Basey, A J vs. Ambrose, James; 1858 Callaway Co. #16 Cir. 233/8

80/27

. Affirmed, sum stipulated in contract was a penalty, not damages
· Breach of contract

THE STATE OF MISSOURI, ss.

The State of Missouri, To the Judge of the Second Judicial Circuit in said State, GREETING:

WHEREAS, In the Record and Proceedings in a certain cause lately pending in the Circuit Court of Callaway County, in the Judicial Circuit aforesaid wherein A. J. Basye was plaintiff and James Ambrose, was defendant

in ~~an~~ action of Civil Action manifest error hath intervened, to the great damage of the said Basye as by Basye's complaint, we are informed.

NOW, we being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf, COMMAND YOU, that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held at the City of Jefferson, in the county of Cole, in said State, on the second Monday in January next, so that our Judges of our Supreme Court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right and according to law ought to be done.

Witness, WILLIAM E. DUNSCOMB, Clerk of our said Supreme Court, at office, in the City of Jefferson, the first — day of November in the year of our Lord one thousand eight hundred and fifty eight

Wm E Dunscomb

$1.50 for writ paid
by Geo. T White esqr

Brasys
vs } Mit Error
Arnebrod
Filed 4th Nov 1858
Geo Bailey Clk

The Execution of this writ may be seen by the accompanying record

Given under my hand and official seal as clerk of said Court. This 6th November 1858
Geo. Bailey Clk

State of Missouri Cattaway County
Be it remembered that
heretofore on the 18th day of
March 1858. the following tran
=script of record was filed in
the office of the Clerk of the
Circuit Court of said County
to wit, " State of Missouri County of Cole
On the 8th day of April A.D. 1857. the
following petition was produced to the
Clerk of the Circuit Court within and
for said County and State and filed
which said petition is in the words and
figures following to wit, In the Circuit
Court Cole County Alfred J. Bayo
Plaintiff in his own right and as assignee
Transcript of N. L. Backman against James
Ambrose defendant. Plaintiff
States that defendant by his certain
obligatory in writing signed by his hand
and sealed with his seal the date
whereof is a certain day and year
therein written bears the 17th day of
May in the year of our Lord one thousand
eight hundred and forty nine & thereby
bound himself heirs and firmly bound
to N. L. Backman and the said plain
=tiff in the sum of one thousand dollars
as liquidated damages and not as
a penalty for the true payment of which
the said defendant by said writing
obligatory bound himself his heirs firmly
by said writing obligatory, which said writing
obligatory is and was subject to the
following conditions thereinderwritten

that is to say; that the said defendant had contracted with the said Backman and Basye to go with them to California to dig gold upon the following terms; the said Backman and Basye were to furnish the necessary teams, wagons provisions tools and cloth for clothing and leather for shoes for the trip and while in California necessary proper and suitable for the expedition, both in going out and whilst remaining there, and to pay his expenses in returning home, if defendant choosed to return with them, when they should be ready to return. In consideration of which defendant agreed to make his own clothing and shoes, to furnish himself with a good gun, two good shirts, bell tomahawk and all such necessary as might be deemed necessary for the trip; and agreed to aid the said Backman and Basyd in building a house when he and they should get to California, and to aid them in making lots for cattle or other necessary work in and about the business of gold digging for two months if required by them. defendant further agreed by the conditions of said writing obligatory to work for the said Backman and Basyd three years from the time of starting to California until he and they should return, to do all things necessary and proper on the trip out, and to work diligently, constantly

3 and faithfully to make a full return
to the said Backman and Basye of
all the gold dug and discovered by
Trans the said defendant, and to give
=cript to said Backman and Basye the half
part of the gold so dug or discovered
defendant by said writing obligatory
further agreed to go alternately with
the other hand which the said Backman
and Basye might have in their employ
into the surrounding country for provisions
which said writing obligatory together
with the assignment of N. L. Backman
to the plaintiff of all said Backmans
interest in said writing obligatory dated
August the 8th 1849 and herewith filed
are made a part of this petition
Plaintiff further states that he and
the said N. L. Backman duly performed
all the conditions in said writing obli
=gatory on their part and for assigning
a breach of the conditions of the said
writing obligatory by the said defendant
said plaintiff says, that said defendant
did not and would not aid the said
Backman and the plaintiff or either of
them in building a house which they or
=ered in California, and did not and
would not aid them or either of them
in making lots for cattle or other necessa
=ry work in and about the business of
gold digging for two months although
he was required by plaintiff so to do
although plaintiff and defendant

4 arrived in California about the month
Trans of February 1850. and for assigning a
-cript further breach of the condition of said
writing obligatory the said plaintiff says
that said defendant did not and
would not work for the said Basye
and Bachman or for either of them
for three years from the time of starting
to California until they returned,
and did not and would not do all
things necessary & proper on the trip out
and did not and would not work dil
-igently constantly and faithfully
and did not and would not make a
full return to them of all the gold
dug and discovered by him, and did
not and would not give to the plaintiff
and said Bachman or either of them
the half part of the gold dug and dis
-covered by him, and did not and would
not go alternately with the other hands
employed by plaintiff and the said Bach
-man to the surrounding country for
provisions, But neglected and failed
to do and perform each and every of the
conditions and stipulations in said
writing obligatory mentioned, although
the plaintiff and defendant left the
State of Missouri for California on or
about the 15th day of May 1849. and
arrived there about the month of February
1850. Whereupon an action has accrued
to the said plaintiff and a right to recov
-er of the said defendant the said

5 sum of one thousand dollars liquidated damages according to the tenor and effect of the conditions of said writing obligatory which has become forfeited Plaintiff therefore claims damages to the amount of one thousand dollars and for which he asks Judgment.

Transcript A. J. Basye the above named plaintiff makes oath and says he believes the above petition and the matters therein as stated are true A. J. Basye

Sworn to and subscribed before me the undersigned Notary Public within and for the County of St Charles in the State of Missouri this second day of April 1857.

(LS) Witness my hand and official Notarial seal the date aforesaid

Jos H. Alexander Notary Public

And afterwards towit, on the 8th day of April 1857 the following writ appears attached to said petition which is in the words and figures as follows towit, State of Missouri County of Cole. The State of Missouri to the Sheriff of Cole County Greeting you are hereby commanded to summon James Ambrose if he be found in your County to be and appear before the Cole Circuit Court on the first day of the next Term thereof to be begun and held at the Courthouse in said County on the third Monday in August next to answer the petition of A. J. Basye and N. L. Backman and have you then and there this writ and do you certify to our said Court how you Execute

6 this writ, In Testimony whereof I. G. A. Parsons
Trans Clerk of the Circuit Court have here
=cript L S, =unto set my hand and seal at
office this 8th day of April 1857
G. A. Parsons Clerk
By Richd. W. Anderson D.C.
and on the back of said writ the follow
=ing return appears in words and figures
following to wit, "I executed the within
petition and writ on the within named
James Ambrose on the 24th day of April
1857 by delivering him a true copy in
the County of Cole State of Missouri
Wm. D. Ken Sheriff
By John W. Scruggs D.S.
and afterwards to wit, on the 27th day of
August 1857 the following other entry
appears of record in words and figures
as follows to wit, Alfred J. Basye vs
James Ambrose Civil action. Answer
filed, which answer is in the words
and figures as follows to wit, "In the
Circuit Court of Cole County of August
Term 1857. Alfred J. Basye plaintiff vs
James Ambrose defendant, defendant
for answer to plaintiff petition says that
although his signature and seal are
affixed to the paper writing annexed to
plaintiff petition and the said paper
writing is not his act and deed. Plaintiff
further states that he never made any
legal and binding contract with the
Plaintiff. Alfred J. Basye, Plaintiff states
that he did make a contract with and
N. L. Backman to go to California with him

7 Bachman; upon terms and conditions
Trans altogether different from those contained
cript in the paper writing aforesaid, that the
contract between said Bachman and
defendant was by agreement to have
been reduced to writing before they left
the State of Missouri; but from some cause
not known to defendant the same was
not done, on the Journey to California
the paper writing now sued on was first
presented to defendant at Council grove
in the present Territory of Kansas, when
after learning its contents this defendant
refused to sign the same for the reason that
it contained stipulations engagements and
conditions not embraced in the contract
between defendant and said Bachman
defendant further states that he neither
saw nor heard of said paper writing now
sued on until they reached Cottonwood creek
in the Mexican Territory when it was
again presented to him, and he again
refused to sign it, threats were then made
by Plaintiff, and said Bachman, that if
defendant did not sign the instrument
sued on, they would leave him where he was
Plaintiff further states that he was in a
foreign Country, and without the means
of reaching home, and in view of the
threats aforesaid and under that duress
he signed the paper writing aforesaid
and not otherwise. defendant further
states that within eight or ten days
after he was thus forced to sign the
paper writing sued on, the said Basyp

and Bachman dissolved their co-
=partnership without his knowledge
or consent, and that the said paper
writing and any, or such interest as
Bachman had therein was assigned
Trans by Bachman to said Basye, and this
=cript defendant services with it, without
this defendant knowledge or consent
defendant further states that not
=withstanding all the aforesaid wrongs
and injuries of said Basye and
Bachman, he proceeded to California
with the said Basye, as by duress
he was compelled to do, and performed
all and every stipulation and condi
=tion in the paper writing aforesaid
until he reached the State California.
defendant further answering says
that he in good faith remained in the
service of said Basye as long as said
Basye remained in California, and
that said Basye left California about
one year or before the expiration of the
hire, for which said Basye and Back
=man had forced this defendant to
engage his services to them, before the
dissolution of their partnership as afore
=said, and returned to the State of Miss
=ouri. and defendant further states
that said Basye & Bachman or either
of them ever furnished or offered to fur
=nish the means necessary to enable
this defendant to return to the State
of Missouri. defendant for answer to the
first breach of the said paper writing

9 assigned by plaintiff, says that he denies that it was demanded of defendant by plaintiff or said Backman to assist them in building a house or enclosures for cattle or that he refused to aid and assist them in the performance of said work in and about the business of gold digging. Plaintiff further answering says that he denies the allegation that he did not and would not work work for the said Basye and Backman or either of them for three years from the time of starting to California, until they returned and denies that he did not and would not do all things necessary and proper on the trip out, or that said defendant did not and would not work diligently constantly and faithfully, or that he did not and would not make a full return to them of all the all the gold dug and discovered by this defendant, or that he did not and would not give to the said plaintiff and Backman or either of them the half part of the gold dug and disco=vered by this defendant or that he did not and would not go alternately with the other hands employed by plaintiff and the said Backman to the surroun=ding country for provisions whenever he was required to do so. James Ambrose

Trans=cript

By Morrow his atty

This defendant James Ambrose upon oath states that the matters and things set forth in the above and foregoing answer as therein stated are true James Ambrose

Sworn to and subscribed before me the undersigned Clerk of Circuit Court this 27th August 1857. G. A Parsons clerk

And afterwards, to wit, on the 1st day of December 1857. the following other entry appears of record in the words and figures as follows to wit, A. J. Basye vs James Ambrose, Motion to strike out a part of defendants answer filed, which motion is in the words and figures following to wit In the Cole County Circuit Court, State of Missouri at its August adjourned adjourned Term 1857. A. J. Basye plaintiff against James Ambrose defendant, Motion to strike out answer. Plaintiff moves the Court to strike out all that part of the defendants answer which charges and relates to the signing of instrument sued on, having been signed by defendant in a foreign country in view of threats made by plaintiff and Bauchman, because said threats did not amount to duress - because defendant does not show from his answer that he was compelled to sign said instrument under such circumstances as in law amounted to duress.

Parsons Batts & White

And afterwards, to wit, on the 4th day of December 1857. the following other entry appears of record in the words and figures following to wit, A. J. Basye vs James Ambrose defendant. The Judge of this Court being related to the plaintiff, it is ordered by the Court, that a change of venue be granted to the Circuit Court of

11 Callaway County; and it is ordered
that the Clerk of this Court make out
the proceedings had in this cause and
certify the same to the Clerk of the Circuit
Court of Callaway County.
State of Missouri County of Cole. I. G. A.
Parsons Clerk of the Circuit Court within
and for said County, do hereby certify that
the foregoing is a true and perfect copy
of the proceedings had in the above entitled
cause as fully as the same appears of record
in my office. In Witness whereof I have
(L S) hereto set my hand & seal of said Court
February 1st 1858. G. A. Parsons clk
By R. N. Anderson D.C.
afterwards. At a Circuit Court continued
and held for Callaway County at the
Courthouse on Saturday the 18th day of
September 1858. The parties appear and
the motion to strike out part of defendants
answer being heard is sustained, on motion
of the defendant leave is given him to
amend his answer, thereupon he pro
=duced & filed the same, which is as
and. follows "In the Callaway Circuit
ans. Court September Term 1858. Alfred J.
Bays pltf against James Ambrose dft
defendant says the plaintiff ought not
to have or maintain his aforesaid action
against the defendant, because he
says that the said plaintiff and the said
Beckman just before the making of the
said writing in the plaintiff's petition men
=tioned to wit, on or about the 15th day of
July 1849, on the plaining between the Western

12 border of Missouri and California, menaced and threatened to leave the defendant alone and without provisions in the Wilderness, unless the said defendant
Amd. would make and seal and as his act
ansr. and deed deliver the said writing, falsely dated the 17th day of May aforesaid, and the said defendant avers that he was then five hundred miles West of the Western border of Missouri, and hundreds of miles East of California and had he been so left alone and without provisions he would have been exposed to starva=tion and to assassination by the Indians and his life endangered and that he did thereupon then and then by reason and in consequence of such menaces and threats, and in fear and apprehension thereof, make and seal, and as his act and deed deliver the said writing

Defendant denies that the plaintiff and the said Bachman duly performed all the conditions in said writing, ob=ligatory on their part or that the dam=ages claimed by plaintiff are liqui=dated or that an action has accrued to to the plaintiff or a right to recover of defendant the said sum of one thousand dollars or any other sum Wherefore defendant asks Judgment for his costs James Ambrose

James Ambrose makes oath and says that the foregoing answer and the matters therein as stated are true sworn to & subscribed James Ambrose

13 before me this 18th Sept 1858
Geo. Bailey Clk

Plaintiff produced and filed his motion to strike out that portion of the amended answer, which pleaded threats of Plaintiff & duress which being seen and the parties heard is sustained by the Court; Thereupon by agreement of the parties the original & amended answers are considered as one in the pleadings. and thereupon come a Jury, who being sworn well and truly to try the issue joined; Thereupon the Jury

Nonsuit Plaintiff takes a nonsuit with leave to move to set the same aside, Thereupon it is adjudged by the Court that

Judgt the Plaintiff take nothing by his action but that the defendant recover of the Plaintiff his costs herein expended, and that he have Execution. The Plaintiff

Mo to set aside Nonsuit filed

produced and filed his motion to set aside the nonsuit, which was overruled by the Court. The Plaintiff then produced his bill of Exceptions which was examined, signed, sealed and allowed by the Court and ordered to be filed, and made a part of the record which said bill of Exceptions is as follows

Bill Exons

"In the Circuit Court of Callaway County State of Missouri, at its August adjourned Term 1858. A. J. Bays Plaintiff against James Ambrose defendant Be it remembered that this cause came on to be heard on the petition, original and amended answer filed, and upon

14 the trial the plaintiff read the following contract (the clerk will here insert the contract) * (There is no contract among the papers) Plaintiff then offered evidence tending to show breaches of the contract and closed the testimony. defendant offered no testimony. Plaintiff then asked four instructions three of which were refused by the Court, and to which plaintiff then and there excepted, which said instructions are as follows

Plts Instons

Sowet, Basye vs Ambrose 1st instructions asked for plaintiff. If the Jury find that defendant has committed a breach in any one of the stipulations set forth in the contract, the measure of damages will be one thousand dollars the amount fixed by the parties to the contract. 2d The plaintiff having shown that defendant left his employ during his absence for provisions, if there was afterwards a return of defendant or an offer to return to the service of Basye it devolves upon the defendant to show that fact, and if he has not satisfied the Jury that he did return or offer to return, they must find for the plaintiff. 3d If the Jury believe from the evidence that at the time defendant left the employ of plaintiff, he left with with the intention of not returning then the Jury must find for the plaintiff unless they further find that defendant returned or offered to return to the

Refused.

Refused.

Given.

15. service of plaintiff in so short a time
Pltfs that Plaintiff sustained no loss by his
Instrs absence. 4th If the Jury find from the
Evidence that deft contracted with
Basye & Backman to go to California
with them, and for the space of three
years from the time of leaving for Califor-
nia to dig gold in California after
their arrival there and to give them
one half of all the gold dug and
discovered by him during that time
whilst in California, and that Basye
& Backman dissolved partnership and
Backman assigned said contract and
in evidence to Basye with the knowledge
and consent of defendant, and that
Backman & Basye while together and
Basye after the dissolution furnished
Oxen, Wagon, provisions and tools, cloth
for clothing and leather for shoes for
the trip, and while in California, necessary
and proper and suitable for the expedition
both in going out and while remaining
there, the Jury ought to find for Plff the
sum of one thousand dollars, if they
further find that deft left the service of
Plff at any time before said three years
had expired; Defendant offered
three instructions two of which were given
by the Court, and to the giving of which
plaintiff then and there excepted, which
said instructions are as follows to wit,
defts "Basye vs Ambrose. defendant asks
instrs the following instructions 1st Unless the
Jury believe from the evidence that plain

Refused,

16 -tiff complied with the conditions of the bond read in evidence on his part to be performed, and that defendant without any fault of the plaintiff left his employment against his will, they must find for defendant

defts instructions

2d. The amount specified in the bond read in evidence is not liquidated damages, but a penalty and if the Jury find the facts necessary to enable the plaintiff to recover, it could only be for such damages as he may have actually sustained by the default of the defendant, which it would, in such case, be incumbent on him to prove; 3d. If the Jury are satisfied from the circumstances detailed in evidence that plaintiff and defendant seperated by mutual consent, after they reached California, and by mutual consent abandoned their original contract before the defendant had broken his agreement, because the diggings would not pay, or for any other cause they must find for defendant:

Exports

Plaintiff afterwards took a nonsuit and thereupon filed his motion to set said nonsuit aside, which motion is as follows, to wit, "In the Circuit Court of Calaway County State of Missouri at its August adjourned Term 1858.

Mo to set aside nonsuit

A. J. Basye Plaintiff against James Ambrose defendant, Motion to set aside nonsuit. Plaintiff by his attorney moves the court to set aside the nonsuit in

17 ~~the trial the plaintiff read the following~~
* ~~Contract~~ Writ, Know all men by these
Contract presents that I. James Ambrose of the County
of Cole in the State of Missouri are held
and firmly bound to N. L. Backman and
Alfred I. Basye of said County in the sum
of One thousand dollars as liquidated
damages and not as a penalty for the
true payment of which I bind myself my
heirs &c firmly by these presents signed sealed and
delivered this 17th day of May 1849. This bond is
given upon the following condition that is to
say, I have contracted with the said Back
man & Basye to go with them to California to
dig gold upon the following terms the said Back
man & Basye is to furnish the necessary Oxen Wag
gons, provisions, Tools and cloth for clothing and
leather for shoes for the trip and while in California
necessary proper and suitable for the expedition
both in going out and while remaining there and
paying expense in returning home if I choose to
return with them when they are ready to return
In consideration of which I have agreed to make
my own clothing and shoes, to furnish myself with
a good gun, two good Knives belt, Tomahawk and
all such weapons as may be deemed necessary for the
trip, I have agreed to aid them in building a house when
we get to California and to aid them in making lot, for
Cattle or other necessary work in & about the business
of gold digging for two months if required by them
I further agree to work for the said Backman & Basye
three years from the time of starting to California until
we return to do all things necessary and proper on the
trip out and to work diligently, constantly and faith
fully, to make a full return to them of all the

18.
Contract

gold dug and discovered by me and also give to said Backman & Basye the half part of the gold so dug or discovered. I have further agreed to go alternately with the other hands which the said Backman and Basye may have in their employ into the surrounding country for provisions. In case of a failure to comply with the above contract on my part I obligate myself to pay to the said Backman & Basye the said sum of one thousand dollars as liquidated damages and should the said Backman & Basye receive damages over and above that sum, then I obligate myself to pay them whatever damages they may sustain, but in no event an said damages to be less than said one thousand dollars in witness whereof I have hereunto set my hand and seal this 17 day of May 1849. James Ambrose (seal)

I N. L. Backman on account of a dissolution of the Copartnership heretofore existing between A. I. Basye and myself do hereby assign all the interest I may have in the within bond to the said Basye, and also do hereby release James Ambrose from all liability to me individually in consequence of the said bond, it being understood that the said Ambrose releases me from all similar liability as one of the Copartners in said bond. As witness our hands & seals this 8th August 1849. N. L. Backman (seal)

19 the above entitled cause, because the Court erred in giving instructions asked for defendant, because the Court erred in refusing to give instructions asked for plaintiff. Harvey & White
Attorneys for plaintiff

Upon which motion was overruled by the Court, and to which plaintiff then and there excepted, and prays that this may be signed and sealed and made a part of the record in this cause John T. Redd
As Clerk of the Circuit Court within and for Callaway County in the State of Missouri I do certify that the foregoing seventeen pages contain a full, true, and complete, copy of the record and papers in the suit therein named of Alfred J. Boggs against James Ambrose as fully as the same appears upon record in my office

Given under my hand & official seal this 6th day of November 1858.

Geo. Bartley Clk

Petition from page 1 to 5
Summons " 5
Sheriffs return 6
answer 6. 7. 8. 9
Mo to strike out answer 10.
Venue changed 10-11.
Mo to strike out answ. sust 11.
leave to amend answer, answer filed 11
Jury & verdict 13.

Judgment 13.
Motion to set aside nonsuit filed 13.
Exceptions 13.
Plts Instructions 18. 19. 14
Defts " 15.
Motion 16.

A. J. Basye 4 ~~84~~ 1/2

vs } Record

Jas. Ambrose
Exam'd
Ck for $ ~~[illegible]~~ 7.21
at Geo Bartley Ck

filed Nov. 19th 1858
Wm E Dunscomb
Clerk

Callaway
16th

In the Supreme Court of the State of Missouri. At its January term 1859,

A. J. Bassee Plaintiff in error,
vs } Assignment of errors,
Jas Ambrose, Defendant in error,

Plaintiff in error by his counsel comes into Court and says that the Court below erred,

1st In refusing the first second and third instructions asked by plaintiff in error plaintiff below,

2d In giving the second and third instructions asked by defendant in error, the defendant below,

3d, In refusing to set aside the non-suit taken in said cause,

Larsens & Waite
for plaintiff in error,

A I Basye

v J Dunn

Vas. Ambrose

filed Jany 15th 1859

Wm E Dunscomb

Clerk

In the Supreme Court of the State of Missouri January Term 1857.

A. G. Basye Plff in Error
vs
James Ambrose Dft in Error—

The Court Below did not err 1st in refusing the first, second and third instructions asked by the plaintiff—

2nd In giving the second and third instructions asked by the Defendant—

3rd In refusing to set aside the Non=suit taken in said Cause—

Lay & Gardenhire
for Dft in Error—

Basye Pltff in Error
vs 3
Ambrose Dft in Error

Gainder in Error

Filed Jany 20. 1859
Wm E Dunscomb clk

A. T. Basey
vs
Jas. Ambrose

Error to the Callaway Circuit Court

As none of the evidence is preserved in the bill of exceptions, but that which related to the breaches of the condition of the bond, the instructions given and refused concerning other matters cannot be reviewed in this Court, as for any thing that appears, they may have been rejected as irrelevant, not being warranted by the testimony. The main point presented for our consideration is whether the sums stipulated to be paid by the defendant for a violation of the condition of the bond was a penalty or liquidated damages.

They mistake the object and tenor of our system of jurisprudence, who while maintaining that men in making all contracts have a right to stipulate for liquidated damages regardless of their disproportion to the sum resulting from a breach of the contract, insist, that it would be hard if men were not permitted to make their own bargains. No system of laws would command our respect or secure our willing obedience which did not to some extent provide against the mischiefs resulting from improvidence, carelessness, inexperience & undue expectations on one side & skill avarice & a gross violation of the principles of honesty and fair dealing on the other. The folly of one in making a wild & reckless stipulation will not justify gross oppression in another. A just man, when he sees one in a situation, in which he is prepared to make a contract which must grind & oppress him, will not take advantage of his state of mind and enrich himself by his folly & want of experience. It has been remarked, that in reason, in conscience, in natural

equity, there is no ground to say, because a man has stipulated for a penalty, in case of his omission to do a particular act (the real object of the parties being the performance of the act) that if he omits to do the act, he shall suffer an enormous loss, wholly disproportionate to the injury to the other party.

By the common law if one bound himself in a penalty of a greater sum for the payment of a less one; as if he bound himself in a penalty of two hundred pounds to pay at a given day one hundred pounds, if the less sum was not punctually paid at or before the day, the penalty was forfeited and in an action at law upon the bond the whole of it was recovered: But Courts of equity seeing the hardship and oppression of this, interfered & granted relief on the payment of the sum really due with interest. This principle was so conformable ~~to the principles~~ to the dictates of natural equity, that Parliament in the 4th year of Anne incorporated it into the statute law and enabled courts of law to give the relief, before only attainable in courts of equity: So with regard to bonds, by which the performance of other acts than the payment of money, was secured ~~to be done~~ by a penalty, at common law, the failure to do the act or any one of the acts whose performance was thus secured, caused a forfeiture of the penalty and the whole of it was recovered in an action at law on the bond. Against these forfeitures courts of equity relieved the defendant upon his compensating for the damages he had actually sustained by reason of the breach of the condition of the bond. Here as in case of bonds conditioned to pay money, Parlia-

ment by statute enabled a party to obtain in a court of law the relief which was afforded by courts of equity. The statute of 8 & 9 of William III. required, that in all actions upon any bond or on any penal sum for non performance of any covenants or agreements contained in any deed or writing, breaches should be assigned, and that damages should be assessed for those breaches, and although judgment as formerly was entered for the penalty, yet if the defendant after such judgment & before execution paid into court the damages assessed, a stay of execution was awarded on the record; or if by reason of the execution the damages & costs were fully paid; the defendant was discharged, until a further breach of the condition of the bond: Upon this statute, Serjeant Williams 1 Saun. 58 remarks that the words "may assign" in the first part & "may suggest" in the subsequent part of the statute are compulsory upon the plaintiff. For the act was made in favor of defendants & is a remedial law calculated to give plaintiffs relief up to the extent of the damages sustained, & to protect defendants against the payments of further sums than are in conscience due & also to take away the necessity of proceedings in equity to obtain relief against an unconscientious demand of the whole penalty in cases where small damages only have accrued. And therefore it is not in the plaintiffs power to refuse to proceed according to the statute, but he must assign the breach of such covenants as he proceeds to recover satisfaction for". We have substantially incorporated into our code of laws the statutes of 8 & 9 William III. and of the 4th of Anne.

Although courts of equity relieved

against penalties, yet they did not interfere, where the damages were liquidated. But whilst they acted on this principle, they did not suffer their jurisdiction to relieve against penalties to be evaded, by the introduction of the words into the agreement "not as a penalty" but as liquidated damages: They acted as they did in the case of Mortgages, in regard to which, having declared, that what was once a mortgage was always a mortgage, they treated as a nullity and utterly ~~expunged~~ discountenanced any contract by which the Mortgagors right of redemption was impaired or in any way attempted to be taken away: As they would act in the case of a usurious contract, where the borrower expressly agrees that the excessive interest should not be so regarded, but deemed a compensation to the lender for his labour in handling & counting the money in making the loan. In such cases they would never be restrained from affording relief to the oppressed, by the claim that free men should be permitted to make their own contracts: The doctrine would amount to this that in all cases the victim of avarice & extortion might by a contract dispense with the law which afforded him protection against the cruelty of his oppressor. Story says, that in cases of liquidated damages courts of equity will not interfere to grant relief, but will deem the parties entitled to fix their own measure of damages; provided always the damages do not assume the character of gross extravagance or of wanton & unreasonable disproportion to the nature or extent of the injury. But on the other hand courts of equity will not suffer their jurisdiction to be evaded merely by the fact, that the parties

have called a sum damages, which is in fact & in intent a penalty; or because they have designedly used language & inserted provisions which are in their nature penal, & yet have endeavorded to cover up their objects under other disguises 2 Story's Eq. sec. 1318

As the object of the statute requiring breaches to be assigned in actions on penal bonds conditioned to perform collateral acts, was to enable defendants to obtain that relief at law, which had formerly only been afforded them by courts of equity, and as courts of equity whilst they did not relieve against liquidated damages, yet would not suffer their jurisdiction to be evaded by calling a penalty damages, so, courts of law succeeding to the jurisdiction of courts of equity by virtue of the statute, will not permit the relief they are authorized to grant to be defeated by the shallow artifice of calling a penalty liquidated damages. The duty of the courts in cases of this kind, is to ascertain, when the sum stated is in fact a penalty, and when it is properly intended as liquidated damages, as the just, appropriate & conventional amount sustained by the doing or not doing the act stipulated to be done or omitted.

It is obvious that every case occurring under this branch of the law must in a great measure be determined by its own circumstances. If courts were to hold that the parties by adopting any particular form might relieve their contracts from their supervision, the law would be entirely defeated, as nothing would be easier than to adopt such form in every case. The nature & stipulations of the contract must determine, whether ~~its observance can be enforced by~~ the sum stipulated to be paid in case of its violation is a penalty or liquidated damages. The statute cannot—

be evaded by arbitrarily calling a penalty liquidated damages. We shall not attempt to review the cases on this subject, they are numerous and not easily reconcilable. On such a question an entire concurrence of opinion could hardly be expected. But yet there are some rules on this subject which are generally concurred in & those rules show that the sum stipulated to be paid in the contract before us, is a penalty and not liquidated damages. The cases of Astley vs Weldon 2 Bos & Pul. 346. Davis vs Penton 6 Barn & Cres. Kemble vs Farren 6 ~~Bing~~ Bing. 141. Boys vs Ancell 5 Bing N. C. 390 & Moore & Hunt vs Platte County 8 Mo. 467 show, that where the agreement secures the performance or omission of various acts which are not measurable by any exact pecuniary standard, together with one or more acts, in respect of which the damages on a breach of the covenant, are readily ascertainable by a jury, and there is a sum stipulated as damages for a breach of any one of the covenants, such sum is held to be a penalty merely.

The case before us when examined will be found to come within the principle above stated. The defendant bound himself in the sum of one thousand dollars ~~as liquidated damages~~ to Basey & Backman as liquidated damages not as a penalty in consideration of certain acts to be performed by them, to go with them to California to dig for gold, to make his own clothing and shoes; to furnish himself with a good gun, two good knives, belt tomahawk & all such weapons as might be deemed necessary for the trip. After he had reached California, he was if required to aid them for two months in building a dwelling house & lots for cattle and to assist them in other necessary work about gold digging. He further bound himself

to work for them for three years from the time of setting out for California, to do all things necessary & proper on their journey, to work diligently, constantly and faithfully, to make a full return to them of all the gold dug & discovered by him & to give half thereof to Backman & Basey. In case of a failure to comply with the contract he obligated himself to pay Backman & Basey one thousand dollars as liquidated damages & not as a penalty and in the event of their receiving damages over that sum he bound himself to pay whatever damages they might sustain but in no event were the damages to be less than one thousand dollars. From this recital of the agreement, it is clear, that there were acts to be performed, the damages resulting from the non performance of which might readily be ascertained by a jury & whose amount would be merely nominal, bearing no proportion to the sum stipulated as liquidated damages: a disproportion so great as would shock the moral sense of every one. What court would suffer a party to recover one thousand dollars from another as liquidated damages because he had failed to account for one dollar's worth of gold dust, or because he had failed to furnish himself with a knife when he already had one.

The 13th sec. of Act 9 of the practice act, prescribes that in every petition, answer or reply amendatory or supplemental, the party shall set forth, in one entire pleading, all matters which, by the rules of pleading may be set forth in such pleading, & which may be necessary to the proper determination of the action or defense. Nothing therefore could be more surprising than in looking over the record in this case to see an entry that by the agreement of parties the original & amended

answers are considered as one in the pleading. The provision is a very wise and salutary one freeing courts and juries of great embarrassment & the parties from much unnecessary cost. It is hard to conceive how any court could arrive at the conclusion that it possessed the power by consent of parties to dispense with this section of the law. No reason is seen, why if the court can in such way dispense with this provision it may not in like manner dispense with every law regulating its conduct & the making up of its records in suits between individuals. Affirmed

J. Richardson concurs. J. Napton absent

Wm Scott

81.

Basey
vs.
Osborne

Opinion
Affd

filed March 18 1859
Wm E Duncomb
Clerk

In the Supreme Court of the State of Missouri. At its January term 1859.

A. I. Basye. Plaintiff in error
vs } Error to Calaway Circuit Court.
Jas Ambrose. Defendant in error.

In the month of April 1849, defendant in error entered into an obligation to plaintiff in error, in the sum of one thousand dollars "as liquidated damages, and not as a penalty," (see record page 17 & 18,) in which he obligated himself to go with plaintiff in error to California, to do certain things on the way out, after geting there to remain with him for three years, in making lots for stock, going for provisions and diging of gold, make a full return to and deliver to plaintiff in error one half of all the gold discovered or dug by him. And in case of a failure to comply with said contract, obligated himself to pay the sum of one thousand dollars, as liquidated damages, and should plaintiff in error receive damages over and above that sum, obligated himself to pay whatever damages he might sustain, but in no event said damages to be less than one thousand dollars.

said obligation was given originally to plaintiff in error and one Bauchman; but on their way out to California a dissolution of partnership took place between Bagge & Bauchman, this obligation with all the rights pertaining to the same was formally transferred to plaintiff in error. Defendant in error proceeded on with plaintiff in error to California, worked with him a short time, but finding there was not gold enough in the hills and gulches of California to satisfy his avaricious propensity whilst plaintiff in error was to have half of what he dug out, he availed himself of an opportunity whilst plaintiff in error had gone to the settlements to get provisions, and left his service, went off into another part of the country, worked upon his own hook til he had gotten as much gold as he thought he needed to make himself comfortable at home, when he returned before the expiration of the three years, and refused to account for or divide the gold dug by himself, with plaintiff in error.

The plaintiff in error brought suit on said obligation, alleging breaches of the same on the part of defendant in error, and his failure to perform each and all of the stipulations therein mentioned, and asking judgment for said sum of one thousand dollars. The answer of defendant (which see page 6 to 9 of record) (& 11 to 12) among other things set up facts in regard to the signing of the obligation which was intended to show that defendant in error had signed said obligation under duress, which parts were stricken out by the court on motions of plaintiff in error,

A jury was then had to try the cause upon the issues made by said petition and the parts of defendants answer not stricken out, which denied that he had failed to perform his parts of the obligation, that he staid with plaintiff in error til he (plaintiff in error) left California, and denied that the damages claimed were liquidated,

Evidence was offered tending to show that defendant in error, after working a short time and dividing the gold with plaintiff,

in error, abandoned his service whilst plaintiff in error was absent geting provisions, The following instructions were asked by plaintiff in error, (See page 14 & 15 Record)

1st If the jury find that defendant has committed a breach in any one of the stipulations set forth in the contract, the measure of damages will be one thousand dollars, the amount fixed by the parties to the contract,

2d. The plaintiff having shown that defendant left his employ during his absence for provisions, if there was afterwards a return of defendant, or an offer to return to the service of Barge it devolves upon the defendant to show that fact, and if he has not satisfied the jury that he did return or offer to return, they must find for the plaintiff.

3d If the jury believe from the evidence that at the time defendant left the employ of plaintiff, he left with the intention of not returning, then the jury must find for the plaintiff, unless they further find that defendant returned or offered to return to the service of plaintiff in so short a time that plaintiff sustained no loss by his absence.

4th If the jury find from the evidence that defendant contracted with Basye & Bauchman, to go to California with them, and for the space of three years from the time of leaving for California, to dig gold in California after their arrival, then and to give them one half of all the gold dug and discovered, by him during that time, whilst in California, and that Basye & Bauchman dissolved partnership and Bauchman assigned said contract read in evidence, to Basye with the knowledge and consent of defendant, and that Bauchman and Basye while together, and Basye after the dissolution furnished oxen wagon provisions and tools, cloth for clothing and leather for shoes, for the trip, and while in California necessary and proper and suitable for the expedition, both in going out and while remaining there, the jury ought to find for plaintiff the sum of one thousand dollars, if they further find that defendant left the service of plaintiff at any time before the said three years expired.

The Court refused the first second and fourth

instructions asked by plaintiff and gave the third, and to the refusing of which plaintiff then and there excepted the defendant then asked the following instructions, (See page 154 & 16 of the record)

1st Unless the jury believe from the evidence that plaintiff complied with the conditions of the bond read in evidence, on his part to be performed, and that defendant without any fault of ~~[illegible]~~ ~~[illegible]~~ plaintiff left his employment and against his will, they must find for defendant.

2d. The amount specified in the bond read in evidence is not liquidated damages but a penalty, and if the jury find the facts necessary to enable the plaintiff to recover it could only be for such damages as he may have actually sustained by the default of the defendant, which it would in such case be incumbent on him to prove.

3d. If the jury are satisfied from the circumstances detailed in evidence that plaintiff and defendant separated by mutual consent after they reached California, and by mutual consent abandoned their original contract, before

the defendant had broken his agreement because the diggins would not pay or for any other cause, they must find for the defendant. The Court refused the first instructions of defendant, and gave the second and third. To the giving of which plaintiff then and there excepted. Plaintiff then took a nonsuit, and on the same day filed his motion to set the same aside which was refused by the Court below, to which plaintiff then and there excepted, and tendered his bill of exceptions (which see pages 13 & 14 of the record) which was signed by the Court below, and this cause is brought to this Court by writ of error.

Parsons & White,

For plaintiff in error.

The second instruction given for the plaintiff and the third given for the defendant show that plaintiff was endeavouring to recover and so shaped his proof, with the view of showing that defendant had abandoned his service after they had arrived in California.

The second instruction asked by defendant and given by the Court is the main instruction that we complain of.

We think that Courts have enough to do to settle controversies between parties where they have omitted to fix in their contracts the precise amount of damage that the delinquent shall pay, without interfering in those cases where parties by their contract have fixed their measure of damages.

We understand that Courts should look at the whole agreement, and its surrounding circumstances, and give judgment accordingly, 2d Parsons on Contracts Page 434. 435 2. Story's Equity Sec 1318, 2. Starkie on Evidence Page 851,

Where parties to a contract fix their measure of damages, Courts have no right to interfere with them, Irwin's Admr vs Cottle & Tanner 1st Mo R P 149, Hempler vs Snider 17 Mo R P 258, Lowe vs Peers 4th Burrow Page 2228. & 9, 17 Wend P 447, 8 2 Storys Eq. Sec 1313. 1321, Story on Contracts S 1021, 2. Greenleaf on Ev. Sec 257,

Before the Court should have given this instruction, the defendant should have laid some foundation for it in his answer, either by alleging that the amount claimed was wholly disproportionate to the injury, or alleging fraud, imposition accident or mistake or something of that sort,
2. Story Eq. Sec 1316, 17 Mo R P 240
2 Story Eq. Sec 1323 to 25

The head note in the case of Moore & Hunt vs Platte County 8 Mo R Page 467, seems to intimate that an obligation will be regarded as a penalty and not liquidated damages where a number of stipulations are set forth in the obligation, but if the Court will examine the opinion there delivered by Judge Tompkins, they will find that no such doctrine is attempted to be set up, and if it were, it is certainly fully overturned by the case of Gower vs Saltmarsh 11 Mo Reports Page, 271, Taylor vs Sandiford 7 Wheaton's R. Page 17, 2 Greenleaf on Ev Section 258, & note 7.

We admit that in many cases courts will look at the actual loss sustained, but this is only in cases, where the meaning of the obligation is not clear, or the obliger having performed so great a portion of his contract, that no great damage is sustained by the breach; In which case if the defendant by his answer would raise the question in such a manner as to meet the requisites of our present system of pleading, the court might relieve him, But til this is done he has no right to insist to relieve himself or throw any further obligations upon us in making out our case than his contract calls for.
2. Starkie on Ev Page 502. see also note g

From the nature of the enterprise that the parties were going into, it is manifest that the damages would be uncertain, in which sort of cases courts are disposed to regard the damages as liquidated, when they have so expressed it in their contract. 2 Greenleaf on Evidence sec. 259.

Basye
vs } Brief of
} Plaintiff in
} Error.
Bauchman,

In the Supreme Court of Missouri
January Term 1859.

Alfred L. Basye pltff in Error
against
James Ambrose Dft in Error.

This was a Suit instituted by Basye in his own right and assignee of one Buckman, at the August Term 1857 of the Cole Circuit Court, on a certain Contract or Bond, executed by James Ambrose the Dft in Error, to the said Buckman and Basye, to recover damages for a breach of the same. The Condition of said Contract or Bond was, that the said Ambrose was to go with the said Buckman & Basye to California to dig Gold. Buckman & Basye were to furnish the necessary oxen, waggons, provisions, tools and Cloth for clothing and leather for shoes for the trip; and while in California necessary, proper and suitable for the expedition both in going & while remaining there and to pay expense in returning home, if the said Ambrose chose to return with them when they were ready to return. The said Ambrose was to make his own Clothing and Shoes; to furnish himself with a good gun, two good

knives, Bell, Tomahawk and all such weapons as might be necessary for the trip. The said Ambrose was also to aid them in Building a House when they got to California — to aid them in making a lot for Cattle and all other necessary work in and about the business of gold digging for two months if required by them. He was also to work for them for three years from the time of starting to California — to do all things necessary and proper on the trip — to work diligently constantly & faithfully — to make a full return to them of of the Gold dug & discovered by him and to give to them one half of all the Gold dug & discovered by him. He was also to go alternately with the other hands employed by them into the surrounding country for provisions. In case of a failure on his part to comply with the above condition or any part of it, the said Ambrose bound himself to pay to the said Basye and Buckman the sum of one thousand Dollars, as <u>liquidated damages</u> <u>and</u> <u>not as a Penalty</u>, and in case the said Buckman and Basye sustained damage over and above one thousand Dollars, by reason of any

failure on his part as above stated, he bound himself to pay to them whatever damage they might sustain, such damage in no event to be less than one thousand Dollars -- The Petition of the plaintiff alleges the due & full performance of all the conditions of said Contract on the part of the d'd Barge and Buckman, and for assignment of a breach of said Contract on the part of Ambrose, allege the failure on his part to comply with any and all the specifications mentioned in said Condition -- The answer of the defendant filed at August Term of the Cole Circuit Court 1857 - alleges that said contract was signed by him on the road to California, and under duress - and that it contained stipulations different from those to which he had agreed before starting on the trip - The answer also alleges that he performed all the stipulations of said Contract until he reached California - and that he remained with the said Barge until he (Barge) left California, which was about one year before the expiration of the time for which he was forced to agree to stay with him -

The defendant, for answer to the assignment of a Breach of said contract, denies, that he failed to comply with any & all the stipulations contained in sd contract - The answer of the Dft. also denies, that the said Basye and Buckman performed all the conditions on their part and charges that the assignment of said contract to Basye by Buckman was without his knowledge or consent - At the adjourned Term of said Court of December 1857, the Plff filed a motion to strike out that portion of the answer which charges that said contract was signed under duress, because the facts stated in said answer do not amount to duress - and while said motion was pending, the venue of this cause was changed to Leaflaway County - At the September Term 1858 of the Leaflaway Court, the motion to strike out part of Defendants answer was sustained by the Court, and leave given him to amend his answer - The amended answer of the Dft - alleges that the Plff ought not to have and maintain this action against him, because the said plaintiff and the

said Buckman, just before the making of said Contract, on or about the 16th of July 1849 on the plains between the Western border of Missouri and California, menaced and threatened to leave the Deft alone and without provisions in the wilderness ~~on~~ unless the said Defendant would sign said Contract, which was falsely dated the 17th day of May - that he was at that time five Hundred miles west of the border of Mo, and Hundreds of miles east of California and had he been so left alone and without provisions he would have been exposed to starvation and to death by the Indians, and that he did by reason of such menaces and threats and in fear and apprehension thereof, sign said Contract - The answer denies that the said plaintiff & Buckman performed the conditions of said Contract on their part - that the damages claimed by Pltff are <u>liquidated damages</u> and that an action has accrued to plaintiff and the right to recover one thousand dollars or any other amount - The plaintiff then moved the Court to strike out that portion of the amended

answer, which plead duress and threats on the part of Pltff - which motion was sustained and by agreement of the parties the original & amended answers were considered as one in the pleadings - Upon the trial of the cause the plaintiff offered evidence tending to show breaches of the contract and closed the testimony - The Deft offered no evidence - Plaintiff then asked the following instructions -

1st - If the jury find that the defendant has committed a breach in any one of the stipulations set forth in the contract, the measure of damages will be one thousand Dollars, the amount fixed by the parties to the contract -

2nd - The plaintiff having shown that the Deft left his employ during his absence for provisions, if there was afterwards a return of Deft, or an offer to return to the service of Basye, it devolves upon the defendant to show that fact - and if he has not satisfied the jury that he did return or offer to return, they must find for the plaintiff

3d If the jury believe from the evidence that at the time defendant left the

employ of plaintiff, he left with the intention of not returning, then the jury must find for the plaintiff, unless they further find that defendant returned or offered to return to the service of plaintiff in so short a time that plaintiff sustained no loss by his absence

4th If the jury find from the evidence that the defendant contracted with Basye & Backman to go to California with them and for the space of three years from the time of leaving for California to dig gold in California after their arrival there and to give them one half of all the gold dug and discovered by him during that time whilst in California and that Basye and Backman dissolved partnership and Backman assigned said contract read in evidence to Basye with the knowledge and consent of defendant and that Backman & Basye while together and Basye after the dissolution furnished oxen, waggons, provisions and tools, cloth for clothing & leather for shoes for the trip and while in California necessary and proper and suitable for the expedition both in going and while remaining there the jury ought to find for the plaintiff the sum of one thousand dollars, if they further find that the defendant left the service

of pltff at any time before said three years had expired.

The 1st, 2nd & 4th instructions asked by pltff were refused by the Court, to which at the time pltff excepted.

Defendant then moved the Court to instruct the jury as follows 1st Unless the Jury believe from the Evidence that plaintiff complied with the conditions of the Bond read in evidence on his part to be performed and that defendant without any fault of the plaintiff, left his employment against his will, they must find for the Defendant.

2nd The amt specified in the Bond read in Evidence is not Liquidated damages, but a Penalty and if the Jury find the facts necessary to enable the pltff to recover, it can only be for such damages as he may have actually sustained the the default of the Defendant, which it could in such case be incumbent on him to prove.

3d If the Jury are satisfied from the circumstances detailed in Evidence, that plaintiff and defendant separate by mutual consent, after they reached California & by mutual consent abandoned their original contract, before the Defendant had broken his agreement, because the diggings would not pay, or for any other cause, they must find for the Defendant.

The 2nd & 3rd instructions asked by defendant were given by the Court & the 1st & 4th refused — Plaintiff then took a nonsuit with leave to move to set the same aside — Plaintiff afterwards filed a motion to set aside the nonsuit, which motion being overruled by the Court, the plaintiff at the time excepted and brings this cause here by writ of Error —

Lay & Gardenhire for defendant in Error insist, that the Court did right in overruling plaintiffs motion to set aside the Nonsuit in this case. The first, second and fourth instructions asked by the plaintiff were properly refused by the Court — These instructions may embody the Law of this case so far as they declare what constitutes a breach of the Contract — But they are all objectionable for the same reason — they are founded upon the presumption that the amount claimed by plff in the suit is liquidate damages and not a Penalty —

The second and third instructions asked by the defendant were properly given by the Court — The second instruction of Defendant embodies the Law governing this case and involves in it the only

point to be determined by this Court=
viz - whether the amount claimed by
the plaintiff in this suit, is to be regarded
as Liquidated damages or a penalty -
If the former, the plaintiff was entitled
to judgment for one thousand Dollars
simply upon showing a breach of
the Contract on the part of the Defendant=
although he may not have sustained
damage by reason of such breach even
to the amount of one cent= If the
latter, he was only entitled to recover
the amt of damage actually sustained,
by reason of such breach - The Court
below decided that the amt claimed by
the plaintiff in this suit, is a Penalty
simply, to secure the performance of the
Contract, and not Liquidated damages -
and to reverse this decision, the cause
is brought here by Writ of Error -
There seems to be an increasing disposition
both in Courts of Law and Equity, to grant
relief in cases of this kind - The reason
of this disposition, as stated in the Books, and
which is obvious to the mind of every one, even
if it never had been so stated - is that
damages are given as a compensation for
an injury actually sustained, by the

party claiming them and that such damages should be precisely commensurate with such injury, neither more nor less. It is in accordance with this principle underlying the Law of damages and likewise required by every principle of right justice and reason, that the Courts are always disposed in cases of this kind, to regard the amount agreed upon by the parties as a Penalty, whenever such construction is at all in consonance with the manifest intention of the parties or otherwise in accordance with the right, reason and justice of the case. "The Law (vide Parsons on Contracts, vol 2 - page 434) is well settled that the action of the Court shall not be defined or determined, by the terms which the parties have seen fit to apply to the sum named in the contract. Though they call this sum a Penalty or give it no name at all, yet it will be regarded as liquidated damages, if from the nature of the agreement, the circumstances of the case, and in justice and reason it ought to be. And though they call it liquidated damages, if from a consideration of the whole contract, it appears to have been intended as a Penalty, or that in justice and reason it ought to be regarded in this light, it will

be so considered – From an examination of the authorities on the subject – and they are numerous, weighty and diverse – the two rules which seem most important & influential in determining this point – i.e. whether the sum is to be regarded as liquidated damages or a Penalty (see Parsons on Contracts vol 2 – page 435) are – 1st – "The sum agreed upon will be treated as a Penalty, unless it is payable for an injury of uncertain amount & extent – 2d Unless it be payable for one breach of Contract – or if for many, then unless the damages to arise from each of them are of uncertain amount – (For authorities – vide, Parsons on Contracts, Vol 2 – Pages 433 – 434 – 35 – 36 – 37 – 38 – 39 & 440 – Moore & Hunt – vs Platte County 8 Mo Reps 467 – Gower vs Saltmarsh 11 Mo Reps 271 – also Chiddick vs March 1st N. Jer – 463 & 65 – Bagley vs Peadie 5 Randf 172 – Lewis-dee vs Bolton 3 Car & Payne 240 –)

If these rules embody the correct principles to be employed in determining this question – and from all the authorities they evidently do – When we come to apply them to the case of Bayse vs Ambrose, there can be no doubt, but what the action of the Court below, in deciding that – the

sum mentioned in the agreement between them, was a Penalty, was warranted by Law = Applying the first rule "that it should be treated as a penalty, unless it is payable for an injury of uncertain amount and extent = The injury for which the sum of one thousand Dollars in this case was payable, was not of uncertain amount and extent = It is easy to ascertain and estimate by a pecuniary standard, what the services of Ambrose were worth on the road to California - in building a House and lots for cattle after they arrived there - in going into the Country for Provisions and in working for Barge three years from the time of starting on the trip - If he lost his services in either of these respects, the actual damage is the value of such service at the time - the amount for which his place and service could have been supplied and this could be easily ascertained -

But when we come to apply the second rule, "that the sum will be regarded as a Penalty unless, it be payable for one breach of contract, or if for many,

then unless the damages to arise from each of them, are uncertain in amount - all doubt as to the correctness of the decision of the Court below is at once removed. For it is certain, that the sum agreed upon was not ~~payable~~ payable for one breach of contract - and it is equally certain, "that the damages to arise from each one of these breaches" mentioned in the contract, are not uncertain in amount - If the Defendant failed to go to California with Barge, or to perform his duty on the road, the damage resulting from this breach, is the cost it would have taken to employ another hand in his place, equally as good - If he failed to assist in Building a house after he got there, or in erecting lots for Cattle or in going for Provisions, the damage resulting from such breaches is the cost it would have taken to have supplied his place - and this amount can be easily and certainly ascertained - And finally it is neither right, just or reasonable, that the plaintiff should recover any greater damage than he has actually

sustained. He himself was bound in no penalty for the faithful performance of his part of the contract and he might perform it or not, as he pleased and for any breach on his part the Defendant could only recover from him the actual damage sustained by reason of such breach. The Law governing this case — all the circumstances attending it as well as every principle of Justice, Equity and reason, seem to require that the plaintiff should be placed on the same footing as the Defendant in this respect, and be allowed to recover only, in this suit, the actual damages he proves himself to have sustained, by reason of any breach or breaches of the contract on the part of the Defendant.

Basyl Pfl. in Erm

mit 3 Dft's Brief

Ambrose Dft. in Erm