is not legally exhibits, and therefore the Court will find for the defendant. —

1st The 1st Instruction embraces the 2nd & 3rd, so far as the first Notice is concerned, and puts the case, though somewhat obscurely: for the copies of notices, could not of themselves, entitle the demand, to be placed in the 5th class, without verification & proof of the claim. We will confine the argument justifying the refusal of this instruction, to two points (1st) was the notice given in time? if so. (2nd) was it so followed up in presenting claim for allowance as to be rendered available?

2nd The 2nd Instruction: the sufficiency of the notices to exhibit & establish the demand will be argued in considering this instruction. —

3rd This Instruction. No instruments in writing were sued on, Graham's acceptances were introduced at the trial, merely as evidence of the &c.

The Circuit Court committed no error in refusing the.——

+ 1st First Instruction, for the notices, entitle the claim to be placed in the fifth class; Notice having been served upon the Admr.

I I Within one year from the granting of letters on the estate, as is admitted, which sets forth the nature & amount of the claim along with a copy of an account, the same in substance & legal effect, with the account proved & allowed before the probate Court; which was sufficient, under the statute (as we shall argue when we come to the next instruction) and constitutes a legal exhibition of the claim, from time of service. Admr. Art. IV §5. A demand does not depend on the time when it is presented for allowance & established, for its classification; but on the time when it is legally Exhibited. Admr. Art. IV §1. the demand thus being legally exhibited (provided the notice was suficient) within one year, it is entitled to be placed in the 5th class of allowances, unless the effect of this diligence of the plffs: is annuled, by some negligence, or failure, on their part, in presenting the claim for allowance.

II II But the notice was so followed up as to be rendered available, & to give it full force, in classifying the demand; for the demand being legally exhibited, it became the duty of the Admr. to classify & make return of it into court at his settling term, which was the term next following the service of notice, Admr. Art. IV §6, this section of the act provides expresly for cases which are exhibited, but cannot be established & allowed within the year, and makes it the duty of the Admr., to classify such claims; otherwise what chance is there, for a distant creditor, an inhabitant of China for instance, to have his debt placed in the 5th class, however diligent he may be. The Admr. is supposed to have done what is required of him by Stat: and the exhibited claim being returned into court, is noted among the record, and is beyond the statutory bar of limitation, for A waiver of notice of a claim noted upon the record, is such evidence of an exhibiting of the claim as will take it out of the stat: of limitation; a fortiori an actual notice, (Milan Admr of Crockett vs Pemberton Ex'ors &c 12 Mo: R. p. 598) But it may be argued that the effect of this first notice was abandoned by Plffs: failure to present their claim for allowance, at the next term according to the terms of said notice; to this we answer, that the notice worked a double effect: 1st to exhibit the demand, 2nd to bring it up before Court for allowance, admr. Art. IV Sec: 12. The second effect was abandoned by failure to present the claim, & had to be revived by the second notice which was served on the 22nd May; but it is by no means clear that the first effect was

also abandoned & annuled, by such failure to present; on the contrary the Plffs: may have intended (& did intend) to present their claim for allowance, on waiver of notice, art IV §. 14 during the term, upon the receipt of the proper affidavit & proof from New York, where Plffs lived: placing the claim on the Docket of said term, by filing a copy of the notice, with the clerk, 10 days before the term, would only have had the effect to render a continuance necessary, in case the claim could not, from any cause, be presented at that term; which putting case on docket would have been useless, since waiver of notice would allow the case to be called up the same as tho' twere on the docket. and Lex non praecepit inutilia, quia inutilis labor stultus. Coke on Lit. 79 a Therefore failure to place the claim upon the docket was no abandonment of the first effect of the notice; Nor can the failure to present the claim for allowance work such an abandonment, for the act on admr. art. IV § 6. requiring the Admr. to return the exhibited claim into Ct., gives the effect of a sort of statutory appearance to plaintiffs notice, which precludes the idea of abandonment or discontinuance of the case, at that term; at the next term but one, (i.e. the June term) there was no room for such an idea, as the claim was on the docket, under a notice served the 22nd May, which refered in terms to the notice first served, on the 15th Decr., and related back in its effect to said notice; the case then being on the docket for the June Term, was regularly continued, along with all cases in the hands of the Public Administr. to the September Term, on account of the resignation of John F. Darby, Public Admr. which continuance was the first proceeding in the Probate Court, and it is erroneously stated that the first proceeding was had at the September term, by the appellant in his statement of the Case. The stat. of limitation is no bar to placing this claim in 5th class, it being allowed under a suit commenced on 15th Decr. & in effect not discontinued Having argued that notice was given in time to Exhibit the demand within one year, and that such notice was available to classify the same in the 5th class; we come now to consider wheather said notice was sufficient to work a legal exhibition under the Statute. and herein to show that no error was committed in refusing the

2nd Second Instruction, for the notices contain a —

III III Sufficient statement of the nature and amount of the claim; The appellant by appearing & pleading to the merits of the case as appears from the claim being allowed waved the objection to the sufficiency &c of Notice, so far as the second notice, and the bringing of the case up for trial, is concerned, otherwise he shd. have stood upon his demurrer, & have objected to the case being tried at all under such notice. But the question arises, was the first notice, served within the year, sufficient to Exhibit the demand? and this I apprehend is the chief point & pinch of the case.

The notice served on the 15th Decr 1849 was similar to that served on the 22nd May 1850, and contained such a statement of the nature & amount of the claim, with a copy of the account on which it was founded, as would enable a person of ordinary understanding to know what was intended; and greater certainty will not be required in a notice, than in a petition in a civil action. No particular form of notice is prescribed by the statute, and the proceedings before the Probate Court, have been hitherto, somewhat summary and informal in their character, for previous to this appeal, there has been but a scanty investigation & exposition of this Statute by the supreme judiciary of this State. Although the notice given was not so precise as might be wished, nevertheless, it apprises the Admr of the nature & amount of the claim, merging Graham's three acceptances, into an account, dated the 1st Novr 1849; the dates &c of the acceptances were not given, nor was it necessary, for though two of them were not due at the time of service of the first notice, they were for the purpose of being allowed against the estate, construed to be debitum in presenti, though solvendum in futuro, and the acceptances themselves were considered so much waste paper, except for the purpose of proving the account. The fact of indebtedness being alleged & these instruments of writing, used as mere evidence, a variance is not fatal, if the substance of the allegation is proven (1st Stark. Ev. 491) which was done to the satisfaction of the Court sitting as a jury, and the claim was allowed; this finding of fact should not be disturbed. The terms of the notice being general the Court should construe it favorably according to the equity & truth of the case (Drew vs Anderson 1 Call R 51) The informality & insufficiency of the notice does not deprive the Defendant of any safeguard given by the law to his rights, he had his demurrer at the trial, and if the first notice was insufficient the second, which was similar to it, was also, and the case should not have been tried, much less allowed, under such notice; had he wished to avail himself of his demurrer, he should have stood upon it, and appealed from the decision of the Ct. allowing claim but having waived it, the Plffs have their rights also; and the conclusion is inevitable, if the claim is allowed at all it must be placed in the 5th class. The effect of these notices was the same as though they had been most minute & circumstantial, for they enabled the Admr to ascertain the condition of the estate, and no order of payment of the 5th class was made, the same being postponed until it should be determined to which class this claim belonged, thus producing

the beneficial end & intention, of the notice provided for in the 5. & 6. §. of the act on Admr. Art. IV. In the exposition of a remedial statute, such construction should be put upon it, as most effectually to meet the beneficial end in view, and, at the same time, to prevent a failure of the remedy, see (Dwarris on Stats. 718, in Law Library vol 7th p. 57)

3rd IV Third Instruction. Circuit Court committed no error in refusing this instruction for, IV. No instruments of writing were sued on, and ergo no copy of them was necessary in a notice legally exhibiting the claim. For the claim, is founded upon an account, as is alleged in the notice, relied on to exhibit it; and Grahams acceptances were merely introduced as evidence to prove the correctness of said account. The first acceptance was due & unpaid at the time of service of the first notice, and the amount had been charged against Graham in account, as is customary among merchants, the second & third acceptances, were not yet due, and of course could not be sued on; the whole amount was therefore merged into an account, thus substituting a liability of inferior dignity, for one of superior. The redundant proof of the account by the acceptances, is not inconsistent with, and does not alter the legal effect, of that which is alleged in the notice, the variance therefore between the allegation & proof is immaterial Stark: Ev. vol. 1 p. 435. & 459. Both of the courts below, have found the fact that the account is sufficiently proved by the acceptances, and it is accordingly allowed; they only differ in the classification of the demand. This objection, that the instruments sued on were not copied into notice if it is entitled to any weight, should have been brought up in another form, viz: on demurrer & appeal by defdt. from the judgment of the Probate Court allowing the demand; and as he did not deem it expedient to pursue this course in regard to the second notice, it is fair to presume he would have done the same thing in regard to the first notice also; had the case been tried under it at the March term. The requirements of the act on Admr. having been substantially complied with in this case, so that the Defdt. has not been misled to his prejudice in maintaining his defence upon the merits; it would be hard to deprive the Plffs, non residents, & of a distant state, of their equity on a point of practice: and this too when the point has hitherto remained unadjudicated; and was, to all appearances, waved by Defdt. at the trial, from which the first appeal was taken.—

Thus then, since the instructions asked by Defdt. were properly refus-ed by the Circuit Court; and the demand was legally exhibited against the estate within one year after issue of letters, by notice in writing, served on the Admrs. stating the nature and amount of the claim, with a copy of the account on which it is founded; which notice is in sub-stantial compliance with the requirements of the act on Admrs., and produced the effect intended, and was not abandoned by pltffs, but was revived by a second notice, relating back to it, and put upon the docket for trial, was tried on the merits, (Defdt. waiving his demurrer for insufficiency of notice) and allowed. We must conclude that the judgment of the Circuit court was not against law, and that the claim must be placed in the Fifth Class.—

If however, it should appear to the Court, as I understand has been intimated in a recent unpublished decission, that the proceedings before the Probate Court, have been hither-to, too loose & informal in their character; it is hoped that such a decision may be given in this case, as to settle the practice in like cases, for the future; and at the same time preserve to the Respondents, the benefit of the equity to which they are entitled; they having exer-cised such diligence as appears to be required, so far as codes he ascertains the unadjudicated state, of the exposition of, and practice under, the act on Administration.—

Wickham, for Respondents

Supreme Court of Missouri

James T. Coulter et. al.
Respondents

vs 3/3 Brief.

James S. Graham's Admr.
Appellant

Wickham for
Respondents

James J. Soutter et al, appellee
vs
Jas. L. Graham's Admr, Appellant
} In the Supreme Court, Oct. April Term 1851

Points and authorities for Appellant

The attorney for the Appellant relies upon the following points, for reversing the judgment of the Circuit Court in this cause - Because

1st There was no such notice of this claim given to the Administrator as is required by the provisions of the law upon the subject of Administration - See Revised Statutes 1845 - title Administration Article 4th § 5 & 12 p. 91 & 93 - Section 5 p. 91, is as follows

"Any person may exhibit his demand against such estate, by serving upon the Executor or Administrator a notice in writing stating the nature and amount of his claim, with a copy of the instrument of writing or account upon which the claim is founded, and such claim shall be considered legally exhibited from the time of serving such notice"

The 12th Sec. p. 93 contains the same provisions, & also additional, that the claimant "will present the same for allowance at the next term of the County Court" Dorsey vs Burns 5 Mo. 334.

2d The notice, even if be held to be sufficient in form & substance, was not given in time - For the first notice was not followed up - First - because, it was not filed in the Probate Court, & entered upon the Docket as a cause pending in that Court -

(over)

Second - There was never any proceeding in the Probate Court consequent upon this first notice, nor is there any entry recognizing it in the Suit -

3d The second notice was dated & served on 22d May 1850 which was after the expiration of the first year of Administration -

At best the Suit is to be regarded as begun from the time of service of this 2d notice - The mere reference in this notice to the former notice, which was abandoned, and was no part of the record proper of the cause tried in the Probate Court, does not make the 2d relate back to the date of the 1st notice -

4th - The record history of the trial does not connect the two notices, so as to make the inception of the Suit before the expiration of the 1st year of Administration.

F. A. Dick for
Appellant -

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No

Supreme Court
October Term 1851

James T. Doutte
et al
Appl

vs

James G. Graham
Administrator Appl

Points of Appellant
F. A. Dick
atty -

James T. Soutter & Others
Appellees
vs
James G. Graham's Admrs
Appellant
Brief of Appellant

Supreme Court

There are two questions raised upon the record in this cause, by the instructions asked by the Defendant, & refused by the Court below -

1st Whether or not the notice given to the Administrator contains a sufficient statement of the cause of action -

2d Whether or no this notice was served in time to entitle the judgment to be placed in the 5th class of allowances against the Estate -

It is contended

1st That there was no such notice of this claim served upon the administrator as is required by law - Even if our statute did not require in express words, a copy of the instrument sued upon, the ordinary rules of pleading & the requirements of reason, would show the notice in this case to be insufficient - If an ordinary suit at law was to be begun in the Circuit Court upon a petition stating no more than the notice does in this case, against a defendant in life, upon demurrer the petition would I think, be held clearly insufficient, because it would impart to the Defendant no notice of what the Plaintiff's case is. The rights of a Defendant are guarded, & he shall have opportunity to defend a case, clearly & fully stated, and may demur until

his adversary's case is so stated. And yet a living defendant certainly knows more about his own affairs than his administrator possibly can, and especially more than the public Administrator is supposed to know.

Then what reason can be urged, for dispensing with such a statement in the Probate Court - Is it because a claim presented before that Court, is supposed correct, as a matter of course, or is it because the Administrator in that Court is not representing his own interests, but those of other persons, and therefore cares less about the result of the suit - Greater guards should be thrown around an Estate, and a Plaintiff in that Court should be required to make as full and clear a statement of his case, as in the Circuit Court. But not only do these reasons exist for this practice, but also the terms of the law expressly require it - Sec. 5th of Article 4th page 91 requires a notice, which shall contain a copy of the instrument sued upon - This is indispensable - And also in addition thereto, a statement must be made of the nature and amount of the Plaintiff's claim - That is, he shall print set out what he claims & how he claims it, or in other words his construction of the instrument he sues on - 2d He must copy the instrument upon which he bases his claim, that the Defendant, who is the Administrator may between the time of the service of the notice & the trial

have opportunity of ascertaining the nature of the Suit, and not go into Court for trial, & there for the first time ascertain what it is that he is called upon to Defend. Look at the circumstances of this case - the Respondent is the Pub. Admin-istrator, succeeding a prior public Administrator - what can he be supposed to know of the claim based upon of his own knowledge; & certainly no additional information is given him by the paper instituting the inception of this case. The practice in the Probate Courts in this State, entirely disregarding the express terms of the law, is entirely too loose, and leaves too much opportunity for injury to be done to the Estates of deceased. The 2d & 3d instructions refused go to this part of the case.

Second

The notice, even if it had been in compliance with the law, was not served in time to bring the judgment within the 5th class of allowances. Letters of Administration issued 5th February 1849, and the first appearance of this case on the record of this Court (for it never was put upon the Docket) is at the September Term 1850 more than a year from the taking charge of the Estate by the Public Admr. But the Plaintiff contends that as he gave a notice in December 1849, he was in time - So he would have been, had he followed up that notice

But he does not make it the commencement of a Suit by filing it in the Court nor does he have it in any manner entered upon the proceedings of the Court nor does he go into Court to present his claim in pursuance thereof - He takes no notice of it himself, & the Defendant is never in Court to answer it - But subsequently, in May 1850, a new notice is served upon the Defendant to bring him into Court to answer this claim - If the Plaintiff regarded the first notice as being in force, why serve a second one - If he intended standing by that, his course should have been to serve a Scire facias on the Defendant, or a proceeding in the nature of a Sci. fa -

If this new Suit, begun under the 2d notice after the lapse of the 1st year, is to be connected with the 1st defective notice which was abandoned, it will cause an interruption & confusion in the administration of an estate, which the Statute Law never contemplated - & in this case - A year from the date of the letters of administration is given to prove up debts, & those proved within this time are placed in the 5th Class - The 5th Class debts are to be paid in full before the 6th are touched - Now if a claim in the 1st year is produced & abandoned until a year elapses - not only not

continued by entries in Court, but actually never entered in Court, and then, after the Administrator has paid all the 5th class debts, this claim may be re-produced & be ranked in the 5th class, then what provision is to be made for its payment. In such case, where the Estate is ~~sufficient~~ exhausted by the 5th class debts, which the Administrator is legally entitled to pay the day the 1st year elapses, the classifying this claim with 5th class claims gives no advantage to the claimant.

If the legislature intended to have such a claim ranked in the 5th class, then this claimant either does not stand upon an equality with other 5th class claimants, whose debts it is supposed have been paid as far as the law permits, or else the Administrator is personally liable to pay the claim because he has paid out the assets, although authorized by law so to do. One other supposition may be made to support the judgment of the Circuit Court, which is that the law intends this claim to stand pre-

ferred to 6th class, though not equal with 5th class claims - But it is too violent a construction of ~~the~~ the law, thus to create an intermediate class of claims - All of these suppositions are unnecessary - If a claimant wishes to have advantage of a higher class of claims he must use diligence in proving up his debt and obtain the advantage in that way, rather than by asking this Court to make a construction of the Administration law, which will throw the whole practice into confusion -

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Supreme Court

Jas. T. Soutter et al

vs

Jas. G. Graham's adm.

Brief of Dfts Atty. F. A. Dick

James T. Soutter & others
vs
James G. Grahams,
Administrator Appellant

Appellant Respondents

In the Supreme Court October Term 1851

And now at this day comes said Respondent by his attorney and asks the Court to set aside the judgment rendered in this cause and grant him a re-hearing of the same. For reasons as follows—

This Court affirms the judgment of the Court below because no evidence is found preserved upon which the questions of law attempted to be raised can be sustained.

If the Court relies solely upon the bill of exceptions, it is admitted by the Appellant that its judgment is well founded; but if the Court will examine the statement of the case filed in this cause which is agreed to and signed by the Counsel for both Appellant and respondents it is respectfully urged that sufficient facts in evidence are shown & preserved to raise the questions attempted to be raised.

If the Court will examine the record & the ~~agreed~~ statement of the case in the suit of Miller assignee of Janney vs Irwin Executor of Janney no. 98 to this term of the Court, it will find the same defects in the bill of exceptions that there is in this case; for

It is apprehended that the omission in the bill of Exceptions in this case is in not mentioning proof of the date of the letters of administration. The same omission is found in the record in both cases unless the mere allusion to that fact in the affidavit of a witness ~~in the says~~ in the case referred be regarded as supplying this defect. That this omission was not regarded by the Counsel in that case as thus remedied is shown by this, that in the statement of the case it is stated that this fact was admitted not moved on the trial in the Circuit Court. But the record does not state that this fact was admitted, nor in any manner does it presume Evidence of it.

In view of what is stated above, that not only a similar, but precisely the same facts omitted in the bill of Exceptions in both cases, & that is supplied by the statement of the case in both [but stronger in this case because the statement is signed by both Counsel] as this Court has examined & reversed the action of the Circuit Court in the one case, it is believed that the same will be done in the other.

F. N. Dick
Atty. for Appellant

No. 86

Supreme Court.

Jas. T. Soutter et al
Res.
vs
Graham's Admr
App.

Motion for re-hearing

F. A. Dick
for appl't

I do not concur in the statement of facts in Janney's case as within

Kafson