Ellis, John vs. Lamme, Josiah W 1867 Boone Co. 277/1
admin of Lamme & Ellis

Old 101/13

Affirmed debt

E admin of partnership estate; claims L owes him $2947 for merchandise
E said L made contract to pay 1/2 sale of goods to help pay a debt
L gave 2 notes to E w/ deed of trust given to secure
L could pay off any time but couldn't use property under trust to do it

In the 4th District Court
July Term 1847

Jno Ellis admr of Lamme & Ellis Respondt
vs
J W Lamme Defdt & appellant
Appeal from Boonbir ct

Brief by Prewitt for Respondent

This was a suit by attachment brought Mar Feby 1864, at the return term the plaintiff filed by leave of the Court his amended petition setting up a contract by defendant to pay to plaintiff one half the inward price of the sale of certain goods sold by William Wirt Lamme defendants brother ~~to~~ delivered to defendant & to go towards the extinguishment of a debt due ~~by~~ to said administrator by said W W Lamme on a note, which half was alleged to amount to 2100 Dollars, ~~on a promise made by said~~ defendant to ~~W W Lamme & to plaintiff~~, also & account for 74 Dollars due by deft to the estate of Lamme & Ellis also for certain money deceased

by defendant on accounts turned over by W W Lamme to plaintiff to be collected for the joint benefit equally of plaintiff and defendant, also for 300 dollars for rent of store house by said administrator to defendant, also on a small note described therein & interest

Defendant filed a plea in abatement & then filed a motion to strike out plaintiffs amended petition & also a demurrer thereto both of which were overruled, & the cause was continued & at a subsequent term plaintiff filed a motion to strike out the plea in abatement because defendant had waived the same by pleading to the merits by demurring to the declaration & because the demurrer being overruled and not withdrawn the plaintiff was entitled to judgment thereon unless a plea in bar was filed by leave of Court. The motion was taken under advisement and at the next term of the Court the plea was stricken out. The defendant then filed a motion for leave to withdraw his de

demurrer to the plff's petition and to plead in abatement to the writ which was refused He then filed his motion for leave to ~~demur~~ withdraw his demurrer and answer to the merits which was granted & leave given to answer in vacation and a motion filed by plaintiff to have damages assessed overruled. In vacation defendant filed an answer & at next Term filed an amended answer putting in issue the facts stated in plaintiffs petition except as to the note & renting stem house. and setup a counter claim. Plaintiff filed his replication, denying facts set up in answer.

At a subsequent Term the case was tried before a jury and plaintiff found had a judgment. The testimony shows that previous to this transaction Plaintiff who was administrator of the partnership estate of Lamme & Ellis, sold to W. W. Lamme goods belonging to said

Estate amounting to $13.000 Dollars
and took his individual ~~note~~
note for 6500 Dollars due
in 12 Months, and his note with
defendant & J D Rollins, for
the other 6500 Dollars due in
two years, with the understand
ing that said W W Lamme
should sell off the goods and
pay off each of said Notes
at or before they became due
That the firm of Lamme & Ellis
was composed of William
W Lamme & William P
Ellis, That William Ellis now
dead, That he was ~~dead~~ the
son of plaintiff and that
W W Lamme the other part
ner was the brother in Law of
Rollins and brother of defend
ant, That afterwards said W. W.
Lamme made a ~~deed of trust to~~
~~the defendant for plaintiff~~ sale
of a part of these goods and in lieu
of and other goods purchased
by him, to defendant with an
agreement that he should pay
one half the invoice price to
Plaintiff as admr of Lamme

& Ellis to go towards the extinguishment of the individual note of ~~Sa~~ Sd Wirt Lamme and defendant agreed with plaintiff also to do so. Plaintiff also proved an acknowledgment by defendant that he owed him half the invoice by several witnesses. It also appears that previous to this sale some 12 months w w Lamme in the absence of plaintiff made a deed of trust to one Orr as trustee on the goods sold by plaintiff to him authorizing said Lamme to proceed and sell the goods and apply the money to the payment of said notes as he should see fit & the said Ellis to allow him a credit for any payment he should make & declaring the object & purpose of said deed to secure the payment of the said two notes. & but authorized Plaintiff ~~or~~ and defendant & Rollins together at any time to require the Trustee ~~at any time~~ to take possession and sell the stock remaining and directed the Trustee when

he sold to apply the proceeds to first to satisfy the ~~Roll~~ note that defendant & Rollins were on and then to the other. ~~See~~

(See the deed in Rollins testimony)

The two Lamms testifying for defendant deny the agreement to pay one half in order to plaintiff but contradict each other as to what was the sale & what was to be done with proceeds.

Plaintiff also proved the account for 74 Dollars and the collection by Singleton of $195.73 on accounts and notes turned over by Wirt Lamme to plaintiff ~~to be applied when collec~~ for the equal benefit of plaintiff and defendant and placed ~~in~~ & for collection in the hands of Singleton defendants clerk which money was put with defendants money in his safe & entered on his books. The other notes & assy were also left in defendants safe. The jury gave 1/2 that amount. W W Lamme paid plaintiff about 4200 Dollars on the individual note

~~& Defendant & that paid off the other note~~
~~Plaintiff got judgment for $2 [illegible] Dollars on invoice~~
~~Plaintiff claimed judg asked the following instructions which were given~~
& defendant paid off the other note. Plaintiff proved the lease of Store House to deft for 300 Dolls for 12 months and his occupation of it for that time, but the administrator having sold it at the end of 8 months by order of the County Court, the jury only gave a verdict for 8 months rent.
The proof shewed the invoice price of the goods to be forty two hundred Dollars or over, the two Lawyers say, 4600 Dollars

The Plaintiff asked and the Court gave the following Instructions

1st If the jury find from the Evidence that J W Lamme at the time of his purchase of the Goods of W W Lamme in consideration thereof undertook and assumed to pay Plaintiff Ellis, or that the invoice price of said Goods or any part thereof or any portion of the proceeds of the same, then they will find for Plaintiff Ellis as much as they find J W Lamb undertook or assumed to pay not exceeding 2100 Dollars,

2nd If the Jury find from the evidence that Jorink to Lamme as a part payment of the Goods undertook & assumed to pay Ellis one half the invoice price of said Goods then they will find for Plaintiff the amount so assumed not exceeding 2100

Dolls

3rd If the jury find from the evidence that J W Lamme owes the account for 74 Dolls or any part thereof they will so find their verdict

4th If the Jury find there was an agreement that the Notes and accounts were to be put into singletons hands and the amounts collected were to be divided between J W Lamme & Ellis and find that One hundred & ninety five Dollars of said collections went into J W Lammes hands, then they will find one half the amount against defendant

5th By the pleadings in this cause the note sued on stands admitted & the jury are bound to find that for plaintiff

6th If the Jury find from the evidence that Ellis rented the Store House to defendant for One year for 300 Dollars &

that he took possession under Ellis renting and remained in possession during said time he is bound for said rent and the lease to Lemme was a valid ~~sale~~ lease against any sale subsequently made by Ellis and the only question is to whom the 4 Months rent is to be paid & if the understanding with Mr Bain was that he was not to have the rent til the end of the year lease then the whole rent is payable to Ellis but if no such understanding exists then they can only deduct the 4 Months rent at the rate of 300 Dollars per year out of the agreement

9th Any payment made by W W Lemme to Ellis he had a right to apply to the first note unless otherwise ordered at the time

10 The jury in answering upon their oaths may if they see fit

the plaintiff on the account
and interest at the rate of
six per cent per year from
the commencement of this
suit

11th The deed of Trust given in
evidence authorized the
Lessee to sell and dispose
of the goods and to pay off
the debts as he saw fit and
he was not required to give
any preference to one note
over the other in any pay
ment made by him.

The record also of the insolvency
of the defendant gave the fol
lowing instructions

2nd Under the deed of Trust
offered in evidence, the
defendant had a first lien
upon the goods and other ef
fects therein conveyed for the
repayment to him of any sum
he might pay up on the notes
upon which he & the defendant &
J. S. Collins were securities and
he had the legal right to pay

pay the purchase price of the stock of goods bought by him in part liquidation of said note

7th All goods purchased with monies arising from sales made of parts of the original mortgaged stock & notes & accounts given in payment of the same were subject to and bound by the deed of trust in the same manner as the original stock

The defendant also asked the following instructions which were refused.

1st If the jury find from the evidence that the plaintiff Ellis received from W W Lanson subsequent to the 17th day of May 1861, goods money or effects in any amount which were conveyed by the deed of trust offered in evidence or arising from the sale of the goods or any collection of the notes and accounts so conveyed they will find for the defendant the

amount so received with interest thereon at the rate of six per cent from the date of such receipt, unless they further find that Sd Monies goods and effects were received with the knowledge of the Sd defendant, and with his consent applied in part payment of the individual note of W W Lamme.

3rd If the Jury find from the evidence that the one hundred and ninety five Dollars claimed in plaintiffs petition was collected on notes and accounts conveyed by the deed of Trust then the plaintiff has no legal right to recover any part of said sum unless they further find that there had been sufficient assets received by defendant exclusive thereof to pay off the note to which he is security or that defendant agreed in writing that the same should be applied to the payment

of the individual notes
to W Lamme.

4 That the purchaser of
the real estate of Lamme
& Ellis at the administrators
sale would be entitled to
the rent and use thereof
from and after the pur
chase unless an open
reservation of rent was
made to the estate at the
time of the sale and the
defendant would be entitled
to recover from plaintiff as
administrator any excess
that he might be forced to pay
to the purchaser.

5 If the jury believe the stock
of goods were mortgaged
and that defendant had
a preference in said in
cumbrance then plaintiff is
responsible in this action for
all of the mortgaged property
or proceeds thereof which
he may have received di
rectly or indirectly and ap
propriated in any other way

than to the note first secured in said Incumbrance as ess they further believe that it was otherwise appropriated by Ellis by consent of defendant

6 That although they may believe from the evidence that J W Lamme assumed to pay plaintiff any part of the purchase money of the goods bought of W W Lamme that assumption to be valid and binding in law must be made and reduced to writing or some note or memorandum thereof & signed by defendant or some one lawfully authorized by him and if not so done they cannot find thereon for plaintiff

The defendant excepted to giving plaintiffs instructions and to the refusal of his own.

The jury found a verdict for plain

tiff [illegible] which defendant ma[illegible] to be set aside & the [illegible] motion being over ruled he elapsed and brings the case to this Court by appeal.

Points & authorities by Prewitt for Respondent

1st The defendant having demurred to the plaintiff petition he thereby waived his plea in abatement. The demurrer standing over ruled and not withdrawn plaintiff was entitled to have his damages assessed and final judgment thereon unless a plea in bar was interposed by leave of the Court & defendants motion for leave to withdraw demurrer &

plead in abatement came too late Kathy vs Sherman 13 Mo 547 Cannon vs McManus 17 Mo 345. 16 Johnson 61.

2nd Filing an answer to the merits and going to trial thereon waived all exceptions to the proceedings in abatement Fugate vs Glascock 7 Mo 577.

3rd The construction which the defendant attempted to put upon the deed of trust is utterly wrong. The language of the deed shows clearly that Wirt Lamme was left free to sell the goods and pay the debts as he chose and the trustee could take no control ~~without~~ of the ~~consent~~ revenue of Ellis

defendant & Raffins

Naturally it was the duty of Wm Lawrence to pay the first the note first falling due. 31 Mo

4th The law does not require the contract ~~[illegible]~~ of defendant to pay to plaintiff one half invoice price of goods purchased by him of his brother. to be in writing. Statute of frauds does not apply. and Plaintiff may sue & recover on such promise Cook v Riggs 12 Mo 430. Bank of Mo v Benoist 10 Mo 519. ~~[illegible]~~ Lawrence v Fox 20 ~~[illegible]~~ New York R 269. ~~[illegible]~~ Barker v Barker 2 Denio 45. Del & H Canal Co v West Chester Bank 4 Denio 97. Farley v Cleveland 4 Cow 432 9 Cow 639. Gold v Phillips 10 Johnson 412. Alger v Scoville 1 Gray 391.

Geo Ellis adv

vs 3
3

J. W. Lamme

Brief for
Plaintiff
Respondent
by Prewitt atty

Filed July 16, 1867
Geo. T. Clements
Clerk

In Boone Circuit
Court.

The following proceedings were had in this Court in the Cause wherein John Ellis Administrator of the estate of Lamme & Ellis is Plaintiff, and Josiah N. Lamme was Defendant, to wit; Plaintiff came on the 3d day of February 1864 and filed in the Office of the Clerk of this Court, his petition as follows, to wit:

Petition. John Ellis Administrator of the partnership Estate of Lamme & Ellis, Plaintiff.
Against
Josiah N. Lamme — Defendant.
In the Circuit Court of
Boone County May Term 1864.

Plaintiff states that the Defendant owes him, as the Administrator of the Partnership estate of Lamme & Ellis, the sum of Twenty nine Hundred and Forty seven Dollars & 98 cents for goods, wares and merchandise, sold and delivered and interest on same, and for house rent, and for money had and received and interest on same, and for money due the firm of Lamme and Ellis, interest on same, the particulars of all, which which will more

fully appear by an account hereto annexed, marked (A) and made a part of this petition. Plaintiff pray judgment for the sum of Two thousand Nine hundred and forty seven Dollars and thirty eight cents, with interest thereon from the filing of this Petition.

B. & W. Gordon
Atty's for Plff.

John Ellis makes oath that he believes the foregoing Petition and the matters therein as stated are true.

John Ellis

Sworn to before me Clerk of the Boone Circuit Court. Witness my hand and the seal of said Court hereto affixed at Office in Columbia Feb. 3. 1863

Seal.

R. L. Todd Clerk.

(A)

1862 Josiah W. Lamme Dr.
May. To John Ellis Admr of Lamme & Ellis

	To amount of Merchandise sold this date	$2100.00
	" Interest on same at 6 pr ct.	220.50
	" Rent of Store-house 1 year	300.00
1863 Feby 1	" Cash collected of W. W. Lamme, Agt	195.73
	" Interest on same 1 year 6 pr ct.	11.70
Apl 13, 1860	" Amt of Note herewith filed	18.20
	" Interest on same 10 pr. ct.	6.90

1859.	To Amt account due Lamond & Ellis	74.00
	" Int. on same 4 years 7 mo. @ 6 pct.	20.35
	Amt. due	$2947.38

(A)

Jos. W. Lamond

1859. In account with Lamond & Ellis

Apl. 18	To 1 Box cigars			2.00
May 23	" Mer. Bill rend			18.73
June 14	" Bottle Whiskey			1.00
July 26.	" Frt pd Emma on furniture	2.75		
	Receiving & forwarding	.40		3.15
	" 4 cans Oysters @	.55		2.20
	" Frt pd on Ps furniture	3.00		
	Receiving & forwarding	.75		3.75
Aug. 30	" Bottle Peach Brandy	1.25		
	" 1 can honey .75 & Box cigars 3.	3.75		5.00
Sept 15	" Insurance	.14		
	" Bill J.A Rogers & Son Lumber	10.00		
	" Frt & Commission on same	2.00		12.14
June 29	" " pd on piano	10.00		
	" Charges	9.00		
	" Commission	3.00		22.00
July 30	" Frt pd carrier on 18 baskets champagne	2.50		
	" Commission	.50		3.00
				73.00
June 15/59	To 1 Bottle Peach Brandy omitted			1.00
				74.00

Plaintiff also filed on said 3d day of Febuary 1864, in the office of the Clerk of this Court his affidavit as follows, to-wit:

" John Ellis admr of the firm of Lamme & Ellis. ——— Plaintiff.

Against

Josiah H. Lamme, ——— Defendant.

In the Circuit Court of Boone County May term 1864.

John Ellis, Plaintiff, makes oath & says that the Plaintiff as admr aforesaid has a just demand against the Defendant, and that the amount the affiant believes he ought to recover, after allowing all just credits and set offs, is the sum of Twenty Nine Hundred and Forty Seven Dollars & thirty eight cts, and that he has good reason to believe that the Defendant is about to remove out of this State with the intent to change his domicil "

John Ellis.

Sworn to before me Clerk of the Boone Circuit Court, Witness my hand and the Seal of said Court, hereto affixed at office in Columbia Feby 3. 1864

R. L. Todd. Clerk "

Plaintiff also on the said Third day of Feby. filed his Bond, as follows, to-wit:

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Know all men by these presents, that we, John Ellis as principal, and Micajah G. Proctor & Peter Ellis as his security, ac=knowledge ourselves indebted to the State of Missouri in the penal sum of Six Thousand Dollars, well and truly to be paid: We bind ourselves, our heirs, exec=utors &c. In witness whereof we hereunto set our hands & seals this 3d day of Feby. A.D. 1865. The conditions of the above ob=ligation is such that whereas the above bond John Ellis as Administrator of the late firm of Lamme & Ellis is about to institute suit by attachment in the Boone Circuit Court, against J. H. Lamme De=fendant; Now if the said John Ellis as Plaintiff in said suit, shall prosecute his action without delay and with effect, refund all sums of money that may be adjudged to be refunded to the Defendant or found to have been received by the Plaintiff and not justly due him, and pay all damages and costs that may accrue to any Defendant or Garnishee by reason of the attachment, or any proces or proceding in the suit, or by ~~any~~ reason of any judgment, or proces thereon, then the above obligation to

be null and void; otherwise to remain in full force and virtue in law.

John Ellis (Seal)
Peter Ellis (Seal)
M.S. Proctor (Seal.)

I approve the above bond Feby. 3, 1864

R.L. Todd, "
Clerk.

Whereupon the Clerk issued the following writ, attached to a copy of the Petition &c. to wit:

" State of Missouri } Sct.
County of Boone } The foregoing is a true copy of the Petition filed in the above entitled cause.

(Seal.) Witness my hand and the seal of said Court hereto affixed at Office in Columbia Feb. 3. 1864

R.L. Todd Clerk.

Copy of Writ. State of Missouri } Sct.
County of Boone } The state of Missouri to the Sheriff of Boone County, greting.

We hereby command you attach the lands, tenements, goods, chattels, rights, moneys, credits, evidences of debit and

effects of Josiah W. Lamme or so much thereof as will be sufficient to satisfy the sum of Twenty nine Hundred and forty seven & 38/100 Dollars, with interest and costs, and to summon said Josiah W. Lamme to appear before the judge of our Boone Circuit Court on the first day of the next term thereof, to be held at the Court House in the town of Columbia, within and for the County of Boone, on the fourth Monday in May next A.D. 1864 to answer the petition of John Ellis Administrator of the partnership estate of Lamme & Ellis, a copy whereof is hereto annexed, and to summon as Garnishees all persons in whose hands or possession any personal property, rights, credits, evidences of debit, effects or moneys of said Defendant may be, or who may be named by said Plaintiff or his attorney as garnishees, to appear before our said Court, on the day and at the place aforesaid, to answer the interrogations which may be exhibited by the Plaintiff, and have you then and there this writ.

Witness Robert L. Todd Clerk of the said Court at office in Columbia Feb. 3, 1864

R. L. Todd Clerk.

Sheriffs return on writ

On which writ is the following return.

"Executed this writ by delivering a true copy of the within petition & summons, to Josiah W. Lamme on the 4th day of Feb. 1864 in Boone County Mipouri.

J.M. Waugh Shff.

By ——— D. S.

Also executed this writ by summons as Garnishees, the following persons, to wit; Abraham Grindstaff, Robert A Roddy, Allen White, James M. Roddy, Miles Hardy, John M. Strickland on the 8th day of Feby 1864 and Park Hurst & Shook, J.W & R.R. McBain, on the 9th Feby 1864, and Wm. Payne, Henry C. Ferrel, Mrs. A.M. Payne, and Green B. Acton on the 10th Feby 1864, all done in Boone County, and which said garnishees a copy is herewith returned.

J. M. Waugh Shff.

Levied this attachment February 4th 1864 upon all the right, title and interest of Josiah W. Lamme in and to the following property in Boone County Missouri, to wit, about 600 bushels of wheat, 180 bushels of oats, 45 Bbls Salt, 400 Bbls Corn, 3 Yoke oxen, 1 gray Horse, 1 yearling Colt, 2 Mules

1 steer, Lot of Tobacco, 1 yearling heifer, 1 Jack, 2 bales of gunny bag, ½ Bbl tar, 2 wood-stoves, 1 Fr. bedstead, 2 marble-top bureaus, 1 centre-table, 4 oak chairs, 1 easy chair, 1 writing desk, 2 wash stands, 1 Bbl N.O. molasses, 33 gallons bourbon whiskey, 6 buckets, 3 dry hides, 1 Keg soda, 10 boxes soap & pickels, part sack of spice, oil, varnish, part coil rope, 1 bale cotton twine, 1 Bbl land oil, 6 boxes drugs, part of bbl flaxseed, and slaves as follows, to wit, Harriet, aged 15, her child minor aged about 2 years, Lucy aged 30 years, Tommy aged 12 years, Eddy aged 6 years, Epick aged 3 years, one large sound horse waggon.

J. H. Haugh Shff.

Petition for Order of Sale

Plaintiff's Petition for Order of Sale.

John Ellis Admr of the partnership Estate of Lamme & Ellis
Against
Josiah W. Lamme
} In the Circuit Court of Boone Co. Mo. May term 1864.
in attachment

To the Hon'l Geo. A. Burckhartt, Judge of the Second Judicial District of Mo.

Your Petitioner, the Plaintiff in the above entitled cause, would respectfully represent that on the 4th day of February 1864, by virtue of an attachment issued from the Boone Circuit Court in the above cause, the Sheriff of Boone Co. Mo. levied upon certain personal property of a perishable nature, consisting of wheat, corn, salt, sugar, molasses, whiskey, horses, mules, cattle, oats, house-hold furniture negroes &c. and has the same now in his possession, and that said property is likely to perish and depreciate in value, before the probable termination of the suit, and further that the keeping of the same would be attended with great loss and expense;

Now therefore your petitioner prays that your honor as acting Judge of this Court, would order the property so levied upon in this cause, by said Plaintiff, be sold at as early a day as may be convenient to the Sheriff, and the proceeds held to abide the termination of this suit.

John Ellis
By B. & T. Gordon Attys.

Order of Sale

State of Missouri }
County of Boone }

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Order of Sale

In Vacation.

It is herby ordered that the sheriff of Boone County Mo. proceed to sell the property mentioned in this petition, according to law, and hold the money until further orders.

Given under my hand this 11th day of Feby 1864.

G. D. Burckhartt.
Judge of Boone Circuit Court

The sheriff filed his report of the said property levied on or attached, which is as follows:

I proceeded to sell the property herein levied upon and ordered to be sold at public vendue for cash in hand by at least three printed hand bills, signed by me, and put up in public places in different parts of the township herein after named between the hours of 9 am & 5 PM. of said day as follows, in the town of Columbia, Columbia township, Boone County Missouri on the 24th day of Feb. 1864, the following property to wit;

Purchasers Names	No.	Articles	Amt. pd	
Anderson Garth	1	Doz. painted buckets @ 250	3	00
J. M. Gordon	2	well buckets @ 65¢	1	30
J. F. Baker	3	" " "	1	95
" " "	10	lbs. Cotton twine 53	5	30
Abd Sublett	1	Bag Shot	2	60
Jas French	1	" "	2	65
W. H. Sillery	1	Pr. Boots	7	00
J. R. Selby	1	" "	6	50
R. Hume	1	" "	7	25
M. Sweeney	1	" "	7	00
W. S. Cane	1	" "	7	75
J. S. Dorsey	1	Box Cut Beed	4	10
F. F. Rufsell	33	Gals B. Whiskey 2.20	75	90
L. Hume	45	" N.O. Molapes @ 60	27	00
Anderson & Garth	1	Lot paper bags	2	30
Jas. C. Orr	25	lbs B. Sugar @ 17½¢	4	35
Anderson & Garth	15	Cakes Chocolate @ 25¢	3	75
S. B. Victor	12	Bots Pickels 114	1	92
To Amt Brot.		Forward.	174	82
S. B. Victor	1	Lot Vials	1	20
Swallow & Gilman	15	# Salt Petre 28½	3	52
J. F. Baker	10	# Tea 1.45	14	50
Anderson & Garth	62	# Soap 6½¢	4	04
S B Victor	39	# " 6½	3	69
J. F. Baker	359	# " 6¼	22	43
F. A. Rufsell	6	Bottles wine 50	3	00
Swallow & Gilman	2	Doz. Pickles 3.00	6	00

Swallow & Gilman	30	# Tobacco @ 78 ¢	23	40
W S Cane	43	# Sulpher 9½	4	08
Swallow & Gilman	1	Rox Doz. Bots wine 41	4	92
" " "	1	Rox Doz. Bots wine @ 41	4	92
J. F. Baker	1	Rox Doz " " 67	8	04
S. B. Victor	1	Can sweet oil	4	00
Mr. Rimbraugh	5	~~m~~ G. D. Caps 90 ¢	4	50
Swallow & Gilman	1	Can caster oil	10	25
S. B. Victor	6	Bots Pickles 16 ¢		96
Swallow & Gilman		pt Rox Mustard seed		70
L Hume		Pt Coil Rope	4	10
Swallow & Gilman	1	Lot flax seed	3	35
L. Hume	1	Keg soda	9	00
J. F. Baker	60	" Spice 29½	17	70
M. S. Matthews		Pt can varnish	1	60
Swallow & Gilman	77	# Spice 26¼	20	52
" " "	41½	Gal. Sweet oil 77½	32	16
L. Hume	70	# Dry Hides 15 ¢	10	50
S. B. Victor	1	Tobacco Cutter		20
Wm Waller	1	wood saw		35
By Ervin Swallow & Gilmans a/c		Evenly when opened 10 Bots wine $40	397	95
" " " "		2 boxes pickles 4.10 6.00	10	10
To Bal. fwd			387	85
" Amt "			387	85
Sale at Providence		Feb. 29, 1864		
John Cauley	1	Bedstead & Mat	25	00
G. W. Sutton	1	Wash stand	7	05
Thos Sinclair	1	W. bowl & Fixtures	7	60

W. P. Tuttle	1	Chamber Mug	1	50
N. B. Garing	1	Centre table	15	50
J. T. McBain	2	Chairs	2	50
Jno. McClausey	5	" @ 95¢	4	75
A. M. Payne	1	Easy Chair	5	50
Wm Easley	1	Wash Stand	3	25
M. B. Banks	1	Comfort	2	60
J. T. McBain	1	Card Table	2	25
Gilpin Spencer	1	Extension table	12	50
N. B. Garing	1	Set Chessmen		50
L. R. Martin	1	Bureau	24	25
Gilpin Spencer	1	"	34	25
J. W. Lamme	179	Sks Wheat @ 2.40	429	60
John Ellis		Part Bbl tar	9	00
J. W. Lamme	27½	Bush wheat 99	27	22
Jno. Parker	50	Gunnies 10¢	5	00
J. W. Lamme	20	Wheat sks 19¢	3	80
M. R. Banks	12	" " 15¢	1	80
J. T. McBain	1	Heating Stove	2	00
" " "	1	" "	3	65
J. W. Lamme	1	Yoke Oxen	90	00
John Ellis	10	Bbl salt 4.15	41	50
Ambrose Gilpin	2	" " 4.00	8	00
Foward			1158	42
To Amb. Brot.		Ford	1158	42
W. C. Rickey	2	Bbls salt 4.25	8	50
John Ellis	10	" " 4.00	40	00
A. M. Payne	2	" " 3.50	7	60

	John Vance	2	Sks Salt	3.76	7	52
	John Ellis	10	" "	3.65	36	50
	" "	6	" "	3.65	21	90
	W. Glenn	1	" "		2	85
	J. T. McBain	101	Sks Wheat	2.50	252	50
	" " "	50	" oats	1.78	89	00
	R. P. Reed	5	" "	1.80	9	00
	John Ellis	9	" "	1.63	14	85
	John Baker	1	Bbl Salt		4	30
	J. W. Lamme	1	Bay Mule		210	00
	" " "	1	Brown "		224	00
	Ben Cannelley	1	Yoke oxen		69	00
	" "	1	" "		60	00
	J. T. McBain	1	Grey Horse		120	00
	J. W. Lamme	1	Waggon		63	00
	J. C. Orr	1	Jack		150	00
	John Ellis	1	Bay Colt		41	50
	J. T. McBain	250	Gunnies 2 @ 20¢		50	00
	" " "	1	Lot tobacco		140	00
	J. C. Orr	40	Bbl corn	2.95	118	00
	Jas Melloway	1	Red Heifer		4	00
	Sale on J. W. Rollins' farm March 3 1864					
1864	J. W. Lamme	1	Lot of corn for		150	00
Feb. 5	Park, Hume, & Shack.		Sale of Bro. Sugar		174	65
" 4	Amt Cash recd of J. W. Lamme by J. Arear				7	60
					$3243	49

Cr.

By J. H. Waugh fees as follows.

" Levy $1. Service writ $1.	2	00		
" Commissions on amt sale above	68	28		
" Cash paid J. T. Baker Storage	2	50		
" " " J. C. Orr. Clerk.	2	00		
" " " for Bills of adv'ts.	15	50		
" " " other expenses in removing & taking care of Property	20	00	110	28
By 13 Garnishees			13	00
		$	123	28

J. H. Waugh
Sheriff.

Allowed May 28, 1864
G. H. Buckhardt Judge
Boone Circuit Court

May 23, 1864, 1st Day May Term

John Ellis Admr Plff.
Vs. att.
Josiah W. Lamme Dft } The Defendant came by his attorney and filed his plea in abatement to Plaintiff's petition as follows

John Ellis Administrator of the estate of Lamme & Ellis, Plaintiff
Against } in attachment
Josiah W. Lamme — Defendant

And now comes the defendant & states the matters alleged in Plffs affi=davit for an attachment are untrue in this, that it is not true that Defendant is about to remove out of this State, with the intent to change his domicil. De=fendant denies that at the time of the filing of said affidavit, he intended to change his domicil from this State.

T. J & J. A. Russell
Attys for Defendant.

J. N. Lamme, Defendant makes oath & says the above plea and matters therein, he believes it to be true.

J. N. Lamme

Sworn to and subscribed before me this 6th Feby 1864

T. J. Russell, A. P.

Friday May 27, 1864. 5th Day May term 64.

John Ellis admr.
vs. } Dbt & att.
J. N. Lamme

On motion of Plaintiff leave is given him to amend his petition herein, and such amended petition is now here filed. and Plaintiff filed also his demurrer to the plea in abatement filed herein by Defendant. "

Amended Petition.

John Ellis, administrator of the partnership effects of the late firm of Lamme & Ellis, Plaintiff
Against } In Circuit Court Boone County.
Josiah W. Lamme Defendant.

Amended Petition.

Plaintiff states that the Defendant on the 1st day of October 1863, was indebted to the late firm of Lamme & Ellis in the sum of Seventy four Dollars, for goods, wares and Merchandise, before that time sold and delivered to defendant by said Lamme & Ellis and at his special instance and request, the particulars of all which, and the credits therin endorsed will more fully appear by an account Marked (A), and filed with the original petition and which is made a part of this petition.

Plaintiff states that said firm of Lamme & Ellis was composed of William W. Lamme, and Wm P. Ellis, and that afterwards — to wit on the — day of June 1865 said William P. Ellis departed this life, intestate, and this Plaintiff as Administrator of the estate of Wm P. Ellis deceased, on the 12 day of Sept 1865

gave bond, and under and by virtue of an order of the County Court of Boone County took charge of the assets of said firm of Lamme & Ellis, And as Administrator of the partnership effects of said firm of Lamme & Ellis, a certified copy of said order is herewith filed. The original not being in the possession or under the control of the Plaintiff cannot be produced, and which give sufficient evidence of Plaintiffs right to have and maintain this action.

Plaintiff states that defendant never paid said sum of money to said Lamme & Ellis in the life time of said W.M. Ellis — nor to this Plaintiff since he has had charge of the said partnership effects of Lamme & Ellis, and that the same is now due and owing Plaintiff as such Administrator. He therefore asks judgment in his favor, as administrator of the partnership effects of said firm of Lamme and Ellis, for said sum of Seventy four Dollars, to gether with interest thereon from the time of the filing of the original petition, in this cause.

Plaintiff further states that

Defendant by his promissory note here-
unto filed, dated the 15th day of April
1860, promised for value received, to pay one
Wm B. Lemon the sum of eighteen 20/100 Dollars,
on day after date thereof with ten per cent
interest thereon from maturity. That after-
wards, to wit, on the 29th day of October 1860
said Wm B. Lemon transferred by indorsement
and delivered said promissory note to
Lamme & Ellis; that said firm of Lamme
& Ellis was composed of Wm W. Lamme &
Wm P. Ellis - that on the —— day of June
1860 said Wm P. Ellis departed this life, in-
testate and as administrator of the estate of
W. P. Ellis deceased, this Plaintiff on the
12th day of Sept 1860, gave bond and
undertook by virtue of an order of the
Boone County Court, he took charge of
the effects of said Lamme & Ellis, as
Admr of the partnership effects of Lamme
& Ellis, a certified copy of which order is
herewith filed. The original, not being
in the possession of nor under the control
of Plaintiff, cannot be produced. And
which give sufficient evidence of his right
to have and maintain this action.

Plaintiff states that Defendant
never paid said sum of Eighteen 20/100

Dollars in said promissory not specified, to the said Lamme & Ellis in the life time of said Wm. P. Ellis, nor to this Plaintiff since the death of said Ellis, and that the same still remains due and owing.

Wherefore he askes judgement in his favor as administrator aforesaid, for said sum of Eighteen Hundred Dollars, together with interest thereon, according to the term and effect of said promissory note.

Plaintiff further states that after the death of said Wm. P. Ellis, and after he had given bond, and under an order of the Boone County Court, taken charge of the effects of Lamme & Ellis — which said firm was composed of Wm. M. Lamme & Wm. P. Ellis — as administrator of said the partnership assets of the said firm of Lamme and Ellis, he Plaintiff sold and delivered to one Wm. M. Lamme, the entire stock of goods, wares & merchandise on hand and belonging to said firm at the death of said Wm. P. Ellis. That afterwards — to wit; on or about the — day of — Wm. M. Lamme sold and delivered to said stock of goods,

wares & merchandise to defendant. Pltff
avers at the price and for the sum of
Forty two Hundred Dollars. Plaintiff
stats that at the time of said
sale of said goods, wares and mer-
chandise by said W.H. Lamme to De-
-fendant, said Wm. H. Lamme was
indebted to this Plaintiff as admin's-
trator as aforesaid, to wit- of the part-
-nership assets of said firm of Lamme
and Ellis in a large sum of money, a-
mounting to over the sum of three thous-
and dollars, as a part payment for said
stock of goods, wares and merchandise, so
sold by Plaintiff as administrator as
aforesaid to said Wm. H. Lamme. Plaintiff
stats that at the time of the purchase
of said stock of goods, wares and
merchandise by Defendant, of said
W.H. Lamme, the Defendant, in consider-
ation of the said purchase of said
goods, wares and merchandise so
made by Defendant of said Wm. H. Lamme
as aforesaid, undertook and then and
there faithfully promised to pay Plaintiff
as Admr of the partnership assets of
said firm of Lamme & Ellis, one half the
sum which he agreed to said Wm

W. Lamme for said stock of goods, wares and merchandize, so purchased by him of said Wm W. Lamme, and which said half, Plaintiff avers amounted to the sum of Twenty one hundred Dollars, as a part payment for said stock of goods, wares and merchandize, so purchased by him, and was to extinguish and pay off the like amount of the indebtedness of said Wm W. Lamme to this Plaintiff, as administrator as aforesaid — whenever he, defendant, should be thereunto afterwards requested.

Plaintiff states that in pursuance to said undertaking he agreed to take and did take Defendant for said one half of the price he was to pay for said stock of goods, wares and merchandise so purchased by him as aforesaid. Plaintiff states that notwithstanding he agreed to take and did take Defendant for said sum of money, has hitherto wholly failed, neglected and refused, and still neglects and refuses to pay Plaintiff as administrator of the partnership assets of said firm of Lamme & Ellis, the said sum of Twenty one hundred Dollars, or any part thereof, although often requested to do so. Plaintiff

therfor asks judgment in his favor, as administrator as aforesaid, for said sum of Twenty one hundred Dollars, together with interest thereon from the date of the filing of the original petition in this cause.

Plaintiff further states that Defendant is indebted to him as administrator of the partnership assets of the late firm of Lamme & Ellis, which said firm was composed of Wm M Lamme & Wm. Ellis, in the further sum of Three Hundred Dollars, for the rent of a certain store-house, the property of said Lamme & Ellis situate in Providence Boone County Missouri, before the first day of July 1863 rented by plaintiff, as such administrator, to Defendant, at his special instance and request, and which was used and occupied for, at least, the space of one year, before said 1st Day of July 1863; that Defendant owes him as administrator as aforesaid, the further sum of One hundred and ninety five 70/100 Dollars, for so much money, before the 1st day of Jan. 1864, had and received by Defendant, to and for the use of and benefit of this Plaintiff, as such administrator as aforesaid, and which was

collected by Defendant for Plaintiff, and Defendant has wholly neglected to pay Plaintiff said several sums of money or any part thereof, although often requested so to do.

Plaintiff therefore asks judgment in his favor as such administrator as aforesaid for the said sum of Three Hundred Dollars, and the said sum of one hundred and ninety five 73/100 Dollars, making in the aggregate the sum of four Hundred and ninety five 73/100 Dollars, with interest from the filing of the original petition in this cause,

John Ellis Plaintiff in the above cause makes oath and says that he believes that the foregoing petition and the facts therein as stated are true

John Ellis.

Subscribed and sworn to before me the undersigned a notary Public, within and for Boone County Missouri

Given under my hand and notarial seal at office in Columbia this the 26th day of May 1864.

Wellington Gordon
Notary Public.

Seal.

Demurrer filed by Plaintiff.

Demurrer filed by Plaintiff.

May 27, 1864
John Ellis Admr. Pliff.
Against
Josiah W. Lamme Deft.

In the Boone Circuit Court
May Term 1864.

And the Plaintiff comes and demurs to the plea in abatement filed by Defendant in the above entitled cause, for the following reasons — to wit:

1st Because the said plea in abatement fails to and does not put in issue the statement in the affidavit, that Defendant was about to remove out of this State with the intent to change his domicil.

2d Because the said plea is otherwise informally and improperly pleaded.

Gordon & Gordon, Prewit & Sheley
for Ellis

Demurrer overruled.

May 30, 1864 7th Day.

Ellis vs. Lamme } The parties came by their attorneys and the demurrer filed to Defendants plea in abatement being heard, is overruled, and said demurrer is overruled and Defendant by his attorney came and

filed his motion to strike out Plaintiffs amended Petition, as follows.

Motion to strike out Amended Petition

" John Ellis Admr. Plff
against
Josiah W. Lamme Deft } In the Circuit Court Boone Co. May term 1864.

And now comes the Deft. and moves the Court to strike out Plff's amended petition, for the following reasons. to-wit;

First. Because Plff's amended petition is an entire new cause of action from the one contained in Plff's original petition.

Second. Because Plff's amended petition is founded partially on a contract between Plff. & Deft. having no reference to any Count in his original petition, which was founded solely on an account.

Third. Because Plff's Amended petition is found partially upon a note alleged to have been assigned to Plff. which note was not pleaded in Plff's original petition.

Fourth. Because a variance between Plff's amended petition and his affidavit for an attachment in the same sworn to.

T. T. & T. A. Rupell
Atty's for Defendant.

"

May 21st 1864, 8th Day.

Ellis Admr.
vs. } debt & attach } The parties came
Lamme } by their attorneys and
the motion filed by De-
fendant to strike out Plaintiffs A-
mended Petition being heard is
overruled; whereupon Defendant filed
his motion to quash the writ herein,
also his demurrer to Plaintiffs amended
Petition. And said motions to quash,
and demurrer being heard and unde-
stood by the Court are overruled, to all
of which decisions of the Court De-
fendant excepts."

Motion to quash which is overruled above.

Motion to Quash writ filed in this
cause is as follows;

John Ellis Admr. Plff. }
Against } In the Circuit
Josiah W. Lamme Defdt. } Court of Boon
les. May term 1864

And now comes the Defdt. & moves
the Court to quash the writ of attach-
ment in the above cause, for the
following reasons, to wit;

First: Because Plff has so
amended his petition as to alter the

ground of action upon which his attach=
=ment was founded.

Second. Because Plff's amended petition sets out a new an entirely different cause of action from his original petition.

Third. Because of the variance between Plff's petition & affidavit.

F. S. & J. A. Rupell
Attys for Defendants

Demurrer to Amended Petition.
Filed May 30. 1864.

Demurred to Amended Petition, overruled above.

John Ellis, Admr Plff.
against
Josiah H. Lamme Defts

In Circuit Court of Boone County, May Term 1864.

And now comes the Defendant and demurs to Plff's petition amended herein, because it does not state facts sufficient to constitute a cause of action in this.

First. Plaintiff fails to state in his amended petition, that Defendant agreed to pay him, Plaintiff, the item of $2100 therein charged to be due from Defs. to Plff.

Second. Plaintiff alleged that Defs

promised to pay off and discharge the debt of one W. W. Lamme; but fails to state any such contract between Plff. & Deft, or any purty of contract between Plff. & Deft.

W. W. & T. M. Russell
Atty's for Deft.

May 21, 1864, 8th Day.

Ellis
vs
Lamme

The Defendants came by their attorney and filed their motion to sale the Sheriff to pay over to Defendant $259.40 of the procuds of sale herein, which motion and also the cause are continued until the next term of this Court

(The motion filed above is not with the papers in the cause).

May 21, 1864 8th Day May term.
John Ellis Admr of the Partnership estate of Lamme & Ellis Plf.
vs. Rule.
Josiah W. Lamme Defr D.

Garnishments dismissed.

On motion of Plaintiff by his attorney the garnishments under the

attachments issued herein against Abraham Grindstaff, Robert A Roddy, Allen White, James A. Roddy, Miles Henley, John H. Hickam, Park, Stume & Shock, J. T. McBain, A. M. Payne, Henry C. Ferree, Mrs. A. M. Payne, Green B. Acton, and J. T. & R. R. McBain are dismissed, and it is ordered and adjudged that Plff. pay all the costs attending said garnishments, and that execution issue therefor.

Boone Circuit Court.
Nov. 24, 1864, 2d Day.

Continued. John. Ellis vs. J. W. Lamme } This Cause is continued until the next term of this Court.

Boone Circuit Court.
May 26. 1865. 5th Day.

Cont'd. by Deft. John Ellis Admr. Plt. vs. Josiah W. Lamme Deft } On motion of Defendant this cause is continued until the next term of this Court and it is ordered and adjudged that Defendant pay all costs of this term and that execution

issue therefor.

Boon Circuit Court,
Nov. 24 1865 5th Day. Nov. Term.

Motion to strike out plea in abatement.

"Ellis vs Lamme } Plaintiff came by his attorney and filed motion to strike out the plea in abatement & filed herein by Defendant, as follows;

John Ellis, Admr, Plff.
vs.
J. W. Lamme, Deft } The Plff.

moves the court to strike from the files of the papers the plea of abatement in this cause because Defendant having pleaded to the merits of this action by demurring to the petition he waived the plea in abatement.

2. Because the demurrer having been overruled, the judgment of the Court is final unless a plea in bar is filed by leave of the Court.

Prewitt, Gordon & Gordon & Shelley."

Boone Circuit Court
Nov. 25 1865. 7th Day. Nov. Term

John Ellis Plt
vs. Deft. & att.
J. W. Lamme Deft. } The parties came

by their attorneys, and the motion to strike out Defts plea in abatement, herein, having been heard by the court, and the Court being not sufficiently advised of and concerning the premises, took time to consider, and on the motion and affidavit of Plff, this cause is continued until the next term of this Court; and it is ordered and adjudged that Plaintiff pay all costs of this term, and that execution issue therefor.

Boone Circuit Court.
May 22 1866, 2nd Day.

Ellis)
vs)
Samms) "The parties came by their attorneys, and the court being now sufficiently advised of and concerning the motion filed by Plaintiff to strike out the plea in abatement filed by Defendant herein, said motion is sustained and said plea in abatement is stricken out.

In Boone Circuit Court
May 22 1866 4th Day.

Ellis)
vs)
Samms) "The Defendant by his

attorney came and filed his motion to withdraw the Demurrer filed herein by Defendant, and file a plea in abatement as follows:

"In Boone Circuit Court
May Term 1866.

John Ellis, Admr. } Defendant comes
vs. }
Josiah W. Lamme } by his attorney moves the Court for leave to withdraw his demurrer filed herein and also leave to file his plea in abatement to the affidavit for the reasons following.

1st Because the Deft. has a right to withdraw his demurrer and to plead over at any time before judgment is rendered thereon.

2d Because the plea in abatement filed at the May term of this Court 1864, stood upon the record a valid and subsisting plea, until the same was stricken out on motion of Plaintiff at present term of this Court.

3d Because the Plaintiff failed to take judgment on the demurrer at the term the same was overruled, and can

only take the same now by the indulgence of the Court.

4th. Because of the neglect of the Plaintiff to ask judgment on the demurrer at the term at which the same was overruled, the Defendant was misled to his prejudice.

5. Because to refuse to allow the demurrer to be withdrawn, and the plea in abatement to be filed now, would defeat the substantial ends of Justice.

Rupell & Guitar,
Attys for Deft.

" Boone Circuit Court.
May 24. 1866. 4th Day.

John Ellis Admr
vs
J. W. Lamme

The parties came by their attorneys, and the motion filed by Deft. to withdraw demurrer and be allowed to plead in abatement, being heard by the Court is overruled, and plaintiff moved the Court to order an inquiry of damages."

Boone Circuit Court
May 26, 1866 6th Day.

Ellis
vs
Lamme

The parties came by their attorneys and the Defendant filed his motion for leave to withdraw his demurrer herein, and file an answer to the merits of Plaintiffs cause, sixty days after this term of the court, of follows;

Motion to withdraw demurrer and file plea.

John Ellis Admr.
vs
Josiah W. Lamme

In the Boone Circuit Court, May term 1866.

Now on this day comes the Defendant by his attys and moves the Court for leave to withdraw his demurrer filed herein at — term 66 and also for leave to file his his plea in bar to merits of answer, and answer in this cause for the following reasons;

1st. Because Deft. has a right to withdraw his said demurrer and to plead or answer at any time before judgment is rendered thereon.

2nd On the decision of said demurrer the Deft. might by law withdraw his demurrer and answer.

3d. Because the plea in abatement filed May 1864, stood on record a

valid and existing plea and issue in the cause, until the same was stricken out on motion, at this term of the Court, by Plff.— Was by both parties recognized as such, both parties went on for four successive terms of Court in said time to summon witnesses and prepare for trial on that issue, and failed to proceed on the Demurrer.

4th. Because the Plaintiff failed to take judgment on the demurrer at the term the same was overruled and up to this time and can only do so now by the indulgence of the Court and therefore Defts rights remain the same.

5th. Because by reason of the neglect of Plff. to ask judgment on the demurrer at the term at which it was overruled, the Defts was misled to his prejudice and failed to ask this leave at that term.

6th. Because to refuse to allow the demurrer to be withdrawn, and the plea or answer on the merits to be filed now would defeat the established ends of justice.

Guitar & Rupell
Attys for Defendant.

And said motion is sustained and Deft's demurrer withdrawn, and Plff's motion for and inquired of damages is overruled. And Plff. tendered herewith his bill of exceptions to the opinion of the Court, which he prayed might be signed, sealed and made a part of the record, and which is done accordingly, as follows:

John Ellis Admr Lamme & Ellis Plff.
Against
Josiah W. Lamme - - - Deft.

Be it remembered that in the progress of this court the following proceedings were had, to wit;

Plaintiff, on the 22d day of May 1866, being the 2d day of the present term of this Court, moved the Court that an inquiry of damages be ordered in the above entitled cause, which not being disposed of until the 26th of May, when the Deft. filed the following motion for leave to answer the merits of the cause, which is in words and figures as follows, to wit:

John Ellis Admr
vs,
Josiah W. Lamme } In the Boone Circuit Court May term 1866

Defendant comes by his attorneys and moves the Court for leave to ~~file~~ withdraw his demurrer filed herein and also leave to file his plea in abatement to the affidavit for the reasons following:

1st. Because the Defendant has a right to withdraw his demurrer and to plead over at anytime before judgment is rendered thereon.

2d. Because the plea in abatement filed at the May term of this Court, 1864, stood upon the record, a valid and subsisting plea until the same was stricken out on motion of the Plff. at the present term of this Court.

3d. Because the Plff failed to take judgment on the demurrer at the term the same was overruled and can only take the same now by the indulgence of the Court.

4th. Because by reason of the neglect of Plff. to ask judgment on the demurrer at the term at which same was overruled, the Deft. was misled to his prejudice.

5th. Because to refuse to allow the demurrer to be withdrawn and the plea in abatement to be filed now,

would defeat the substantial ends of justice.

Rufell & Guitar

Attys for Defts.

on which no evidence was offered, where-upon the Court refused to award said inquiry of damages, and granted Defts leave to file answer, to which action of the Court in refusing said inquiry of damages, and sustaining said motion, and permitting Defendant to file his answer, Plaintiff, at the time and now, objected and excepted, and now tenders this his bill of exceptions, and prays that the same may be signed, sealed and made a part of the record, which is done accordingly.

G. A. Burkhartt Seal.

In Boone Circuit Court
May 28th 1866 1st Day. May Term

Ellis }
vs. } The Defendant by his attorneys,
Lamme } came and tendered to the Court herewith his bill of exceptions to the opinion of the Court, which he prayed might be signed, sealed and made a part of the record, and which is done accordingly as follows;

John Ellis Admr. of Lamme Ellis — Plaintiff

against

Josiah W. Lamme ——— Defendant

Be it remembered that in the progress of this cause, the following proceedings were had, to wit;

Plaintiff, on the 24th day of Nov. 1865 being the — day of the November term of said Court, filed his motion to strike out the plea in abatement, filed by Defdt. in said cause, which is in words and figures as follows;

The Plaintiff moves the Court to strike from the files of the papers, the plea in abatement in this cause;

Because Defdt having pleaded to the merits of this action by demurring to the petition, he waived the plea in abatement.

2d. Because the demurrer having been overruled, the judgment of the Court is final, unless a plea in bar is filed by leave of the Court.

Prewitt, Gordon & Gordon & Shively.

Whereupon the Court sustained said motion, and struck out said plea in abatement, which action of this Court in sustaining said motion,

and striking out said plea, the Deft. at the time and now objected and excepted to. Afterwards, to wit, on the 4th day of May term 1866 one day prior to the day on which cause was set for trial, Defendant filed his motion asking leave to withdraw his demurrer filed in said cause, and to file his plea in abatement to the affidavit of Plaintiff filed therein, which is in words and figures as follows.

John Ellis, Admr.
vs
Josiah W. Lamme.

In Boone Circuit Court
May term 1866.

Defendant comes by his attorney and moves the Court for leave to withdraw his demurrer filed herein, and also leave to file his plea in abatement to the affidavit, for the reasons following:

1st. Because the Deft. has a right to withdraw his demurrer and plead over at any time before judgment is rendered thereon.

2d. Because the plea in abatement, filed at the May term of this Court, 1864, stood upon the record as a valid and subsisting plea, until the same was stricken off on

motion of the Plff. at the present term of this Court.

3d. Because the Plff. failed to take judgment on the demurrer at the term the same was overruled, and can only take the same now by the indulgence of the Court.

4th. Because by reason of the neglect of Plff. to ask judgment on the demurrer at the term at which the same was overruled, the Defts. was misled to his prejudice.

5th. Because to refuse to allow the demurrer to be withdrawn and the plea in abatement to be filed now, would defeat the substantial ends of justice.

Rufus & Guitard
Atty. for Defts."

Whereupon the court overruled said motion and refused to allow Defts. to withdraw his demurrer, and file his plea in abatement, to which action of the court in overruling said motion, and refusing to allow Defts to withdraw his demurrer, and file his plea in abatement to the affidavit, Defts at the time objected and now

objects, and excepts, and now herewith tenders his bill of exceptions, and prays that the same may be signed, sealed and made a part of the record, which is done accordingly.

G. H. Burckhartt Seal.

In Boone Circuit Court in Vacation

On the 19th day July 1866 the Defendant came and filed with the Clerk of this Court, in the office thereof his answer, to the merits of Plaintiffs' cause, as follows, to-wit:

John Ellis, Admr of the estate of Lamme & Ellis, —— Plaintiff
against
Josiah W. Lamme — Defendant

In the Circuit Court of Boone Co. Mo. May term 1866.

Defendant in answer to plaintiffs petition states that he denies that he owes Pl'ff. in the capacity as Admr, as aforesaid, the sum of $74 0/0 for goods, wares & bought of Lamme & Ellis. He also denies that he bought out a stock of goods of

W. W. Lamme for $4200 00, and he denies that he undertook and assumed to pay Plaintiff Adms &c. one half of any sum, or any other sum; he denies that he undertook to pay said Plff $2100 00 as a part payment on goods bought by him of W. W. Lamme, or any other sum, or any such assumption & in part extinguishment of his liabilities to W. W. Lamme or W. W. Lamme's liabilities to said Ellis, and says that he did not, and he denies that Plaintiff Ellis agreed to so take Defendant for any such sum.

Defendant denies that he owes Plff. $300 00 for rent of a store-house as alleged, because he says that although he rent the store house of Plff. for 1 year for $300 per year, that yet the Plff. proceeded to sell out and deliver ~~it~~ to one Jas. F. McBain, said store-house, during the year and when Defendant had used it but 4 months, & that Defendant was compelled to rent it again of said McBain at the rate of $1000 00 per year, and really paid to said McBain $333 30/100 more for the house for said four months, than he had contracted to pay Plaintiff, for the entire year, which

he here sets up by way of an offset and counter claim and for which he asks judgment.

Pltf denies that he owes him the sum of $190.73 for money had & received by Defts to and for the use and benefit of him, the Plff. Admr &c. as aforesaid and all interest on this and all other items is denied & disputed

Josiah W. Lamme

Sworn to and subscribed before me in Boone Co. as N.P. this 13th 1866

J. J. Ruffell

Seal

Nov. 20. 1866. 2d day Nov. term 1866.

John Ellis Admr }
vs. }
Josiah W Lamme } The parties came by their attorneys and Plaintiff filed his replication to the answer of Defendant filed herein. as follows

Jno. Ellis. Admr. Plaintiff }
Against }
Josiah W. Lamme Defr }

In Circuit Court of Boone County.

Replication

Plaintiff for replication to the answer

of Defr. denies that he delivered the store-house as charged in Defts answer; denies that Deft Lamme was compelled to rent said house of McBaine, as stated in his answer, at the rate of one thousand Dollars per year, or at any other rate.
Denies that he is liable to Defendant for the sum of Three Hundred and thirty three, or any other sum therefor, or that Defendant is entitled to offsets any amount therefor. He prays judgment as in his amended petition, and for costs.

Prewitt, Gordon & Sheley.

And on motion leave is given to Defendant to file an amended answer herein during this term of the Court. And on motion and affidavit of Plaintiff this Cause is continued until the next term of this Court, and it is ordered and adjudged that Plff. pay all costs of this cause, and that execution issue therefor. Defendant filed his answer.

Answer.

Answer of Defr.

John Ellis, Admr. of the estate of Lamme & Ellis, Plff
against
Josiah H. Lamme Defr.

In the Circuit Court of Boone County Mo. Nov. term 1866.

Defendant Lamme for amended answer to Plff's petition states, that he denies that he owes Plff in the capacity of Admr as aforesaid, the sum of $74.00 for goods, wares &c. bought of Lamme & Ellis. He also denies that he bought out a stock of goods of W. W. Lamme for $4200.00 & he denies that he undertook & assumed to pay Plff admr &c, one half of such sum, or any other sum, He denies that he assumed to pay said Plff. $100.00 as part payment on goods bought by him of W. W Lamme, or any other sum: or any such assumption in part extinguishment of his, Defts, liabilities to W. W. Lamme or said W W Lamme's liabilities to said Ellis, admr as aforesaid ~~&~~ and in fact says that he did not. He denies that Plff. Ellis with him, Defts, to so take him and his, Defts, accountability for any such sum, or any sum in such manner alleged.

Defendant denies that he owes Plff $300. for rent of a store-house as alleged, because he says, that although he did rent the store-house of Plff for one year for $300 per year, that yet said

Plff. proceeded to & did sell out and deliver said store-house over his head to one James S. McBain, during and before the end of his said term of one year, and avers defendant had only held and used it for 8 months, and in violation of his own contract with Deft. whereby Deft was compelled to rent the same house again for the rest of the year, the remaining 4 months of the lease of Plff, and had to pay said McBain & did pay him the sum of $100.00 per year therefor, and that he really paid McBain $33.00 more for said 4 months than he was to pay Plff for the entire year and that on said account Plff owes Deft $133.00, which he here gets off by way of counter-claim & offset and for which he asks judgment. He denies that he owes him the sum of $195 73/100 for money had and received by Deft. to and for the use and benefit of Plff, Admr &c. as aforesaid, and all interest on this and all other items is also denied and disputed.

Defendant further answering, states that W.W. Lamme as Principle with Deft. and one Jas. S. Rollins as his securities, on the 1st day of October 1866, executed & delivered to Plff as Admr. of said Jim

of Lamme & Ellis, their promissary note for the sum of $6500 dlls due and payable two years after the date thereof, without interest, and that on the day and date aforesaid the said W.W. Lamme executed to the said Rliff as Admr. as afore-said, his individual note for the like sum of $6500 dlls due and payable twelve months after date thereof without interest, said two notes constituting and being the purchase money paid for a stock of goods, wares & merchandise, and other personal effects in the town of Providence sold and delivered by Rliff as Admr. as aforesaid to said W.W. Lamme

Defendant further answering states, that thereafter, to wit, on the 14th day of May 1861 the said W.W. Lamme duly made, executed and delivered his certain deed of trust, whereby he mortgaged to one James C. Orr in trust to secure the payment, 1st the cost and expenses of the trust, 2d, the payment of the note above-mentioned, which the said Defts & Jas. S. Rollins owed the securities of the said W.W. Lamme, & in the 3d place the payments of said above mentioned note executed by the said W.W. Lamme, individually

and without surety to Plaintiff.

Defendant further states that thereafter, to wit, on the 12th day of November 1862, he paid off and discharged said first ~~note~~ above-mentioned note, paying the principal sum of $650.00 and in addition thereto the further sum of $72.00, interest accrued up to date of payment, by reason whereof the said W.H. Lamme the said W.H. Lamme became the debtor of Defts, in the sum of $65.72. which with the interest remaining yet outstanding and unpaid and which according to the terms of said deed of trust, (after defraying the costs and expenses of the trust Deed), was to be first satisfied out of the proceeds and avails arising from the sale and proceeds, and disposition of said stock of goods, wares & merchantdise & other effects.—

Defendant, further answering, charges & avers that Plff., during the year 1861, received from the said W.H. Lamme large sums of money, arising from the sale of portions of said stock of goods, wares and merchandise, and other effects, & from other collections made on the books, notes and accounts, conveyed

by said deed of trust, amounting in the aggregate to the sum of $4000.00, which said sum Plff in fraud and wrong of the rights of Defendants, has converted and applied to the use and benefit of the said partnership estate of Lamme & Ellis, and in part payment of the individual note of W. W. Lamme to him as aforesaid as Admr. of said estate, & which said sum with the interest thereon amounting in the aggregate to $5200.00, Deft sets up & pleads as offsett, as counter claim & for which he also asks judgment against the Plaintiff

Guitar & Russell
Attys for Defendant.

Josiah W. Lamme makes oath and says that the above answer and matters therein, as stated, are true to the best of his knowledge.

Josiah W. Lamme

Sworn to before me Clerk of the Boone Circuit Court. Witness my hand & the seal of said Court hereto affixed at Office in Columbia Nov 20, 1866

Seal.

R. Todd Clerk

Boone Circuit Court
Nov. 24, 66. 6th Day. Nov term.

"Ellis
vs
Lamme } On motion of Plff. leave
is given him to reply to the
Defendants within ninety days before
the next term of this Court. And
this cause is continued until the next
term of this Court."

Boone Circuit Court.
In Vacation Feb. 5, 1867.

John Ellis, Admr
vs } Replication
Josiah W. Lamme } On this day Plff.
came by his atty.
and filed his replication to Defts
amended answer, as follows:

"John Ellis Admr Plff.
against
Josiah W. Lamme Deft.

Replication

In the Circuit Court of
Boone County.

Plff by leave of Court, first had
and obtained for replication to the
amended answer of Deft. filed herein,
denies that he sold out and delivered
to one J. T. McBain over Defts head the
store-house as charged therein. &c

denies that Defts. was compelled to rent said house of McBain or any other person for four months or any other time. He denies that Defts. had to pay or did pay said McBain $100.00 or any other sum per year for the rent or use of said store-house; denies that Defts. rented said house of said McBain, or that Defts. paid McBain $33.33 or any other sum, more for said 4 months that he was to pay for the entire year, as charged in said answer.

Denies that he owes Defendant $193. or any other sum for the rent of said house, or on any other account.

Plff. denies that on the 12th Day of Nov. 1862, or at any other time the Defts. Lamme, paid off & discharged the note referred to in said amended answer, or any part thereof, as averred in said answer, amounting to $6500, and the interest up to the time of Payment, to $72., or that by reason of any such payment, the said W.W. Lamme became the debtor of Defts. Lamme, in the sum of $6572.00 or any other sum. He denies that by the terms of the Deed of Trust referred to

, that said note was to be first satisfied out of the proceeds of the sale of the stock of goods, wares and merchandise & other effects, as alleged in said answer, after defraying the expenses of the Trust. Etc denies, that during the year 1861, or at any other time he, the Plff. received, of W.N. Lamme, the sum of $4000 00 or any sum from the sale of the goods, wares and merchandise & other effects as referred to in said amended answer, or from the sale of any part thereof, or from any collections made on the books, notes & accounts, alleged to have been conveyed by the Deed of Trust, mentioned in said answer, or that he has in fraud of ~~Pl~~ Defts rights, converted or applied said sum of money, or any part thereof to the benefit of the partnership estate of Lamme & Ellis, or in part payment of the individual note of the said W.N. Lamme, as alleged in said answer.

Plaintiff requiring strict proof of each and every material allegation in said answer, Plaintiff having fully replied to the new material allegations

in said amended answer, asks that judgment be rendered in his favor as prayed for in his said petition

Shirley, Prewitt & Gordon
Attys for Plff.

Boone Circuit Court
May 22, 1867 3d Day, May term.

John Ellis Adm'r
vs
Josiah W. Lamme

And now on this day came the parties by their attorneys, and thereupon came a jury to wit, J. A. Boulton, A. B. Garing, Chas Masterson, T. W. Roberts, Jos McGuire, James Peathe, Jno. A. Lyons, Jos A. Douglass, Warren Fragier, W. W. Beattie, Wm Hunter & Wm Robinson, who being duly elected, tried and sworn to well and truly try, & true deliverance make between said Plff. and defendant. And not having agreed on a verdict at the usual time of adjourning Court, are permitted to dispose until to-morrow morning at nine o'clock with the usual order from the Court.

Boone Circuit Court
May 24th 1867 3d Day. May term

"John Ellis Admr
vs.
Jr. W. Lamme } And now on this day came the

Judgment. parties by their attorneys, and the jury aforesaid empanneled and sworn as aforesaid, And the jury upon their oaths do say:

"We the jury do find for the plaintiff, the following items.

The acct of $74. Int. since filing Petition	$14.67	total	88.67
Note on Lenoir 18.20 "	" 17.63	"	35.83
1/2 Invoice, $2100 Int. "	" 416.50	"	2516.50
Rent of Store-house $200 "	" 39.66	"	239.66
Cash collected of Singleton 97.86 Interest,	19.39	"	117.25
Whole amount			$2997.91

And the attachment issued in this cause having been sustained at a previous term of this Court, it is ordered and adjudged by the Court that Plff. recover of Deft. the sum of Twenty nine hundred & ninety seven & 91/100 Dollars, to be levied of the goods and chattels levied on under the attachment issued in this cause, and sold by J. H. Waugh, Ex. Sheriff, under an order of this Court, and any other goods, chattels or real estate of said Defendant, and that said Defendant pay all costs of this suit, and that execution issue

therefor said debt and costs, and that the Ex Sheriff pay over the money arising from the sale of the attached property, or so much thereof as will sufficient to pay off and discharge this judgment.

Boone Circuit Court.

May 27, 1867. 7th day May term

"Jno Ellis, Admr. vs J W Lamme } Defendant came by his attorneys & filed his motion for a new trial, in this cause, and arrest of judgment, as follows:

Motion for a new trial &c.

"Jno Ellis Admr of Lamme & Ellis, Plff. vs. Josiah W. Lamme — Deft }.

In Boone Circuit Court May term 67.

Now on this day comes the Defendant and files his motion in Court to set aside the verdict of the jury rendered in this cause, and grant him a new trial.

1st. Because the finding of the Jury is against the evidence in the case.

2d. Because the verdict of the jury is against

the law and the evidence of the case.
3d. Because the damages found by the jury are excessive and bagainst the law and the evidence.
4th Because the Court improper instructions to the jury, and refused to give other instructions which ought to have been given.
5th. Because the misdirected the jury as to the law of the case.

Rollins & Guitar
Attys for Defts.

Which motion being overruled by the Court, defendant filed his motion and affidavit for an appeal to the District Court of the 4th District of this State. as follows;

In the Boone Circuit Court
May Term 1867.

John Ellis, Admr of the partnership estate of Lamme & Ellis Plaintiff
vs.
Josiah F. Lamme Defendant.

The Defendant Lamme comes and prays the Court an appeal from the judgment of the Court rendered herein, and makes oath and says that says appeal is not made

for vexation or delay, but because affiant believes he is aggrieved by the decree of the Court.

J. W. Lamme

Subscribed and sworn to before me Clerk of the Boone Circuit Court.

Witness my hand and the seal of said Court hereto affixed at Office May 24, 1884.

Jno. M. Samuel
Clerk.

Seal.

And such appeal is now here allowed, and Defts. presented a recognizance for such appeal entered into by Jos W. Lamme, Jas. S. Rollins, and D. H. Hickman as follows:

Appeal Bond.

Know all men by these presents that we Josiah W. Lamme as principal and Jas. S. Rollins & D. H. Hickman as securities are held and bound to John Ellis Admr of the partnership estate of Lamme & Ellis in the penal sum of six thousand Dollars, for the payment of which we bind ourselves, our heirs, executors and administrators.

The condition of the above bond is such, that whereas the said Josiah W. Lamme, has taken an appeal from the Judgment of the Circuit Court of Boone County, rendered

at the May term 1867, in a suit, wherein John Ellis Admr. of the partnership estate of Lamme & Ellis is Plaintiff, and Josiah W. Lamme is Defendant. Now if said Josiah W. Lamme, shall prosecute his appeal with due diligence to a decision in the appellate Court, and shall perform such judgment as shall be finally given by such appellate Court, or such as the Circuit Court may be directed to give, and if the judgment of said Court, or any part be affirmed, that he will comply with and perform the same, so far as it may be affirmed, and will pay all damages and costs which may be awarded against appellant by appellate Court.; then this bond shall be void, but otherwise to remain in full force.

Signed and sealed this — day of May 1867

J. W. Lamme. Seal.
Jas S. Rollins. Seal
D. H. Hickman Seal.

who are approved by the Court and such recognizance is filed, and Defendant tendered his bill of exceptions to the opinion of the Court, which

they pray may be signed, sealed and made a part of the record, and which is now done accordingly, as follows;

In the Boone Circuit Court
May Term 1864.

John Ellis Admr. of Lamme & Ellis }
Plaintiff }
against }
Josiah W. Lamme Defendant. }

Be it remembered that in the progress of the cause the following proceedings were had on the trial thereof.

Evidence of J. Orear

The Plff introduced Jeremiah Orear, who testified that he was the deputy Sheriff, who levied the attachment in this cause; that he served the writ on the Deft, and levied upon the property attached as Provided in this County; that he had a conversation with the Defendant Josiah W. Lamme, at that time, in which he, Lamme, complained of the amount of property which had been attached, and said that the debt he owed General Ellis, the Plaintiff,

was about Fifteen Hundred Dollars.

Evidence of O Harris

The Plaintiff then introduced Overton Harris, who testified that he was a clerk in the store of Defendant (Lamme); came in a day or two after he purchased the goods of Kirk Lamme, never saw the invoice. Suppose the goods the Defts. bought of Kirk Lamme would amount to between 4 & $5000.

Evidence of Jno. Ellis.

The Plaintiff John Ellis was then sworn who testified as follows; That he went to Providence shortly after Defts bought the goods of Kirk Lamme, (it might have been 3 or 4 weeks afterwards); that he was written for Defts; that Defendant took him up stairs in one of the rooms by themselves, and told him what he had done, and said, perhaps he ought to have sent him sooner. Witness told him it did not matter, so he made it all right now.— Defendant said he purchased the goods, to save Rolf and Rollins and had agreed with Kirk, to pay 1/2 of the invoice to

Plff. as Admr. of Lamme & Ellis, and asked the Plff what the amount of his claim was. He replied to him that his claim on Wirt was something over $2000, about $2200. Deft. said there was enough to save both, and told him to make it sure, to go to Wirt Lamme, and get him to transfer to Plff his books, notes & accounts, and he did so, and placed them in the hands of Singleton to collect, with the understanding with Deft that the amounts collected were to be divided equally between Plaintiff & Deft. to be applied to the notes on which defendant and Rollins were security, and the note held by Plff, Ellis on W.W. Lamme alone

Defendant asked Plff if a payment to Bradford on a note Bradford held against estate of Lamme & Ellis, would be equivalent to a payment to him, to which Plff responded, that it would, and would be better perhaps than money going through his hands. Bradford held a note against the estate of Lamme & Ellis, with Plff, Deft and Rollins &

other securities. Afterwards Plff. met with Defts. to settle with him, but Defendant could not find the invoice book, and they could not agree on the amount, and afterwards he told Defts. Lamme, that he would want a $1000 from him when he made a distribution amongst the creditors of Lamme & Ellis, and that Defts promised to furnish it in a short time.

On the day the attachment was got out he met defts. and had a friendly talk with him about their business matters, in which he told him that if he would give him an order on the constable of Cedar township for certain assets in his hands, amounting to over one thousand Dollars, in money, he would wait, to which Defts replied that he would do it, if he could, but that he could not, as he had recently been compelled to mortgage his land for about $500.; that they set a time to meet at Rollins', and afterwards apologized for not coming on acct of the rain.

Says that he presented the account of $74. to Defts. Due by him & Lamme & Ellis

and that he admitted it was correct and promised to pay it. Says that he, Admr. rented him the Deft., the store house of Lamme & Ellis for one year from the 1st day of May 1862 for $300.; that he put him in possession & did not put him out, and Deft kept possession to the end of his term. Says part of the agreement between him and Deft was that he, Ellis, was to get 1/2 of the invoice of the sale of the goods from W. W. Lamme to Deft., and which was to go to the payment of the note due by W. W. Lamme alone, to the Admr. of Lamme & Ellis, the Plff. The $8000 note on which Deft. & Rollins were securities was shown and identified by witness. Said that this note was not out and unpaid, but afterwards erected the statement, and said that he put in into R. Bradfords hands about the 10th day of Nov. 862, and must therefor have had it in his possession, when he had the conversation with Deft.; that he told Deft there was still due on the note of W. W. Lamme to him, about $2000. of principal, and that there had

been paid upon it the sum of $4200, and which had been credited on the note, These payments were made on this note by W.W. Lamme. Note was produced and identified with the credits, marked exhibit A, and read to the jury as follows:

Part of the payments on the notes were made as late as 1863. Witness also said that Defendant bought his half of a note due by Dr Yancy to W.W. Lamme for the sum of $1000 and that he credited W.W. Lamme with $150, which was one half of the principal of the note. Witness said he never intended to claim but 1/2 of the $195. collected by ~~Col~~ Singleton and placed in Lamme's safe. The Yancy note was one of the notes placed in Singleton's hands.

Evidence of J.H. Singleton

Def. then read the Deposition of James H. Singleton, who testified that he knew of the sale of the stock of goods at Providence Boone Co. Mo. from W.W. Lamme to Josiah W. Lamme in the Spring of 1862. The goods were invoiced, and the

invoice amounted to $4200 00.
J. W. Lamme continued business about one year, ~~at~~ and closed out his stock of goods for the purpose of going to Idaho. Kitrup says that he did not invoice the stock of goods but was employed sometime after as Clerk by J. W. Lamme. Had access to the invoice book. It amounted to a little over $4200. Pfff became alarmed and pressed J. W. Lamme for a settlement. Agreed to meet at Jas. S. Rollins' house. Lamme failed to come, and Pfff very shortly afterwards attached the property of the Defts, who complained of the amount of the attachment in my presence, in Columbia. Attachment was made to secure the purchase money of the stock of goods. The indebtedness arose out of the sale of goods purchased from W. W. Lamme by consent of Pfff. to J. W. Lamme. The Defts objected to the amount of the attachment, and gave as a reason that he was owing only about $1500. Said he did not think the invoice amounted to over $2000. This conversation was had in reference to this stock of goods. The

Note Books & accounts of W. W. Lamme were placed in the hands of Witness for collection. Collected $190, and placed same with Defts. Lammes, funds and made an entry on books to credit of Lamme, Ellis & Rollins. In this he was wrong, it ought to have been placed to the credit of Lamme & Ellis, Defts. & Plff. Dont know what became of the balance of the notes & accounts. They amounted to about $1000.00. The ~~Defendants~~ Plff. held a Deed of Trust on the stock of goods bought by J. W. Lamme of W. W. Lamme, means that Plff held a Deed of Trust on goods that W. W. Lamme bought of Plff. The invoice was for $4200. On cross examination Witness says he entered the employment of J. W. Lamme early in the Summer 1862, and staid about eight months. Witness states that he was not present when Defts. bought the stock of goods of W. W. Lamme but thinks this was early in the Spring of 1862. It was about one month after J. W. Lamme bought the goods before witness entered the

employment. Was not in the employment of W. W. Lamme when he sold out to J. W. Lamme. Had left him about 2 months. W. W. Lamme frequently bought goods & replenished his stock. Thinks W. W. Lamme lost money while in the business. Money for which goods were sold was used in replenishing stocks, and they were added to goods on hand. Never saw the Deed of Trust spoken of, only heard W. W. Lamme & Ellis talking about it. Don't know its date. Witness says he was not present at time of sale of goods from W. W. Lamme to J. W. Lamme, but saw the invoice afterwards, and it amounted to about $1200.00. Never heard J. W. Lamme say what amount or to whom he was to pay for the goods. Thinks Ellis sold store-house in January 1863. He rented it in in May 1862. to J. W. Lamme for one year $300. a year. Witness said he understood that J. W. Lamme took the place of W. W. Lamme, and assumed payment to Ellis. Never heard J. W. Lamme say anything about it, but heard it spoken of in his presence in the store, and in his hearing.

Witness dont know what became of the accounts, notes &c, which witness had in his hands, they were left at the store. When he witness was arrested by the military authorities, these accounts were left in possession of and under the control of W.T. Lamme. Never heard the question raised as to the amount of the invoice, by the parties.

Witness stats that just after the attachment, Lamme complained of the amount of the attachment, said he owed Ellis ½ of the invoice of the goods, but that the amount of the invoice was not much over $3000; that he owed him only $1500, that was ½ of the invoice. He acknowledged he owed Ellis one half of what he thought the invoice was. but he said the invoice was lost.

Here plaintiff closed his evidence. Whereupon the Defts offered evidence tending to prove as follows:

Evidence of Jas S. Rollins

James S. Rollins ~~testified~~; Said he would give an intelligible account of the transaction. Wm Ellis & W.T. Lamme, two young men, the former, the former the son of the plaintiff, the latter witnesses' brother-in-law formed partnership in mercantile business at Providence Boone Co.

by buying out the mercantile establishment of G. B. Parker, both the goods and the house for ten thousand Dollars. The sum to be paid for this mercantile concern, and house and lot was $10,000.00, and for which sum these two young men, Wm Ellis & W. H. Lamme, executed their notes to G. B. Parker with John Ellis, Peter Ellis, Josiah H. Lamme and Jas S. Rollins as the securities, these two notes were sold and assigned by G. B. Parker to Austin Bradford. This was in 1859. In June or July 1860 Wm Ellis, one of the firm of Lamme & Ellis, died. John Ellis, his father, and who is the Plff. in this cause, administered on the partnership effects of Lamme & Ellis. He got an order from the County Court of Boone Co., to sell the goods & merchandise of the firm, Privately, he, the Plff. with W. H. Lamme, the surviving partner came repeatedly to the house of Witness, with the view of inducing him and Dft. J. H. Lamme to go the security of W. H. Lamme on notes to the amount of $13,000, being the amount which he had agreed to pay for the goods & merchandise of the partnership. Time and again, Witness promptorily refused but the Plff. Ellis, and W. H. Lamme persisted for months in their im-

=portunities and begging to get him & Deft. to sign the notes for $13,000, repre=
senting, at the time, that the estate was
perfectly solvent and good; that the object
in selling the goods to the surviving partner
was to prevent a sacrifice, and that there
might be saved, what had been made
by the partnership during its existence, which
the Plff. & W. H. Lamme represented amounted
to several thousand Dollars. They stated
to witness about amount of assets of
the firm, and also the debts owing, by
which they showed, the debts could
be paid and have several thousand
Dollars left. On auction sale of the
goods, they represented, would amount to a
sacrifice of the property, and a loss of
what they claimed the firm owned, over
and above the debts. The further in=duce=
ments urged by the Plff. for this witness
and Deft. to sign the notes as ~~security for~~
$13,000. was the fact that we were al=
ready bound to Austin Bradford as se=
curity on the notes held by him, and
assigned by Geo. B. Parker to him. Plaintiff
said we would not get ~~thereby~~ any deeper in debt;
that any amount paid by the witness
and Deft on the $13,000 would be

credited as so much paid by us as securities on the notes held by Austin Bradford. And after much persistence the Plff. Jno. Ellis, sold W. W. Lamme the goods of Lamme & Ellis, for the sum of $13,000, and half secured by W. W. Lamme, note payable 12 months after date, and the other ~~note~~ half secured by W. W. Lamme, note payable 2 years after date, with Josiah W. Lamme the Deft, and Jas. S. Rollins the witness, as securities. these notes read as follows:

Notes.

$6500 Twelve months after date I promise to pay to the order of John Ellis, admr. of the partnership estate of Lamme & Ellis, the sum of six thousand five hundred dollars, for value received, and with ten per centum interest per annum, after due till paid.

W. W. Lamme

October 1. 1860.

The other note read as follows, and original of which was presented by witness to the jury, identified and read as evidence.

$6500. Two years after date we promise to pay to the order of John Ellis, admr. of the partnership estate of Lamme & Ellis

the sum of Six Thousand Five Hundred Dollars, for value received, and with ten per centum interest per annum, after due till paid.

W. W. Lamme.
J. W. Lamme,
Jas S Rollins.

Oct. 1, 1860.

It was agreed at the time of the execution of these notes by and between the Plff. and W. W. Lamme, he had the privilege of paying of any part of either of them or both before they fell due, and for any sum paid by him, he was to get the credit for the same as paid and ten per cent interest per annum thereon for the time the note had to run. These notes were delivered to the Plff and W. W. Lamme took charge of and continued the mercantile concern at Providence. A short time after this, the difficulties in the country commenced, and in May 1861, this witness, having to leave home to be absent a long time, and J. W. Lamme the other security on the last-mentioned note then living in St Louis, asked W. W. Lamme to give a deed of trust on his mercantile concern at Providence with the note books & accounts of the

concern to secure the above mentioned notes, which he did and is dated the 1st day of May 1861. The Trust Deed was executed to J.C. Orr, as trustee. It was presented and read to the jury as evidence in the cause, as follows.

Deed of Trust.

This deed made and executed this 1st day of May 61, by and between W.W. Lamme of Boone Co. Mission, party of the first part, James C. Orr of same County and state, party of the second part and Jas S. Rollins, Josiah W Lamme and John Ellis partys of the third part; witnesseth that said party of the first part, for and in consideration of the debt & trust hereafter mentioned and created, and of the sum of five Dollars to him in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, do by these presents, grant, bargain, sell, transfer and assign unto the ~~said~~ said party of the second part, his entire stock of merchandise, produce, groceries, hardware, household and kitchen furniture, now in his possession, and belonging to him, and remaining in his Store-house and in the town of Providence

Boone County Mo, together with the books of said mercantile concern, including the notes and accounts due to and on said books - for merchandise, groceries &c sold and delivered by me, including all debts due to said mercantile concern, all personal property of every kind and description, connected therewith. To have and to hold the same unto said party of the second part, in trust for the following purposes, whereas Jas. S. Rollins & Josiah W. Lamme are the securities of the said W. W. Lamme, on a note payable to John Ellis, admr. of the partnership effects of Lamme & Ellis, date the 1st day of October 1860 and payable two years after date without interest, for the sum of $6500; also the said W. W. Lamme is indebted to said John Ellis admr. as aforesaid, on an individual note dated the first day of October 1860, for the sum of $6500 payable twelve months after date with interest, and both of which said notes, the said Lamme is fully authorized to pay off, and discharge at any time, he may see fit & the said Ellis to allow him a credit for any payment he may make with interest at the rate of ten per centum

per annum on the payment or payments so made by him. The object and purpose of this Deed being to secure my securities aforesaid the said Lamme and Rollins, from the payment of any part of this note for which they are bound, and also the payment of the aforesaid note, due by me to the said John Ellis as herein specified, and in order to secure the largest amount out of the sale of the goods, wares and merchandise, notes, books and accounts herein assigned, transferred and conveyed, and to promote the advantage of the securities herein named and the creditors of the said W. W. Lamme, it is agreed that W. W. Lamme, in connection with said Trustee or any one to be appointed by him & with the consent of Lamme and Rollins, is to continue to sell the goods, wares and merchandise & groceries to the best advantage and for the best prices and to close up the books of said mercantile concern, he being familiar with the same, collecting and putting all the accounts due into notes so as to make them available at the shortest possible period in the payment of the notes above specified. And provided further that the said

Lamme & Rollins securities as aforesaid and the said John Ellis may at any time require of said Trustee to close out by sale all the personal property herein conveyed, for cash or on short credit, first giving ten days notice of the time and place of sale by printed advertisements and by published notice in the "Missouri Statesman", and delivering all property purchased at any sale which may be made, to the purchaser upon payment thereof, or otherwise complying with the terms of sale; or said trustee may proceed at any time he may see proper to sell the property herein conveyed upon the terms above specified, and out of the proceeds of any and all the property so sold and of the accounts and notes collected, the same shall be faithfully appropriated, — first to the payment of the costs and expenses of executing this trust. Second, to the payment of the note above specified and on which said Josiah H Lamme and James S. Rollins are the securities of the said W. H. Lamme — and third to the payment of the note due to said John Ellis as above specified, and anything

beyond to be appropriated ~~by~~ the debts due by the late firm of Lamme & Ellis, a full and complete schedule of all the property herein conveyed and of the notes and accounts due to be made out at once and furnished said trustee or Lamme and Rollins, securities as aforesaid or said Ellis, and any statement or recital in any conveyance contemplated hereby shall be received in all Courts as prima facie evidence of the truth thereof, and the ~~said~~ said party of the second part covenant faithfully to perform and fulfill the trust herein created.

In witness whereof the said parties hereto set their hands and seals the day and year above written

W. H. Lamme [Seal]

Jas. C. Orr [Seal.]

State of Missouri } ss.
County of Boone }

Be it remembered that on this 20th day of May 1876, before me, the undersigned, clerk of the county Court within and for the County and State aforesaid, came W. H. Lamme and Jas. C Orr, who are personally known to me, to be the persons whose

names are subscribed to the foregoing instrument of writing, as parties thereto, acknowledged the same to be their act and deed for the purposes therein mentioned,

In testimony whereof I have hereunto set my hand and affixed the Seal. seal of said Court at office this day and date above written

J. B. Douglass Clerk.

State of Missouri } ss.
County of Boone } This Deed of Trust from W. H. Lamme to Jas S. Orr, for the use of Jas S. Rollins was produced before me Clerk of the Circuit Court and Ex-officio Recorder for Boone County, on the 20th day of May xxxx in the year of our Lord one thousand eight hundred and sixty one, and with the certificate thereon endorsed is duly recorded in Mortgage Book No 2, pages 304-5-6.

Given under my hand as recorder aforesaid, with the seal of said Court hereunto affixed at Office in Columbia on the day and year aforesaid

R. L. Todd

Clerk & Recorder

Witness wrote the deed of trust. Saw
Offf. in Columbia afterwards, and he
expressed his gratification that the
Deed of Trust had been given—
W. W. Lamme according to the terms
of the Deed of Trust continued to carry
on the mercantile concern, at Providence,
Witness was absent from the State in
the Spring of 1862. Knew nothing per-
sonally of the purchase of the goods
by J. W. Lamme of W. W. Lamme. On his
return home in Sept 1862, found J. W.
Lamme doing business at Providence,
having bought out W. W. Lamme, The
note for $6000 on which the Defts. J. W.
Lamme and Witness were securities
was nearly due, and as J. W. Lamme
had bought the mercantile concern of
W. W. Lamme, with the understanding
to pay off the note on which Defts &
Witness were securities to Offf. witness
told Defts. he expected him to do so
which he agreed to do; but not suiting
him to take funds from his business
at that time, he borrowed of the
"Exchange Bank" in Columbia Missouri
the sum of six thousand five
hundred Dollars, and with witness

and Mos Prewitt as endorsers. — This note was payable ninety days after date —
Witness produced original note, which was read, in evidence, to the jury, and is as follows:

$6500. Columbia Mo. Nov. 10th 1862.

Ninety days after date I promise to pay to the order of James S. Rollins the sum of Six thousand five Hundred Dollars at the Branch of the Exchange Bank at Columbia Missouri, negotiable and payable without defalcation or discount, for value received. Witness my hand this day and date above

W. T. Samme

Endorsed thus James S. Rollins
Mos Prewitt

The money on this note was received by witness, and paid by him to ~~Mr~~ Austin Bradford, who held the note on which Defendant and Witness were securities to John Ellis, the Plff, as above described, and which was taken up by Witness, and the amount was at the same time credited by Bradford on the original notes held by him, against Samme & Ellis, according to the agreement

and understanding made with Pleff, at the time he sold the merchandise to W.W. Lamme, and the witness and J.W. Lamme became the securities of W.W. Lamme on the note for $6500 on the 7th day of October 1860; Before Prewitt would agree to endorse the note in Bank of J.W. Lamme spoken of above, he required collateral to be placed in his hands, and this was done by witness, by placing in his hands, Boone County Bonds, belonging to him, to the amount of six thousand Dollars. When the Bank note fell due, witness was absent from the State, J.W. Lamme the Principal in the note was not ready to pay it. Prewitt, the security, sold the Boone County Bonds, placed in his hands as collateral security, and paid the note in bank with the exception of $469.71 which has been paid upon it by Rollins the Witness on the 3d day of December 1862, as credited on note. This further credit is endorsed on the note "$6,030.29 Rec'd of Moss Prewitt, on the within note, Six Thousand and thirty Dollars & 29/100.

Feb. 11 1863. — R.B. Price Cashier

Jas S Rollins has paid me the full amount of this note

Moss Prewitt. "

J. W. Lamme the Deft. afterwards during the Spring, Summer and Fall of the year 1863, paid Witness betwixt Five and six thousand dollars, on account of money paid by witness on the Bank debt. There are several hundred dollars still due and owing Witness, the precise amount not known. A controversey betwixt Witness and Deft. as to precise amount he has paid witness. On Cross Examination, Witness stated that he had never received a cent from W. W. Lamme to be appropiated to the payment of the notes held by Plaintiff, Ellis, nor did he know of the Deft, Lamme, ever having received anything, except the stock of goods bought of W. W. Lamme He did not believe he had ever received a cent besides, Witness states that the object in taking the Deed of Trust was — first to secure the securities, Witness and Defendants that although W. W. Lamme was authorized to go on and sell the goods, he sold them according to

the terms specified in the Deed of Trust. Witness stated that he was not at Providence, and according to his recollection, none was in the Store of W. W. Lamme, whilst he was doing business there.

Evidence of W. W. Lamme

W. W. Lamme was then introduced as a witness and testified that he was of the firm of Lamme & Ellis; that between the 1st & 15th days of May 1862 he sold to J. W. Lamme his stock of goods in Providence for the sum of four Thousand six hundred dollars — that Samuel Cully and Edward Ferguson were present and also J. W. Lamme and aiding in taking the invoice. J. W. Lamme paid Witness no money. He took the goods with the understanding that he was to appropriate the purchase money to the payments of the debts of witness, and the note owing by Witness to John Ellis, the Plff. with Deft. and Rollins as his securities for the sum of six thousand five hundred Dollars, was first to be paid. A short time after Witness sold his goods to J. W. Lamme, the Plff.

Ellis came down to Providence, and in an interview between Witness, Ellis & Mr. Lamme, and a statement was made to him of the sale of the goods to J. M. Lamme, and how the purchase money should be appropriated, and to which he made no objection. The invoice of the goods was taken at $4800. Ellis was not present when the sale of goods was made to J. M. Lamme, & he did not come to Providence for sometime perhaps several weeks afterwards. At the time of the sale of the goods to J. M. Lamme, he did not assume to pay one half of the invoice of the goods on my individual note for $1500, to Defendant or any other sum. The agreement was when Witness sold the goods to J. M. Lamme, he was to pay the amount of the purchase money on the note of Witness on which Rollins and Defs. were the securities for the sum of $1500, and whatever amount was paid on this note was to be paid over to Austin Bradford, on the original note held by him. This was when Ellis was present. Nothing was said of the appropriation of the purchase money

at the time of the sale. Witness stated that he had already paid the Plff. a sum of upwards of four thousand Dollars, which was credited on his individual note. When this money was paid to Plff. from time to time, there was nothing said as to where it should be credited. A large portion of the amount paid Plff. was out of the sales made of the goods and merchandise and of the payment made to him and credited in the individual note due by Witness to Plff. was after the execution of the Deed of Trust spoken of. Witness says he never paid Deft. J. H. Lamme, anything, except goods he got of him, and these were to go to payment of Debt on which Rollins & J. H. Lamme were the securities. Witness stated that he remained clerking for J. H. Lamme, after he sold out to him. Witness on Examination said he and J. H. Lamme had a personal difficulty and misunderstanding afterwards; that he demanded money of J. H. Lamme, that the reason why he did it was because the understanding with his brother J. H. Lamme

at the time he purchased goods of Witness was that whatever Deft realized on Sale of goods over what would pay this debt was to be paid to Witness; that having clerked in Defts store from that time until Deft sold out, witness knew he had realized more than enough to pay off the Note on which he and Rollins were securities, and witness believed he was entitled to same. Witness demanded of Deft. at the time he was about to close out to McBain some thousand or fifteen hundred dollars, because he believed there was that amount coming to witness. It might have been as much as a thousand or fifteen hundred dollars. — J. M. Pamm never gave Witness any money. Witness went on selling regardless of deed of Trust, and now and then replenished his stocks of goods with with monies for which goods were sold by him. I was out of means. Deft knew Witness was selling goods and buying others, being the notes and accounts obtained for goods sold that he turned over to Plaintiff.

Witness did not recollect amount of goods purchased from time to time, but he bought the goods with money. Gave some accounts and notes to Ellis. Witness does not know the amount of goods sold by him during the year. While he was carrying on business in Providence, the Defr, J. W. Lamme was living in St Louis. Witness never ordered goods through him. Might have sent him some time when he was down in St Louis to purchase goods. Does not remember. The Deed of Trust was written by Jas. S. Rollins He sent for me to Providence & I signed it. Dont remember that Ellis was present. Never heard any promise made that J. W. Lamme was to pay Ellis, one half of the amount of the goods which J. W. Lamme bought of Witness. Defr was to raise out of the goods Witness let him have enough to pay off note which Defr. and Rollins were securities on and divide the surplus with Witness. Witness did not intend to pay that to Ellis. He intended to keep it.

Evidence of J.W. Lamme

J.W. Lamme, the Defendant sworn, testified that he bought, in May 1862 a stock of goods of W.H. Lamme at Providence. There was an invoice of an old stock of goods, amounting to $1700. and he took other goods at the bills of purchase, amounting to $2900, making $4.600. The Plff Ellis was not present at the time; he, Defr bought the goods, came down there some two weeks afterwards; had a talk with him in the presence of W.H. Lamme and he expressed himself satisfied. Witness said he sent for Plff to come down, wanted him to the see the quantity of goods, which he had got. Evasive. Was fearful Plff. might think he got a larger amount of goods than sufficient to pay off the $6500 cc, on which he was security. The Deed of Trust was talked of. Defendant never assumed to pay Plff. one half of the invoice of the stock of goods, or any other sum on W.H. Lamme's individual note, or on any other account. Plff Ellis held a note on W.H. Lamme for $5,500 cc on which Witness and Rollins were securities. This note he was to pay, but none others, there was never any arrangement by which W.H. Lamme

was to get part of proceeds of goods.
Witness said he borrowed $6.500, from "Exchange Bank" in Columbia in Nov 1862 with Rollins & Prewitt as securities. With this money he paid to Bradford, through Rollins, the note of $6500 on which he & Prewitt were the securities. Never got a farthing from W. H. Lamm except the Stock of goods he bought of him. W. H. Lamm was owing Witness a large amount of money, outside of these transactions. Have no recollection of ever having told Singleton that Witness owed Ellis fifteen Hundred Dollars, or any other sum, for he owed him nothing, and never had a transaction with him by which Witness could come into his debt. Witness thinks that there was some misapprehension on the part of Singleton in regard to his statement to him. Never promised Ellis to pay him any money. Never told Oscar he owed Ellis fifteen Hundred Dollars, or any other sum, recollect no such conversation. Never paid Ellis any part of the $195. collected by Singleton and kept by him in safe. Recollect no

interview with General Ellis up stairs. Did pay Ellis one Hundred Dollars for his interest in Yancey note.

Evidence of Ellis

John Ellis, Plaintiff, testified that he sold store-house under order of the County Court, with the consent of Defn and with the understanding, at the time with the purchaser, that Defts was to keep possession his time out.

This was all the evidence offered upon either side; whereupon the Court gave to the Jury the following instructions on part of the Plaintiff.

Instructions of Plff.

1st. If the jury find from the evidence that J. H. Lamme at the time of his purchase of said goods of H M Lamme in consideration whereof, undertook and assumed to pay Plff. Ellis one half the invoice price of said goods or any part thereof, or any portion of the proceeds of the same, then they will find for Plff. Ellis so much as they find that J. H. Lamme undertook or assumed to pay not exceeding 2100 dollars.

2d. If the Jury find from the evidence that Josiah H. Lamme, as a part payment for the goods, undertook

and assumed to pay Ellis one half the invoice price of said goods, then they will find for Pltff. the amount so assumed not exceeding 2100 dollars.

3d. If the Jury find from the evidence that J. W. Lamme owed the account for $4 or any part thereof, they will so find their verdict.

4th. If the jury find there was an agreement that the notes and accounts, were to be put into Singleton's hands, & the amount collected to be divided between J. W. Lamme & Ellis, and find that one Hundred and Ninety five Dollars of said collections went into J. W. Lamme's hands, then they will find one half the amount against Defendant.

5th. By the pleadings in this cause the notes sued on stands admited and the Jury are bound to find that for Plaintiff.

6th. If the Jury find from the evidence that Ellis rented the store-house to Defendant for one year for $300 and that he took possession under said renting and remained in possession during said time, he is bound for said rent, and the lease to Lamme

was a valid lease against any sale subsequently made by Ellis, and the only question is to whom the 4 months rent is to be paid, and if the understanding was with McBain that he was not to have rent till the end of the lease, then the whole rent is payable to Ellis; but if no such understanding existed, then they can only deduct the 4 months rent at the rate of $300 per year, out of the years rent.

9. Any payment made by W.T. Lamme to Ellis, he had a right to apply to the payment of the first note, unless otherwise ordered at the time.

10. The Jury in making up their verdict may if they find for Pltff. on the account, add interest at the rate of six per cent per year, from the commencement of this suit.

11. That Deed of Trust given in evidence authorized W.T. Lamme to sell and dispose of the goods and to pay of the debts as he saw fit. — And he was not required to give any preference to one note over the other, in any payment made by him. —

Deft. objects.

and to the opinion of the Court in giving of all of which instructions, the Defendant ~~of~~ objected, which objection was overruled by the Court, and to the opinion of the Court in overruling said objection the Defendant excepts.

The Defendant asked the Court to instruct the Jury as follows;

1st If the Jury find from the evidence that the Plff. Ellis received from W. W. Lamme subsequent to the 1st day of May 1861, goods, monies or effects in any amount, which were conveyed by the Deed of Trust offered in evidence, or arising from the sale of the goods, or on collections of the notes & accounts as conveyed, they will find for the Deft. the amount so received with interest thereon at the rate of six per cent from the date of such receipts — unless they further find that said monies, goods and effects were received with the knowledge of the said Defendant, and with his consent applied in part payment of the individual note of W. W. Lamme.

2d, Under the Deed of Trust offered in evidence, the Deft. had a

first lien upon the goods and effects therein conveyed. for the repayment to him of any sum he might pay upon the note, upon which Defts & James S. Rollins were securities, and he had a legal right to apply the purchase price of the stock of goods bought by him in part liquidation of said note.

3d. If the Jury find from the evidence that the one Hundred and Ninety five Dollars, claimed in Plff's petition was collected upon notes and accounts conveyed by the Deed of Trust, then the Plff. has no legal right to recover any part of said sum, unless they further find, that there has been sufficient assets received by Defts, ex clusive thereof, to pay off the note to which he is security, or that the Defts agreed in writing that the same should be applied to the payment of the individual note of W. W. Lamme

4th. That any purchaser of the real estate of Lamme & Ellis at the Admr's sale, would be entitled to the rent and use thereof from and after his purchase, unless an open reservation of rent, was

made to the estate at the time of the sale, and the Defts would be entitled to recover from Plff. as admr. any excess, that he might be forced to pay to the purchaser.

5th If the Jury believe that the stock of goods were mortgaged and that Defts had a preference in said incumbrance, then Plff is responsible in this action for all of the mortgaged property or proceds thereof, which he may have received directly or indirectly and appropriated in any other way, that to the note first secured in said incumbrance, unless they further believe, that it was otherwise appropriated by Ellis, by consent of Plaintiffs.

6th That although the Jury may believe from the evidence that W.W. Lamme assumed to pay Plff any part of the purchase money of the goods bought of W.W. Lamme, that assumption to be valid and binding in law, must be reduced to writing or some note or memorandum thereof and signed by Defendant or by some one lawfully authorized by him, and if not so done they cannot find thereon for Plaintiff.

7th. All goods purchased with monies, arising from sales made of parts of the original mortgaged stock, and notes and accounts given in payment for the same, were subject to and bound by the Deed of Trust, in the same manner as the original stock.

The Court refused to give and overruled the 1st — 3d — 4th — 5th and 6th instructions, and to the opinion of the Court in overruling said instructions asked, the Defendant excepts.

Thereupon the cause was submitted to the Jury who found and returned to the Court the following verdict

We the Jury find for the Plff. the following items;

The acct. of $74.00	Interest filing petition	$14.67	total 88.67
Note on Lovid 1881	" " "	17.63	" 35.83
1/2 of invoice $2100.	" " "	416.50	" 2516.50
Rent of Store house $200.00	" " "	39.66	" 239.66
Cash collected by Singleton $99.85	" "	19.39	" 117.25
	Whole Amount		$ 2997.91

J. A. Boulton
Foreman

And the Court rendered thereon the following Judgment;

And the attachment issued in this cause having been sustained at a previous term of this Court it is ordered and adjudged by the Court that Plaintiff recover of Defts. the sum of Twenty Nine hundred and ninety seven & 91/100 Dollars to be levied of the goods and chattels levied on under an order of this Court and any other goods, chattels or real estate of said Defts. and that Defts pay all costs of this suit, and that Execution issue for said debt and costs, and that the Ex Sheriff pay over the money arising from the sale of the attached property or so much thereof as will be sufficient to pay off and discharge the judgment.

Whereupon the Defendant filed his motion to set aside the verdict and grant him a new trial and an arrest of Judgment, which motion was overruled by the Court and to the opinion of the Court in overruling the same, the Defts excepts.

Now on this day comes the Defts & files his motion in Court to set aside the verdict of the jury rendered in this cause and grant him a new trial.

1st, Because the finding of the Jury is against the evidence in the cause.

2d, Because the verdict of the Jury is against the law and the evidence of the case.

3d, Because the damages found by the Jury are excessive and against the law and the evidence.

4th, Because the Court gave improper instructions to the Jury & refused to give other instructions, which ought to have been given.

5th, Because the Court misdirected the Jury as to the law of the case.

Rollins & Gantt
Attys for Defts.

The Defendant thereupon filed his affidavit for an appeal in this cause, and having entered into bond, which is approved by the

Court, prays that this bill of exceptions may be made a part of the record and duly signed & sealed, which is done accordingly.

G. A. Burckhartt, (Seal)
Judge of 2d Judicial Cir. Mo.

State of Missouri } Ss.
County of Boone }

I Jno. W. Samuel Clerk of the Circuit Court, within and for the County and State aforesaid, do hereby certify that the above and foregoing is a full, true & perfect copy of the record and proceedings had in our said Court in the cause of John Ellis Admr vs. J. M. Lamme, as the same appears from the records and original papers now on file in the office of said Court.

In testimony whereof I hereto set my hand and affix the seal of said Court at office in Columbia June 24. 1871.

(Seal)

Jno. W. Samuel
Clerk.

Fees of Jno. W. Samuel
Clerk.

Record. 28320 Words 15c per C	$ 42, 48.
Stamps 5c Cert. & Seal 30 C.	,35
Postage.	,85

State of Missouri S.S.

Be it remembered that at a regular Term of the Fourth District Court of the State of Missouri, begun and held at the City of Macon, on the Third Monday of July, it being the fifteenth day of said month, in the year of our Lord One Thousand Eight Hundred and Sixty Seven, there were present, Honorable R. A. DeBolt, Honorable E. V. Wilson and Honorable G. N. Buckhartt, Judges: Jno. T. Clements Clerk and William T. Forbes Marshall.

Among others the following proceedings were had:

Tuesday July 16. 1867

John Ellis Admr. Respt

vs.

Josiah W. Lamme, Applt. J. Now at this day comes the Respondent by his attorney and files Brief and Joinder in Error

Wednesday July 17. 67

John Ellis Admr Respt

vs

Josiah W. Lamme Applt J. And now at this day come the parties by their attorneys

and after argument submit this cause to the Court. And the Court being now sufficiently advised of and concerning the premises doth consider and adjudge that the judgment rendered herein be reversed and cause remanded.
Opinion filed.

Opinion of Court.

John Ellis Admr. Respt
vs.
Josiah W. Lamme Appellt

Appeal from Boone Circuit Court.

De Bolt Judge delivered the opinion of the Court.

"This was an action by attachment upon promissory notes and accounts, and upon a promise of Defendant that he would pay to Plaintiff one half of the price of a stock of goods bought by Defendant of W. W. Lamme. The Defendant in his answer denied the promise and also claimed the property under a deed of trust executed by W. W. Lamme to appellant, James S. Rollins and Respondent.

"There was a trial before a jury and a verdict for Respondent.

In our opinion the Circuit Court misconstrued the provisions of the Deed of

Instr. and improperly instructed the Jury.
For this error of the Judgment of the Circuit Court is
reversed and the cause remanded.
Judges Wilson and DeBolt concur.
Judge Buckhartt, dissents
R. A. DeBolt
Judge.

John Ellis Admr Respt
vs.
Josiah W. Lamme Applt } And now
at this day comes the Respondent by
his attorney and moves the Court to
grant an appeal in this cause to the
Supreme Court of Missouri and files
affidavit; whereupon the Court
having heard and fully considered
said motion, doth order that the
same be sustained:

Motion for appeal.

In the 4th District Court of
Missouri. July Term A.D. 1861
John Ellis Administrator of }
Lamb & Ellis — Respt
against
Josiah W. Lamme — Applt }

The said
John Ellis the Respondent in this Court
by Robert T. Prewitt his attorney comes

and moves the Court to grant him an appeal of this cause to the Supreme Court, and files herewith his affidavit for an appeal.

Prewitt Atty.

In the 2nd District Court of Missouri
July Term A.D. 1867

John Ellis administrator of
Landon Ellis — Respt
Against
Josiah W. Lamme — Appellt.

Robert J. Prewitt agent and attorney for John Ellis on this his application for an appeal of this cause from the Fourth District Court to the Supreme Court of the State of Missouri, being duly sworn, on his oath states that the appeal is not made for vexation or delay but because this affiant believes that the said John Ellis, the Respondent in the District Court, now Appellant, is aggrieved by the judgment and decision of the District Court.

Robert J. Prewitt

Subscribed and sworn to before me this 1st day of July A.D. 1867

Jno J. Clements
Clerk

Assignt of Errors.

John W. Ellis Admr partnership effects of Lamme & Ellis — Respt

vs.

Josiah W. Lamme — Applt.

Applt Josiah W. Lamme Deft below now comes and says that in the record and proceedings in the Circuit Court manifest and palpable errors have intervened and assigns the following errors thereon

1st. The Court erred in striking out Defendants plea in abatement.

2d. The Court erred in refusing leave to Deft to withdraw his demurrer to plaintiffs petition and file an answer to the merit.

3d. The Court erred in granting instructions to the jury prayed for by Plff. and in refusing instructions asked for by Defendant.

4th. The Circuit Court gave judgment for the Respt John W. Ellis. Whereas the said judgment ought to have been given for the appellant Josiah W. Lamme.

Wherefore for the errors aforesaid and others appearing in the said record and proceedings

in this cause, the ~~Defts~~ Appellants Defts below, prays. that the said judgment may be reversed and annulled, and that he be restored to all things which he has lost by reason thereof, and that the Court here proceed as will to the examination of said record and proceedings as of the matters above assigned for errors and that Respondent rejoin to said errors &c.

Henry & Williams
for Appellants

In the 4th District Court
July term 1867.

John Ellis — Respt

Joinder in error.

vs

Josiah W. Lamme — Appelt.

Now at this day comes the Respt, by Prewitt his attorney and says that there is no error in the record and proceedings in this cause, nor in the judgment and asks that the same in all things be affirmed

Prewitt
Atty

State of Missouri. Sct.

I, John T. Clements, Clerk of the Fourth District Court of the State of Missouri do hereby certify that the above and foregoing is a full, true and perfect copy of the record and proceedings in our said Court in the cause of John Ellis, Admr. Respt vs. Josiah H. Lamme Appellt, as the same appears of record and on file in my office.

In testimony whereof I hereto set my hand and seal of said Court at office in Macon City this 23d day of November A.D. 1864

Jno. T. Clements
Clerk.

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John Ellis, App.

vs.

Josiah W. Lemmer. Resp

Appeal

4th Dist. Court

Boone Circuit

Clerk's fees $43.88

Postage 73

Dist Clerk's fees $45.45

Postage .85

46.30

Prewitt for

Ellis.

Filed Nov. 26th. 67

N C Burns

$10 paid

John Ellis administrator of the firm of Lamme & Ellis Appellant
Against
Josiah McLamme Respondent
In the Supreme Court of Appeals
January 1868 Appeal from
District Court

Now comes the appellant and assigns the following errors to wit,

1 The said District Court erred in reversing the judgment of the Circuit Court.

2 The Circuit Court committed no error in construing the deed of trust or otherwise

3 The Circuit Court correctly and legally instructed the jury and the district Court erred in deciding that wrong instructions had been given by the Circuit Court—

4 The decision & judgment of the District Court is erroneous and illegal

5 The district Court erred in its construction of the deed of trust

6 The decision and judgment

of the said district Court is otherwise illegal and Contrary to law and the judgment of the Circuit Court was legal and valid

Trevit & Shelley
For Appellant

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No Ellis Adm appl
vs
J W Lamme Respondt

Assignment of errors

Filed Jany 13/68
N C Burch
Clos

In the Supreme Court.

January Term 1868

John Ellis Administrator of the Partnership Effects of Lamme & Ellis - Appellant

vs

Josiah N. Lamme Respondent -

Now at this day comes the Respondent, and says there is no Error in the Judgment and opinion of the District Court, and joins in Error.

Reed & Rollins

Attorneys for Respondent

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John Ellis Administrator
of Lamme & Ellis
appellant

vs

Josiah W. Lamme
Respondent—

Appeal from the 4th
District Court—

Joinder in Error—

Filed Jany 14/68
N O Burch
clerk

In the Supreme Court
January Term 1848

John Ellis admr of Lamme & Ellis
vs
Josiah W Lamme

Brief by Prewitt & Sheley for Jno Ellis Plaintiff below and appellant here

This suit was instituted by the plaintiff as administrator of the partnership effects of the late firm of Lamme & Ellis against the defendant J W Lamme one ~~a promise~~ Count of which is on a promise made by defendant to ~~pay~~ One William Wirt Lamme to pay to said administrator One half of the invoice price of certain goods then sold by said W W Lamme to defendant, ~~and~~ toward the extinguishment of a certain Note which said administrator held against the said W. W. Lamme, to which arrangement plaintiff assented which half plaintiff avered amounted to 2100 Dollars

~~Thereof~~ defendant ~~denied~~ was attached on the ground that

he was about to leave the State with intent to change his domicile, at the return term plaintiff filed an amended petition, and defendant then files a plea in abatement and afterwards filed a demurrer to plaintiff's amended petition, which was heard and judgment given overruling the demurrer. The defendant stood on the demurrer and excepted to the opinion of the Court on the record, and the cause stood continued, at the subsequent term the plaintiff filed a motion to strike out the plea in abatement on the ground that it was, ~~was~~ waived by defendant by the proceedings on the demurrer. This motion the Court took under advisement until the next term, when it was sustained and the plea stricken out.

The defendant then filed his motion for leave to withdraw his demurrer and to file a plea in abatement which the Court overruled

The defendant then filed his ori-

tion for leave to withdraw his de
murrer and file an answer ~~to the~~
~~merits~~ in bar, This motion was sus
tained, and the defendant after
wards filed an answer and
then afterwards an amended
answer denying the undertak
ing set out in the first Count of
plaintiff petition.

Plaintiff also sued on a small
note, To this defendants answer made
no defense.

Plaintiff also sued for the amount
of a small account for goods alleged
to have been purchased by ~~defen~~
defendant of the firm of Lamme
& Ellis, of 74 Dollars The answer denied having
purchased these goods.

Plaintiff also sued for $195.73
received by defendant of money
collected for said administrator
on accounts delivered to plaintiff
as administrator, by W W Lamme
The answer denied receiving it.

Plaintiff also sued for the rent
of a store house leased for 12 months by him as
administrator to defendant for $300 The
answer admitted the lease but set

up as defend, That before the ex
piration of the lease the Adminis
trator under an order of the County
Court, sold said store house, and
defendant was compelled to rent
of the purchaser for 4 months of
the year at a larger rent.

The answer also set up as an offset
that sometime previous the W. W. Lamme
had made a deed of trust by on cer
tain goods to secure the payment
of two Notes for $600 each made by W. W. Lamme
to plaintiff as administrator. One
due in twelve months, the other in 2
years, the first with out security.
The Second signed by defendant and
J. S. Rollins as security, and that the
deed of trust required the Trustee
to apply the money arising from the
sale of goods first to the extinguish
ment of the last note, that plaintiff
had received large amounts of
money arising from the sales of the
said goods under which he had
fraudulently misapplied to the
payment of the first note instead
of the last by which defendant
was damaged, and he asked to offset

the same against the demand of the plaintiff.

Plaintiff filed a replication putting in issue all the facts in regard to the second sentence, the paying the purchaser rent &c set up by defendant, also all the facts set up as an offset, the construction of the deed of trust, the reception or misapplication of any money &c

On the trial of the cause the plaintiff proved by John Ellis the administrator that a short time after William Wirt Lamme sold out his stock of goods ~~to defend~~ in Providence to defendant, that defendant sent for plaintiff, took him into an upper room in the Shed at Providence and told him he the defendant had purchased of his brother Wirt Lamme his stock of goods and had agreed with his brother, Wirt to pay one half the invoice price of the goods to plaintiff to be applied by him as administrator towards the payment of the note ~~plaintiff~~ that said W. W. Lamme indeed nally

owed to plaintiff as administrator of Lamme & Ellis. The defendant further asked plaintiff howsmuch was yet unpaid by Wirt on that note, plaintiff replied some two thousand or twenty two hundred that 4200 Dollars had been paid on the note Dollars besides the interest, defendant said he had purchased the goods to save plaintiff & Jas. S. Rollins and these would be enough to pay both notes, but in order to make that certain, defendant requested plaintiff to see W. W. Lamme and get him to transfer to plaintiff all his notes and accounts to be collected and proceeds decided in the same way, Plaintiff agreed to the whole arrangement, saw Wirt Lamme and had him to transfer to plaintiff his notes and accounts, which were placed in the hands of one Singleton a clerk of defendant, to be collected and divided according to agreement. That defendant afterwards ~~promised~~ told him he would settle with him but that the Invoice was mislaid and he could

not find it to ascertain The amount coming to plaintiff. Defendant also admitted to the plaintiff on the day of the attachment was levied out, That he owed him and owned make arrangement to pay him a Thousand Dollars or more on his claim if he could. but he had just been compelled to mortgage his land for 15 hundred Dollars and could not therefore make the arrangement to do so. at the time The Sheriff Crear levied the attachment, he complained of the amount of the levy and said he only owed plaintiff about 15 hundred Dollars on the goods. He also stated to the witness Singleton after the attachment was levied That he owed plaintiff one half of the Invoice of the goods but he insisted that the invoice did not amount to more than three Thousand Dollars. Singleton further states That the invoice amounted to 4200 Dollars. Defendant proved by himself and two Witnesses, That it amounted to $3600

The plaintiff proved by Singleton the collection of the 195 Dollars which he placed in defendants safe with defendants money. The account for 74 Dolls was proved by plaintiff & others. Plaintiff proved the lease of the Store house for 300 Dollars, and the occupation thereof by defendant for the whole year.

Defendant proved by J S Rollins that William Ellis & W W Lamme some time before had gone into partnership and purchased a stock of goods & Store house in Providence and had given three notes to Bradford for the purchase money with plaintiff defendant, Rollins, and others as securities, that when William Ellis died, plaintiff administered on the partnership estate of Lamme & Ellis, and about the 1st of October 1860, plaintiff as admr sold to said W W Lamme the stock of goods then on hand for 13 thousand Dollars, and took two notes for sixty five hundred Dollars each, dated Oct 1st 1860, one due in 12 months the other in 2 years after date, &

bearing ten per cent interest after due
the first ~~without~~ signed by W. W.
Lamme alone, the second by W
W. Lamme, Josiah W Lamme & Jas
T Rollins, and payable to plaintiff
as administrator, ~~and~~ It was agreed that for any
money paid by W W. Lamme to plaintiff
on either note before it became due, he should
be allowed ten per cent ~~for~~ until the note
became due. On the 17th day of May
1841. ~~The def.~~ W W Lamme at the request
of Rollins in the absence of plaintiff made
a deed of trust on the goods accounted
to secure said notes, and continued to
sell and replenish the stock as before, af
ter Defendant purchased the goods of W
W Lamme which was in the spring of
1842. ~~Rollins &~~ Afterwards Defendant raised the money
by making a Bank note with Rollins & Prewitt endorses
and paid off the note they were Sureties on
and had the money applied to the pay
ment of the note given originally ~~in~~ by
the firm of Lamme & Ellis in Bradfords
hands on which they and others were
sureties. ~~One of which except some 3 or~~
~~4 hundred dollars~~ ~~Sh~~
The notes and deed of Trust referred to
were read in evidence, copies of which
will be found in Rollins' Testimony

The deed of Trust conveys the property goods notes and accounts to J Corr in Trust and authorises W W Lamme the maker to proceed and sell and collect and pay off the said two notes as he saw fit, and required plaintiff who is declared a party thereto, to give him credit, and ~~allow~~ him ten per cent interest ~~on either note~~ & on any payments made by him on either note ~~in~~ for the time the note had to run. It further provides that the Trustee shall take possession at the request of plaintiff defendant & Rollins at any time and when he sells he shall pay first the note secured by defendant & Rollins & then the note given by Wm Lamme alone.

There is no pretense that the Trustee ever took possession or that the deed of Trust was ever acted on.

Defendant introduced W W Lamme the maker of the deed of Trust who testified that he sold the goods to defendant, that the Invoice price of the goods was 4600 Dollars, that there was no understanding that 1/2 Invoice price of goods was to be paid on account

of his individual note, but the price of the goods was to be paid first on the note that defendant and Rollins were on. And on cross examination he stated that he & his brother had had a difficulty that he let his brother have the goods with the understanding that his brother the defendant was to sell the goods and with the proceeds to pay of the note that he and Rollins were on and the surplus was to be divided between defendant & witness, and that witness did not intend to pay that surplus to plaintiff but intended to keep it, that witness remained clerking for his brother in the Store, and knew that he had received more than enough to pay off the Note secured by defendant & Rollins, and he believed that his part of the surplus amounted to one thousand or fifteen hundred Dollars, and he ~~demanded~~ demanded that amount of him ~~and that he had [illegible]~~ That before he made the trade with his brother he went on selling regardless

of the deed of Trust and renewing the stock with the means arising from the sales &c and that defendant knew it. Witness turned over to plaintiff some notes & accounts.

Defendant testified in his own behalf that he bought the goods of his brother in May 1862, never agreed to pay any part of money to plaintiff or any one else except the note he & Rollins were on. Defendant paid off this note in Nov 1862 He never made any arrangement with his brother by which he was to get part of the proceeds of the goods never promised plaintiff to pay him any money, never told Singleton he owed plaintiff 1500 dollars or any other sum, never told any such thing to Sheriff Orear, had no such conversation with him. Admits he paid plaintiff one hundred dollars for plaintiffs interest in the Yancy note. (Plaintiff states in his testimony that this Yancy note one half of which he afterwards sold to defendant was one of those which he got of W. W. Lamme ~~let~~ at defendants request to be divided equally between them

and which he delivered over to Singleton to be collected and which Singleton says ~~[illegible]~~ in his testimony he left at defendants Store when he left there.

Whereupon the Court gave the follow
=ing instructions to wit for plaintiff Viz:

"1st If the jury find from the evidence
that J W Lamme, at the time of his
purchase of said goods of W W Lamme
in consideration thereof undertook and
assumed to pay plaintiff Ellis One
half the invoice price of said goods or
any part thereof or any portion of the
proceeds of the same then they will
find for plaintiff Ellis so much as
they find J W Lamme undertook or
assumed to pay not exceeding 2100
dollars"

"2 If the jury find from the evidence
that Josiah W Lamme as a part pay
=ment of the goods undertook and assum
=ed to pay Ellis One half the invoice
price of said goods then they will find
for plaintiff the Amount so assumed
not exceeding 2100 dollars"

"3 If the jury find from the evi
=dence that J W Lamme owes the ac
=count for twenty four dollars or
any part thereof they will so find their
verdict"

"4 If the jury find there was an agreement that the Notes and accounts were to be put into Singleton's hands and the Amounts Collected were to be divided between J.H. Lamme and Ellis and find that One hundred and ninety five dollars of said Collections went into J.H. Lamme's hands then they will find One half the Amount against defendant"

"5 By the pleadings in this Cause the note sued on stands admitted and the jury are bound to find that for plaintiff"

"6 If the jury find from the evidence that Ellis rented the Store house to defendant for One year for three hundred dollars and that he took possession under said renting and remained in possession during said time, he is bound for said rent and the lease to Lamme was a valid lease against any sale subsequently made by Ellis and the Only question is to whom the four months rent is to be paid and if the understanding with McBain was that

he was not to have rent till the end of the lease then the whole rent is pay=able to Ellis, but if no such under=standing existed then they can only deduct the four months rent at the rate of three hundred dollars per year out of the years rent.

"9 Any payment made by W W Lam=me to Ellis he had a right to apply to the first note unless otherwise ordered at the time"

"10 The jury in making up their verdict may if they find for the plaintiff on the account at interest at the rate of six per cent per year from the commencement of this suit"

"11 The deed of trust given in evidence authorised W W Lamme to sell and dispose of the goods and to pay off the debts as he saw fit and he was not required to give any preference to one note over the other in any payment made by him

The Court also at the instance of the defendant gave the following instructions to wit

"2 Under the deed of trust offered in evidence defendant had a first lien upon the goods and other effects therein conveyed for the repayment to him of any sum he might pay upon the note upon which the defendant and J S Rollins were the securities and he had the legal right to apply the purchase price of the stock of goods bought by him in part liquidation of said note"

"7 All goods purchased with moneys arising from sales made of parts of the original mortgaged stock and notes and accounts given in payment of the same were subject to and bound by the deed of trust in the same manner as the original stock"

The defendant also asked the following instructions which were refused to wit

"1 If the jury find from the evidence that the plaintiff Ellis received from Mc Lamme subsequent to the 17 day of May 1861 goods money or effects in any

amount which was conveyed by the deed of trust offered in evidence or arising from the sale of the goods or any collection of the notes and accounts so conveyed they will find for the defendant the amount so received with interest thereon at the rate of six per cent from the date of such receipt unless they further find that said moneys goods and effects were received with the knowledge of said defendant and with his consent applied in part payment of the individual note of W W Lamme

"3 If the jury find from the evidence that the One hundred and ninety five dollars claimed in plaintiffs petition was collected on notes and accounts conveyed by the deed of trust then the plaintiff has no legal right to recover any part of said sum unless they further find that there had been sufficient assets received by defendant exclusive thereof to pay off the note to which he is security or that defendant agreed in writing that the same should be applied to the individual note of W W Lamme"

"4 That the purchaser of the real estate of Lamme & Ellis at the administrators sale would be entitled to the rent and use thereof from and after the purchase unless an open reservation of the rent was made to the estate at the time of the sale and the defendant would be entitled to recover from plaintiff as administrator any sums that he might be forced to pay to the purchaser"

"5 If the jury believe the stock of goods were mortgaged & that defendant had a preference in said incumbrance then plaintiff is responsible in this action for all the mortgaged property or proceeds thereof which he may have received directly or indirectly and appropriated in other way than to the note first secured in said incumbrance unless they further believe that it was otherwise appropriated by Ellis by Consent of defendants"

"6 That although the jury may believe from the evidence that J.H. Lamme assumed to pay plaintiff any part of the purchase money of the goods

bought of W W Lamme that assumption to be valid and binding in law must be reduced to writing or some note or memorandum thereof and signed by defendant or some lawfully authorized by him, and if not so done they can not find thereon for plaintiff—

The cause being submitted to the jury they found a verdict for the plaintiff for the note sued on and interest, also for the account of seventy four dollars, also for 2100 dollars half the invoices and ninety seven dollars & 86 Cents half the money Collected by Singleton And two hundred dollars eight months rent of Store house and interest on these several items from commencement of the suit Amounting in the aggregate to 2997 $\frac{21}{100}$ dollars

Defendant filed a motion for a new trial in the usual form, which was by the Court Overruled, Whereupon the defendant appealed to the district Court and that Court reversed the judgment of the Circuit Court, Where

plaintiff below appellant here, appealed to this Court - And

Points and authorities by Prewitt and Sheley for Ellis plaintiff below appellant here

1st The defendant having demurred to plaintiff's petition he thereby waived his plea in abatement, the demurrer standing overruled and not withdrawn plaintiff was entitled to have his damages assessed and final judgment thereon unless a plea in bar was interposed by leave of the Court And defendants motion for leave to withdraw the demurrer and plead in abatement Come too late Hartley v Sherman 13 Mo R 547 — Cannon v McManus 17 Mo Rep 345 — The People v Champion 16 Jun R

61 — New Jersey vs New York 6 Peters 327 — Stephen on Pleading Appendix Note 26 —

2° Filing an answer to the merits and going to trial thereon waives all exceptions to the proceedings in abatement Fugate vs Glasscock 7 Mo Rep 577 —

"3 The law does not require the Contract of defendant to pay to plaintiff One half the invoice price of the goods purchased by him of his brother to be in writing. The Statute of frauds does not apply and the plaintiff may sue and recover on such promise Cox vs Riggs et al 12 Mo Rep 430 — Bank of Missouri vs Benoist 10 Mo Rep 519 — Lawrence vs Fox 20 N Y Court of Appeals 269 — Barker vs Bucklin 2 Denio 45 — Dale et

Company vs West Chester Bank 4 Denio 97 - Farley vs Cleveland 4 Cowan 432 - 9 Cowan 639 - Gold vs Philips 10 Johnson 412 - Alger vs Scoville 1st Gray 391 -

4 The true and proper construction of the deed is, that so long as W W Lamme remained in possession of the goods and continued to sell the same, he had the lawful right to appropriate the proceeds to the note first due, When the trustee took possession he was bound to pay first the note on which defendant was security Mitchel vs Ladew 36 Mo Rep 526 -

5 That as defendant permitted W W Lamme to retain possession of and sell the goods after the mortgage, and he did sell them and pay the money over to Ellis without instruction Ellis had the lawful right to appropriate the payment to the note first due. And after having purchased the goods him=self under the Contract as found by the jury he will not be allowed to call that appropriation in question Brooks vs Wymer 20 Mo Rep 505 – Brady vs Hill 1st Mo Rep 315 – Middleton vs Frame 21 Mo 412

6 That defendant having allowed W W Lamme to go on selling and renew=ing the stock of goods and paying out money and finally himself pur=chasing the goods of W W Lamme and not of the trustee and making the Con=tract for the payment for them on the basis that 4200 dollars had al=ready been paid Ellis on the notes first due, is estopped from setting

up that sum as an offset, or of setting up any construction of the deed in opposition to his action thereon - Dezell vs Adell 3 Hill 219 Taylor & Mason vs Jno & Jacob Zepp 14 Mo Rep 482 - Corbett vs Norcross 35 N H 115 - Morris Canal & Banking Co vs Lewis 1 Beasley (N J) 332 -

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Ellis adm appte

vs

J W Lamme Respt

Appellants brief
by Prewitt & Shelby
attorneys

Filed Jany 17/68
N. C. Burch
Clerk

In the Supreme Court
January Term 1848—

John Ellis Administrator of the Partnership Effects of
vs Lamme & Ellis Appellant
Josiah W. Lamme Appellee—

This cause was originaly tried in the Circuit Court of Boone County, where there was a verdict and Judgment, in favour of Ellis the Administrator— It was taken by appeal to the 4th District Court held at Macon City, and by which Court, the Judgment of the Circuit Court, was reversed— and it is now brought to this Court, by the appeal of Ellis, from the District Court, and who was the ~~Orginal~~ Plaintiff in the Original Suit.

This was a suit brought by John Ellis Administrator of the Partnership Effects of Lamme & Ellis Plaintiff with attachment vs Josiah W. Lamme Defendant— to recover $2684.$\frac{20}{100}$, claimed to be owing by Defendant to Plaintiff, for one half of the purchase price of a stock of goods, bought by Defendant of one W. W. Lamme, and which same Plaintiff alleges the Defendant agreed and promised to pay him, in discharge of a note held by Plaintiff Administrator aforesaid, against said W. W. Lamme, and for sundry other items:

At the return term of the suit, To wit: May 21st 1844 Defendant filed his plea in abatement, to the affidavit of Plaintiff filed in said cause: and afterward at same term of said Court, Plaintiff with leave filed his amended Petition, and afterwards at same term Defendant filed his Demurrer, to said amended Petition: the

demurrer was overuled by the Court, and to the opinion of the Court in overuling the same, the Defendant excepted: & tendered his Bill of Exceptions which was signed Afterward at the November Term of said Court 1865, the Plaintiff filed his motion, to Stroke out the Plea in abatement, filed by Defendant, and at the next term of said Court, the motion was sustained, and said plea, was stricken out, and to which opinion of the Court, in Striking out said plea, the Defendant excepted, & tendered his Bill of Exceptions &c. The Defendant then filed his motion to withdraw the demurrer, and file his answer to the Plaintiffs action, which motion was sustained:

The Defendant then filed his answer, denying any indebtedness as charged in the Petition, or that he agreed to pay the Plaintiff the amount claimed, ~~in his~~ or any other sum; and further alledging, and setting up, by way of counter claim and offset, that the Plaintiff was indebted to him in a large sum of money, to wit the sum of $4.200, which Defendant avered, the Plaintiff had received, from the Sale of the good and chattels, purchased of him (Plaintiff) by W. W. Lamme, and on which good and chattels, there was a deed of Trust, (duly executed and recorded), and which was given by the said W. W. Lamme, to secure certain debts therein enumerated, and of which debts, the Defendant was the Security of said W. W. Lamme, on a note for the Sum of $6.500, due to Plaintiff, and

Which by the Express terms of the deed of Trust, was first to be secured, and paid, out of the stock of good and assets therein mentioned — Replication was filed by Plaintiff denying generally the allegations in Defendants answer —
In the Evidence given on part of the Plaintiff, there was some proof, tending to shew that the Defendant had admitted an indebtedness to Plaintiff of some $1,500:— also that the amount of the invoice of the goods sold by W. W. Lamme, to J. W. Lamme, amounted to about $4,200: also that there was a deed of Trust on said stock of good, given to secure debts due by W. W. Lamme ~~and~~ to Plaintiff, and for a part of which the Defendant was the Security of W. W. Lamme, and who by the terms of the deed of Trust was first to be secured: that J. W. Lamme bought the Stock of goods of W. W. Lamme, sometime in the Spring of 1862:—
The Plaintiff in the suit testified that he was not present, at the time of the purchase of the goods, by the Defendant of W. W. Lamme that three or four weeks after the sale of the good, he saw the Defendant, and who he told him, that he purchased the goods to secure Plaintiff and his (Defendants) Co-security Rollins:— Plaintiff further testified that his claim against W. W. Lamme was something over two thousand

dollars,— that Defendant said, there was enough to save both,— and that Defendant requested him to go to W. W. Lamme, and get him to transcribe to him (Plaintiff) his Books notes and accounts and place them in the hands of one Singleton for collection; that the amounts collected should be Equaly divided between Plaintiff and Defendant, to be applied to the notes on which Defendant & Rollins were securities, and the note held by Plaintiff:— Plaintiff further testified that a part of the arrangement between him and Defendant was, that he Plaintiff was to get one half of the invoice of the sale of goods, made by W. W. Lamme to Defendant, and which was to go to payment of balance due on note by W. W. Lamme to Plaintiff: Plaintiff also testified that there had been paid upon the note due him, by W. W. Lamme, about $1.200,— and which sum had been credited on the note:

individual

On the part of the Defendant it was proven that W. W. Ellis the son of the Plaintiff, and W. W. Lamme, two young men, in 1859, formed a Partnership in the mercantile business in Providence Boone County Missouri, by purchasing the mercantile concern, with the Store House of G. B. Parker, for the sum of $10.000, and for which sum the said Lamme & Ellis Executed their notes to said Parker, with John Ellis, Peter Ellis, Josiah W. Lamme

(the Defendant) and James S Rollins as
their securities — These notes were assigned
by said Parker to Austin Bradford —
In June or July 1860 - William Ellis one of
the firm of Lamme & Ellis died — John Ellis
the Plaintiff in this suit, administered on
the Partnership Effects of Lamme & Ellis —
Under an order of the County Court of Boone
County — the Plaintiff as Administrator, sold
the Stock of goods, to W. W. Lamme, for the
sum of $13.000, secured by two notes, - one
Executed by W. W. Lamme, for the sum of
$6.500 payable 12 months after date, and
one executed by W. W. Lamme, with Joseph
W. Lamme and James S. Rollins as his
Securities, for the sum of $6.500, payable
two years after date: it was agreed and
understood at the time that the above notes
were given, that the said W. W. Lamme, had
the privilege, to pay the whole or any part of
them as 'he saw fit' and before they became
due, and for any sum paid by him, he was
to be allowed 10 per centum Interest per annum
thereon, for the time the note on which the
same was paid had to run: these notes
were delivered to Plaintiff: On the 17th day
of May 1861. W. W. Lamme Executed the
Deed of Trust above spoken of, on his
mercantile concern at Providence
including the goods &c, which he

had purchased of Plaintiff, and the notes, Books and accounts of the concern making one J.C. Orr the Trustee, and for the following purposes on the sale of the goods as specified in the Deed of Trust, — and in the following order —

1st. To secure the costs of executing the Deed of Trust —

2. To secure the note, due the Plaintiff, and on which Josiah W. Lamme the Defendant and James S. Rollins, were the securities for the sum of $6.500 —

3. To secure the note owing the Plaintiff by W. W. Lamme, for $6.500

4. any further sum realized from the sale of the Trust property, or the collections on the notes and accounts transfered in the Deed of Trust, — was to be paid over to the Creditors of W. W. Lamme, or of Lamme and Ellis: — It was further specified in said Deed of Trust, that the said W. W. Lamme was to continue "to sell the goods wares and merchandize &c to the best advantage, and for the best prices" &c —

In the Spring of 1862, Josiah W. Lamme the Defendant, bought out the mercantile concern of W. W. Lamme, with the agreement and understanding, that he was to pay off, the note for $6.500, payable to the Plaintiff and on which he (Defendant) and James S. Rollins were the securities

according to the terms of the deed of Trust.

It was further proven that in order to pay off the note of $6.500 on which defendant and Rollins were the securities, that defendant borrowed of the Exchange Bank in Columbia, the sum of $6.500, with Jas. S. Rollins & Mose Prewitt as his securities, payable 90 days after date; — that this Bank note at maturity was paid by one of the Endorsers (Prewitt) out of collaterals placed in his hands by the other Endorser (Rollins), and that the defendant, paid the amount, or a large portion thereof afterwards to Rollins — that the sum of $6.500 borrowed as above stated from the Bank, was appropriated to the payment of the note for the sum of $6.500, due to the Plaintiffs, by W.H. Lamme, and on which the defendant & Jas. S. Rollins were the securities, — and said note being then held by Austin Bradford, — as collateral security for the original notes assigned to him, by G.B. Parker, — and when paid to Bradford, the amount was credited as so much paid on the original notes, held by Bradford, and assigned to him by Parker — It was further proven that neither James S. Rollins, nor Isaiah W. Lamme

the Defendant ever received anything from W. W. Lamme, Except the Merchandize purchased by J. W. Lamme the Defendant, from W. W. Lamme: — That the Deed of Trust was given to secure the payment of the debts therein named, and in the order ~~and~~ preference, ~~&~~ specified in the Deed of Trust:-

It was further proven - that between the 1st & 18th day of May 1862 - W. W. Lamme sold to J. W. Lamme the Defendant, his Stock in goods in Providence for the sum of $4.600 — — that J. W. Lamme paid him no money — that he took the goods, with the agreement and understanding, - that the amount for which they sold, was to be appropriated to the payment of the note, due to the Plaintiff, for $6.500, and on which the Defendant and said Ellis were the Securities — — that W. W. Lamme a short time after the Sale of the goods, to J. W. Lamme the Defendant, told the Plaintiffs of the sale, and how the purchase money was to be appropriated, to which he made no objection — that the invoice of the goods was taken at $4.600 —

That the Plaintiff Ellis was not present at the time of the sale of the goods to the Defendant J. W. Lamme —

— that at the time of the Sale of

the Goods, nor at anytime thereafter, did J. W. Lamme the defendant agree to pay one half of the invoice of the goods, ~~to~~ on the individual note of W. W. Lamme, for $6,500 due to the Plaintiffs, — or any other sum —

— that there had been paid on this note out of the proceeds of the sale of the goods, mentioned in the deed of Trust upwards of $4,000 —

— that J. W. Lamme the defendant never got of W. W. Lamme anything except the goods, bought of him, and the purchase money for which, was to go to the payment of the note for $6,500, on which he defendant and Rollins were the securities —

— the defendant J. W. Lamme testified — that in may 1862 - he bought the stock of goods of W. W. Lamme —

— that the invoice amounted to $4,600 —

— that Plaintiff Ellis was not present at the time defendant bought the goods — did not see him, for three weeks afterwards —

— that he defendant never agreed to pay plaintiffs one half of the invoice of the stock of goods, or any other sum, - on W. W. Lamme's individual note —

— that he never received anything of —

W. W. Lamme except the stock of goods mentioned above — never was any arrangement by which W. W. Lamme was to get a part of the stock of goods — or the proceeds of the sale thereof —

— that besides his being security for W. W. Lamme, on the note mentioned for $6.500 — W. W. Lamme was otherwise seriously indebted to him —

— that he borrowed $6.500 of the Exchange Bank in November 1892 — with this money he paid Bradford the note for $6.500, on which himself & Rollins were sureties, and which sum was credited on the original note, signed by G. B. Parker to said Bradford — and according to the agreement of the Plaintiff —

The above was the substance of the Evidence given on either side — Whereupon the Plaintiff asked the following instructions, all of which were given by the Court, and to the giving of which the Defendant excepted —

1. If the Jury believe from the Evidence, that J. W. Lamme, at the time of his purchase of said goods of W. W. Lamme, in consideration thereof, understood and assumed to pay Plaintiff Ellis, one half the invoice price of said goods, or any part thereof —

or any portion of the proceed of the Same, Then they will find for Plaintiff Ellis, so much as they find that J. W. Lamme undertook and apsumed to pay not Exceeding $2.100 —

2. If the Jury find from the Evidence that Josiah W. Lamme, as a part payment for the good, — undertook and apsumed to pay Ellis one half, the invoice price of said good, then they will find for Plaintiff, the amount so apsumed not Exceeding $2100 —

3. If the Jury find from the Evidence that J. W. Lamme owed the account for $48 or any part thereof, they will so find their Verdict.

4. If the Jury find there was an agreement that the notes and accounts, were to be put into Single Coms hand, and the amounts collected, to be divided between J. W. Lamme and Ellis, and find that $195 of said Collections, went into J. W. Lamme's hand then they will find one half the amount against the Defendant —

5. By the pleading in this case, the note Sued upon stands admitted, and the Jury are bound to find that for Plaintiff —

6. If the Jury find from the Evidence that Ellis, rented the Store House to Defendant for one year for 300$ and that he took possession of the

same under said renting, and remained in possession during during said time he is bound for said rent, and the lease to Lamme was a valid lease, against any sale subsequently made by Ellis, and the only question is, to whom the 4 months rent is to be paid and if the understanding was with McBain that he was not to have rent, till the End of the lease, then the whole rent is payable to Ellis; but if no such understanding existed, then they cannot deduct the 4. months rent at the rate of 800$ per year, out of the years rent.

9. Any payments made by W. W Lamme to Ellis, he had a right to apply to the payment of the first note, unless otherwise ordered at the time —

10. The Jury in making up their verdict, may if they find for Plaintiffs on the account add interest, at the rate of Six per cent per year, from the commencement of this suit —

11. That the Deed of Trust given in Evidence authorised W. W. Lamme, to sell and dispose of the goods, and pay off the debts as he saw fit, and he was not required to give any preference to one note over the other, - in any payment made by him —

The Defendant thereupon asked the following instructions - The 1st 3rd 4th, 5th and 6th were refused by the Court, and to the opinion of the Court in overruling the same the Defendant Excepts -

1. If the Jury believe from the Evidence that the Plaintiff Ellis received from W. W. Lamme subsequent to May 17 1861 (the date of the Deed of Trust), goods monies or Effects, in any amount which were conveyed by the Deed of Trust, offered in Evidence, or arising from the sale of the goods, or on collection of the notes and accounts, so conveyed, they will find for the Defendant, the amount so received, with interest thereon at the rate of Six per centum from the date of such receipt, unless they further find that said monies goods and Effects were received with the knowledge of the said Defendant, and with his consent applied, in part payment of the promissory ~~debt~~ note of W. W. Lamme.
2. Under the Deed of Trust offered in Evidence the Defendant held a first
3. lien upon the goods and other Effects therein conveyed, for the repayment to him of any sum, he might pay upon the note, upon which Defendant

and James S Kellum's note as securities and he had the legal right to apply the purchase price of the stock of goods, in part liquidation of said note –

3. If the Jury find from the evidence that the 195 $ claimed in Plaintiffs Petition was collected on notes and accounts, conveyed by the Deed of Trust, then the Plaintiff, has no legal right to recover any part of said sum, unless they further find, that there has been sufficient assets recieved by Defendant, Exclusive thereof to pay off the note to which he is security, or that Defendant agreed in writing that the same should be applied to the payment of the provisional debt of W. W. Lamme

4 That any purchaser of the real Estate of Lamme & Ellis, at the Administrators Sale, would be entitled to the rent and use thereof, from and after his purchase, unless an open reservation of rent was made to the Estate, at the time of the sale, and the Defendant would be Entitled to recover from the Plaintiff as Administrator, any excess that he might be forced to pay to the purchaser –

5. If the Jury believe that the stock of goods were mortgaged, and that Defendant had a preference in said incumbrance, then the Plaintiff is responsible in this action, for all of the mortgaged property, or proceeds thereof which he may have received, directly or indirectly, and appropriated in any other ~~manner~~ way, than to the note first secured in said incumbrance unless they further believe that it was otherwise appropriated by Ellis, by consent of Defendant—

6. That although the Jury may believe from the Evidence, that J. W. Lamme assumed to pay Plaintiff any part of the purchase money of the goods, bought of W. W. Lamme, that such an assumpsit to be valid and binding in law, must be made and entered into in writing, or some note or memorandum thereof, and signed by Defendant, or by some one lawfully authorized by him, and if not so done, they cannot find thereon for Plaintiffs—

7. All goods purchased with monies
8. arising from sales made, of parts of the original ~~Stock~~ mortgaged stock, and notes and accounts, given in payment for the same, were subject to and bound

by the Deed of Trust in the same manner as the original stock.

The Jury thereupon retired and returned the following verdict - "We the Jury find for Plaintiff the following items

The act of 74$ & Int since filing the Petition $88.67

Note on Lenoir & Int " " 35.83

one half Invoice and Int " " 2516.50

Rent of Store House & Int " " 239.66

Cash collected by Singleton & Int " " 117.25

Whole amount. $2997.91

J. A. Boulton Foreman -

- Judgment was given by the Court for the amount of the verdict -

Motion was made by Defendant to set aside verdict and in arrest of judgment - which was overruled, and opinion of Court Excepted to; - by Defendant -

Thereupon he filed his affidavit, and prayed an appeal, as required by Statute and same was granted. -

In the 4th District Court

Josiah W. Lamme appellant Macon City July Term 1867

John Ellis Ann's &c. appellee - from Boone Circuit Court -

X upon the trial of this cause in the District Court, the Judgment of the Circuit Court is reversed, (~~See~~

opinion of Court, in Record) and the
cause is brought by appeal of Ellis
the Respondent in the District-
Court,- and Plaintiff in the
Court below to this Court.

The Brief filed herewith, will present
more clearly the points upon
which the Defendant (Lamme)
insists upon the affirmance of
the Judgment of the District
Court and a reversal of
the Judgment of the Circuit
Court.

Reed & Rollins
Attys for Defendant

John Ellis Administrator of the partnership effects of Lamme & Ellis Appellant

vs

Josiah W. Lamme Respondent

Brief of Respondent

1 The District Court committed no error in reversing the decision of the Circuit Court. The District Court construed the Deed of Trust of Trust in accordance with its intent and established rules of construction

2 Parsons on Contracts page 6. note 7

1 Domat page 167 & 168

Dwarris on Statutes page 553

2

Points and Authorities showing that the action of the Circuit Court was erroneous and should have been reversed

1 The Court erred in refusing to strike out plaintiff's amended petition

General Statutes 1865 page 669 & 670 Sects 3 & 7.

3 Points upon the Demurrer

1 A Demurrer is a dilatory plea in the nature of a plea in abatement and not a plea to the merits as contemplated in case of

Fugett vs Glasscock 7 Mo. page 577

Hartsy vs Shannon 13 " " 547

2 It was competent for the dependent to have demurred to the petition and plead in abatement to the affidavit at the same time, as he was pleading and demurring to (Instant statements) Stephens Pleading page 278

3 Unless the dependent had the right to demur to the petition, and plead in abatement to the affidavit at the same time, he is cut off from one or the other defence. General Statutes Mo. page 658 Sects 5, 10 & 11 Also page 660 Sect. 24 – Page 566 – Sections 36 & 41

In any event dependent had a right to withdraw demurrer, and file his plea in abatement to affidavit and it was the duty of the court in furtherance of justice to have allowed the same. Gen Statutes 1865 page 669 Sects 3 & 7

4 Assumpsit

There was no evidence given to warrant the first and second instructions of the court for plaintiff. On the contrary the proof is clear and conclusive that at the time of the sale, there was no promise, agreement or assumption made by deft to pay any part of the purchase price of the goods bought, to plaintiff, or to any one else for

his benefit, and in the absence of any such evidence the giving of such instruction was erroneous.

2 The alleged promise of defendant to pay to plaintiff any part of the purchase price of the stock of goods bought by him of W. W. Lawrence was no part of the original contract or undertaking; and if made at all the making of the same was subsequent thereto, ~~and was not an assumption by defendant to pay the indebtedness of W. W. Lawrence,~~ and therefore void unless the same, or some memorandum thereof in writing signed by the defendant, or by some one lawfully authorized by him was made at the time, Hence the court erred in refusing to give the 6th instruction asked by defendant See Gen. Stats page 1035. Sec 5.

3 The first and second instructions given on motion of plaintiff were calculated to mislead the jury. They declare the law to be that an agreement by defendant to pay to plaintiff a debt due him from W. H. Lawrence need not have been in writing. There was evidence tending to show such an agreement with-

with Lamme, and also afterward with plaintiff. And even if we concede, which we do not that the law was properly declared if applied to the first; it is improperly declared if applied to the latter agreement And although the jury might have found that it was no part of the contract between Wm Lamme and Joseph Lamme, that Joseph should pay Ellis part of the consideration money, yet they were warranted by the instructions in finding a verdict against defendant, on his promise to Ellis, although the agreement was not reduced to writing. Smith on Contracts page 214 —

Respondent insists that although he may have agreed with Wm Lamme to pay part of the consideration for the goods on the debt Wm owed Ellis. yet plaintiff (appellant here ~~[illegible]~~) had no right to sue defendant on that agreement. There being no privity of contract between plaintiff and defendant and no part of the consideration for such promise moving from plaintiff 5 Cushing Mass Reports 488

27 Mo. 419 Manyus Francis & Son

For the same reasons the 6th instructions asked by dept and refused by the Court should have been given

5 Under the deed of Trust offered in evidence the defendant had a first lien on all the goods, merchandise and effects therein conveyed for the repayment to him of any sum he might be required to pay upon the note to which he was security, and the proceeds of said Trust property no matter when, or by whom the same was realized, collected or received should have been applied

1st to the payment of the Expenses of the Trust

2d To the payment of the note on which dept was security, and neither the plaintiff, nor the said W.W. Lamme had the legal right to apply any part of the avails arising from said Trust property on the individual note of said W.W. Lamme, until the secured note was first paid off, and discharged.

The Court below in giving the 9th & 10th instructions asked by plaintiff, and in refusing to give the 1st, 3d and 5th instructions asked by defendant ~~[illegible]~~ decided

that under the Deed of Trust, the defendant had no first Lien upon the property mortgaged for the discharge of the note on which he was security, but on the contrary that the said W. W. Lamme in derogation of defendants rights, and in violation of the very terms of the deed of Trust, could apply and appropriate any part, or all of the Trust property in payment of his individual note, and to the entire exclusion of the other note which the Deed of Trust was designed to prefer

6 The 9th and 11th Instructions given for plaintiff, are in direct conflict with the 2d Instructions given for defendant.——

7 If the Deed of Trust gave no power to W. W. Lamme to sell and dispose of the Trust property the 11th Instructions given for plaintiff was erroneous

Reed & Robbins Attys for Defendant

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John Ellis Aomirse
appellant
vs
J St Lawrence
Respondent.

Appeal from 4th
District Court —

Respondents Statement
of Case & brief —

Filed Jany 14/68
N C Burch

In the Sup Ct Mo
Jan 7, 1868.

John Ellis, adm^r &c App.
vs
Josiah W Lamme Res } Appeal from 4th Dist, Court.

Opinion of the Court.

The question raised and argued by Counsel in regard to pleading is irrelevant and wholly beside any issue in the case, for after the decision of the Circuit Court with respect to the demurrer and the plea in abatement, the defendant was permitted to file his answer, and the cause proceeded to trial on the merits without objection or exception.

There was no substitution or novation of parties within the meaning of the rule raising an assumpsit in such cases. (Manny vs Frasier 27 Mo 419; Edgell vs Tucker 40 Mo 523); but this question is immateral and unimportant, as the whole matter

as presented by the record essentially depends upon the construction to be given to the deed of trust. The deed of trust was given to secure the payment of two promissory notes made and executed by W.H. Lamme to plaintiff for $6500 each, the first was made by Lamme due and due twelve months after date the other was executed by Lamme with defendant and Rollins as securities, and due and payable two years after date. By agreement of parties, and by the express terms of the deed, the proceeds of the property was to be approximately; First to the payment of the costs and expenses of executing the trust; Second, to the payment of the note specifies on which defendant and Rollins were securities; and, Third to the payment of the note due to the plaintiff, and executed by Lamme above.

The principle of law laid down in Mitchell vs Sadler (36 Mo 526) that where a deed of trust secu

ering several notes maturing at different dates, the notes shall be paid and satisfied in the order of priority in which they mature can have no application here. Such would be the principle of law where the parties had made no special agreement; But in the present case the parties have contracted that the payments shall be made transversely, and that the note last falling due shall have the priority of lien. From a careful reading of the whole instrument there can be no difference of opinion as to the real intention of the parties. It is evident that the first and primary object was to make safe and fully indemnify the securities on the second note. All parties were fully apprized of this fact, the plaintiff was one of the parties entering into the agreement, and he is no position to either dispute its legal effect, or to attempt to change

the rights of the sureties. But it is urged for the plaintiff that by a provision of the deed of trust, Lamme the grantor was expressly authorized to pay off the note to the plaintiff at any time. This is true, But was he empowered to use the property incumbered by the trust for that purpose without the consent or approbation of the securities? Most assuredly, not. Such a construction can only meet favor by violently taking one single sentence, and isolating it from the whole context, but when it is construed with the other parts of the deed of trust, the interpretation attempted to be placed upon it is entirely inadmissible. The deed provides that Lamme the grantor shall be fully authorized to pay off and discharge at any time he may see fit, the note to Ellis the plaintiff, and that Ellis shall allow him a

credit for any payment he may make with interest at the rate of ten per cent. But this provision is nothing more than an agreement between the parties - the grantor and the plaintiff, that the note may be paid before maturity and in consideration of such payment the plaintiff will allow ten per cent. on all amounts so paid. There is no agreement that the advanced payments shall be made out of the trust funds, or goods which are covered by the lien. Under the tenor of the whole instrument discountenances any idea. There is nothing to show that anything was intended to be appropriated for this purpose, other than what the grantor might raise by his own individual means, independent of the property included in the deed of trust.

This view fully disposes of the whole case, as the records shows, that the property attached

and which has been sold by order of Court is insufficient to pay off the note on which defendant and Rollins are sureties and on which they had the prior lien.

My conclusion therefore is, that the Circuit Court misconstrued the meaning of the deed of trust, and that its judgment was rightfully reversed in the district court.

The judgment of the district Court is affirmed, and the cause remanders to the Circuit Court to be proceeded with, in conformity to this opinion. The other judges concur.

David Hagner.

~~15~~ 6.

Jno Ellis
vs
J W Lamure.

Opinion of the
court
Wagner.

Filed Jany 22/68
Burch
Clerk

Affirmed