SCHUETZE, JOHN E. & EGGERS, CHARLES F. V PECK, CHARLES H. & EADS, JAMES B. MARCH 1867 COUNTY OF ST. LOUIS 5783

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Page 1

State of Missouri }
County of St. Louis } SS.

Be it Remembered that on the Twenty fourth day of February in the year of our Lord one thousand eight hundred and sixty five, there was filed in the office of the Clerk of the St. Louis Land Court a petition.

Which Petition is in the words and figures following, to wit;

Petition

John E. Schuetze & Charles F. Eggers. Plffs. vs. Charles H. Peck & James B. Eads, trustees of Caroline Garnier, and George Bailey. Defts	In the Saint Louis Land Court. March Term 1865.

Saint Louis County. SS.

The plaintiffs state that on the third day of June in the year A.D. 1857, Volney S. Stevenson was the owner in fee of the following described lot and parcel of land, situate in Block No. Eighty-seven in the City of Saint Louis, to wit; containing twenty-five feet in front on Third street, by one hundred and seventeen feet deep to an alley; commencing at a point in the west line of Third street one hundred and ten feet five inches, north of the north line of Pine street, which point is supposed to be opposite to the centre line of a partition line between the building on the lot hereby conveyed and the one adjoining on the South, thence westward parallel with said Pine street and through the centre of said partition wall on a line continued one hundred and seventeen feet to an alley, thence northward with said alley twenty five feet thence Eastward parallel as before and through the centre of the north wall of the building hereby conveyed one hundred and seventeen feet to Third street and thence South with the west line

2 of said Third Street twenty-five feet to the point of beginning.

The plaintiffs further state that the Defendant George Bailey on the said twentieth day of June 1857 was the owner in fee of the following described lot in said Block in said City and County, to wit: beginning at a point in said Block and in the western line of Third Street, distant one hundred and sixty five feet and nine inches, northwardly from the intersection of said west line of Third Street with the north line of Pine Street - thence running westwardly and parallel with said north line of Pine Street one hundred and fifty seven feet, three inches to a point, thence southwardly and parallel with said Third Street thirty five feet, four inches to a point, thence Eastwardly and parallel with said Pine Street twenty-five feet three inches to an alley, thence northwardly along the west line of said alley five feet to a point, thence Eastwardly and parallel with Pine Street one hundred and thirty two feet to Third Street and thence northwardly along the west line of said Third Street thirty feet and four inches to the place of beginning.

The plaintiffs further state that the said lots and parcels of land adjoin each other and on the said twentieth day of June 1857, said Volney S. Stevenson being about to erect a building on his said lot on and along the line dividing his said lot from the lot of said George Bailey - the said lot of the latter being at that time vacant and unimproved, the said Stevenson and Bailey made and entered into an agreement in writing, signed and sealed by them, and dated June 20, 1857, whereby and in and by said agreement, the said Bailey consented and permitted said Stevenson to build his northern wall of his intended building upon the ground of said Stevenson and said Bailey equally; that is to say, one half on each of said lots, so that the centre of said wall should rest upon the dividing line of the two lots and said

George Bailey, in consideration of the building of such wall by said Stevenson, further agreed that whenever, he the said Bailey or his assigns should build upon his said lot permanent buildings and use the whole of said wall, he would pay said Stevenson one half of the value of the said party wall - to be estimated at the time of such building - and said Bailey then delivered said written agreement to said Stevenson.

The plaintiffs further state, that said George Bailey, by his deed dated November 2, 1863, conveyed and assigned his said lot and parcel of land before mentioned together with all the appurtenances and privileges thereunto belonging or in anywise appertaining to the defendants Charles H. Peck and James R. Eads as trustees and in trust for the use and benefit of Caroline Garnier - a copy of which deed last mentioned, (the original not being in the possession or under the control of the plaintiffs) is filed herewith, marked A.

The plaintiffs further state, that the said Volney S. Stephenson by his deed dated July 5, 1864 conveyed and assigned his said lot, hereinbefore mentioned together with all the privileges and appurtenances thereunto belonging or in anywise appertaining to the plaintiffs - which deed they file herewith - marked B.

The plaintiffs further state that in pursuance of and in conformity with the said agreement made and entered into between said Bailey and said Stevenson, beginning in said year 1857 and within two years after the date of said agreement, the said Volney S. Stevenson built, erected and completed a good and substantial wall of stone and brick material upon the said ground of said Stevenson and the said ground of said Bailey equally so that the centre of said wall rested upon the dividing line of the said two lots and which party

4 wall consisted of the kind and quantity of material, and work and of the value following, that is to say:

Rubble Masonry. 105' x 9'0" x 2'6" = 2362½ F = 107 P - 8½ F

107 Perch 8½ Cubic feet @ $3.25 ¢ perch — $349.05

Brick work. 1 Story Wall. 104'6" x 10' x 35 bricks = 57520

2d & 3d & 4th stories. 104'6" 40'0" x 28" = 117040

Garret — 40'0" x 22'6" x 21" = 18900

" — 64'6" x 20' x 21" = 27090

Total = 221550

221550 Bricks @ $12.50 ¢ 1000 — 2769.37

$3118.42

The plaintiffs further state, that on or about the day of November in the year 1872 the said Bailey by his lease in writing, let and leased his said lot for the term of years from said last mentioned date to Louis Thaunberger, who with the knowledge and consent of said Bailey and within one year after the date of said lease, erected a permanent building on the Third street front of said lot and in erecting said building said Louis Thaunberger used a portion of said party wall, that is to say, beginning on Third street and extending back westwardly about seventy five feet more or less.

The plaintiffs further state, that at the time said Bailey conveyed and assigned said lot to the defendants Charles H. Peck and James B. Eads in trust as aforesaid he cancelled his said lease to said Louis Thaunberger with the consent of the latter and the said lease was delivered up.

The plaintiffs further state, that the

defendants Charles H. Peck and James B. Eads, after the making of said deed by said Bailey to them, erected an additional permanent building on the remaining portion of said lot of land and in erecting said additional permanent building they used the remaining portion of said party wall.

The plaintiffs further state, that the whole of the said party wall, that is to say, all that part and portion of said party wall that was placed upon the ground and lot belonging to said Bailey was used by said Louis Thaumberger and the defendants Charles H. Peck and James B. Eads in the construction and erection of the permanent building that is now upon the said lot sold and conveyed as aforesaid to the defendants Charles H. Peck and James B. Eads.

The plaintiffs further state that said Bailey by his said deed to said Charles H. Peck and James B. Eads covenanted with them that said lot was free of incumbrances done or suffered by him and that he would warrant and defend the lot conveyed by said deed against the claims of all persons whomsoever, and said Charles H. Peck and James B. Eads took said deed from said Bailey with full knowledge of the said written agreement between him and said Stevenson and with full knowledge that the said Stevenson had built and erected said party wall as hereinbefore stated under said agreement.

The plaintiffs further state, that the said Volney S. Stevenson by his writing signed and sealed by him, dated July 12. 1874, assigned and transferred said writing and all his demands and claim for compensation for building and erecting said party wall to the plaintiffs and they file herewith the said written agreement and the assignment thereof - marked C.

6

The plaintiffs further state, that the whole value of the said party wall computed and estimated at the time the said permanent building was erected as aforesaid on said lot, which said Bailey conveyed as aforesaid to said Charles H. Peck and James B. Eads equals the sum of Three thousand and one hundred & eighteen $\frac{42}{100}$ Dollars for one half of which sum, last mentioned, the defendants are liable to the plaintiffs and they have a lien upon the said lot conveyed by said Bailey to said Charles H. Peck and James B. Eads for the payment of one half of said last mentioned sum, viz. for $1559.21

Wherefore in consideration of the premises the plaintiffs ask judgment against the Defendants for said sum of Fifteen Hundred & fifty nine $\frac{21}{100}$ Dollars, and for interest and the plaintiffs also pray that this Court by its judgment and decree will enforce the lien of the plaintiffs upon the said lot and premises secondly hereinbefore described for the payment of said sum and interest.

Krum & Decker Attys for Plffs.

John E. Schuetze one of the Plaintiffs being duly sworn says that the foregoing Petition & the matters therein as stated he believes to be true

John E. Schuetze.

Subscribed and sworn before me this Twenty fourth day of February A. D. 1875.

Witness my hand and Notarial seal.

(Seal) Francis J. Donovan Notary Public St Louis County Mo.

Upon the filing of the above petition the Clerk then issued to the Sheriff of St. Louis County, a Summons.

Which Summons is in the words and figures following, to wit:

7

Summons

County of St. Louis. S.S.

The State of Missouri,

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

We command you to summon Charles H. Peck & James B. Eads, trustees of Caroline Garnier, and George Bailey to appear before the Judge of our St. Louis Land Court, on the first day of the next term thereof, to be held in the City of St. Louis, within and for the County of St. Louis, on the second Monday of March next, then and there to answer the complaint of John E. Schuetze & Charles F. Eggers as set forth in the annexed petition: and have you then and there this writ.

Witness, Robert White, Clerk of our said Court, with the seal thereof hereto affixed, at office, in the City of St. Louis, this 25th day of February in the year of our Lord eighteen hundred and sixty five.

Seal & U.S. Stamp

Robert White Clerk

By Chas. Levy D.C.

Upon which summons the Sheriff made his Return in the words and figures following, to wit:

Sheriff's Return.

Executed this Writ in the County of St. Louis Mo. on the 25th day of February 1865 by delivering a copy of the writ and Petition as furnished by the Clerk to George Bailey and by leaving a copy of the Writ as furnished by the Clerk at the usual place of abode of Charles H. Peck with a white person of his family over the age of fifteen years. Jas. B. Eads not found in my County.

John C. Vogel Sheriff

By Adolphus Boettcher.

And afterwards the following proceedings were had in this cause, to wit:

March Term 1865 — Monday March 20th 1865

Ans.r filed

John E. Schuetze, et al,
vs
Charles H. Peck et ali

} Answer filed in this cause.

Which answer is in the words and figures following, to wit:

Answer.

John E. Schuetz et al Plffs
vs.
Charles H. Peck et al Defts

} In St. Louis Land Court, March Term 1865 No. 103.

And the said Defendants come & for answer to the petition of said Plaintiffs deny that George Bailey & Volney S. Stevenson on the 20 day of June 1857 or at any other time, made, signed, sealed, executed, delivered or entered into the written agreement mentioned & set forth in said petition.

They deny that said George Bailey in writing consented or permitted the said Volney S. Stevenson to build one half of his, (Stevenson) wall upon the lot of said Bailey.

They deny that said George Bailey ever agreed to pay to said Volney S. Stevenson one half the value of the wall mentioned in said petition, at any time or under any circumstances.

They deny that said George Bailey ever delivered the written agreement mentioned in said petition to said Volney S. Stevenson.

These defendants further state, that they have

not any knowledge or information thereof sufficient to form a belief whether the said Volney S. Stevenson by deed dated July 5. 1874 conveyed or assigned the lot described in said petition to said plaintiffs —

These defendants deny, that said Volney S. Stevenson built or erected the wall mentioned in said petition, in pursuance or in conformity, with any agreement made by said George Bailey with said Volney S. Stevenson —

They deny, that the said wall mentioned in said petition is now, or was ever worth the sum of three thousand one hundred Eighteen $\frac{42}{100}$ Dollars or any sum near that amount —

They deny, that the whole of said wall, or the whole of that part or portion of said wall standing on the lot of ground secondly described in said petition was used by said Louis Hamm-berger & these defendants or any of them, or either of them, in the construction or erection of permanent buildings, or the buildings now on said lot —

They deny that the whole of said wall, or the whole of that part or portion of said wall standing on the lot of ground secondly described in said petition, is now used or was ever used by these Defendants or any of them, or was ever used by the said George Bailey or his assignees or assignee —

They deny, that said Charles L. Peck & James B. Eads received or took the deed mentioned in said petition, with the full knowledge of the pretended written agreement alleged in said petition, or with full knowledge of the erection by said Stevenson of said wall under said pretended written agreements —

They further state, that they have not any knowledge or information thereof sufficient to form a belief

10

whether the said Volney S. Stevenson, on the 12 day of July 1874, or at any other time assigned or transfered to said Plaintiffs. the said pretended written agreement, or any pretended cause of action arising under the same –

These Defendants deny that the value of said wall was ever the sum of three thousand one hundred & eighteen 42/100 Dollars, or any thing like that sum –

They deny that they are liable for one half of the value of said wall – or that they said Plaintiffs have a lien on said premises for the same –

They deny that they are liable to said Plaintiffs for the sum of fifteen hundred & fifty nine 2/100 Dollars or any other sum whatever.

They deny. that Louis Thamberger used the said wall to the depth of seventy five feet from third street.

They deny that said Louis Thamberger used any portion of said wall from the bottom to the top of said wall –

They deny that said George Bailey & Louis Thamberger cancelled the lease made by said Bailey to said Thamberger. Wherefore they ask for judgment & also for costs.

Lackland Cline & Jamison.
Attys for Defts.

James L. Waters agent of Defendants makes oath & says that he believes the foregoing answer & the matters & things therein as stated are true.

Jas. L Waters

Sworn to & subscribed before me on this 18 day of March 1875

Seal

Bernard M. Rice
Notary Public

And afterwards at the October Term 1865, the following further proceedings were had in this cause, to wit:

Wednesday November 22d 1865

Trial Begun &c.

John E. Schuetze & Charles F. Eggers vs Charles H. Peck and James B. Eads, trustees of Caroline Garnier, and George Bailey

Trial Begun.
Now at this day come said parties by their respective attorneys, and thereupon this cause coming on to be heard is tried by the Court, upon the pleadings evidence and proofs adduced, therefore the trial progressed, and it is thereupon Ordered by the Court, that this cause be placed on the Law Docket.

And afterwards at the same term the following further proceedings were had in this cause, to wit:

Friday December 22nd 1865.

Judgment

John E. Schuetze & Charles F. Eggers vs Charles H. Peck and James B. Eads, trustees of Caroline Garnier, and George Bailey.

Judgment.
And now again at this day, come said parties by their respective attorneys, and the Court being now fully advised of and concerning the premises, doth find the issues herein for the Plaintiffs against the defendant George Bailey, and doth assess their damages herein, at the sum of Thirteen hundred and ten dollars and sixty cents. It is therefore Ordered and adjudged by the Court, that the Plaintiffs recover of said defendant George Bailey, the damages aforesaid, in form aforesaid as found and also their costs and charges herein expended and have Execution therefor.

And afterwards, to wit; on the same day, the following further proceedings were had in this cause. to wit:

Mo. for New trial filed.

John E. Schuetze et. al
vs.
Charles H. Peck et ali

Motion for new trial filed in this cause.

(For which motion for New trial. See "Bill of exceptions". Clerk)

And afterwards at the same term, the following further proceedings were had in this cause, to wit:

Friday December 29th 1905.

Mo. for new trial Overruled.

John E. Schuetze et. al
vs.
Charles H. Peck, et. ali

Now at this day the Court being fully advised of and concerning the motion heretofore filed in this cause for a new trial, doth Order and adjudge that said motion be overruled.

And afterwards, to wit; on the same day the following further proceedings were had in this cause. to wit:

Aff't for Apl. & Bond filed & Apl. granted

John E. Schuetze. et al
vs
Charles H. Peck et. ali

Appeal to the Supreme Court.

Now at this day there is filed in this cause an affidavit for appeal, and there is also filed in this cause an appeal bond, which bond is approved by the Court, and thereupon it is Ordered by the Court, that an appeal to the Supreme Court, be granted from the decision herein rendered.

For which affidavit for appeal and Bond see this Transcript following the close of "Bill of Exceptions". Clerk

And afterwards at the same term the following further proceedings were had in this cause, to wit:

Saturday December 30th 1865.

Bill of Exc'ps. filed

John E. Schuetze et al
vs
Charles H. Peck et ali

Bill of exceptions filed in this cause.

Which Bill of exceptions is in the words and figures following, to wit:

Bill of Exc'ps

John E. Schuetz et al
vs
Charles H. Peck et al

In St. Louis Land Court.
October Term 1865.

Be it remembered that on the trial of the above entitled cause, which was before the Court sitting as a jury, the Plaintiffs offered to read in evidence the writing under seal executed by Kennett McKenzie Agent of Volney S. Stevenson & George Bailey dated June 20. 1857.

Agreemt by K. McKenzie A. V. S. & Geo Bailey

This agreement made this Twentieth day of June in the year Eighteen hundred and fifty seven between Kenneth Mackenzie agent for Volney S. Stevenson of the first part and George Bailey of the second part: Witnesseth that whereas the said parties are proprietors of adjoining lots of ground, or parcels of land in Block Eighty seven (87) of the City of Saint Louis, Missouri the northern line of the lot of the said party of the first being the southern line of lot of the said party of the second part; and whereas it is agreed that said party of the first part in Building upon

14 his lot shall put his northern wall upon the ground of said party of the second part, and said party of the first part equally, so that the centre of said wall may rest upon the dividing line of the two lots, now therefore in consideration of said party of the first part so building his said northern wall the said party of the second part his executors, administrators or assigns, covenants & agrees that when he or they shall build upon his lot permanent buildings so as to use the whole of said wall he will pay to the party of the first part or his assigns the value of the one half of said party wall, the said value to be computed & estimated at the time of such building.

In witness whereof said parties of the first and second parts have hereto set their hands & seals the day & year above written.

R. Mackenzie (Seal)
Agent for Volney S. Stevenson.

Witness.
Chas. H. Peck. Z

Geo. Bailey (Seal)

Which was objected to by Defendants because it was not a contract between Volney S. Stevenson & George Bailey, the Court overruled the objection & let the same be read, subject to the legal effect of the same, to which Defendants then & there duly excepted.

Assignmt of 2d agreemt by Stevenson to Schuetz & Eggers.

I, Volney S. Stevenson one of the contracting parties to the agreement on the preceding page, having sold the lot on the south side of the dividing line therein mentioned, to Messrs. Schuetz & Eggers, do hereby sell, assign transfer and convey to them all my interest & estate legal and equitable in and to the said contract and do hereby empower and authorize them in my name or otherwise to use all lawful means to enforce a compliance with the terms thereof as fully as I could

enforce the same, But it is also understood that I am not to be held liable on account thereof nor shall I be put to any cost and expense in enforcing the same, The within contract is only assigned and transfered by me to vest in said Schuetz & Eggers whatever rights or claims I may have by virtue of the same, But it is distinctly and expressly understood and agreed that I do not guarantee or become liable in any manner, or for any purpose upon or by said Contract or upon or by this transfer or assignment thereof, and that I am not in any manner, or in any event to be held liable for any matter upon said contract or this transfer thereof.

Witness my hand this 12th day of July A. D. 1864.

W. S. Stevenson (Seal)

The plaintiffs then read in evidence the deed from Volney S. Stevenson to Plaintiffs dated July 5, 1864.

Deed from V. S. Stevenson to Pltffs.

This Deed, made and entered into this fifth day of July Eighteen hundred and sixty four by and between Volney S. Stevenson (single man) of the City of St. Louis State of Missouri party of the first part, and John Edward Schuetze and Charles F. Eggers composing the firm of Schuetze & Eggers, as tenants in common of the same place parties of the second part, Witnesseth: That the said party of the first part, for and in consideration of Fifty thousand Dollars, to him paid by the said parties of the second part, the receipt of which is hereby acknowledged, does by these presents, Grant, Bargain and sell convey and confirm, unto the said parties of the second part, the following described tract or parcel of land, situated in the County of St. Louis and City of St. Louis in the State of Missouri, to-wit: a lot of ground situate in Block No. 27 of said City, containing Twenty-five (25)

16 feet in front on Third Street, by one hundred and seventeen (117) feet deep to an alley, commencing at a point in the west line of Third (3d) street One hundred and ten feet five inches (110 5/12) north of the north line of Pine Street, which point is supposed to be opposite the center line of a partition wall between the building on the lot hereby conveyed and the one adjoining on the south thence westward parallel with said Pine street and through the center of said partition wall on a line continued one Hundred and seventeen (117) feet to an alley, thence North with said alley Twenty five (25) feet; thence Eastward parallel as before and through the center of the north wall of the building hereby conveyed, one hundred and seventeen (117) feet to Third (3d) Street, and thence South with the west line of said Third street Twenty five (25) feet to the point of beginning.

To Have and to Hold the same, together with all the rights, immunities, privileges and appurtenances to the same belonging, unto the said parties of the second part, and to their heirs and assigns forever: the said Volney S. Stevenson party of the first part hereby covenanting that he and his heirs, executors and administrators, shall and will warrant and defend the title to the premises unto the said parties of the second part, and to their heirs and assigns forever, against the lawful claims of all persons whomsoever. In Witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

V. S. Stevenson (Seal)

Witness. U. S. Rev. Stamps 4 20# each (Seal)

State of Missouri } SS.
County of St. Louis }

Be it Remembered, that on this sixth day of July A. D. Eighteen hundred and sixty four before me the undersigned, a Notary Public, within and for the County and State aforesaid, came Volney S. Stevenson who is personally known to me, to be the same person whose name is subscribed to the foregoing instrument of writing as party

thereto, and acknowledged the same to be his act and deed for the purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and affixed my Notarial seal, at office, in the City of St. Louis, the day and year last above written.

Seal

Leicester Babcock
Notary Public. St. Louis Co. Mo.

State of Missouri
County of St. Louis } ss. I the undersigned Recorder for said County certify that the foregoing Instrument was filed for Record in my office July 11. 1874 and is truly recorded in Book 294 p 57.

Witness my hand & official seal the date last aforesaid.

Seal

A. C. Bernoudy Recorder

Then read in evidence the lease from George Bailey to Louis Thomberger dated Oct. 28. 1862.

Lease from Geo Bailey to L Thannberger

This Indenture, made this Twenty eighth day of October 1862 between George Bailey and Mary Bailey his wife, party of the first part and Louis Thannberger, party of the second part, both of the City of St. Louis and State of Missouri, Witnesseth: That the said party of the first part doth hereby demise and lease unto the said party of the second part the following described tract of land, to wit: A lot of ground situate on the west side of Third Street, in Block No 87 in said City of St. Louis, fronting thirty feet and four inches on third street and running back westwardly in depth one hundred and ten feet more or less to a line even with the buildings North and south of said lot, bounded East by Third Street, North by lot of Dorriss, South by lot of Stevenson and west by a lot reserved

18

by the party of the first part, together with the right of way over the land of the party of the first part so reserved in the rear of said premises to the public alley leading Southwardly to Pine Street. To have and to hold the same unto the said party of the second part his assigns for the full term of five years from the first day of January 1893 at the yearly rent of Eleven hundred dollars payable in equal quarter yearly instalments, that is to say, The sum of Two hundred and twenty five dollars on the first days of April, July, October and January of each and every year during the continuance of said term; the first payment to be made on the first of April 1893. And the said party of the first part covenants that the incumbrances on said premises will be removed on or before the fifteenth day of January 1893 and that said party of the second part upon complying with the terms and conditions on his part to be kept and performed, shall peaceably and quietly have, hold and enjoy the premises demised for said term of years. And the said party of the second part covenants to pay the said rent in manner aforesaid and to pay all taxes and assessments, State, County and City, general and special when the same shall become due and payable, that may be levied or assessed on said premises during the continuance of this term. And the said party of the second part further covenants that he shall and will before the expiration of the first year of the said term at his own proper cost and expense erect, build and complete in a workmanlike manner a good and substantial house upon said premises, according to the plans and specifications accepted and signed by both parties in duplicate to the approbation of said party of the first part or his architect. The said party of the first part covenants to save and keep harmless the said party of the second part from all costs, loss, damages and attorneys fees, which may result from using the south wall of the building adjoining the premises on the North for the purpose of plastering the

same, or the north wall of the building which said party of the second part is to erect. And the said party of the first part covenants at the end of said term, unless the same shall be renewed as hereinafter provided, to pay to said party of the second part the value of said house erected as aforesaid at the price and sum fixed by two disinterested appraisers, one to be appointed by each party and they to choose a third in case of disagreement, which appraisers shall be appointed one month before the termination of this lease, and whose decision or the decision of two of them shall be final and binding on both parties; and the party of the second part shall have the right to retain possession of said premises at the same rate of rent until said building shall be paid for as aforesaid, and in case such payment shall be delayed more than ninety days after the valuation is fixed as aforesaid, said party of the second part shall not be required to pay any rent for said premises for the time he shall remain in possession after the ninety days and until the amount of such valuation has been paid. And it is further agreed that any other buildings or improvements erected or constructed on said premises not embraced in the plans and specifications of the building and back building referred to, and not constituting a part of said buildings may be removed by said party of the second part at the expiration of the term. It is further covenanted by the party of the first part that if thereto requested in writing by the party of the second part three months before the expiration of the term hereby demised he will grant a further lease of said premises to the party of the second part for the further term of five years, at the yearly rent of six hundred dollars, payable in quarter yearly instalments of four hundred dollars each and containing therein the like covenants, agreements, stipulations and reservations as are in these presents (except the covenant to erect

20 buildings and the covenant of renewal) he the said party of the second part executing at the same time a counterpart thereof. It being well understood that in case said party of the second part shall elect to retain said premises for a second term as aforesaid, then said building shall be appraised and paid by the party of the first part at the expiration of such second term and not sooner, in the same way and upon the same terms as hereinbefore provided. And provided further and this lease is made upon this express condition that if the said party of the second part, his administrators or assigns at any time during the term hereby granted or the renewal thereof shall neglect or fail to pay the rent herein reserved when due and payable or shall neglect or fail to perform any other of the covenants and agreements by him to be kept and performed, then it shall and may be lawful for said party of the first part, to declare this lease forfeited by notice to the party of the second part, his heirs or assigns in writing by posting such notice upon any part of the premises demised and to reenter and repossess the premises as of their former estate and intent, & to require double rent for holding over after forfeiture of this lease. In Witness Whereof said parties have hereto set their hands and seals the day and year first above written.

Geo. Bailey (Seal)

Mary Bailey (Seal) L. Hannberger (Seal)

The words "& to require double rent for holding over after forfeiture of this lease" on the fifth line of last page before signing & the words "at the same rate of rent" on the 15th line of 4th page, interlined before execution of this Deed.

E. W. Decker

State of Missouri }
County of St. Louis } SS. Be it remembered that on this thirtieth day of October eighteen hundred and sixty two before me the undersigned, a Notary

Public within and for the County aforesaid, duly commissioned and qualified, came George Bailey and Mary Bailey his wife, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument of writing as party thereto and they severally acknowledged the same to be their act and deed for the purposes therein mentioned. And she the said Mary Bailey, having been by me first made acquainted with the contents of said instrument of writing, acknowledged on examination apart from her husband that she executed the same and relinquished her dower in the real estate therein described freely and without compulsion or undue influence of her said husband.

In Testimony whereof, I have hereunto set my hand and Notarial seal at office in the City of Saint Louis the day and year last above written.

Seal Hiram W. Leffingwell. Notary Public St. Louis Co. Mo.

Filed & Recorded Novemb. 5. 1862. A. C. Bernoudy. Recorder.

State of Missouri }
County of St. Louis } I, the undersigned, Recorder for said County, certify that the foregoing is a true copy of a Deed from Geo. Bailey to Louis Thannberger, the certificate of acknowledgment and the date of Filing and Recording, as the same remains of record in my office in Book 266, page 398.

Witness my hand & official seal this 21st day of Nov. 1865.

Seal & Rev. Stamp

Julius Conrad. Recorder.

Then read in evidence the deed from George Bailey to Charles H. Peck & James B. Eads, Trustees of Caroline Garnier dated Nov. 2. 1863

Deed from Geo Bailey to Peck & Eads. Trust'ts of Caroline Garnier

U.S. Stamp $40 00/100
G. B. Nov 4. 63

This Deed made and entered into on this

22 Second day of November Eighteen hundred and sixty three by and between George Bailey and Mary A. his wife, parties of the first part, Charles H. Peck & James B. Eads parties of the second part & Caroline Garnier wife of Louis C. Garnier party of the third part, all of St. Louis in the State of Missouri; Witnesseth, That the said parties of the first part in consideration of Twenty seven Thousand ~~and~~ seven hundred and fifty Dollars cash in hand paid the receipt of which is hereby acknowledged do by these presents grant bargain and sell, alien & transfer convey and confirm unto the said parties of the second part the following described Lot or parcel of ground situated in Block numbered Eighty seven (87) of the City of St. Louis in the County of St. Louis & State of Missouri, to wit: Beginning at a point in said Block & in the Western line of Third Street distant one hundred and sixty five feet nine inches northwardly from the intersection of the said West line of Third Street with the north line of Pine Street, thence running Westwardly & parallel with the said North line of Pine Street one hundred and fifty seven feet three inches to a point thence Southwardly and parallel with said Third Street thirty five feet four inches to a point, thence Eastwardly and parallel with Pine Street Twenty five feet three inches to an alley thence Northwardly along the West line of said alley five feet to a point thence Eastwardly and parallel with Pine Street one hundred and thirty two feet to Third Street and thence Northwardly along the West line of said Third Street thirty feet and four inches to the place of beginning and being the same premises acquired by said George Bailey of Vernon B. Stevenson & wife & Sidney S. Stevenson by deed dated December 4, 1856, and recorded in the Recorder's office of St. Louis County in Book 187 page 8. To have and to hold the said Real estate with the appurtenances unto the said parties of the second part & to the survivor of them and to the

legal representatives of such survivor & to their successors and assigns forever. In trust however and to the express use and intent that said premises shall be forever held for the sole separate & exclusive use, benefit and behoof of said Caroline Garnier party of the third part, without any account to her said husband or his assigns or any liability in any manner for his debts and liabilities. And in further trust, that the said Caroline Garnier shall forever have & fully enjoy the rents profits and issues of said premises for which her receipts and acquittances shall forever be a sufficient discharge, that the said parties of the second part & the survivors of them and the legal representatives of such survivor & the successors & successor of said parties of the second part shall always mortgage or in any other manner encumber lease, sell or dispose of in fee simple & execute and deliver such assurances leases and conveyances of said premises in fee or any part thereof in fee, or any interest or Estate therein as may at any time be required by the said Caroline Garnier. Provided always and this Deed is made & executed upon this express condition that in the event the said Caroline Garnier shall die before the said husband the said Louis C. Garnier, & the said premises or any part thereof are then undis-posed of, then the said parties of the second part & the survivor of them & the legal representatives of such survivor & the successor or successors of said parties of the second part shall convey in fee simple unto said Louis C. Garnier the said premises and such parts thereof as are undisposed of as aforesaid & this deed is made & executed upon the further condition that the said Caroline Garnier shall have the right to select other Trustees or Trustee in lieu of the said parties of the second part, at any time by declaration in writing signed and acknow-ledged by her and recorded in the said Recorder's office and upon such selection and election as aforesaid the legal title and all

24 the power herein contained vested in said parties of the second part shall immediately be divested out of said parties of the second part and vest in said new Trustees or Trustee selected as aforesaid & such new Trustees or Trustee shall have all the power & authority vested in said parties of the second part & such new Trustees or Trustee shall perform the trust herein created. And the said George Bailey hereby covenants and agrees to and with the said parties of the second part, their successors & legal representatives, that he, his heirs executors and administrators shall and will Warrant & defend the title to the said premises and every part thereof to the said parties of the second part their successors & legal representatives forever against the lawful claims of all persons whatsoever, except a certain Lease given by him to Louis Thamberger dated October 20. 1862. & recorded in said Recorders Office in Book 200. page 390. and the said parties of the second part covenant to faithfully perform and fulfil the trust herein created.

In Witness Whereof the said parties have hereto set their hands and seals on the day and year first herein written.

Geo: Bailey (Seal)
Mary A. Bailey (Seal)

State of Missouri }
County of St. Louis } S.S. Be it remembered that on this Fourth day of November in the year of our Lord eighteen hundred and sixty three before the undersigned a Notary Public within and for the State and County aforesaid came George Bailey and Mary A. Bailey his wife who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument of writing as parties thereto and they acknowledged the same to be their act and deed for the purposes therein mentioned, and she the said Mary A. Bailey, being by me first made acquainted with the contents of

said deed acknowledged on an examination separate and apart from her said husband, that she executed the same and relinquished her dower in the Real estate, therein mentioned freely and without compulsion or undue influence of her said husband. In witness whereof I have hereunto set my hand and affixed my notarial seal the day and year last aforesaid.

(Seal) Bernard M. Rice. Notary Public St. Louis Co. Mo.

Filed & Recorded Nov 5th 1863. A. C. Bernoudy Recorder.

State of Missouri }
County of St. Louis } SS. I, the undersigned Recorder for said County certify that the foregoing is a true copy of an instrument executed by George Bailey & wf. together with the acknowledgment date of filing and recording thereof, as the same remain of record in my office in Book 283 p 5.

Seal & Rev. Stamp Witness my hand & official seal this 20th day of November A.D. 1865. Julius Conrad. Recorder.

Louis Thawanberger's Test: Louis Thawanberger called by Plaintiffs testified as follows: I am the Lessee named in the Lease made by George Bailey just read — I commenced to build on the lot soon after the Lease was made — The building I put up had its front on 3d street & extended back westwardly about 50 feet — It had a cellar & was 4 stories high above the cellar I had the building under roof towards the end of January 1863 & it was completed about the first of May 1863 — It was a permanent building & was built according to specifications agreed upon between Mr. George Bailey & Myself — In building I used the north wall of the Stevenson building — The timbers of my building were inserted in the wall of the Stevenson building — I occupied

20 the building I placed there until after Bailey sold to Mess Garniers Trustees in the fall of 1863. After they purchased they immediately commenced to build on the rear or back part of the Bailey lot – They made a cellar & put up a permanent building two stories high – The building they put up extended from the one I put up back westwardly to the alley – the building they put up extended as far back as the Stevenson building – Garnier bought me out & my lease was cancelled in Nov. 1863.

On Cross examination this witness said. Garnier commenced to build immediately after he bought which was in Oct. or Nov. 1863 & his building was completed in the Spring of 1864 – The north wall of the Stevenson building is higher than the building I put up & also higher than the one Garnier put up – The timbers of his building were put into the wall of the Stevenson building just as mine were.

Theo Weber's Test: Theodore Weber called by Plffs testified as follows: I am an Architect & builder by profession – I measured the north wall of the Stevenson building before this suit was begun – I also made a computation of the Cost or value of that wall – I measured the whole of the north wall of the Stevenson building from 3d Street to the alley – This paper now shown me contains my measurement & my computation of the cost or value of that wall – This paper contains the quantity of the brick & stone work in that wall according to my measurement of it & the prices at which I computed the work I think were the customary prices for such work in this City

The said paper is as follows

Bill of Measurement by Weber

Measurement of Rubble Masonry and Brick work contained in the party-wall of the Buildings of M. Mrs Schuetze & Eggers; and Louis Garnier. West side of 3d street between Pine & Olive Sts

Rubble Masonry. 105 x 9'0" x 2'6" = 2362 $\frac{F_1}{2}$ = 107 P 8 $\frac{F}{2}$

107 Perches 8½ cubic feet @ $3.25 p. perch $349.05

Brick Work. 1st Story wall. 104'6" x 16'0 x 35 bricks = 58520

2d 3d & 4th Story 104'6" x 40.0 x 28 = 117040

Garret 40'0" x 22.6 x 21 = 18900

do 64.6 x 20 x 21 = 27090

Total 221550

221550. Bricks at $12.50 p/1000 $2769.37⁵

Total $3118.42.⁵

Measured February 23d 1865

Th. Weber Archt.

Theo Weber's Test: cont'd

I built Mr Thauanbergers building & for it used the north wall of the Stevenson building The Stevenson building extends from 3d street westward to the alley about 104 feet — I laid the joists of Thauanbergers building into the Stevenson Wall — Garnier did the same when he built. The Stevenson Wall I think is twenty one inches or two feet thick — When I put up Thauanbergers building I think stone work was worth about $2.75 per perch & Brick work about $10 $\frac{25}{100}$ per thousand — this was in the fall of the year 1863 The next spring I think such work was higher

E. Mortimer's Test:

Mr. E. Mortimer called by Pfeffs testified as follows; I am a builder by occupation I built the Garnier building in

2d the rear of the building put up on the Bailey lot by Thananberger—
The building I put up is only two stories high & extends from the Thananberger building about 53 feet westward to the alley— I used the north wall of the Stevenson building for the building I put up for Garnier— I inserted the joists in that wall. Where the building I put up joins the Thananberger building it is higher than it is at the rear as the roof slopes back westwardly— The building I put— is a permanent substantial building— This building & the Thananberger building are united & make one all through from 3d street to the alley. When I put up that building stone work was worth about $3. per perch & Brick work about $10. per thousand—

Pltff then rested.

Jno. F. Mitchell's Test: Defendants called John F. Mitchell who testified— I am a builder = about a week before the trial of this case at the instance of Mr. Garnier I measured the north wall of the Plaintiffs building— that is to say I measured so much of it as was used by the Thananberger building & so much as was used by the building erected by Garnier— This paper shewn me contains my measurement as I made it of the stone & Brick work so used in the erection of said buildings

The said measurement is as follows.

Bill of measurement by Mitchell

Measurement of Party Wall on South line of Garnier's building
West side of 3rd st between Pine & Olive st.

East	Rubble Wall	$53\frac{5}{12} \times 9' \times 2'6''$ =	1,203.75
West	" "	$51' \frac{4}{12} \times 9' \times 2'6''$ =	1,156.50
			2,360.25 or $110\frac{28}{100}$ Perch

East.	Brick wall	53'×17'×35 brick	= 31.535.00	
"	"	" 53'×41'½ ×28 "	= 59.508.40	
"	"	" 53'×3½ ×21 "	= 3.450.30	94.493.70
West	"	" 51'3 × 16.5 × 35 "	= 29.625.75	
"	"	" 51'3 × 17.5 × 28 "	= 25.137.00	54.762.75
				149.256 45/100

The above heights are to the top of Mr. Garnier's building - ie to the highest part of each building - as measured by me this 16th day of Nov. 1885.

John F. Mitchell

Fees $10 to paid

Jno F. Mitchell's Test: cont'd

The whole of the Stevenson Wall is not used by the Garnier & Thanauberger buildings. What I mean is that one of those buildings is four stories & the other 2 stories high. The Stevenson building I think is 5 stories high.

Chas. H. Peck's Test:

Charles H. Peck One of Defts testified for Defts. as follows: I am a builder. The stone wall or foundation of the Stevenson building is two feet thick & the brick wall is 22 inches. I think the wall is unnecessarily thick for Thanauberger & Garniers building - a less thick wall would answer. I superintended the building of the Stevenson building. It extends from 3d street West to the alley about 104 feet & it is 5 stories high - The building Thanauberger put up is 4 stories high & is not as high as the Stevenson building - Garnier's building is only two stories high - The roof slopes westward towards the alley. The Thanauberger & Garnier buildings join together & make one & extend from 3d street to the alley as far back as the Stevenson wall extends.

This was all the evidence -

30

The Defendants asked the five following instructions

Deft's Instr. Refused

1. The Plaintiffs are not entitled to recover in this suit.

Refused

2. The contract read in evidence by the Plaintiffs is not a contract between George Bailey & Volney S. Stevenson, & the Plaintiffs are not entitled to recover.

Refused

3. Unless George Bailey or his assignees have built upon the lot secondly described in said petition permanent buildings or building so as to use the whole of the wall standing on said lot erected by Volney S. Stevenson, the Plaintiffs are not entitled to recover.

4. If Volney S. Stevenson erected a five story building on the lot first described in said petition fronting on third street by 104 feet deep to the alley — that the stone foundation of the northern wall of said building is two & a half feet thick & that the brick wall is twenty two inches thick for the first story — that Louis Tharnberger Lessee of George Bailey in 1862 & 1863 erected a four story building on the lot secondly described in said petition only 53 feet deep — that Caroline Garnier grantee of George Bailey in 1863 & 1864 erected a two story building on the east side of said alley only 51 feet deep — that in the erection of the two last buildings only a portion of the northern wall of said Stevenson was used — that for the said four story building & said two story building a wall of less thickness than the northern wall of said Stevenson would be ample sufficient, then said Plaintiffs are not entitled to recover.

Refused

5. In any event the Plaintiffs are only entitled to recover the value of so much of that portion of the wall used by said George Bailey or his assignees

at the time of using the same.

Bill of Exc'ps. Which instructions the Court refused to give to which ruling of the Court in refusing the said instructions the Defendants at the moment duly excepted –

The Court found for the Plaintiff against George Bailey $1300, & in favor of said other Defendants –

George Bailey duly filed a motion for a new trial

Mo. for New trial

John E. Schuetze et al
vs.
Charles H. Peck et al

In St Louis Land Court, No. 113. March Term 1865.

And the said George Bailey one of said Defendants in said cause, comes & moves the Court to set aside the finding & Judgment & grant a new trial in said cause for the following reasons, to wit:

1. Because the Court refused legal & proper instructions asked by said Defendant.
2. Because the Court gave illegal & erroneous instructions.
3. Because the Court erred in declaring the law applicable to the case.
4. Because the finding & Judgment ought to have been for said Defendant.
5. Because the damages are excessive
6. Because the Court admitted illegal evidence.

Lackland Cline & Jamison
Attys for said Defendants

Bill of Exc'ps. Which motion was overruled by the Court, to which

decision of the Court in overruling said motion the said George Bailey then and there duly excepted to all which rulings & decisions of said Court the said George Bailey at the moment duly excepted & tendered his bill of exceptions & asked said Court to sign & seal the same & be made a part of the record, which is accordingly done.

C. B. Lord (Seal)

The affidavit for Appeal and Bond filed as aforesaid in this cause, is in the words and figures following, to wit:

Aff't for Appeal

John E. Schuetze et al
vs
Charles H. Peck et al

In the St Louis Land Court
No. 103 to March Term 1865.
State of Missouri
County of St Louis

William C. Jamison being duly sworn upon his oath says, that he is one of the Attorneys of said Defendants in said cause — that the appeal in said cause is not made for vexation or delay, but because this affiant believes that the Appellant George Bailey is aggrieved by the judgment & decision of the Court in said cause.

William C. Jamison

Sworn to & subscribed before me on this 29th day of December 1865.

Robert White Clerk
By E. P. Walsh D. C.

Bond

Know all men, by these Presents, That we Louis C. Garnier as principal, and James L. Waters & William C. Jamison as sureties are held and firmly bound unto John E. Schuetz & Charles F.

Eggers in the sum of twenty seven 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 twenty ninth day of December A.D. 1865.

The Condition of the above Obligation is such, that whereas George Bailey has appealed from the judgment rendered against him and in favor of said John E. Schuetz & Charles F. Eggers in the St Louis Land Court, for the sum of thirteen hundred & ten dollars and sixty cents, together with costs.

Now, if the said appellant will pay all costs and damages that may be awarded against him occasioned by such appeal; and shall prosecute his 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 Land Court to give; and shall, if the judgment or any part thereof be affirmed, comply with and perform the same so far as it may be affirmed; and pay all damages and costs which may be awarded against him by the Supreme Court, then this obligation shall be void, otherwise it shall remain in full force and effect.

Approved by the Court.
Decr. 29th. 1865
Robert White Clerk
By E. P. Walsh D.C.

Louis C. Garnier (Seal)
Jas. L. Waters (Seal)
William C. Jamison (Seal)

St. Louis Land Court October Term 1865.

Be it Remembered, that on this 29th day of December 1865 personally appeared Louis C. Garnier the principal, and James L. Waters & William C. Jamison the securities in the foregoing bond, and acknowledge

that they executed the same for the purposes therein expressed.

In witness Whereof, I hereto set my hand and affix the seal of said Court, the day and year last aforesaid.

Seal

Robert White Clerk

State of Missouri
County of St. Louis } S.S. I, F. A. H. Schneider, Clerk of the Circuit Court of St. Louis County, within and for the County aforesaid, and having custody of the records of the St. Louis Land Court, do hereby certify that the foregoing Transcript, is a true copy of the record and proceedings (as required) had, in the case of John E. Schuetze and Charles A. Eggers plaintiffs and Charles H. Peck and others defendans as fully as the same remains of record in my office.

In Testimony Whereof, I hereto set my hand, and affix the seal of said Circuit Court, at office in the City of St. Louis this First day of February A.D. 1866

F. A. H. Schneider. Clerk

Index

Petition . . . . Page 1 to 6 inclusive
Summons & Sheriff's Return . . " 7.
Ans^r. filed & Answer . . " 8. 9 & 10.
Trial Begun & Judgmt . . " 11.
M^o. for new trial filed & overruled . . " 12.
Aff^t for Apl. & Bond filed & Appeal granted . " 12.
Bill of Excp^s. filed . . . " 13.
Bill of Excp^s. (Embodies the following viz:) . " 13 to 32 in.
Agreemt by K. McKenzie agt. &c & Geo Bailey " 13 & 14.
Assignmt of sd. agrmt by Stevenson to Schuetze et al " 14 & 15.
Deed from V. S. Stevenson to Plffs. . . " 15. 16 & 17.
Lease from Geo Bailey to L. Thaunberger . " 17 to 21 in.
Deed from " " to Peck & Eads Trust^s. of Caroline Garnier " 21 to 25 in.
Louis Thawanberger's Test: . . " 25 & 26.
Theo. Weber's Test: (including Bill of measurement by same) " 26 & 27.
E. Mortimer's Test: . . " 27 & 28.
Jno F. Mitchell's Test: (includg Bill of measurement by same) " 28 & 29.
Chas. H. Peck's Test: . . " 29.
Defts Insts. . . . " 30 & 31.
M^o. for New Trial . . " 31.
Aff^t for Apl. & Bond . . " 32 to 34 in.

1150 words 23.10

Certificate & Stamp 80

23.90

~~XVC~~ ~~207~~ 29 ~~36~~ 29.

March Term 1867

John E. Schuetze & Charles F. Eggers
Aplees

vs

(Charles H. Peck & James D. Eads
Trustees of Caroline Garnier and)
George Bailey. Aplt.

Appeal from Land Court.

Krum & Decker Attys for ~~Res~~
Res.

Sackland Cline & Jamison Attys for Res.

Filed Febry 5th 1865 Appelt.
O. T. Fishback
Clk.

$10,00 pd. by Caroline Garnier.

This Transcript $23.90 paid by Caroline Garnier

1866. Mch 19 Assignment of Errors filed

John E. Schuetze et al
vs Res.
Charles H. Peck et al
Apts.

IN SUPREME COURT,
March TERM, 1866
No. 207,

AND now come the said Appellants and say, that in the record and proceedings of the Court below, in the above entitled cause, there is manifest error, and for error said Appellants assign the following, to wit:

1. That said Court admitted improper and illegal testimony offered by Respondents
2. That said Court rejected proper and legal testimony offered by Appellants
3. That the Court gave ~~to the Jury~~ improper and illegal instructions.
4. That the Court refused to give ~~to the Jury~~ proper and legal instructions offered by Appellant
5. That the verdict was against the evidence.
6. That the verdict was against law.
7. That the verdict was against both law and evidence, and against the law under the evidence.
8. That the verdict was against the weight of evidence.
9. That the judgment was rendered in favor of the Respondents when it should have been rendered for the Appellants
10. That said Court overruled the motion for a new trial, made by Appellants

Lockland Clint & Garnison
for Apts.

And now come the Respondent and for joinder in error say, that there is no error in the record and proceedings of said Court in said cause, as assigned by said Appellant

Brown & Decker
for Res.

No. 207
March Term 1866

John E. Schuetzo
et al Res
vs
Charles H. Beck
et al, Apts,

Assignment of
Errors,

Filed Mch. 19, 1866
O. T. Fishback
Clk

John E. Schnetze et al
Respondents
vs
George Bailey et al
Appellants

In the
Supreme Court
March Term
1867.

Points & Authorities
For Respondent

I. The Court below did not err in admitting in evidence the contract sued on.

a. This contract is that of Stevenson - not being within the rule of Story on Agency § 140 &c, and showing that the intention of the agent was to bind the principal.

Wood v Goodridge 6 Cush. 120.
Spencer v Field. 10 Wend. 87.

b. In any event, it was ratified by the principal and became thereby his contract.

Bredin v Du Barry 14 S & R. 27.
Rogers v Kneeland. 10 Wend 218.
Kelly v Munson. 7 Mass. 319.
Hann v St Joe RR v Marion Co. 36 Mo. 294.
Story on Agency § 242.

II. The appelant Bailey is estopped to deny his liability under the contract in question.

a. It is immaterial whether his covenant be regarded as one running with the land, or the contract held to be akin to one concerning boundaries. In either case Bailey is estopped. In the first as covenantor. In the second by his silence during & since the erection of the wall.

Qui tacet, consentire videtur.
Hempstead v Easton 33 Mo. 142.
Blair etc v Smith 16 Mo. 273.

III. The contract having been sustained the respondents, (grantees of Stevenson), can recover the value of half of the party wall.

Bullock Adm v Peck Ex. 2 Dev 90.

The wall was used in

the sense of the contract. The buildings erected by Bailey's grantees were permanent structures. The fact that these buildings did not cover the entire side of the wall cannot affect the question of damages. The Court below properly refused appellants' instructions. The wall was used in length & this constituted an entire use in the sense of the agreement.

Respectfully submitted

For Respondent.

No. 36.

Supreme Court.
March T. 1867.

Jno E. Schuetze
Wal
Respondent
vs
Geo Bailey Wal
Appellants.

Points & Authorities
For Respondents.

Kruum Dickers & Kruum
For Respn

Filed April 5. 1867
O. T. Fishback Clk
per E. O. McCarty Dep

John E. Schuetze et al, Res,
vs
Charles H. Peck et al, Apts,

In Supreme Court
March Term 1867
No, 36 -

Statement & Brief of Appellant

The Respondents instituted suit in the St Louis Land Court on the 24 of February 1865, against Charles H. Peck & James B. Eads, Trustee of Caroline Garnier, & George Bailey; - & in their petition stated that on the 3 of June 1857, Volney S. Stevenson was the owner of a lot of ground in Block No, 87 of the City of St Louis, fronting 25 feet on 3rd Street by 117 feet deep - that said George Bailey was the owner of the lot immediately north & adjoining said Stevenson's lot, fronting 50 feet 4 inches on 3 Street by 157 feet deep, on the 20 of June 1857 - that on the said 20 of June 1857, the said Stevenson being about to erect a building on his said lot, the said Stevenson & Bailey made & entered into an agreement in writing signed & sealed by them & dated on said day, whereby & in & by virtue of the same the said Bailey consented & permitted said Stevenson to build his northern wall of his intended building upon the ground of said Stevenson & Bailey equally - that is, one half on each of said lots, so that the centre of said wall should rest upon the dividing line of the two lots & said Bailey, in consideration of the building of such

wall by said Stevenson further agreed that whenever the said Bailey or his assigns should build upon his said lot permanent buildings & use the whole of said wall, he would pay said Stevenson one half of the value of the said party wall, to be estimated at the time of such building & said Bailey then delivered said written agreement to said Stevenson – that on the 2d of Nov. 1863 said Bailey conveyed his said lot to said Beck & Eads as Trustees of Caroline Garnier – that on the 5 of July 1864 the said Stevenson conveyed his said lot to said Respondents – that within two years after the date of said agreement the said Stevenson built a good & substantial wall upon the ground of said Stevenson & Bailey equally, so that the centre of said wall rested upon the dividing line of said two lots & that the value of said wall was $3118.42 – that on the day of Nov, 1862 said Bailey leased his said lot to Louis Thomberger who, with the consent of said Bailey & within one year after the date of said lease, erected a permanent building on S Street front & in erecting said building said Lessee used a portion of said party wall – that said lease was cancelled by said Bailey & his Lessee – that after the execution of said deed to said Beck & Eads as Trustees as aforesaid, they erected an additional permanent building on the remaining portion of said lot & in erecting said additional building they used the remaining portion of said party

wall - that the whole of said party wall, that is, all that part & portion of said wall that was placed upon the ground & lot belonging to said Bailey was used by said Louis Thomberger & Peck & Eads as Trustees as aforesaid in the construction & erection of permanent buildings that is now upon said lot - that said Peck & Eads took said deed from said Bailey with knowledge of said written agreement - that said deed was a full warranty deed - that on the 12 of July 1864 said Stevenson assigned said agreement to said Plaintiffs or Respondents - they claimed a lien on said lot conveyed by said Bailey to Peck & Eads as Trustees for $1559.21/100 the half of said wall & asked judgment against said Defendants & against said lot &c &c.

The Defendants in their answer denied, that George Bailey & Volney S. Stevenson executed the agreement mentioned in the petition - denied that said Bailey ever agreed to pay to said Stevenson one half the value of the wall mentioned in said petition - denied that said Bailey ever delivered the said written agreement to said Stevenson - denied that said Stevenson built or erected the said wall in pursuance or in conformity with any agreement made by said Bailey with said Stevenson - denied that said wall was ever worth $3118.42/100 or any sum near that amount

- denied that the whole of said wall or the whole of that part or portion of said wall standing on the lot of ground of said Bailey, lot was ever used by said Louis Thomberger & said Defendants or any of them or either of them in the construction or erection of permanent building, or building - denied that said Beck & Eads received or took the said deed mentioned in said petition, with knowledge of said pretended agreement - denied their liability for $1559,21 (01) or any other sum & asked for judgment.

On the trial which was before the Court sitting as a jury, the Respondents offered to read in evidence the writing under seal executed by Kennett McKenzie Agent of Volney S. Stevenson & George Bailey dated June 20, 1887, which is as follows, to, wit:

This agreement made this 20 day of June 1887, between Kennetth Mackenzie agent for Volney S. Stevenson of the first part & George Bailey of the second part; Witnesseth, that whereas the said parties are proprietors of adjoining lots of ground or parcels of land in Block 87 of the City of St Louis Mo, the northern line of the lot of the said party of the first, being the southern line of lot of the said party of the second part, & whereas it is agreed that said party of the first part in building upon his lot shall put his northern wall upon the ground of said

party of the second part & said party of the first part equally, so that the centre of said wall may rest upon the dividing line of the two lots, now therefore in consideration of said party of the first part so building, his said northern wall the said party of the second part, his executors, administrators or assigns, covenants & agrees that when he or they shall build upon his lot permanent building so as to use the whole of said wall he will pay to the party of the first part or his assigns the value of the one half of said party wall - the said value to be computed & estimated at the time of such building - In witness whereof said parties of the first & second parts have hereto set their hands & seals the day & year above written

Witness — R. Mackenzie (Seal)
Chas. H. Peck — Agent for Volney S. Stevenson
Geo. Bailey (Seal)

The Appellants objected to the reading in evidence this said instrument of writing, because it was not a contract between Volney S. Stevenson & George Bailey - the Court overruled the objection & let the same be read, subject to its legal effect, to which Appellants duly excepted - It was proved on the trial, that Louis Flomberger under the lease from George Bailey built a four story building on Bailey's lot four stories high & extended from 3 Street back west 53 feet

- that the same was a permanent building & was finished in May 1865, - that in the erection of the same the north wall of the Stevenson building was used - that after the Trustees of Mrs Caroline Gomier purchased said lot they erected a two story building in the rear of said Thomberger building extending from said building to the Alley 51 feet - that the same was a permanent building & that the north wall of Stevenson building was used in the erection of the same - that the said Trustees of Mrs C. Gomier purchased the said leasehold of Louis Thomberger - that the north wall of the Stevenson building was higher than the Thomberger building & also higher than the building erected by said Trustees - that the stone wall or foundation the Stevenson building was two feet thick & the brick wall on the same was twenty two inches - that the Stevenson building was five stories high & extended from 5 Street to the Alley 104 feet - that in February 1865, stone work was worth $3.25 per perch & brick work worth $12.50 per 1000. (see record page 27) - that when Thomberger built stone work was worth $2.75 & brick work was then worth $10.25 per 1000. (see record page 27) - that when Mrs. Gomier's Trustees built the two story

building store work was worth $3. per perch & brick work $10 per 1000 (See Record page 28) - The Appellants proved that the whole of the Stevenson (north) wall was not used by the Garnier & Thaumberger buildings - that the Stevenson building was 5 stories high - that the Thaumberger building was 4 stories high & that the Garnier building was only two stories high - that the north wall of the Stevenson building was unnessarily thick for Thaumberger & Garnier buildings - a less thick wall would answer - that the north wall of the Stevenson building as used by the Thaumberger & Garnier building contained 149,256, brick, whereas the whole of the north wall of the Stevenson building contained 221,550 brick -

The Appellants asked the following instructions

1, The Plaintiffs are not entitled to recover in this suit -

2, The contract read in evidence by the Plaintiffs is not a contract between George Bailey & Volney S. Stevenson, & the Plaintiffs are not entitled to recover -

3, Unless George Bailey or his assigns have built upon the lot secondly described in said petition permanent buildings or building so as to use the whole of the wall standing on said lot erected by Volney S. Stevenson, the Plaintiffs are not entitled to recover -

4 If Volney S. Stevenson erected a five story

building on the lot first described in said petition fronting on third Street by 104 feet deep to the Alley - that the Stone foundation of the northern wall of said building is two feet thick & that the brick wall is twenty two inches thick for the first story - that Louis Ghoumberger Lessee of George Bailey in 1862 & 1863 erected a four Story building on the lot secondly described in said petition only 53 feet deep - that Caroline Gonnier grantee of George Bailey in 1863 & 1864 erected a two Story building on the east side of said Alley only 51 feet deep - that in the erection of the two last buildings only a portion of the northern wall of said Stevensons building was used - that for the said four story building & said two story building, a wall of less thickness than the northern wall of said Stevenson would be ample sufficient, that said Plaintiffs are not entitled to recover -

5) In any event the Plaintiffs are only entitled to recover the value of so much of that portion of the wall used by said George Bailey or his assignees at the time of using the same - Which said instructions the Court refused to give, to which refusal the Appellants duly excepted - The Court found & rendered judgment against George Bailey for $1500, & in favor of the other Defendants - George Bailey only filed a motion for a new trial which was overruled, to which he duly excepted & appealed to this Court -

Brief of Appellant,

1. The court below erred in admitting in evidence the contract, & in refusing to give the first & second instructions asked by Appellant.

The petition alleges a contract made between Volney S Stevenson & George Bailey, & the said contract being under seal & made in the name of Kenneth Mackenzie, & in fact & in law his contract & not Stevenson, with George Bailey.

All contracts under seal must be in the name of the principal

1 Story on Agency p. 176-177-178- Sections 147-148-149-150

2 Rents Cons. p. 631,

31 Missouri R. p. 193. Smith vs Alexander

5 Peters R. (U. S) p. 319-349-350-351 Clark vs Courtney

6 Johnson R. p. 93. Bogart vs De Bussy

7 Mass R. p. 14 Fowler vs Shearer

16 Mass R. p. 42 Elwell vs Shaw

23 Wend. R. p. 435-441 Townsend vs Corning

7 Cowen R. p. 435 Stone vs Wood,

10 Wend. R. p. 87 Spencer vs Field

8 Peters R. (U. S.) p. 165 Lutz vs Lenthieno

1 Maine R. (Greenleaf) p. 231 Strickfield vs Little

1 Harris & Johnson R. p. 622-709. Boyer vs Hampton

2, There was no sufficient authority shown or proven authorizing Kenneth Mackenzie to make said contract for Volney & Stevenson.

3, The court below erred in refusing to give the third & fourth instructions asked by Appellant. The Respondents were not entitled to recover against George Bailey, unless he or his assignees used the whole of the wall, for the contract sued upon thus provides. The using of two thirds of the wall is not the whole of the wall. Why should George Bailey pay for that portion of the wall not used by him, nor his assignee, when it is expressly against the provisions of his contract sued upon; & when a wall of less thickness & of course less expensive would answer his purpose, & which influenced him in making the contract. Neither Stevenson nor Respondents were injured by Bailey or his assignees using any portion of the wall which had been built long before, & both Stevenson & Respondents were benefited by Bailey allowing them to erect half of the wall on his lot, thereby enlarging or widening the building

4. If the Respondents were entitled to recover outside of the contract, that they were only entitled to recover the value of so much of that portion of the wall used by Bailey & his assignees at the time of using the same, & the Court erred in refusing to give the fifth instruction asked by Appellant

Ellis & Jamison
Attys. for Appellants

No. 36,
March Term 1867,

John E. Schuetz et,
Respondents
vs
Charles H. Peck et,
Apts,

Appellants Statement
& brief

Filed April 4. 1867
C. J. Fishback Clk
per E. M. Cartz

Clins & James'on

John E. Schnetzer & Charles F. Eggers Respondents
vs
George Bailey et al Appellants.

In the Supreme Court.

March Term 1867.

Statement by Respondents.

This was an action to recover the value of half a partition wall, which was built by the assignor of the respondents, (under an agreement with one of the appellants), and afterwards used by the appellants.

It appears from the evidence, that in the year 1857, Sidney S. Stevenson & George Bailey were the owners of adjacent lots in Third Street Saint Louis. As Stevenson proposed to build upon his lot, an agreement in writing was entered into by himself & Bailey, to the effect, that Stevenson should erect one of the walls of his store partly on his own lot & partly on that of Bailey, and the latter bound himself and grantees to pay to the former or his assigns the value of one half of this wall, whenever they should use it – the value to be estimated at

the time of such use. In 1864, Stevenson conveyed his lot to respondents and assigned to them the agreement with Bailey - relating to the party wall. In 1862, Bailey leased his lot for a term of years to one Thamberger, who entered into possession and erected a permanent building on the premises - and used some fifty feet of this party wall. In 1863, Bailey conveyed his lot to the appellants Peck & Eads trustees of Caroline Garnier, by a general warranty deed. In the same year Thamberger's lease was cancelled. Immediately after the purchase by Peck & Eads, they built upon the remainder of Bailey's former lot & used the rest of the party wall. Thamberger's lease was cancelled by the purchase by the husband of Mrs Garnier.

Evidence was introduced which tended to prove the value of half of the party wall. It was shown that Stevenson's building was five stories high - while Thamberger's was four & Garnier's two stories high.

The defendants, (appellants), asked the following instructions, which were refused by the

Court, sitting as a jury:

1. The plaintiffs are not entitled to recover in this suit.

2. The contract read in evidence by the plaintiffs is not a contract between George Bailey & Volney S. Stevenson & the plaintiffs are not entitled to recover.

3. Unless George Bailey, or his assigns have built upon the lot secondly described in said petition, permanent buildings or building, so as to use the <u>whole</u> of the wall standing on said lot erected by Volney S. Stevenson, the plaintiffs are not entitled to recover.

4. If Volney S. Stevenson erected a five story building on the lot first described in said petition fronting on Ohio street, by 104 feet deep to the alley - that the stone foundation of the northern wall of said building is two & a half feet thick & that the brick wall is twenty two inches thick for the first story - that Louis Thaumberger lessee of Geo Bailey in 1862 & 1863 erected a four story

building on the lot secondly described in said petition only 53 feet deep - that Caroline Gannier grantee of Geo Bailey in 1863 & 1864 rected a two story building off the last side of said alley, only 51 feet deep - that in the rection of the two last building only a portion of the northern wall of said Stevenson was used - that for the said four story building & said two story building a wall of less thickness than the northern wall of said Stevenson would be amply sufficient, then said Plaintiffs are not entitled to recover.

5. In any event, the plaintiffs are only entitled to recover the value of so much of that portion of the wall used by said George Bailey or his assignees at the time of using the same. - Defts duly Excepted -

The Court found for the plaintiffs against the defendant George Bailey, who moved for a new trial, and, this motion having been overruled, the case comes to this Court on appeal.

No. 36.

Supreme Court
March T. 1867.

John E. Schnetze
et al
Respondents
vs
Geo Bailey et al
Appellants.

Statement for
Respondents

Kronen Dickerson
For Respondents.
Filed April 5. 1867
C. T. Fishback Clk
per E. O. McCarty Dep

John E. Schnetze et al. Res.
v.
Charles H. Peck et al. Appts.

In the Supreme Court
March T. 1867.

Opinion of the Court.

The contested questions arise upon the instructions refused for the defendants, touching the effect that is to be given to the contract in writing on which the action is founded. This was an agreement "between Henrietta McKenzie agent for Volney S. Stevenson of the first part and George Bailey of the second part", witnessing that "whereas the said parties are proprietors of adjoining lots in Block 87 of the city of St. Louis, the northern line of the lot of the said party of the first part being the southern line of the lot of the said party of the second part", and continuing to the end in the same style, the said party of the second part agreeing to pay to the said party of the first part one half of the cost of building the party wall which he was about to erect, whenever he should have occasion to build on his lot, and should use the whole of said party wall, and concluding thus:

"In witness whereof said parties of the

first and second parts have hereto set their hands and seals the day and year above written.

Witness: } K. McKenzie (L.S.)
Chas. H. Peck. } Agent for Volney S. Stevenson.
Geo. Bailey (L.S.)"

It appears from the evidence that it was Volney S. Stevenson who was in fact the proprietor of the adjoining lot, and built the party wall, and was really the person intended as "the party of the first part"; that the contract so made was adopted by Stevenson, and by him assigned to the plaintiffs to whom he had conveyed the lot on which his building was erected; and that, subsequently, buildings had been erected by Bailey and three belonging under him, on his lot, using the party wall, the front building being four stories and the rear building two stories only in height; the plaintiffs' building being five stories in height. The agreement read that "when he or they shall build upon his lot permanent buildings so as to use the whole of said wall, he will pay to the party of the first part, or his assigns, the value of the one half of said party wall, the said value to be computed and estimated at the time of such building". Judgment was recovered against Bailey alone for the

sum of $1310.40, one half of the cost of the wall being proved to have been $1359.21.

The court refused to instruct the jury for the defendants to the effect that the plaintiffs were not entitled to recover on the evidence, or that, in any event, they were not entitled to recover for more than the value of that portion of the wall which was used by Bailey or his assigns, at the time of using the same. The plaintiffs did not ask for any instruction.

The determination of the case depends upon the construction that is to be given to the written contract, as to the right of the plaintiffs to sue upon it, and as to the use of the whole wall.

Where a sealed instrument purports in the body of it to contract in the name of the principal and to bind him, the execution of it by the agent in the manner in which this contract was signed would be sufficient to make it the contract of the principal, if there was an authority under seal; and whether or not such is the purport of the instrument, is to be gathered from the general tenor of it, rather than from any

particular clause, and if the intention of the parties can be ascertained, such intention is to be carried into effect, if it can be done consistently with the rules of law. (Hale v. Woods, 10 N.H., 470; Deming v. Bullitt, 1 Blackf., 241; Wilks v. Back, 2 East, 142; Wilburn v. Larkin, 3 Blackf., 55; Vannum v. Evans, 2 McMull., 409; Shanks v. Lancaster 5 Gratt., 118; Martin v. Dorlch, 1 Stew. 479).

Parol evidence was admissible to explain the latent ambiguities of the instrument, and to aid in interpreting it. (Smith v. Alexander, 31 Mo., 193). Upon the face of the paper, without the aid of extrinsic evidence, there might be room for doubt whether the words "Kenneth McKenzie agent for Volney S. Stevenson of the first part" referred to the agent or the principal as the party contracting; but the general tenor of the instrument purports that it was the proprietors of the lots who were in fact the contracting parties, and the evidence aliunde very clearly shows that it was Stevenson, and not McKenzie, who was such proprietor. We think the case comes within the reasoning that would

make this the contract of the principal; but as a contract under seal, it is ineffectual for want of an authority under seal.

Now, if this were an instrument affecting real estate, this would be conclusive of the case; but when the contract relates to personal property only, or is a mere agreement to pay money, though but as a ~~sealed~~ contract under seal, the seal is unnecessary, and may be disregarded as surplusage, and it will be good as a contract not under seal, provided there were authority by parol for its execution; and such parol authority may be proved by a subsequent ratification. (Dispatch Line v. Bellamy Manuf. Co., 12 N.H., 205; Hunter v. Parker, 7 Mees. & Wels., 322; Cooper v. Bantram, 5 Binn., 613; Van Ostrand v. Reed, 1 Wend. 424; 1 Amer. Lead. Cas. (3d. ed.) 587).

Here, the principal adopted the contract as his own, and assigned it to the plaintiffs as such, and there was a clear ratification of the authority by parol.

Under the present system of practice, the technical distinction between the three forms of action no longer exist. The petition states the material facts of the case, and if there be a good cause of action stated, it matters not whether it be such as would have been a assumpsit or covenant, under the former practice. This petition states the case as upon an agreement in writing not under seal, and we think the allegations are sustained by the proofs, and that there is no material variance.

As to the matter of "the whole wall", the contract must receive a construction with reference to the subject-matter and the intent of the parties. It could not have been intended that the buildings to be erected by the defendants should literally cover every inch of the whole surface of the party wall. The meaning of the parties must have been that a substantial use of the whole wall should be considered enough; and there was ample evidence on this subject to justify the verdict of

the jury. Some allowance appears to have been made for the difference in the extent of the two buildings. We find no sufficient reason for disturbing the verdict.

It results from these views, that that there was no error in refusing the defendants' instructions.

Judgment affirmed.

The other judges concur.

N. Holmes.

36 /

John E. Schuetze
et al. Res.
v.
Charles H. Peck et al.
Appts.

Opinion
Affirmed.
Holmes.

Filed April 15. 1869
C. P. Fishbackak
per E. M. Carf Dep