Angelrodt, Ernest C vs McKee, Stewart 1852 St. Louis Co 306/7
Barth, Robert

557/5

Ryland / Rev & Rem.

State of Missouri
Saint Louis County } ss. Be it remembered that heretofore to wit on the 26th day of August A. D. 1857 there was filed in the Office of the Clerk of the Saint Louis Court of Common Pleas within and for the State and County aforesaid a Petition in the words and figures following to wit: "St Louis Court of Common Pleas. St Louis County September Term A.D. 1857. Stewart McKee Plaintiff against Frederick Angelbeck Ernest C. Angelrodt and Robert Barth, Defendants

Petition

Plaintiff states that on the nineteenth day of april in the year of our Lord one thousand eight hundred and forty nine a Deed of Lease, the original of which dated on said day and year, (marked A.) is filed herewith as an exhibit, was executed by and between Stewart McKee, Plaintiff herein, as party of the first and Frederick Angelbeck, one of the Defendants herein, as party of the second part which said Deed witnessed that, for and in consideration of the sum or sums hereinafter mentioned, to be paid quarterly in four equal instalments by the party of the second part or his assigns to the said party of the first part or his assigns, said party of the first part did demise, lease, and let unto the said party of the second part and to his assigns the following described property to wit: First — a lot of ground situated in the City of St. Louis in Block number two hundred and thirty three (233) bounded as follows: Beginning at a point on Mullanphy street one hundred and fifteen feet eastwardly from Main Street: thence southwardly, parallel with Main street, and along the east side of an alley fifteen feet wide, seventy feet: thence eastwardly about one hundred and eighteen feet to to an alley thirty feet wide: thence northwardly seventy feet to Mullanphy Street: thence westwardly one hundred and eighteen feet to the Beginning. For this lot the said party of the second is to pay the yearly rent of Three Hundred and fifty One dollars to be paid quarterly for and during the term of eleven

2 years from the date of said Deed. Second.— a Lot of ground fifty seven and a half feet by about one Hundred and eighteen feet and the brick house thereon. This lot is bounded on the East and West by the two alleys mentioned in the description of the first lot: on the South by S. E. Walsh and others unknown, and on the North by an alley ten feet wide situated between this and the first lot. For this lot the party of the second part is pay One hundred dollars yearly rent to be paid quarterly. The time of this house and lot to commence on the tenth day of May A. D. 1850. Third a Stone warehouse one hundred feet on Mullanphy street by twenty seven and a half feet on front street occupied at the date of said deed as a sugar refinery, situate and being in the City of St. Louis. For this house the said party of the second part is to pay the yearly rent of Eight hundred dollars to be paid quarterly. The time of this house to commence on the twenty second day of april A. D. 1850. Fourth— a lot of ground adjoining the abovementioned warehouse on the South, forty feet on Front street and running back One Hundred feet to an alley. For this lot the said party of the second part is to pay One hundred and sixty dollars yearly rent to be paid quarterly. The time of this lot to commence on the sixteenth day of August 1850. To have and to hold the above described premises for the term of Eleven years from the date of said Deed unto the said Angelbeck his heirs, executors, administrators and assigns subject to all the covenants stipulations and agreements and terms expressed in said deed he and they fully complying therewith. And the Plaintiff further states that the said Angelbeck expressly agreed and covenanted in said Deed that he the said Angelbeck, his heirs, executors, administrators, or assigns shall yield and pay unto the said party of the first part plaintiff herein his heirs administrators, executors or assigns the sums hereinbefore mentioned making in all fourteen hundred & Eleven dollars to be paid quarterly every year in four equal instalments of three hundred and fifty two dollars and seventy five cents,

3 as they become due every three months during said term.
Plaintiff further states that said Angelbeck, by a written article of agreement dated and entered into and executed on the eizhteenth day of April A.D. 1851, between himself of the one part and Ernest C. Angelrodt and Robert Barth (composing the firm of Angelrodt & Barth) of the other part granted assigned and set over to said Angelrodt and Barth the aforesaid deed of lease made as aforesaid by and between said Stewart McKee and said Frederick Angelbeck, and all the messuages thereby demised fully describing the same as hereinbefore described, the said Angelrodt and Barth and their legal representatives to have and to hold the same for the residue of the term mentioned in said lease under and subject to the yearly rents and covenants therein contained on the part of the lessee to be kept done and performed as will more fully and at large appear by reference to a certified copy of said written articles of aguement filed herewith as an Exhibit (Marked B) the original of said aguement not being in the custody, power or control of Plaintiff. Plaintiff further states that the rent due upon the aforesaid third mentioned lot and Stone Warehouse by virtue of said deed of Lease for the quarter commencing on the twenty second day of April A.D. 1851, and ending on the twenty second day of July A.D. 1851, being the sum of two hundred dollars; and also the rent due by virtue of said Lease upon the aforesaid Fourth mentioned lot for the quarter commencing on the sixteenth day of May A.D. 1851 and ending on the sixteenth day of August 1851, being the sum of forty dollars — and altogether making the sum of Two Hundred and Forty dollars, remains in arrear and unpaid contrary to the stipulations and covenants in said lease notwithstanding the same has been demanded from the said Angelbeck and also from the said Angelrodt and Barth who are the assignees of said Angelbeck and in possession of said premises. Wherefore Plaintiff asks judgement for the sum of Two

4 Hundred and forty dollars against said Defendants Frederick Angelbeck, Ernest C. Angelrodt and Robert Barth. Wm McKee atty for Plaintiff.

Henry McKee being sworn upon his oath says the above petition and the matters therein contained are true to the best of his knowledge and belief. Henry McKee

Sworn to & Subscribed before me Aug. 23rd 1857

P. Tippett Clk.

And the following are the Exhibits referred to in the above and foregoing Petition to wit:

Exhibit "A"

Exhibit A.

This deed made this nineteenth day of April anno Domini One thousand eight hundred and forty nine by and between Stewart McKee of the County of Grant in the State of Wisconsin party of the first part and Frederick Angelback of the City of St. Louis and State of Missouri party of the second part Witnesseth: That for and in consideration of the sum or sums hereinafter mentioned to be paid quarterly in four equal instalments by the party of the second part to the party of the first part, the said party of the first part hath demised, leased, and let, and doth hereby demise, lease and let unto the said party of the second part, the following described property to wit: First A Lot of ground situated in the City of St. Louis in Block number two hundred and thirty three (233) bounded as follows: Beginning at a point on Mullanphy Street one hundred and fifteen feet eastwardly from Main Street: thence southwardly parallel with Main Street and along the East side of an alley fifteen feet wide, Seventy feet: thence Eastwardly about One hundred and eighteen (118) feet to an alley thirty (30) feet wide: thence northwardly Seventy (70) feet to Mullanphy Street: thence eastwardly One hundred and eighteen feet to the beginning: For this lot the said party of the second part is to pay the yearly rent of three hundred and fifty one Dollars - to be

5 paid quarterly for and during the terme of eleven (11) years from the date hereof; and it is agreed that if the said party of the second part wishes, after the expiration of the aforesaid term of eleven years from this date, to hold it for ten years longer, he can do so by paying the yearly rent of seven per cent per annum on the then value of said lot. Second — A Lot of ground fifty seven and a half (57½) feet by about one hundred and eighteen (118) feet; and the brick house thereon, This lot is bounded on the East and West by the two alleys mentioned in the description of the first lot; on the South by J & E. Walsh and others unknown; and on the north by an alley ten feet wide situated between this and the first Lot. For this lot the party of the second part is to pay one hundred Dollars yearly rent to be paid quarterly. The time of this house and lot is to commence at the expiration of a lease held on said house by the party of the second part, that is to say, on the tenth of May One thousand eight hundred and fifty (1850) Third A stone warehouse One hundred feet on Mullanphy Street by twenty seven and a half feet on front Street now occupied as a Sugar refinery situate and being in the City of St Louis. For this house the said party of the second part is to pay the yearly rent of eight hundred (800) dollars, to be paid quarterly to the said party of the first part his heirs or assigns. The time of this house to commence at the expiration of a lease now held by the said party of the second part, that is to say on the second of April One thousand eight hundred and fifty. Fourth — A lot of ground adjoining the above mentioned Warehouse on the South, forty feet on front Street and running back One Hundred feet to an alley For this lot the said party of the second part is to pay One Hundred and Sixty dollars (160) yearly rent to be paid quarterly to the said party of the first part his heirs or assigns. The time of this lot to commence at the expiration of a lease held thereon by Pomard Ennan, that is to say, on the Sixteenth day of August One thousand eight hundred and

6 fifty (1850) and it is agreed that if after the expiration of Eleven years from this date, being the term for which this lease is hereinafter limited, the said Angelback wishes to hold this last mentioned lot ten years longer he can do so by paying the yearly rent of Seven per cent per annum on the ~~value~~ then value of said Lot. To have and to hold the above described premises for the term of Eleven (11) years from the date of this deed unto the said Angelback his heirs, Executors, administrators, and assigns, subject to all the Covenants Stipulations, agreements and terms herein before or after expressed, he and they fully complying therewith, and it is further agreed and covenanted that the said party of the second part, his heirs, executors, administrators, or assigns shall yield and pay unto the said party of the first part his heirs, executors, administrators or assigns the sums herein before mentioned making in all fourteen hundred and Eleven (1411) dollars to be paid quarterly every year in four equal instalments of three hundred and fifty two dollars and Seventy five cents ($352.75) at the end of every three months as they become due during said term. It is expressly agreed that no stone or earth be taken or carried away from the above mentioned premises by the said party of the second part or by his legal representatives, under a penalty of One thousand dollars, and a forfeiture of this lease, but said Angelback shall have privilege to remove any buildings or other improvement erected by him on the premises, provided, that all rents and damages are fully paid up by him. It is understood and agreed that when any portion of said rent becomes due if it shall remain unpaid and in arrears one month after the same shall have been due and demanded at the said premises whether any person can be ~~found~~ found there or not of whom such demand can be made, that then the time and period of this lease, limited as aforesaid shall be

7 deemed to have been perfected and shall cease to exist, and the said Stewart McKee, his heirs & assigns, may enter upon and take possession of said premises the same as if this lease had not been made. And it is further agreed that the said party of the second part at the end of the term aforesaid being Eleven years from the present date, is to deliver unto the said Stewart McKee or his legal representatives full and peaceable possession of the mentioned premises and in as good order as he received the same the natural wear and decay and the effects of accidental fire excepted.

In testimony whereof the said parties have hereunto set their hands and affixed their seals the day and year first above written. Stewart McKee (Seal) Frederick Angelbeck (Seal) State of Missouri County of St Louis ss. Be it remembered that on this 21st day of April A.D. 1849 before the undersigned Recorder within and for the County aforesaid Came Stewart McKee and Frederick Angelbeck both of whom are personally known to me to be the same persons whose names are subscribed to the foregoing Instrument of writing as parties thereto and severally acknowledged the same to be their act and Deed for the purposes therein mentioned (Seal) Witness my hand and seal at Office the date last aforesaid T. D. Barlow Recorder.

Exhibit "B"

Exhibit B.

This agreement, made and entered into this eighteenth day of April in the year eighteen hundred and fifty one between Frederick Angelbeck of the one part, and Ernest C Angelrodt and Robert Barth composing the firm of Angelrodt & Barth of the other part. Witnesseth: Whereas the said Frederick Angelbeck is engaged in the business of Sugar refining in the City of St Louis in the building known as the "Missouri Steam Sugar Refinery" and has acquired and is now the owner of the Stock, machinery fixtures, tools, implements of trade and labor appurtenances and conveniences now in the said

8 "Missouri Steam Sugar Refinery and of a leasehold interest in the premises upon which the said buildings stand, and whereas the said Frederick Angelbeck in the prosecution of said business has become indebted to Abraham G. Switzer, John M. Platt and William N. Switzer composing the firm of Switzer, Platt & Co. in the sum of twenty four thousand and twenty eight and eighty six cents for which amount, at the request of the said Frederick Angelbeck, the said Angelrodt and Barth have given their acceptances to said Switzer, Platt & Co. And whereas the said Angelbeck is desirous to procure additional money facilities and aid from said Angelrodt and Barth and to employ the services of said Angelrodt & Barth in and about the purchase of stock to be used in the prosecution of said business and in the sale of the articles manufactured and produced in the progress of the same — Now therefore in consideration of the premises it is mutually agreed as follows to wit. I The said Angelrodt and Barth agree to furnish from time to time such sums of money not exceeding fifteen thousand dollars, to be extended beyond that sum only at the pleasure of the said Angelrodt and Barth, for the purchase of brown sugar and molasses to be used for manufacture in said business. All articles so purchased to remain in the charge and under the control of said Angelrodt and Barth until required for the purpose of being manufactured — All such purchases to be made to the best advantage. II They also agree to sell and dispose of all the articles manufactured and procured by said Angelbeck in the prosecution of said business to the best advantage, and to account faithfully for the proceeds and monies arising therefrom. And the said Frederick Angelbeck also agrees 1. That said Angelrodt and Barth shall be his sole agents for the purchase of the stock to be used in said business and for the sale and disposal of the articles produced and manufactured in said business and that such

9 produce and manufactures shall not be sold or disposed of otherwise than through the agency of said Angelrodt & Barth, to whom they shall be delivered for sale in a reasonable time after being made ready or capable of being made ready for market.
II The said Angelrodt and Barth shall receive a commission of one per centum upon the amount of all purchases of Sugar and Molasses as stock to be used in said business, They shall also receive a commission of two and half per centum upon all monies advanced by them other than for the purchase of stock, such as advances made for the payment of freight insurance — Storage &c. and shall further receive a commission of two and a half per centum upon the proceeds of all sales of manufactured articles delivered to them for sale by said Angelbeck and in addition shall be reimbursed all such necessary costs and charges of transportation as shall arise in the course of such purchase and sales. The said Angelrodt and Barth are to charge and receive interest at the rate of six per centum per annum upon all advances of money made by them under this agreement. The said Angelbeck to be allowed interest at the same rate on all monies realized by said Angelrodt and Barth from sales made for him; for the better regulation and understanding of which matter an interest account shall be kept touching all the business of said Angelbeck as well as said Angelrodt and Barth — The said Angelrodt and Barth in addition to the several commissions and compensations aforesaid shall receive from said Angelbeck the amount of all exchanges and costs of Exchanges which may accrue or be incurred by them in connection with the purchase of stock to be made by them for said business
III during the existence of this agreement the said Angelbeck shall insure and keep insured at his own proper costs and charges against loss by fire or permit the said Angelrodt and Barth to insure the stock machinery fixtures tools apparatus &c &c used by him in said Sugar refinery and contained in the building now used and occupied as the refinery for a sum at least equal to the value of two thirds thereof which insurance

10 shall be for the benefit of said Angelrodt and Barth as a security to them in connection with the matters of this agreement for any balance that may be justly due them from said Angelbeck and to that end any policy of insurance procured in pursuance of this agreement by the said Angelbeck shall be forthwith assigned to said Angelrodt and Barth or if any policy shall be procured by the Angelrodt and Barth, the premium thereon shall be paid by said Angelbeck. This agreement shall continue in force from the said eighteenth day of April in the year eighteen hundred and fifty one to the eighteenth day of April Eighteen hundred and fifty four but may be dissolved by mutual consent or at the option of either party, always provided that the party wishing a dissolution of this agreement shall first adjust, settle, fully pay off and discharge, all the debts dues and demands existing at the time on a fair settlement in favor of the other party. In consideration of the premises and in further consideration of the sum of one dollar paid to said Angelbeck by said Angelrodt and Barth the receipt whereof is hereby acknowledged, the said Frederick Angelbeck grants assigns and sets over to said Angelrodt and Barth and to their legal Representatives a certain indenture of Lease made this nineteenth day of April in the year eighteen hundred forty nine between Stewart McKee and Frederick Angelbeck party hereto and recorded in book D no. 5 page 120 and following and all the messuage thereby demised to wit: First a lot of ground situated in the City of St. Louis in block number two hundred and thirty three (No. 233) bounded as follows: to wit: Beginning at a point on Mullanphy Street one hundred and fifteen feet eastwardly from Main street, thence southwardly parallel with Main Street and along the east side of an alley fifteen feet wide, seventy feet, thence eastwardly about one hundred and Eighteen feet to an alley thirty feet wide — thence northwardly seventy feet to Mullanphy Street, thence westwardly one hundred and Eighteen feet to the place of beginning — Second: A lot

11 of ground fifty seven and a half feet by about one hundred and eighteen feet and the brick house thereon, bounded on the East and West by the two alleys mentioned in the description of the first, on the South by J & E. Walsh and others unknown and on the north by an alley ten feet wide situated between this and the first lot — Third, A. Stone warehouse one hundred feet on Mullanphy street by twenty seven and a half feet in Front street now occupied as a sugar refinery situate in the City of St. Louis. Fourth, a lot of ground adjoining the above mentioned Warehouse, on the South, forty feet on Front street and running back one hundred feet to an alley with all the appurtenances belonging to said property To have and to hold the said messuage to the said parties of the second part and their legal representatives for the residue of the term mentioned in said lease under the yearly rents and covenants therein contained, and on the part of the lessee to be kept done and performed, And the said Angelbeck also bargains sells assigns and conveys to said Angelrodt and Barth all the machinery engines fixtures tools implements, of trade and labor appurtenances and conveniences in or in any wise appertaining to, or belonging to the said "Missouri Steam Sugar refinery," as now held and used and employed or hereafter to be held used or employed by said Angelbeck in his said business and trade of Sugar refining, together with all the stock of sugars and Molasses which said Angelbeck now has and from time to time shall have on hand during the continuance and life of this mortgage and the agreement aforesaid. But this sale is upon condition that the property herein and hereby conveyed shall be held by the said Angelrodt and Barth for the purpose of securing the payment to them of all advance made by them to said Angelbeck in and about or on account of said business, and to secure them for all money paid on said acceptances to said Switzer Platt & Co. and all indebtedness that may exist in favor of said Angelrodt and Barth against said

12 Angelbeck, and when such indebtedness is fully and fairly settled paid and adjudged then the said Angelrodt and Barth shall reconvey said property to said Angelbeck. but in case of any failure on the part of the said Angelbeck to perform or fulfill any of the stipulations and agreements contained in the foregoing contract on his part to be performed or in case of nonpayment of any monies or balance due to said Angelrodt and Barth, the said Angelbeck for himself and his legal representatives agrees, that the said Angelrodt and Barth or their legal representatives may forthwith take possession of all the property hereby mortgaged and may proceed to sell the same at public auction to the highest bidder for cash first giving thirty days notice of the time terms and place of said sale in some public newspaper printed in the City of St. Louis and upon such sale to make and execute to the purchaser or purchasers proper sale bills, conveyances and assignments, and the monies arising from said sale, shall be applied to the payment of such sum or sums of money as shall be due to said Angelrodt and Barth and the balance if any, shall be paid to the said Angelbeck or to his legal representatives. It is expressly understood and agreed that no foreclosure of said mortgage need be made, but that any sale under the above stipulations and agreements shall be as valid to intents and purposes as though made under a regular foreclosure and sale any law to the contrary thereof notwithstanding. In Testimony whereof the parties to this agreement have hereunto set their hands and seals the day and year first above written Frederick Angelbeck (Seal)
E. C. Angelrodt (Seal) Robert Barth (Seal)
State of Missouri County of St. Louis ss. Be it remembered that on this second day of May A. D. eighteen hundred and fifty one, before me Felix Coste, a Notary Public duly commissioned and qualified within and for the County aforesaid came Frederick Angelbeck, Ernest C. Angelrodt and

13 Robert Barth who are all personally known to me to be the same persons whose names are subscribed to the foregoing instrument of writing as parties thereto and severally acknowledged the same to be their act and deed for the purposes therein mentioned (Seal) In testimony whereof I hereunto set my hand and affix my official seal at Office the day the day and year last ~~mentioned~~ aforesaid. Felix Coste, Notary Public
Filed and Recorded May 3d 1851. S. D. Barlow Recorder
State of Missouri, County of St Louis ss. I the undersigned Recorder for said County Certify, that the foregoing is a true and correct copy of an instrument of writing executed by Fred. Angelbeck & Angelrodt & Barth and of the certificate of acknowledgement as well as of the date of filing and recording thereof, as fully as the same remains of Record in my office in book W No 5 page 129 & following (L.S.) Witness my hand and Official seal this 22nd day of August eighteen hundred and fifty One. S. D. Barlow Recorder

Summons The State of Missouri, To the Sheriff of St Louis County Greeting: We command you to summon Frederick Angelbeck, Ernest C. Angelrodt and Robert Barth to appear before the Judge of our St. Louis Court of Common Pleas, on the first day of the next term thereof, to be held at the City St. Louis within and for the County of St. Louis, on the Third Monday of September next, then and there to answer the complaint of Stewart McKee as set forth in the annexed Petition and have you then there this writ. (Seal) Witness Philip Tippett, Clerk of our said Court, with the Seal thereof hereto affixed at Office, in the City of St. Louis this 26th day of August in the year of our Lord One thousand eight hundred and fifty one. P. Tippett Clerk.

Sheriff's Return Executed this writ on the 28th day of August 1851 By delivering to Frederick Algelbeck a true copy of the Petition and writ, also by delivering a true copy of writ and offering to read the Petition to Ernest C. Andelrodt and Robert Barth which they refused to hear in St Louis

time to answer Extended

County. Henry B. Bett Sheriff by Geo Stevens Deputy.
And afterwards the following proceedings were had viz:
September Term 1857 September 16th 1857

Stewart McKee
vs.
Frederick Angelbeck &c } On motion of the defendants further time until the 4th day of October next is given them to answer herein

and the following answer was filed September 22nd 1857. viz:

Answer of Angelbeck and Barth

Stewart McKee — plff.
against
Ernest C. Angelbeck and Robert Barth. impl. with Angelbeck } In Saint Louis Court of Common Pleas.

Defendants state that on or about the 30th day of May A.D. 1857 The premises for which rent is claimed by plaintiff became wholly untenantable, by reason of a rise in the Mississippi River the said premises being overflowed so that said Angelbeck could not and did not use and enjoy the same from the time aforesaid during the said quarter for which rent is claimed. Defendants further state that on the 12th day of June A.D. 1857 the buildings on the premises for which rent is claimed, were destroyed by fire, so as to become wholly untenantable and from that time the said Angelbeck could not and has not used or enjoyed the same as has been by reason of said fire unable to prosecute his business theretofore carried on, on the said premises. Defendants further state, that the said Lease was assigned to them only by way of mortgage, and that they have not now, and never were at any time have had, any other assignment of the same, except as security by way of mortgage, as by said assignment herewith filed will fully appear — And these defendants have never at any time been in possession of the said premises or any part thereof nor have they received the

Motion for Judgment on Angelbeck's answer.

And the following motions were filed Oct. 13th 1851. viz:

Now at this day comes the Plaintiff by his attorneys and moves the Court to enter judgment in the above entitled cause in his favor and against Frederick Angelbeck one of the Defendants for the reason that the answer of the said Angelbeck does not set forth a sufficient and valid defence in law.

McKee & Clover Plaintiffs attorneys.

Motion for Judgment on answer of Angelrodt & Barth

Now at this day comes the plaintiff by his attorneys and moves the Court to enter judgment in his favor and against Ernest C. Angelrodt and Robert Barth defendants in the above entitled cause for the reason that the answer of the said Angelrodt & Barth does not set forth a sufficient and valid defence in law.

McKee & Clover Plaintiffs attorneys

15 the rents and profits thereof. C. B. Lord for
Angelbeck & Barth

Robert Barth one of the Defendants makes oath & says that he believes the above answer and the matters therein as stated are true Robert Barth

Sworn and Subscribed before me Sept 20th A.D. 1857.
Benj. F. McKenny Justice of the Peace.

and the following Answer was filed September 22nd 1857 viz

answer of Angelbeck

In St. Louis Court of Common Pleas

Stewart McKee - plff
against
Frederick Angelbeck
impl.d &c. with others Deft.

Defendant states that on the thirtieth day of May A.D. 1857 the premises for which rent is claimed by plaintiff by reason of the rise and flood in the Mississippi River, were overflowed, and from thenceforth become and were wholly untenantable, so that this defendant could not and did not use and enjoy the same from the time aforesaid during the said quarter for which rent is claimed. Defendant further states, that on the twelfth day of June A.D. 1857 the buildings on the premises for which rent is claimed were wholly destroyed by fire so as to become utterly untenantable, and from that time the defendant could not and has not used and enjoyed the same and has been by reason of said fire unable to prosecute his business theretofore carried on, on the said premises C. B. Lord for Angelbeck.

Defendant makes oath and says that he believes the above answer, and the matters therein as stated are true.

Sworn and Subscribed before me Frederick Angelbeck
September 20th A.D. 1857
Benj. F. McKenny Justice of the Peace

Motions for Judgt. against Defendants Sustained

and afterwards the following proceedings were had to wit

September Term 1857 — December 29th 1857

Stewart McKee vs. Frederick Angelbeck, Ernest C.

and 16 time till 15th January 1852 given to Angelrodt and Barth to file answer amended.

Angelrodt and Robert Barth. Now at this day come the parties by their attorneys and thereupon the plaintiffs motion for judgment upon the answer of the defendants Frederick Angelbeck being heard and the Court being fully advised of and concerning the premises it is ordered that said motion be sustained and that the plaintiffs petition be taken against him as confessed. And the plaintiffs motion for judgment herein against the defendants Ernest C. Angelrodt and Robert Barth being heard and the Court being fully advised of and concerning the premises it is considered that said motion be sustained. On motion further time until 15th January is given said defendants Angelrodt and Barth to file an amended answer herein.

And the following amended answer was filed January 16 1852

Amended answer of Angelrodt and Barth.

"In Saint Louis Court of Common Pleas.
Stewart McKee against Ernest C. Angelrodt and Robert Barth impld. with Frederick Angelbeck. Defendants.

Defendants that on the seventh day of January 1850 Frederick Angelbeck assigned and transferred the deed of Lease mentioned in plaintiffs petition and the term of years created thereby, and the premises described therein unto Abraham G. Switzer, William R. Switzer & John M. Platt composing the firm of Switzer Platt & Co. as by a copy of said Lease and the assignment and transfer endorsed thereon filed herewith and prayed to be taken as a part of this answer, will more fully appear (the original Lease not being in the custody of nor under the control of these defendants). Defendants further state that said Switzer Platt & Co. are now and have continually since the making of the said assignment to them as aforesaid, the assignees of said lease and the term of years thereby created, and have never at any time, sold transferred or conveyed the same to any person. Defendants

17 further state that said Angelbeck undertook to transfer and assign said lease to them by way of mortgage to secure them for certain advances made and to be made as is mentioned in said petition; but these defendants state that no estate passed to them by said assignment, the Legal estate then and now being in said A. G. Sutter, W. N. Sutter and John M. Platt. Defendants further state that they have at no time had possession of said premises nor have they at any time used the same, or received the profits thereof — Robert Barth — E. C. Angelbeck

State of Missouri. St. Louis County } ss. Robert Barth one of the above defendants on his oath says that He believes the above answer and the matters therein as stated are true. Robert Barth

Subscribed and sworn to before me January Sixth 1852
John W. Colvin Sav. Cour. By Edwd E Allen Deputy

Lease & assignment referred to in amended answer.

Lease and assignment referred to in amended answer. This Deed made this nineteenth day of april etanno Domini, one thousand, eight hundred and forty nine by and between Stewart McKee of the County of Grant in the State of Wisconsin, party of the first part, and Frederick Angelbeck of the City of St. Louis, and State of Missouri, party of the second part, Witnesseth that for and in consideration of the sum or sums hereinafter mentioned to be paid quarterly in four equal instalments by the party of the second part to the party of the first part, the said party of the first part hath demised, leased and let, and doth hereby demise lease and let unto the said party of the second part, the following describing property to wit: First, a lot of ground situated in the City of St. Louis in block number, two hundred and thirty three (233) bounded as follows: beginning at a point on Mullanphy Street, one hundred and fifteen feet Eastwardly from Main Street, thence Southwardly, parallel with Main Street and along the East side of an alley fifteen feet wide, Seventy feet — thence eastwardly about one hundred

18 and eighteen (118) feet to an alley thirty (30) feet wide; thence northwardly seventy (70) feet to Mullanphy Street — Thence Westwardly, One hundred and eighteen feet to the beginning. For this lot the said party of the second part is to pay the yearly rent of three hundred and fifty one dollars to be paid quarterly, for and during the term of eleven (11) years from the date hereof, and it is agreed that if the said party of the second wishes, after the expiration of the aforesaid term of eleven years from this date, to hold it for ten (10) years longer, he can do so by paying the yearly rent of seven per cent per annum on the then value of said lot. Second, a lot of ground, fifty seven and a half (57½) feet by about One hundred and eighteen (118) feet, and the brick house thereon. This lot is bounded on the East and West by the two alleys mentioned in the description of the first lot: on the South by J. E. Walsh and others unknown and on the North by an alley ten feet wide situated between this and the first lot. For this lot the party of the second part is to pay One hundred dollars yearly rent to be paid quarterly. The time of this house and lot is to commence at the expiration of a lease held on said house by the said party of the second part, that is to say, on the tenth day of May, One thousand, eight hundred and fifty. Third A stone warehouse, one hundred feet on Mullanphy Street by twenty seven and a half on front street, now occupied as a sugar refinery situate and being in the City of St. Louis. For this house the said party of the second part is to pay the yearly rent of eight hundred (800) dollars, to be paid quarterly to the said party of the first part his heirs or assigns. The time of this house to commence at the expiration of a lease held now by the said party of the second part, that is to say, on the twenty second of April, one thousand eight hundred and fifty — Fourth A lot of ground adjoining the above mentioned warehouse on the South forty

19 feet on Front street, and running back one hundred feet to an alley. For this lot the said party of the second part is to pay, one hundred and Sixty (160) dollars yearly rent to be paid quarterly to the said party of the first part, his heirs or assigns. The time of this lot to commence at the expiration of a lease held thereon by Bernard Curran, that is to say, on the Sixteenth day of August, one thousand, eight hundred and fifty, and it is agreed that if after the expiration of Eleven years from this date, being the term for which this lease is hereinafter limited, the said Angelbeck wishes to hold this last mentioned lot ten years longer he can do so by paying the yearly rent of Seven per cent per annum on the then value of said lot. To have and to hold the above described premises for the term of Eleven (11) years from the date of this deed unto the said Angelbeck his heirs executors, administrators, and assigns, subject to all the covenants stipulations agreements and terms herein before or after expressed he or they fully complying therewith and it is further agreed and covenanted that the said party of the second part, his heirs, executors, administrators or assigns, shall yield and pay unto the said party of the first part, his heirs executors administrators or assigns the sums herein before mentioned making in all fourteen hundred and eleven (1411) dollars to be paid quarterly every year in four equal instalments of three hundred and fifty two dollars and Seventy five cents ($352.75) at the end of every three months as they become due during said term. It is expressly agreed that no stone or earth be taken or carried away from the above mentioned premises by the said party of the second part or by his legal representatives, under a penalty of one thousand dollars and a forfeiture of this lease, but said Angelbeck shall have privilege to remove any building or other improvements erected by him on the premises, provided that all rents and damages are fully paid up by him. It is understood and agreed that when any portion of said becomes due and

demanded at the said premises whether any person can be found there or not of whom such demand can be made, that then the time and period of this lease, limited as aforesaid, shall be deemed to have been perfected and shall cease to exist, and the said Stewart McKee his heirs and assigns may enter upon and take possession of said premises the same as if this lease had not been made. And it is further agreed that the said party of the second part at the end of the term aforesaid, being eleven years from the present date, is to deliver unto the said Stewart McKee or his legal representatives full and peaceable possession of the above mentioned premises, and in as good order as he received the same, the Natural wear and decay and the effects of accidental Fire excepted. In Testimony whereof the said parties have hereunto set their hands and seals and affixed their seals the day and year first above written

Stewart McKee (Seal)
Frederick Angelbeck (Seal)

Acknowledged April 21. 1849. S. D. Barlow Recorder.
Recorded in Book D No 5 page 120. April 21. 1849
S. D. Barlow Recorder

For value received I hereby transfer all my right title and interest to the within described property unto Switzer, Platt & Co. they complying with the terms therein mentioned done this Seventh day of January Eighteen hundred and fifty at St. Louis Missouri.

Attest J. Switzer &c Frederick Angelbeck (Seal)

Motion to strike out amended answer of Angelrodt and Barth Sustained

And afterwards the following proceedings were had viz:

February Term 1852. February 6th 1852

Stewart McKee vs. Frederick Angelbeck, Ernest C. Angelrodt and Robert Barth &c. Now at this come the parties by their respective attorneys and thereupon the plaintiffs motion to strike out the amended answer of

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and Judgment against all defendants for $240.00 with costs.

the defendants Angelrodt and Barth and for judgment as for want of answer herein being heard and the Court being fully advised of and concerning the premises it is ordered that said motion be sustained and that the plaintiffs petition be taken against said Defendants Ernest C. Angelrodt and Robert Barth as confessed, and it appearing to the Court that said petition has heretofore been taken as confessed against the said defendant Rederick Angelbeck On motion of the plaintiff no Jury being required the Court doth assess his damages sustained by reason of the premises in his petition at the sum of two hundred and forty dollars. It is therefore considered by the Court that the Plaintiff recover of the defendants the damages aforesaid in form aforesaid assessed, and also his costs and charges herein expended and have thereof Execution.

Monday February 9th 1852

Appeal Granted

On motion of the defendants Robert Barth and Ernest C. Angelrodt an appeal is granted them from the decision herein to the Supreme Court, Whereupon the said defendants present to the Court an appeal bond conditioned according to law which is acknowledged by the Obligors and approved by the Court and filed.

Appeal Bond

And the following appeal Bond was filed Feby 9th 1852 viz: "Know all men by these Presents, that we Robert Barth as principal, and Charles C. Lord as surety are held and firmly bound unto Stewart McKee in the sum of three Hundred dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated at St. Louis this 9th day of February A. D. 1852. The condition of the above obligation is such, that Whereas Ernest C. Angelrodt and Robert Barth have appealed from the judgment rendered against them and in favor of Stewart McKee in the St. Louis Court of Common

22 Pleas for the sum of two Hundred and forty dollars and costs – Now if the said appellants will pay all costs and damages that may be awarded against them occasioned by such appeal, and shall prosecute their appeal and shall perform such judgment as shall be given by the Supreme Court and such as the Supreme Court may direct the St. Louis Court of Common Pleas to give, and if the judgment or any part thereof be affirmed, that they 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 them by the Supreme Court, then this obligation to be void, otherwise to remain in full force and effect. Robert Barth (Seal) C. B. Lord (Seal)
Approved in Open Court Feby 7th 1852. P. Tippett Clk.
St. Louis Court of Common Pleas, February Term 1852
February 7th 1852. This day appeared Robert Barth the principal and Charles B. Lord the security in the foregoing bond and acknowledge to have executed the same for the purposes therein expressed. (L. S.) In Witness Whereof, I hereto set my hand and affix the seal of said Court, at Office, in St. Louis, the day and year last aforesaid.
P. Tippett Clerk C.C.P.
and the following Bill of Exceptions was filed on the 7th day of February A. D. 1852. to wit:

Bill of Exceptions

In St. Louis Court of Common Pleas February Term 1852. Stewart McKee against Ernest C. Angelrodt and Robert Barth impled. with Angelbeck. & Be it remembered that heretofore to wit on the 15th day of January A. D. 1852 the plaintiff in this case filed his motion to strike out the amended answer of Angelrodt & Barth and for judgement against them as for want of answer. In the St. Louis Court of Common Pleas. St. Louis County. Stewart McKee, Plaintiff against Ernest C. Angelrodt and Robert Barth impleaded

Mo to strike out Ans

23 with Frederic Angelbeck Defendants. Now at this day
Comes the Plaintiff in the above entitled cause by his attorneys,
and moves the Court to strike out the amended answer of
the said Ernest C Angelrodt and Robert Barth and award
judgement in favor of said Plaintiff against said defend-
ants as for want of an answer, for the reasons:

1. That the Court sustained a motion for judgement
in favor of the Plaintiff on the original answer of said defend-
ants: and therefore the said defendants ought not to have been
permitted to file another answer until after a motion granted
for a new trial.

2. That the declarations in a certain article of agreement
signed and sealed by said defendants and by them recorded
(the original of which is filed in this cause by said defendants
and a certified copy is filed by said plaintiff) estop said
defendants from denying that they are the legal assignees of said
Angelbeck: and from asserting that a previous assignment
by said Angelbeck to Switzer Platt & Co, upholds a valid
and subsisting title to the premises in question, in Switzer
Platt & Co. subsequently to the assignment by Angelbeck to
Angelrodt & Barth.

3. That the defendants, having put upon the record their own
affidavit that they were the assignees of Frederick Angelbeck, at
the time of filing their original answer, ought not to be permitted
now to put upon the same record their own affidavit denying that
fact, without also informing the Court, under oath, that at the time
of giving their acceptances to Switzer, Platt & Co. for Angelbeck's
indebtedness to them, and ever since, said Switzer Platt & Co had
intentionally reserved, unknown to them (Angelrodt & Barth)
and now bona fide claim to hold, as defendants have learned
since filing their original answer, the residue of the term of
years, created in said deed of lease from Plaintiff to Angelbeck,
by virtue of an assignment made by said Angelbeck to
said Switzer, Platt & Co previously to said Angelbeck's
assignment to said defendants.

4. That the assignment by Angelbeck to Switzer, Platt & Co, a copy of which is filed by defendants with their amended answer, does not purport to be a conveyance of "the deed of lease mentioned in plaintiffs petition and the term of years created thereby" as alleged by said defendants in their amended answer, but only purports to convey an undetermined and uncertain right title and interest to the property described in said deed of lease.

McKee & Clover

Attorneys for Plaintiff.

Which motion being seen and heard by the Court and taken under advisement, The said Court did on the 7th day of February in this same term of February 1852 by its decision sustain the motion to strike out said amended answer and for judgement against said defendants and did thereupon render judgement against said defendants, to which Decision of said Court the Defendants did then and there at the time Except, and because said Exception does not appear of record the said defendants file this their bill of Exceptions and pray the Court to allow and sign the same, which is done February 7th 1852.

Samuel Treat, Judge &c

State of Missouri
Saint Louis County } SS.

I Philip Tippett Clerk of the Saint Louis Court of Common Pleas within and for the State and County aforesaid Certify the above and foregoing to be a true and perfect Transcript

25 of the Record and proceedings in the case of Stewart McKee Plaintiff against Frederick Angelbeck, Ernest C. Angelrodt and Robert Barth as the same now remain of record and on file in my Office.

In Testimony Whereof I hereto set my hand & affix the Seal of said Court at Office in the City of Saint Louis this first day of March in the year Eighteen hundred & fifty two—

Philip Spencer

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(2)

March. T. 1852

Stewart McKee
Respondent.

vs. } Transcript

Frederick Angelbeck
Ernest C. Angelrodt
and Robert Barth
Appellant.

McKee & Clover p.q.
&
C. B. Lord p.d.

Filed March 2nd 1852
William S. Glanville, Clerk.

Exd

$9.75 paid by Ally Lord

Stewart McRee - Respondent
vs
Angelrodt & Barth Appellants

Mi Sup. Court

And now come the said dependants by their attorney & say that in the record & proceedings aforesaid & in the giving of the judgement aforesaid there is manifest error in this: to wit:

The Court erred in striking out the answer of Dependants & in giving judgement for plaintiffs -

The Court erred in giving judgt. by default -

The Court erred in striking out the amended answer of Dependants -

The Court erred in deciding that Dependants were estopped from setting up in their second & amended answer the fact that Snitzer Platt & Co. had & held a previous assignment of said Lease -

Dependants pray that for the errors aforesaid, & for other errors, manifest in the record & proceedings aforesaid that said judgement may be reversed annulled & for nought held, & the appellants restored to all things which they have lost by the same

C. Blood
Atty for Appellants

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Stewart McRae
vs
Angelrodt & Batte

Assignment of Error

Lord
for Appellants

Filed 16th March 1852
Wm L Glanville, Clerk

Stewart McKee, Respondent against Ernest C Angelrodt and Robert Barth, Appellants	In the Supreme Court of the State of Missouri.

And the said Stewart McKee by his attorneys says that there is no error in the Record nor in the giving of judgement in the above entitled cause

McKee & Clover
Attorneys for Plf.

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In the Supreme Court

Stewart McKee Respt.

v.

Ernest C Angelrodt &
Robert Barth, Appellants

Joinder in Error

Filed 17 March 1852
Wm F Glanville, Clerk

McKee & Clover
Attys for Plf.

Stewart McKee, Resp^dt.
against
Angelroot & Barth
Appellants

In Sup. Court -

- Statement of Case -

On the 19th day of April 1849. McKee Leased certain premises, situate in St. Louis to one Frederick Angelbeck, for a term of years. On the 18th day of April A.D. 1851, Angelbeck assigned the Lease in question to Appellants by way of Mortgage, to secure Appellants for certain advances by them made & thereafter to be made. McKee brought his suit to recover the rent due by the terms of said lease, & which rent accrued after the date of the assignment by way of Mortgage above mentioned. - The suit was brought against Angelbeck, the Lessee, & Appellants as assignees. - Angelbeck the Lessee filed his answer which upon motion was stricken out, & Judgement rendered against him for the amount claimed. - Appellants filed a separate answer, setting up, - amongst other things, - "that the said lease "was assigned to them only by way of Mortgage, "& that they have not now, and never at any "time ~~had had~~ have had any other assignment "of the same, except as security by way of "Mortgage" # McKee moved to strike out the answer of Appellants & for Judgement. The court sustained the motion, whereupon Appellants asked & obtained leave from the Court to file a further & amended answer, by which they set up as a defence to the action, that the said Leasehold premises were only assigned to them by way of Mortgage

And that Appellants had never at any time had possession of the leasehold premises

and that they had never had possession of the premises, and that before the attempted assignment to them by way of Mortgage & on the 7th day of January 1850. The said Angelbeck had assigned & transferred the said lease to Switzer Platt & Co. ~~who~~ who from thenceforth became the legal assignees of the same, & still continue the legal assignees of the same – Mr Rae moved to strike out this answer & for Judgement. For the following reasons.

1. That appellants were estopped from denying that they are legal assignees of Angelbeck, having signed the agreement by which the assignment by way of Mortgage was made –

2. That appellants having put upon record an answer under oath, stating that they are assignees, cannot now put upon record an answer, stating that they are not assignees, without informing the Court, under oath, that Switzer Platt & Co. intentionally reserved unknown to them, and now claim to hold the residue of the term of years, created in said lease, by virtue of an assignment from Angelbeck to said Switzer Platt & Co. previous to the assignment to appellants –

3. That the assignment from Angelbeck to Switzer Platt & Co. does not purport to be a conveyance of the Deed of Lease & the term thereby created, but only of an uncertain & undetermined interest –

4. Because Judgt. was rendered in favor of plaintiff on first answer, and defendants ought not to be permitted to file another answer until after motion granted for a new trial.

The Court sustained the motion & gave judgement for plaintiff. & the case is brought here by appeal

C. Blood
per Appellants

McKee & Clover
for Respondent

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Stewart McKee
v.
Angelrodt & Barth

Appellants statement of case

(adopted)
Ryland

Filed 22nd March 185
W. J. Glenwin Cl

McKee vs Angelrodt & Barthe

It will be seen from the above statement of the case, that the main question for the decision of this Court, is in regard to the liability of a person, to whom a lease has been assigned by way of Mortgage, for the payment of rent, to the lessor, without such assignee ever having possession of the premises leased –

This question is is embarrassed by the authorities being found on both sides of it – both in the affirmative and in the negative –

In the case of Paton vs Rogers Douglas 455, Lord Mansfield, and Justices Willes, Ashhurst and Buller, held, that the assignee of the lease by way of Mortgage without having had possession, was not liable to the lessor for rent – Lord Mansfield said, numberless inconveniences would arise if such a doctrine could be supported. The Mortgagee never asks whether the rent be paid; he only looks to his security, and when the principal and interest are paid, he reassigns – But if the plaintiff is right, a Mortgagee might be called upon years after such reassignment for arrears or breaches of Covenant during the assignment – The consequences would be terrible –

Justice Buller declared that

even if the assignment were absolute, the action in his opinion, would not lie, without possession — He referred to Danver's Abridgt. Title Rent where the Court declared, that the ground upon which assignees are made liable, is because they have enjoyed the profits —

"In leases, the lessee being the party to the original Contract, continues always liable, notwithstanding any assignment: ~~though~~ the assignee is only liable in respect to his possession of the thing. He bears the burthen, while he enjoys the benefit and no longer — 2.

To do justice between men, it is necessary to understand things as they are; and construe instruments according to the intent of the parties — What is the effect of this instrument between these parties? The lessor is a stranger to it — He shall not be injured, but he is not entitled to any benefit under it — It was a mere security and it was not, nor even is meant, that possession should be taken, until default of payment and the money has been demanded". Such is the language of Lord Mansfield in the case of Eaton vs Jaques —

In the case of Williams vs Bosanquet and others 1 Broderip & Bingham 238. 5 English Com. Law Rep. 72. The case of Eaton vs Jaques is overruled, by a large majority of Judges, who decide, that when a party takes an assignment of a lease by way of Mortgage as security for money lent, the whole

interest passes to him and he becomes liable on the covenant for payment of rent though he has never occupied or become possessed in fact—

It is a principle of law, that the assignee of a lease is subject to the performance of all the covenants contained in such lease— So that where a lease was assigned by way of Mortgage, the Mortgagee would become liable to the covenants in the lease, unless a distinction were made between an absolute assignment, and one by way of Mortgage— This distinction was recognized in the case of Eaton vs Jaques and though it was overturned in the case of Williams vs Bosanquet & als— it nevertheless has more of equity and good sense to support it, than the contrary doctrine—

It is well settled as a general rule, that a mere legal ownership does not make the assignee liable in such cases without some evidence of his possession or actual agency— This principle is clearly recognized in the law of shipping, the rule being settled, that the Mortgagee of a ship does not incur the liabilities of an owner, until he takes possession, or actually interposes in the employment of the Vessel— Chinery vs Blackburne 1. Hen. Blacks. 117— Briggs vs Wilkerson 7. D&C. 30—

Westerdell vs Hale 7. Term Rep. 306 – Brooks vs Bondsey 17. Pickr. 441 – Colson vs Bonsey 6 Greenl. 474. McIntyre vs Scott 8. Johns. 159 –

It seems to us the better opinion, that the Mortgagee of a term of years, who has not taken possession, has not all the legal right, title and interest of the Mortgagor, and therefore is not treated as a complete assignee, so as to be chargeable on the real covenants of the assignor — The case of McMurphy vs Minot in 4 New Hamp Rep. 251 is an authority against this view of the subject; in this case Richardson Chief Justice says, the case of Eaton vs Jaques has been long questioned, and cites 7. Term Rep. 312 and also the case of Williams vs Bosanquet et als. —

The doctrine of Williams vs Bosanquet stands on grounds purely technical – It is conceded if the assignee by way of Mortgage, have all the term, of the lease, except one month, or one day only, assigned to him, he is not liable – the whole interest and estate of the lessee did not pass by the assignment, one day of the term still remained in him. —

The doctrine in Eaton vs Jaques is founded in substantial justice and equity and supported by strong common sense! Under the doctrine of Williams vs Bosanquet a Mortgagee might lose his capital and interest and still be compelled to pay rent without deriving a farthing from the

estate — In the case before us, the lease was assigned by way of Mortgage, it was a mere security for the payment of money — The assignees never took possession, it never entered into the heads of the assignees, that the Mortgage to them in order to secure the money due to them, made them liable to pay the rent for the lease — We hold therefore, that possession in the assignee is necessary in order, to create a liability to pay rent — That the assignee must be in a situation to receive the benefits, before he can be made to suffer the burden — Possession is the mother of his liability — to borrow a maritime idea about freight & wages —

Greenleaf's Treatise on Real Property has afforded much light on this subject, Title XV — Mortgage — Chap. II. page 110 — note I: and I have adopted and used the language of the Courts and elementary writers as far as suitable to the subject embraced herein, and may not have used the marks of quotation in every instance —

I do not think it necessary to review the authorities any further on this subject — We have examined and compared many cases — and the conclusion we have formed is contained in this opinion —

The other judges concurring the judgment of the Court below is reversed, and cause remanded —

John F. Ryland

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McKee

v

Angelrod & others

Opinion of the Court
by Ryland Judge

Filed 3 May 1852
Wm. L. Glanville
Clerk

Stewart McKee
vs.
Angelrodt & Barth

In Sup. Court
Points & Brief for Appellants

On the 19th April 1849, McKee leased certain premises situate in St. Louis to one Frederick Angelbeck, for a term of years, on the 18th day of April 1851, appellants became the assignees of said Lease by way of Mortgage, made ~~the by them~~ by Angelbeck to them, to secure them ~~against~~ for advances made. McKee brought suit against Angelbeck as Lessee & Appellants as assignees, for rent accruing subsequent to the assignment. Judgement was had against Angelbeck, and upon motion, the answer of appellants, which set up that the assignment to them was only by way of Mortgage, & that they had never had possession of the premises, was stricken out. Whereupon appellants by leave of Court, filed a further & amended answer, by which they set up as a defence to the action, that the assignment was only made to them by way of Mortgage, that they had never had possession of the premises, & the further fact, that before the Lease was Mortgaged to them, the said Angelbeck had made an absolute assignment of the premises to Mitzer Platt & Co. who from thenceforth became & still were the legal assignees of the same. McKee moved to strike out this answer & for Judgt. for several reasons of which the two following were only noticed in argument before the Court below - 1st That the appellants were estopped, having signed the agreement

by which the assignment by way of Mortgage was made, from denying that they were the legal assignees. 2d. that having put upon file an answer stating that they were assignees, cannot put upon the record an answer stating that they are not, without informing the Court, that Switzer Platt & Co. intentionally reversed, unknown to them and now claim to hold the residue of the term of years, created in said Lease, by virtue of an assignment from Angelbeck to said Switzer Platt & Co. previous to the assignment to appellants. The court sustained the motion & gave Judgt. for McKee & the case is brought here by appeal

The appellants say.

1. The assignee of a Lease, who takes such assignment only by way of Mortgage, ~~is not~~ & who has not taken possession of the premises, & the mortgage has not become forfeited, is not liable to the performance of the Lessees Covenants —

Assignments by way of Mortgage being merely conditional are not considered as an actual transfer of the property, but as a security only for money; Eaton v. Jaques Douglass 460, see note Woodfalls Landlord & Tenant 357

If a Lessee for years, with covenants to repair, assigns to I.S. by way of Mortgage & I.S. never enters

he will not be compelled to repair though he had the whole interest in him

Spark v. Smith, 2 Vernon 275

The assignee is only liable in respect to his possession, he bears the burthen while he enjoys the benefit & no longer.

Douglas 184. 460

Woodfall Landlord & Tenant 348

In the case of Eaton v. Jaques, Douglas 455. it was determined that a Mortgagee assignee of a term of years, should not be liable to the covenants in the lease, unless he had taken actual possession.

In Williams v. Bosanquet 3. Com. Law Rep. 72. this doctrine was overruled & it has since been held in England, that the Mortgagee is liable, although he never enters into possession, because he has the legal estate.

The decision in Eaton v. Jaques is quite as consonant to sound reason as the decision in Williams v. Bosanquet, at all events the last case can have no influence here, the liability of the ~~[illegible]~~ Mortgagee is put expressly on the ground of his having the legal estate. Whereas here the legal estate is in the Mortgagor & the

Mortgagee has but a chattel interest.

It is on the strength of this last case, that Chancellor Kent lays down the ~~doctrine~~ rule that the Mortgagee of the whole term is liable for payment of rent, whether he enters or not

In the case too of Williams v. Bosanquet the Mortgage money was due, and the Mortgage had become absolute. See 5 Com. Law. Opinions of Dallas C.J. at Page 77, 78

Again what privity of estate is there between Lessor & Assignee by way of Mortgage, when the Mortgage has not become absolute? & when the Mortgagee has not taken possession & is not even entitled to the possession? In the case at bar assignee could not take possession until condition broken -

When there must be privity of Contract or privity of estate, there was neither here.

The assignee must take the place of the assignor in law or in fact, in law by taking the legal estate, in fact, by taking possession & receiving the rents & profits -

If the assignee assign over his term he is not liable for the breach of any Covenant after such assignment: the privity of estate is gone.

Douglass 452.
2 Atkyns 546
4 Term 99
8. Term 61
1. Bosanquet & Puller 23.

And the assignment will be good though made to a beggar, or to a person leaving the Kingdom

Douglass 764.
1. Bosanquet & Puller 23.
Woodfall Landlord & Tenant 350.

It is now, I believe universally held ~~that~~ in Law & Equity, that the Mortgage is a mere Security for the debt, & only a chattel interest, The Mortgagor continues the real owner of the fee.

4 Kent 161.

He has not the legal estate

Law 1845. Sec 183. & following

In Brinson v. Nelson 7. Mo. Rep. 466. it was decided that a Mortgage deed under our statute, was no more than a bond to pay money & might be assigned by parol, & that a Mortgage did not carry the legal estate as in England

See also Robertson v. Campbell 8 Mo. 616

In Walcop & Griswold v. McKinney's heirs 10. Mo. 230 the Court seem to adopt the doctrine laid down in 1. J. J. Marshall 257. but seem to hold that after the mortgage has become absolute the Mortgagee may maintain ejectment. but not till after forfeiture -

In New York it is held that the assignee by way of Mortgage is not liable upon the covenants

Astor v. Hoyt. 5. Wendell 603.

All the right title and interest must pass out of the Lessee to the assignee - - Now when the Mortgagor is the real owner can all right title & interest be out of him?

Walton v. Crowley adm. 14. Wendell 63. See opinion of Sutherland Jus.

We think therefore that the Court below erred in striking out the first answer -

But.

III. By the amended & further answer filed by leave of Court we show that we could not take ~~[illegible]~~ the estate though we had a nominal assignment ~~the assignment~~ of the Lease because there was a prior assignment absolute upon its face to Switzer Platt & Co. yet the Court below decided that we were estopped

from showing that fact as a defence, & this we say is error.

1. It is contended that we are estopped by the recitals in the deed of assignment.

We think not. When a recital in a deed is intended to be the statement of one party only, the estoppel is confined to that party; and the intention is to be gathered from construing the instrument.
Davis Vendors & purchasers of real ~~Est~~ Estate 254.

A general recital in a deed does not conclude a party
5. John. Chy. Rep. 23. & 26.

A recital in a deed founded in mistake & untrue in fact, will not be allowed to operate by way of Estoppel, to exclude the truth, satisfactorily shown to the Court.
Stoughton v. Lynch. 2 John. Chy. Rep. 209. *

2. We surely are not precluded from showing the real nature of the estate; or whether there was any estate
Gaunt v. Wainman 32. Eng. C. Law 42

* In most of the cases where recitals are held to estop, it will be found that which is said to be recital, is so mixed up with the operative parts of the deed, that the estoppel will generally be found to refer to those parts, rather than to matter of recital.

The signing of the deed admits its execution, but it is consistent with the deed to show that nothing passed by it, or that the Grantor was not seized at the time.

Comyns Digest Estoppel (E.3.) Page 205 Vol. 4. of 1st Am. Ed. from 5th Eng. edition.

We are estopped from denying the Deed, but not from denying its operation.

Hayne v. Maltby 3. Term Reports 439.

A recital to amount to an estoppel must come from the party to be estopped.

Miller v. Bagnell 3 McCord 429.

Grantee is not estopped from denying that Grantor had no title.

Averill v. Wilson 4. Bach. Sup. Ct. Reports 180

As to the supposed estoppel by the first answer

An Estoppel must be certain to every intent.

Co. Litt. 353.b 303 a.

Com. Digest (E.4) 205

If therefore a thing be not directly & precisely alleged, it

Averill v. Wilson
See Opinion at
Page 188. 4. Barber
Sup. Court Rep. N.Y.

I shall not be an estoppel, or if it be alleged by way of inference, or recital
Com. Digest (E.4.) P. 205.
18 - John - Rep. 490
Now what does the answer say: "that the assignment to them was only by way of mortgage" Surely we are not estopped by that.

Estoppels are odious because they tend to conceal the truth.

We admit the assignment but deny its effect. We have a right to show that the assignment was of no effect, by reason of the prior absolute assignment. So that we had not the legal estate nor the possession & are not bound to pay the Respondent his rent.

It is not like the cases put in the books of pleading, when the party by pleading over admits the truth of what has gone before. We admit the assignment but deny its effect -

C. B. Lord

Stewart McKee
Respondent
v.
Angelwood & Barth
Appellants

Points & Brief for
Appellants

C. B. Lord
for Appellants

Stewart McKee, Respondent, vs. Ernest C. Angelrodt & Robert Barth, Appellants.	In the Supreme Court. Appeal from the St Louis Court of Common Pleas.

Brief and Points for Respondent.

I. The Court of Common Pleas committed no error in giving judgement for Respondent upon the original answer of Appellants. That answer did not set forth facts sufficient to constitute a valid defence to the action. When a party takes an assignment of a lease, by way of mortgage, as a security for money lent, the whole interest passes to him, and he becomes liable on the covenant for the payment of rent, though he has never occupied, or become possessed in fact.— Williams v. Bosanquet et al. 5 Eng. Com. Law Rep, 72; Platt on Covenants, 488; Coote on Mortgages, 118-124; 4 Kent's Com. 144 McMurphy v. Minot, 4 N. Hamp. 251. This is, unquestionably, a well established doctrine of the common law. It is founded upon the principle that the whole legal interest passes to the mortgagee, by virtue of the mortgage, and consequently gives to the mortgagee a right to the possession of the mortgaged premises.

The common law exists in this State without modification in this respect. It is adopted, generally, by express enactment, Rev. St. 1845, p. 693, and is incidentally affirmed in this particular by the Act concerning Mortgages, Rev. St. 1845, sec. 24, p. 753, wherein it is declared that the acknowledgement of satisfaction, upon any mortgage, shall have the effect to "re-vest in the mortgagor, or his legal representatives, all title to the mortgaged premises"— clearly indicating that, by the execution of the mortgage, the title passes out of the mortgagor to the mortgagee. It is so held by this Court, Carr v. Holbrook 1 Mo. R. 172; White v. Todd & Todd, 10 Mo. R. 189; Meyer v.

Campbell, McNiff & Barnes, 12 Mo. Rep., 615-616; and that the mortgagee may maintain ejectment against the mortgagor, Walcop v. McKinney's heirs, 10 Mo. Rep. 229. By an assignment of the whole term the mortgagee takes the whole interest of the lessee, and, by accepting it, assumes all the relations of the latter toward the lessor. In the case at bar, this was understood and intended by the parties; and the liability of the assignees, or mortgagees, to the lessor, is expressed in the terms of the assignment, as a condition of the conveyance, as follows: — "To Have and to Hold the said messuage to the said parties of the second part, [the Appellants] and their legal representatives, for the residue of the term mentioned in said lease, under the yearly rents and covenants therein contained, and on the part of the lessee to be done kept and performed."

II. — The amended answer of Appellants was properly stricken out, as all of the material averments contained in it are contradictory to their deed of agreement and assignment, (which is the basis of this action,) and to the record. In the deed of assignment which contains mutual covenants, and was executed by Appellants, it is recited that Angelbeck, the lessee of Respondent, "has acquired and is now (at the time of executing the deed, April 18th 1851) the owner" of certain stock, buildings, &c. "and of a leasehold interest in the premises upon which said buildings stand." Following this recital is the assignment by Angelbeck to Appellants. The amended answer, filed by appellants, denies the truth of the recital & the effect of the assignment in this deed, alledging a previous assignment by Angelbeck to Switzer Platt & Co., and that "Switzer Platt & Co are now and have been continually, since the making of the said assignment to them as aforesaid (on the 7th day of January 1850) the assignees of said lease and the term of years thereby created, and have never, at any time, sold, transferred or conveyed the same to any person."

But in point of fact there was no such assignment

by Angelbeck to Switzer Platt & Co, as that described in the Amended Answer, exhibited to the Court, as the record will show. The assignment alluded to was not of "said lease and the term of years thereby created," as alledged. It only purports to convey an undetermined and uncertain "right title or interest to the property described in said deed of lease."

The truth of the defence set up in the amended answer is impliedly rebutted by one of the recitals in the deed of Agreement and assignment executed by Angelbeck and Appellants, viz: "The said Frederick Angelbeck in the prosecution of said business has become indebted to Abraham G. Switzer, John M. Platt and William H. Switzer, composing the firm of Switzer Platt & Co., in the sum of twenty four thousand and twenty eight dollars and eighty six cents, for which amount, at the request of the said Frederick Angelbeck, the said Angelcodt & Barth have given their acceptances to said Switzer, Platt & Co". If any assignment ~~of~~ ~~the~~ premises was made to Switzer Platt & Co. it was, most probably, to secure the indebtedness mentioned in this recital; and when Appellants, at the request of Angelbeck, discharged that ~~indebtedness~~ indebtedness to Switzer Platt & Co for him, and took an assignment of the same premises to secure themselves for their advances, it is to be presumed that they, knowing the relation in which Angelbeck stood to Switzer Platt & Co, would see that the security on which they relied was properly transferred from Switzer Platt & Co to themselves. Common prudence and business capacity would have suggested this, at least.

But whether true or not, the Appellants cannot avail themselves of such a defence. They are estopped,

1. By the recitals and declaration contained in their deed of Agreement and assignment. — Dickson v. Anderson et al. 9 Mo. Rep. 156; Stow v. Wyse, 7 Conn. Rep. 214; Jackson v. Parkhurst et al. 9 Wend. 209; Carver v. Jackson, 4 Pet. U.S. Rep. 83; Crane v. Lessee of Morris, 6 Pet. U.S. Rep 598

1 Greenleaf on Ev., 26; 2 Starkie on Ev. 20, 437; Comyn's Dig. title, "Estoppel". A party cannot set up title in another person contrary to ~~his~~ a recital in his own deed. Denn. v. Brewer, Cope, 172.

There can be no doubt that the Respondent can take advantage of this estoppel by the deed; for, although not a party, he is a privy to that instrument. He is so because the execution of it by appellants created a relationship between him and them — both a privity of estate and a privity of contract, Williams v. Bosanquet, 5. Eng. Com. Law Rep. 78. It gave to them a right to enter upon and possess his premises; and it gave to him a right to demand rent from them for the use of those premises. The rights of the parties being reciprocal under the deed, of course, they must be either parties or privies to it. But Bouvier's definition of the meaning, in law, of the term "privy" is conclusive upon this point. He says, "Privies are persons who are partakers, or have an interest in any action or thing, or any relation to another". Bouvier's Law Dictionary, title "Privies." He cites Wood Inst. b. 2. c. 3. p. 255; 2 Tho. Co. Litt. 506; Co. Litt. 271. a.

2. The appellants are estopped by the record from setting up the defence contained in their amended answer. In their original answer, which is a part of the record, and which was verified by affidavit, they admit that they were the assignees of Angelbeck in the leasehold in question. The same parties cannot, in the same suit, be permitted to deny a fact which they have alledged or admitted — Stephen on Pleading, 197; 4 Com. Dig. 190; The Mary, 1 Mason's Rep. 365. In addition to grounds of policy which heretofore existed for sustaining and enforcing the law of estoppel, (Greenleaf on Ev. p. 26, the late Practice Act has introduced another, as to the record. The pleadings must be ~~must be~~ sworn to. As the parties therefore would have to deny under oath, what they once admitted under

oath, to permit them to do so, would be countenancing a practice immoral in the highest degree.

McKee & Clover,
for Respondent.

In the Supreme Court.

Stewart McKee, Respt.

v.

Angelrodt & Barth, Appelts.

Brief & Points

On the part of Respondent

McKee & Clover

Attys.