Bassett, Jonathan M. et al vs Murlatt, George 1857 Buchanan Co/12th Cir 222/9

77/1

THE STATE OF MISSOURI, ss.

The State of Missouri, To the Judge of the Buchanan Court of Common Pleas in said State, GREETING:

WHEREAS, In the Record and Proceedings in a certain cause lately pending in the Court of Common Pleas of Buchanan County,

wherein Jonathan M Bassett and others, use of The City of Saint Joseph was plaintiff, and Geo. Merlett, Frederick W. Smith, Joseph Robidoux and others were defendants.

in an action of manifest error hath intervened, to the great damage of the said plaintiffs as by their complaint, we are informed.

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

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

Wm E Dunscomb

Index in case of

City of St. Louis &c

vs

George Merlatt, et als

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Be it remembred that among the Records and Proceedings of the Buchanan Court of Common Pleas within and for said County and State of Missouri among other are the following:

"Jonathan M. Bassett, Hugh D. Lauthen
"James Pendleton Joseph C. Hull.
"Preston T. Moss. Armstrong Beattie and
"John O. Fishn who sue to the use of
"the City of St. Joseph
" against
"George Merlatt, Joseph Robidoux
"Frederick W. Smith and Isadore Paulin

Be it remembred that on the 14th day of May A. D. 1856 the plaintiffs filed in the office of the clerk of the Buchanan Court of Common Pleas their petition which is in words and figures following to wit:

Jonathan M. Bassett. Hugh D. Lauthen James Pendleton Joseph C. Hull. Preston. T. Moss. Armstrong Beattie and John O. Fishn who sue to the use of the City of Saint Joseph. Plaintiffs against Civil action George Merlatt Frederick W Smith. Joseph Robidaux and Isadore Paulin. Defendants

In the Buchanan Court of Common Pleas

Buchanan County SS.

Plaintiffs state that on the 11th day of April AD 1855 the said Jonathan M. Bassett was Mayor of the city of Saint Joseph and the said Hugh D Lauthen James Pendleton Joseph C. Hull. Preston T Moss Armstrong Beattie and John O Fishn were the council men of said city. That defendants by their Bond bearing date on said 11th

day of April AD 1855 acknowledged themselves to be held and firmly bound to plaintiffs by the name style and discription of the Mayor and Council men of the city of Saint Joseph in the sum of five thousand dollars and for the payment of which said sum well and truly to be made they the defendants therein and by said bond bound themselves their heirs executors and administrators.

That said bond was and is subject the following condition towit = That if the said George Merlatt shall well truly and faithfully discharge and puform all acts and duties required of him in his official capacity as Marshall and Ex-Officio Collector of the city of Saint Joseph by any law of the Statute of Mispanii or ordinance of the city of St Joseph existing at the date of this bond or subsequently passed then this bond shall be null and void and of no effect otherwise to remain in full force and virtue in law - a certified copy of said bond is filed herewith Marked "A" and made part of this petition - the original being on file in the office of the city Registor the same cannot now be filed herewith. Plaintiffs further state that defendants have not nor has either or any of them paid said sum of five thousand dollars according to the tenor and effect of said bond nor has the said George Merlatt well truly and faithfully discharged and performed all acts and duties required of him in his official capacity as Marshall and Ex. Officio Collector of the city of St. Joseph by any law of the ~~States~~ of Mispanii or ordinance of the city of Saint Joseph existing at the date of said bond or subsequently passed, but so to do he has failed in this towit. By the provision of Article Second of an ordinance of the city of Saint Joseph entitled an ordinance in relation to and for the collection of taxes and other revenue of the city approved August 22 1851 which was in

force in said city on the 11th day of April 1855 and continues to be in force; the said George Merlatt as Marshall and Ex Officio Collector of the city of Saint Joseph for the year 1855 was required to collect all accounts for taxes placed in his hands for collection and on the first Mondays in each month to pay to the treasurer all monies collected by him on account of the city which he has failed and neglected to do. That the tax book of the city of Saint Joseph for the year 1855 on which was charged taxes on real and personal property amounting in the aggregate to the sum 4990 dollars and sixty three cents. and the further sum 1075 dollars for poll tax. was delivered to him for collection in pursuance of the provisions of an ordinance. Entitled an ordinance establishing an assessor and regulating an assessment of property subject to taxation approved April 16th 1851 and which was in force on the 11th day of April 1855 and still continues in force. That the said George Merlatt collected of taxes so charged on the said tax Book on real and personal property for the year 1855 amounting in the aggregate to the sum of 4928 dollars and 47 Cents. In pursuance of the provisions of said ordinance entitled an ordinance in relation to and for the collection of taxes and other revenue of the city Approved August 22. 1851. the said George Merlatt as Marshall and ex officio Collector of the city of St Joseph collected on retailers license the sum of 790 dollars – an exhibition license the sum of 92 dollars and fifty Cents an Pedlers license the sum of 15 dollars – on Hawkers License the sum of five dollars. an auction licenses the sum of 33 dollars and 64 Cents. on Money Brokers Licenses the sum of 80 dollars – On Billiard Table Licenses the sum of 90 dollars – on Dram shop Licenses 2250 dollars and the sum of 16 dollars and

3 cents being 6 per cent and $267.25 taxes on delinquent Lots advertised – That on said several sums he has paid to the Treasurer at various times in the aggregate the sum of 4907 dollars and fifty seven cents and has accounted (toward) for amount of delinquent personal property tax $6.09 tax and cots on lots bought by city $14.74 and errors in assessment &c $56.07) for $76.90 being the aggregate of said last mentioned sums. The residue of said sums so received by him as aforesaid amounting in all to the sum of 3378.33 by which by said last mentioned ordinance and the terms of said bond he was required to pay to the Treasurer prior to the 12 day of April 1856 to do which he has hitherto wholly neglected failed and refused and still neglects fails and refuses to pay the same,

Plaintiffs further state that by virtue of the provisions of the ordinance last aforesaid the said George Merlatt as Marshall and Ex Officio Collector of the city of Saint Joseph was required to collect the poll tax charged on the tax book and delivered to him as aforesaid and pay the same to the Treasurer prior to the 12th day of April 1856 – that he has accounted (– toward by a list of delinquent Poll tax returned –) for the sum of 363 dollars. and the further sum of 310 dollars and 42 cents paid to the treasurer. the residue of said sum amounting to the sum of 401 dollars and fifty Eight cents. he has hitherto wholly neglected failed and refused and still neglects fails and refuses to pay the same to the Treasurer. That the said George Merlatt as Marshall and Ex Officio Collector of the city of Saint Joseph for the year 1855 in pursuance of the provisions of an ordinance of the city of Saint Joseph entitled an ordinance concerning the Mayors Court regulating the proceedings therein. Approved July 28th

1851 and which was in force on the 11th day of April 1855
and still continues in force, has received for fines ass
essed in favor of said city the sum of $668 and forty cents
that he has paid to the treasurer and otherwise accoun
ted in the aggregate for the sum of $507.55 cents. the
residue of said sum to wit - the sum of 160 dollars
and 85 cents. he was required by an ordinance entitled
an ordinance in relation to, and for the collection of
taxes and other revenue of the city aforesaid to pay to
the treasurer prior to the 12th day of April 1856. but so
to do he has hitherto wholly failed neglected and re
fused and still neglects fails and refuses to pay the
same. That by reason of the failure and neglect of the
said George Merlatt faithfully to pay over said se
veral sums ~~of money~~ of as required by said ordin
ance and the terms and conditions of said bond the
same has became and is forfeited to the said Jona
than M Bassett Mayor as aforesaid and the said
Hugh D Lauthen. James. Pendleton. Preston J. Mos
Joseph C Hull. Armstrong Reattie and John O Fisher
Councilmen as aforesaid to the use of the city of Saint
Joseph whereby and by reason whereof the said def
endants became and are indebted to the said Jon
athan M. Burgett & Hugh D Lauthen. James. Pendleton. Preston
D Mos. Joseph C. Hull. Armstrong Reattie and
John O Fisher by the name style and description of the
Mayor and Councilmen of the city of Saint Joseph to
the use of the city of Saint Joseph in the sum of five thou
sand dollars and for which judgment is asked

Alexander Davis city attorney
of the city of St Joseph Mo

Alexander Davis agent and city attorney of the
city of Saint Joseph makes oath and says he
believes the foregoing petition and the matter and

things therein as stated are true to the best of his knowledge

Alex. Davis

Sworn to and subscribed before me this 14th day of May 1856 William Ridenbaugh Clerk Buchanan Count of Common Pleas

Copy of Bond Marked "A"

Know all men by these presents that we George Merlatt as principal and Frederick W Smith. Joseph Robidaux and Isadore Paulin as his securities are held firmly bound unto the Mayor and Councilmen of the city of Saint Joseph in the sum of five thousand dollars for the payment of which well and truly to be made we bind ourselves our heirs executors and administrations firmly by these presents sealed with our seals and dated this 11th day of April AD 1855 The condition of the above bond is such that whereas the above bound George Merlatt has been duly elected Marshall of the city of Saint Joseph for the period of one year from the second Monday in April 1855. Now if the said George Merlatt shall well and truly and faithfully discharge and perform all acts and duties required of him in his official capacity as Marshall and Ex officio collector of the city of Saint Joseph by any law of the state of Missouri or ordinance of the city of Saint Joseph existing at the date of this bond or subsequently passed then this bond shall be null void and of no effect otherwise to remain in full force and virtue in law.

George Merlatt. (Seal)

F. W Smith (Seal)

J. Robidaux (Seal)

I. Paulin (Seal)

The form of the above bond is approved by me this 11th day of April 1855 John Scott. city Attorney

The sufficiency of the security of the above bond is approved by me this 11" day of April 1855
J M. Bassett Mayor

State of Michigan
County of Buchanan City of Saint Joseph

I William C. Doole. Register of the city of St Joseph do hereby certify that the foregoing is a true copy of the official Bond and the approvements thereon of George Merlatt as Marshall and Ex Officio Collector of the city of Saint Joseph for the year commencing on the second Monday of April 1855. In testimony whereof I have hereunto set my hand and affixed (Seal) the seal of the city of Saint Joseph at my office this 14" day of May 1856
William C. Doole Register

Copy of writ

State of Michigan County of Buchanan: ss.

The State of Michigan to the sheriff of Buchanan County Greeting = you are hereby ~~commanded~~ required to summon George Merlatt. Frederick W. Smith. Joseph Rabideux and Isadore Paulin that they be and appear in our Buchanan Court of Common Pleas before the Judge thereof at the Court House in Saint Joseph on the first day of the next term ~~thereof~~ of said to be begun and held on the 9" day of June 1856 then and there to answer the petition of Jonathan M. Bassett. Hugh D Lanthum. James Pendleton Joseph C. Hull. Preston D. Moss. Armstrong Beattie and John O Fish who sue to the use of the city of Saint Joseph. And Have you then this writ

Witness William Ridenbaugh Clerk of the Circuit Court and Ex Officio Clerk of the Buchanan Court of Common Pleas with the seal thereof affixed at office in Saint Joseph this 14th day of May AD 1856

(Seal)

William Ridenbaugh Clerk

And whereas afterwards to-wit — on the 16th day of May 1856 the foregoing Petition and writ was returned by the Sheriff of said County of Buchanan Missouri. with his endorsement as follows to-wit

" I served the within petition and writ upon George Merlatt by delivering to George Merlatt a true copy of petition and writ. also by delivering a true copy of the within writ to Frederick W Smith. Joseph Robidoux. and Isadore Paulin. Dane in Buchanan County State of Miss and this 16th day of May 1806.

Joseph B Smith. Shff. B.C.
By L. St. Sheridan Deputy

And whereas afterwards to-wit on the 14th day of June 1856. and 6th day of said term this cause coming on for hearing. Hon. Washington Jones. being said Judge of said Court and entry of record was made in said Court. as follows.

City of St Joseph
vs
George Merlatt
and others
} Pet.

By agreement of parties defendants have leave to file answer. to plaintiffs petition 30 days before the next regular term of this court.

9. And whereas afterwards to wit. on the 9" day of August AD 1856 there was filed in the office of the Clerk of the Court of Common Pleas. the defendants answer. which said answer is in words and figures following to wit

Jonathan M. Bassett. Hugh D Lauthen. James Pendleton Joseph C. Hull. Preston. F Mass Armstrong Beattie and John O. Fisher who sue to the use of the city of Saint Joseph } Plaintiffs

Against }

George Merlatt. Fred. W. Smith. Joseph. Robidaux and Isadore Paulin } defendants

In the Buchanan Court of Common Pleas

June term 1856

Defendants George Merlatt. Joseph. Robidaux ~~and~~ Isadore Paulin and Frederick W Smith admit the execution of the Bond sued in manner and form as charged. They admit that the Tax Book of the city of Saint Joseph for the year 1855. on which was charged taxes to the sum $4990.63. and $1075. poll tax was delivered to said Merlatt. for collection. But they deny that he collected the sum $4928.47 as charged in said petition on said tax Book on real and personal property for the year 1855. They further admit that he collected on retailers licenses $790- Exhibition Licenses $92.50. Pedlars Licenses $15. Hawkers Licenses $5. auction licenses $33.64. Money Brokers Licenses $80. Billiard Table Licenses $90. Dram shop licenses $2250. & $16.03 on delinquent Lots advertised and sold by Marshall and Collector. But they deny. that on said several sums aforesaid. said Merlatt had only paid at the commencement of this suit the sum of $4907- and ~~that~~ state the fact to be that in and for the year 1855 and whilst said Bond sued on was in full

306 force defendant Merlatt paid into the city Treasury on
307 Taxes and charges assessed before the commencement of
308 this suit the sum $76 29. 34. That his commission
309 for collecting and paying over said sum at 6 pr
310 cent. is $457. 76. to which he is entitled. That on said char
311 ges he is entitled to a credit $76.90. for delinquent list
312 personal property Tax. 6.09 Tax and costs on lots
313 bought by city $14.74 and errors in assessment &
314 $56.07. That since said suit was commenced
315 said Merlatt has paid into said City treasury on
316 said city Revenue for the year 1855 the further sum
317 of 138.20 which with his commission thereon he prays
318 may be allowed him.
319 Defendants admit that said Merlatt
320 stands charged with amount of Poll tax of $1075. for
321 1855 which is denominated street fund. but deny that
322 said Merlatt has failed to pay to the treasurer of
323 the city of Saint Joseph the residue of said sum
324 amounting to $410.58 or any other sum and state the
325 fact to be that in and for the year 1855 whilst
326 said bond was in full force and before the comm
327 encement of this suit said Merlatt had accounted
328 for $363. by list of delinquent poll tax - and paid
329 into the city treasury the sum of $869. 27. on said
330 fund which with his commission of six per cent
331 making $5155 which over pays his liability on said
332 street fund $198.82 - which he prays may be allowed
333 him as a sett off in this cause. also since this suit was
334 commenced said Merlatt has paid on said street fund
335 for 1855 $23.00. which he prays may be allowed
336 Defendants further admit that for the year 1855 said
337 Merlatt received for fines assessed in favor of said
338 city called the Mayors court fund. the sum of $668.
339 40. But deny that he failed to account for a

11. residue of said fund amounting to the sum of $160.85 or any other sum. But they charge that within and for the year 1855 whilst said bond was in full force and before the commencement of this suit. said Merlatt paid into the city Treasury and accounted for said fund to the amount of $741.17. which with 6 per cent commission thereon amounting to $44.70. over pays his liabilities therefor in the sum of $117.18 which they pray may be allowed as a sett off in this cause

Defendants deny any default as charged. say that said Merlatt has during the year 1855 and since the commencement of this suit paid the full amount of the revenue of the city of Saint Joseph for the year 1855. Deny that their said Bond has been forfeited and pray to be dismissed with their costs

Hughes Woodson and Vories
attys for defendants

George Merlatt for himself and as agent for his co-defendants Joseph Robidoux. Frederick W. Smith and Isadore Paulin makes oath and says he believes that the foregoing answer and the matters therein as stated are true George Merlatt

Subscribed and sworn to before me this 9th day of August 1856 W. Ridenbaugh Clerk

And whereas afterwards to wit. on the 11th day of September 1856. an order was made in court and entered of record. Hon. Joseph. J. Wyatt sole Judge. as follows to wit —

City of Saint Joseph
vs
George Merlatt. Isadore Paulin
Frederick W. Smith & Jos. Robidoux } Came now

said parties by counsel and the issue joined coming on for trial a Jury came to wit - Walker G. Reed John E Barrow. Absalom Fants. William Giddens S. F. Floyd. John Devorss. Samuel Hill, William Devorss. James A Matney. Weston J. Everett William B. Powe and Joseph. Gabbert. in all twelve good and lawful men. residents of our said County of Buchanan. who being elected tried and sworn. the truth to speak upon the issue joined in the premises and some progress having been made in this cause said jurors are allowed to disperse until to morrow. morning at 9 Oclock under the strict charge of the Court.

And whereas afterwards to wit on the 12" day of September and 5" day of said term. this cause again coming on for hearing Hon. Joseph J Wyatt sole Judge of said Court. an order was entered of record as follows to wit

The city of Saint Joseph
vs
George Merlatt
Frederick W Smith
Joseph Robidoux &
Isadore Paulin

Petition

Came now said parties by counsel and the Jury of Jurors aforesaid also come and the trial of this cause being submitted to the Jury. and they failing to agree are allowed to disperse under the charge of the Court. until to-morrow morning at 9 Oclock

And whereas afterwards to wit. on the 13" day of

September 1856. this cause again coming on for
trial Hon. J. J. Bryatt. Judge. the fallowing was
entered of record. Court =

City of Saint Joseph
vs
George Merlatt
Isadore Paulin
Fred. W Smith &
Joseph Robidoux
} Petition

Came now said parties by counsel
and the jury of Twelve Jurors aforesaid also come and return
the fallowing verdict. "We the Jury in the case of the
city of St Joseph against George Merlatt et als ren-
-du a verdict in favor of plaintiff for $1540. 42.
John. E. Barnes. Foreman.

It is therefore considered
by the Court. that the said plaintiff recover of the said
defendants. the sum of fifteen Hundred and forty dol
lars and forty two cents by the Jury aforesaid asses
sed and also the costs and charges herein expended
and have thereof execution."

and whereas afterwards to wit on the 13th day of
September 1856. an additional order was entered
of record as fallows. Court —

City of Saint Joseph
vs
George Merlatt
Isadore Paulin
Fred. W. Smith &
Joseph Robidoux
} Petition

Came now said plaintiff

by attorney and files his motion to set aside the verdict of jury rendered in this cause and to grant him a new trial. and the Court being well advised in the premises overrules said motion

And by agreement of parties plaintiff has leave to file Bill of exceptions by the next regular term of this Court.

And whereas afterwards at a regular term of this Court. on the 13th day of December. 1856. and 6th day of said term J. J. Wyatt. Sole Judge. this cause coming on for hearing an order was entered of record. as follows to wit —

The city of Saint Joseph
vs
George Merlatt
Isadore Paulin
Frederick W Smith &
Joseph Robidaux

Petition

Came now said plaintiff by his attorney and files his Bill of Exceptions herein which are signed sealed and enrolled and allowed by the Court and ordered to be placed among the records of said Court. which said Bill of Exceptions are in words and figures following

Jonathan M. Bassett & others
To the use of the city of Saint of
Saint Joseph
vs Civil action
George Merlatt and others

In the Buchanan Court of Common Pleas. Be it remembered that

in the progress of this cause the issue. joined coming
on for trial the plantiffs to maintain the issue on their
part proved a receipt executed by George Merlatt
as Marshall and Ex. Officio collector of the city of
Saint Joseph for the tax Book of said City for the
year 1855 and then gave said tax Book in evidence
on which was charged taxes assessed on real and
personal property amounting in the aggregate to the
sum of 4990 dollars and 63 cents and the further
sum 1075 dollars for poll tax.

They then gave in evidence the following
statements of the accounts and settlements of the said
George Merlatt as collector of the city of St Joseph
for the year 1855

1855 – Sept. 12. For aggregate amount of taxes on
real and personal property for the year 1855

$4990.63

1856. April 12. for amount collected on retailers
License 790.00
" " " Exhibition " 92.50
" " " Pedlar " 15.00
" " " Hawkers " 5.00
" " " Auction " 33.64
" " Money Brokers. " 80.00
" " Biliard Table 90.00
1856. April 12. Amount collected on Dramshop license 2250.00
6 per cent on $267.25. on delinquent
Lots advertised 16.03

$8362.80

1856. Oct. – By Treas. Receipt for. 863.01
1856 April 12. Amount of tax and
costs lots bought by the city Feb 1856. 14.74
Delinquent personal tax
for 1855. as per list returned

439	man oath		6.09	
440	Errors in assessment in real			
441	estate assessed twice &c.		56.07	
442	6 pr Cent on 8285.90.		497.15	
443	to Balance.		6925.74	
444			8362.80	$8362.80
445	1856. April 12" for Balance			$6925.74
446	also			
447	1856. Apl 22. By Treasurers Receipt		3719.89	
448	" May 1. " "		324.67	
449	" June 10 " "		86.20	
450	" Aug 4 " "		80.00	
450	" " 9 " "		30.00	
451			4240.76	
452				
453	And also the fallowing			
454	1855 Sept. 12. For aggregate amount			
455	Poll tax as pr tax 1855			$1075.50
456	1856 April 12. By amount delinquent			
457	Poll tax as pr report.		363.00	
458	By commission on 7125 6 pr ct.		42.72	
459	Amt to Balance.		669.28	
460			$1075.50	$1075.50
461				
462	1856. April 12. For Balance			669.28
463	1856. April 22. By Treasurers Receipt		310.42	
464	June 10 " " "		23.01	
465			333.42	
466	And also add the fallowing			
467	1855. July 9. for amount of funds collected			
468	for quarter ending this day			230.95
469	1855. Oct. 8. For amount of fines collected			
470	for quarter Ending this day			194.50
471	1856 Jany. 14" For amount of fines collected			

for quarter ending this day 210. 95

1856. April 12. For amount of Fines collected
for quarter ending this day 32. 00

$ 668. 40

1855 act By Treasurers Receipt 299. 75
" " Amt. to Balance 328. 85
Commission on 668.40. 40. 10

668. 40. $ 668. 40

And also the following

1856. April 12 For Balance due 328. 55
1856 " 22. By Treasurers Receipt 207. 80

$ 120. 75

The defendants to maintain the issue on their part gave in evidence the following receipts for money paid into the treasury — having first proved the Treasurers signature to them to wit =

1. Received April 25th 1855 of George Merlatt an account of street fund. six dallars. John Lund. Treas.
2. Rec'd May 11. 1855. of George Merlatt 550 dallars on account of city revenue. John Lund. Treas.
3. Rec'd May 10. 1855. of George Merlatt Sixty nine dollars and Nine cents on account of street fund. John Lund. Treas
4. Received April 25. 1855. of George Merlatt two Hundred and Eighty six dallars and twenty six cents. on a/c of City Revenue. John Lund. Treas.
5. Rec'd May 10th 1855. of George Merlatt 105 52/100 dollars on a/c, city Revenue. John Lund. Treas.
6. Rec'd April 12th 1855 of George Merlatt city collector $1511 49/100 dallars on account of city

1511. 49/100

revenue John Curd Treasurer.

7th Rec'd April 22d 1856. of George Merlatt city collector an account of General Administration fund 37 19 89/100 $
John Curd. Treas.

8th Received May 8th 1856. of George Merlatt city collector 324 67/100 dollars on a/c city revenue.
John Curd. Treas.

9th Rec'd June 9th 1856. of George Merlatt 86 20/100 dollars on account of general Administration fund.
John Curd. Treas

10th Rec'd Aug. 9th 1856. of George Merlatt city collector 30 dollars on a/c city revenue for 1855.
John Curd. city Treas

11th Rec'd of George Merlatt city collector 86 31/100 dollars on general Administration fund St Joseph Oct 18th 1855.
John Curd. Treas
By Isaac Curd.

12th Rec'd Aug. 2d 1855. of George Merlatt city collector 268 43/100 dollars on account of city revenue.
John Curd. Treas.

13. Rec'd April 22. 1856. of George Merlatt city collector 310 42/100 dollars on account of Street fund.
John Curd. Treas

14th Rec'd June 9th 1856 of George Merlatt 23 dollars on a/c. Street fund.
John Curd. Treas.

15. Received Aug. 2. 1855. of George Merlatt city
Collector 473 dollars 76. cents.
John Curd. Treas.

16th Rec'd of George Merlatt. city Collector
299 75/100 dollars belonging to Mayors Court fund
Oct. 18. 1855. John Curd Treas
By Isaac Curd

17th Rec'd April 26. 1856 of George Merlatt city
collector 207 80/100 dollars on a/c. of Mayors
Court fund.

18th Rec'd Aug. 2. 1855. of George Merlatt city
collector two hundred and thirty three dollars
62 cents on a/c Mayors Court fund
John Curd Treas

Defendants then closed their case

Plaintiffs then gave in evidence the following accounts and settlements of the said George Merlatt as the collector of the city of St. Joseph for the year 1854

1854. Aug. 25. For aggregate amount of taxes upon real and personal property for the year 1854. 4753. 03

1854 For amount collected on retailers License		
	Pedlars Licence	25. 00
	Exhibition "	33. 50
	Tavern "	90. 00
	Hawkers "	15. 00
	Auction Licence & duties	69 24
	Ten Pin alley "	15. 00
	Money Brokers	80. 00
	Biliard	30. 00

574		Dram shops	700.00
575	6 per cent on Lots advertised and		
576	collected before sale. 266 77/100		16.00
577	6 per cent on deliniquent Lots advertised		
578	and sold as per report of Sales.		8.23
579	For amt. collected for rent of stalls		109.37
580			$ 6871.37
581	April 7. 1855		
582	By amount of deliniquent		
583	personal property for the year 1854 as		
584	per List returned under oath	$ 7.05	
585	Amount of tax and cats on		
586	Lots bought in by the city Feb. 1855.	$ 8.71	
587	Commission 6 per cent on	411.33	
588	6855.61.	411.33	
589	1854. July 11. By Treas. Receipts	182.00	
590	" 22 " " "	126.00	
591	Oct 9 " " "	245.50	
592	Nov 9. " "	125.00	
593	" 18. " "	50.00	
594	" 23. " "	100.00	
595	1855 Jany 24. " "	2082.10	
596	Feby 16. " "	22.00	
597	" 23 " "	790.00	
598	April 7. for Balance	2721.68	
599		6871.37.	$ 6871.37
600	April 7. 1855 For Balance due.		2721.68
601	1855 April 12. By Treas. Receipt	1511.49	
602	" " 25 " " "	286.26	
603	May 10. " " "	105.50	
604	May. 11. " "	550.10	
605	Aug 2.	268.43	
606		2721.68.	$ 2721.68
607			

608 And also add the following statement of the
609 accounts and settlements of the said George Mulatt
610 as collector of said city.
611 For amount of Poll tax upon the tax
612 Book of 1854 $877.50
613 1855. April 7. By amount of delin
614 quent Poll tax returned as per report
615 202.50
616 6 per cent for Commission 40.50
617 1855. June 24. Treasury Receipt 86.65
618 Amount to Balance. 548.85
619 $877.50 $877.50
620
621 1855 April 7th For Bal. due 548.85
622 " " 25. By Treasury Receipt 6.00
623 " May 10. " " " 69.09
624 " Aug. 2 " " " 473.76
625 548.85 $548.85
626
627 It was also proved upon the trial that the
628 Fiscal year of the Corporation of the city of Saint
629 begins on the 2nd Monday in April in each
630 year and that the securities of the said Mc-
631 Catt on his Bond as Marshall and collector
632 for the year 1854 were other and different from those
633 on the Bond for 1855 on which this suit was
634 brought.
635 This was all the evidence given or offered to be
636 given in the case. Therefore the plaintiffs prayed
637 the following instructions to wit
638
639 Jonathan M. Bassett and others
640 to the use of the city of Saint Joseph
641 vs

642 George Merlatt and others

643 The Plaintiff moves the Court to instruct
644 the Jury as follows
645
646 1. That the pleadings admit the Plaintiffs as Given
647 named in the petition were the Mayor and Coun
648 cilmen of the city of Saint Joseph and that the
649 bond sued on was executed to them by the name
650 style and description of the Mayor and Councilmen
651 of the city of Saint Joseph.
652
653
654 2 = That the pleadings admit that the Refused
655 said George Merlatt as Marshall and Ex. officio
656 collector of the city St Joseph for the year 1855
6.57 was required to collect all accounts for taxes placed in his
658 hands for collection and on the 1st Mondays in each
659 month to pay to the treasurer all monies collected
660 by him on account of the city of Saint Joseph
661 and that he has failed and neglected to do so
662
663
664 3. That the receipt for the tax Book for the
665 year 1855 and the settlements of said Merlatt for
666 the year 1855 ~~and~~ are in evidence to the Jury prima Given
667 facie under the defendants liable on the bond sued
668 for the amount charged on said tax Book and said
669 settlements and it devolves on the defendants to
670 show that the said Merlatt ~~paid~~ collected and
671 paid over the same or has otherwise legally
672 accounted therefor
673
674 4. If the Jury believe from the evidence
675 that the said George Merlatt as collector

of the city of Saint Joseph for the year 1855 has failed to collect any of the taxes charged and assessed upon the Tax Book for the year 1855 except the delinquent list returned to the city Council they will find for the plaintiff and assess the damages at such sum as the said Merlatt failed to collect other than such delinquent tax list Given

5th If the Jury believe from the evidence that the said Merlatt at any time during during the period between the time of the date of the bond sued and the 12th day of April 1856. as collector of the city of Saint Joseph. collected any Revenue of said city which he has failed to pay into the treasury of said city or otherwise legally accounted for they will find for the plaintiff and assess the damages at such sum as was so collected of said revenue and has not been paid into the treasury or otherwise legally accounted for Given

6th For all monies collected by said Merlatt during the fiscal year 1855 for the revenue of and for all other moneys collected for said city during that year and paid into the treasury the Jury will allow as credits on defendants liabilities and for all monies for which the receipts read in evidence or any of them was given which were moneys collected on the revenue which had accrued prior to the 11th day of April 1855 on which were of the private or other means of the said Merlatt other than money collected for said city after the 11th day of April 1855 Given

and had been applied by him on his indebtedness
for the year 1854 they will exclude from their consideration
nor will the Jury allow the same or any part thereof
as credits on the liabilities incurred by the said
Merlatt since 11" day of April 1855"

to the giving of the 2d of said instructions the defendants objected and the Court overruled said objection and refused the same to which opinion of the Court the plaintiff at the time excepted

The defendants then prayed the following instructions

City of St. Joseph
vs
George Merlatt et als } Buchanan Court of Comm. on Pleas.

The defts ask the Court to instruct the Jury as follows

1— That all payments made by Merlatt as collector during the fiscal year of 1855 to the treasurer of the city will be presumed in the absence of proof to the contrary to be made in the extinguishment of the liabilities of that fiscal year Given

2— That payments made by the collector as stated during the fiscal year 1855 will be presumed to be made out of monies collected by him during that year for the city out of the various sources of Revenue for that year unless the contrary is shown by the plaintiff Given

25.

3. That if any of the ~~money~~ sums of money credited to Merlatt by the Register on his liability for the fiscal year 1854 was derived by him from the various sources of revenue which he had authority to collect for the city for the fiscal year 1855 neither said Merlatt nor said Register had any right to appropriate the same to any default or balance or sum due on his liability as collector for the year 1854 and the same should be credited to his liability as collector for the fiscal year 1855

Evidence

4" That if the Jury believe from the evidence that said Merlatt did not collect out of the Revenue of the city of Saint Joseph for the ~~Year~~ year 1856 the amounts of money or any part thereof paid into the treasury since April 11. 1856. they will give defendant credit for all such amounts so paid — unless the same was collected out of the revenue of of 1854

Evidence

5" = The Jury will allow defendants six per cent Commission on all money collected and paid over by Merlatt into the city treasury before the Commencement of this suit and up to the time of filing defendants answer which were collected from and belonging to the revenue of the city of Saint Joseph for the fiscal year 1855

Evidence

6" That if Merlatt has paid of the revenue of

the city of Saint Joseph for the fiscal year 1855 any money over and above the amount of his liabilities for said year they will allow defendants the amount of such overplus so paid

To the giving of which the Plaintiffs objected — the Court overruled the objection and gave all of said instructions to this opinion of the Court the Plaintiffs at the time excepted

The Plaintiffs afterwards in due time filed the following motion to set aside the verdict of the Jury and to grant a new trial of said cause

Jonathan M. Bassett and others
to the use of the city of St. Joseph
against
George Medlett & others

The said Plaintiff moves the Court to set aside the verdict and undered in the above cause and grant a new trial thereof for the following reasons

1st. Because the Court misdirected the Jury as to the law governing the case

2nd Because the Jury disregarded the instructions of the Court.

3. Because the verdict is against the evidence and against the weight of evidence

4" Because the Jury disregarded the law & evidence Ben. Loan and others attys for Plffs

And afterwards this matter being up for hearing was overruled by the Court — to this opinion of the Court the plaintiffs at the time excepted and now having written out a bill of their said several exceptions they pray that the same may be signed sealed and made part of the record which is done according ly Joseph. J. Wyatt. Judge (SEAL)

State of Missouri
County of Buchanan } ss

I. William Rudmbaugh Clerk of the Buchanan Court of Common Pleas within & for the County and State aforesaid hereby certify the foregoing to be a full and complete Transcript of the case of "The City of St. Joseph vs. George Mulatt et als," as the same remains of record in my office

Witness my hand and the seal of said Court at my office in St Joseph this 20th day of June 1857.

William Rudmbaugh Clerk.

8. ~~59~~

O. M. Bassett & others, inc of the City of St. Joseph - pe.

vs

George Merlatt ~~[illegible]~~
Fred. W. Smith, Jos Robideau & Isadore Paulin.

Loan & Davis for Pltff
Hughes & Voris " Deft

filed June 26 1857
Wm E Dunscomb
Clerk

Clerks fees $14.00.

Buch. Com. Pleas
12th

Jonathon M. Bassett & others
to use of the City of St Joseph } Appellant
against }
George Merlatt & others, Respondents

Writ of Error to the Buchanan Court of Common Pleas—

Statement of the Case

This was an action on the Official Bond of Merlatt, as Collector of the Revenue of the City of St Joseph, for the fiscal year 1855—Charging him with defalcation in failing to pay over the Revenue for said year—

Respondents Answer, denying any breach of their Bond, and plead payment in full—

On trial, Respondent ~~offered~~ in evidence various receipts of the Treasurer of the City of Saint Joseph, dated after said Bond was given, and after Respondent, Merlatt, had entered upon the discharge of his duty as Collector for said year 1855—Amounting in the aggregate to more than said Merlatt was charged with for said year—

Appellants then gave in evidence a Statement or Settlement

made by Merlatt of the Revenue of St. Joseph for 1854, which included some of the payment made in 1855, and being the same amounts and dates of the payments given in evidence by Respondents - as embraced in said Receipts - Also Settlement of Merlatt for 1855 -
Appellants then moved the Court to give as the law governing the Case the following instructions - which were all given, but the Second -

1st. That the Pleadings admit the plaintiffs as named in the Petition were the Mayor and Councilmen of the city of St. Joseph, and that the Bond sued on was executed to them by the name Style and description of the Mayor and Councilmen of the City of Saint Joseph.

2nd. That the Pleadings admit that George Mercatt as Marshall and ex-officio Collector of the City of St. Joseph, for the year 1855, was required to collect and account for taxes placed in his hands for collection, and on the 1st Mondays in each month to pay to the Treasurer all monies collected by him on account of the City of St. Joseph, and that he has failed and neglected to do so -

3rd. That the receipt for the Tax book for the year 1855, and the Settlement of said Mercatt for the

year 1855, read in evidence to the Jury, prima facie render the defendants liable on their Bond sued for the amount charged on said Tax Book and said Settlements, and it devolves on the defendants to shew that the said Merlatt collected and paid over the same or has otherwise legally accounted therefor -

4th If the Jury believe from the evidence that the said George Merlatt as collector of the city of St. Joseph, for the year 1855, has failed to collect any of the Taxes charged and assessed upon the Tax Book for the year 1855, except the delinquent list returned to the city council, they will find for the plaintiff and assess the damages at such sum as the said Merlatt failed to collect, other than such delinquent tax list. -

5. If the Jury believe from the evidence that the said Merlatt at any time during the period between the time of the date of the Bond sued and the 12th day of April 1856, as collector of the city of St. Joseph, collected any Revenue of said city, which he has failed to pay into the Treasury of said City or otherwise legally account for, they will find for plaintiff, and assess the damages at such sum as was so collected of said Revenue, and has not been paid into

the Treasury or otherwise legally accounted for.

6.th For all monies collected by said George Mercer during the fiscal year 1855- for the Revenue of, and for all other monies collected for said City, during that year and paid into the Treasury, the Jury will allow as credits on defendants liabilities- and for all monies for which the receipts read in evidence or any of them, was given which were monies collected on the Revenue which had accrued prior to the 11th day of April 1855, or which were of the proceeds or other means of the said Mercer, other than Money collected for said City after the 11th day of April 1855- and had been applied by him on his indebtedness for the year 1854, they will exclude from their consideration, nor will the Jury allow the same or any part thereof as credits on the liabilities incurred by the said Mercer Since the 11th day of April 1855-

Which said instructions were all that were asked by Appellants-

Respondents then moved the Court to give the following Instructions to the Jury, as the law governing the case- which were given by the Court- to the giving of all which Appellants excepted - to wit -

1st. That all payments made by Mercatt, as collector, during the fiscal year of 1855, to the Treasurer of the city, will be presumed, in the absence of proof to the contrary, to be made in the extinguishment of the liabilities of that fiscal year.

2nd That- payments made by the collector as stated, during the fiscal year 1855, will be presumed to be made out of the monies collected by him during that year, for the city, out- of the various sources of Revenue for that year, unless the contrary is shewn by the Plaintiff-

3rd That- if any of the sums of money credited to Mercatt by the Register on his liability for the fiscal year 1854, were derived by him from the various sources of Revenue, which he had authority to collect for the city, for the fiscal year 1855.- neither said Mercatt or said Register have any right- to appropriate the same to any default- or balance or sum due on his liability as collector for the year 1854, and the same should be credited to his liability as collector for the fiscal year 1855-

4th. That- if the Jury believe from the evidence that said Mercatt did not collect- out of the Revenue of the city of St. Joseph for the year 1856-

the amount of money or any part thereof, paid into the Treasury since April 1856. they will give defendants credit for all such amounts so paid, unless the same was collected out of the Revenue of 1854.

5th. The Jury will allow defendants six per-cent commission on all monies collected and paid over by Mercatt into the City Treasury before the commencement of this Suit, and up to the filing of defendants answer, which were collected from and belonged to the Revenue of the City of St. Joseph for the fiscal year 1855.

6th. That if Mercatt has paid of the Revenue of the City of St. Joseph for the fiscal year 1855, any monies over and above the amount of his liabilities for said year, they will allow defendants the amount of such overplus so paid.=

And after trial and verdict for Appellants, they filed their motion to set aside the verdict so rendered, and grant them a new trial— which motion embraced the usual allegations, of the verdicts being against law and evidence, and alledged improper instructions by the court, in behalf of Respondents— said motion being over-ruled, Appellants bring the

case here by writ of Error—

Allen H. Vories, attorney for Respondent, insists that the only question involved in this present case, arises out of the instructions given ~~given~~ by the court in behalf of Respondents.

The court gave all appellants instructions but the 2nd That was properly refused — The answer denies any default on said Bond — There is no prayer in the Petition for Judgment for failure to make Monthly Settlement — And in accordance with the repeated decision of this court, the Judgment being for the right party, will not be disturbed —

Respondents 1st & 2nd & 4th Instructions are right — There is no evidence showing when Merlatt a collector received the Tax Books for 1855 — His liability commenced so soon as his Bond was executed — There was no evidence to show that for 1854 or 1856 he had any thing in his hands out of which Money due the city could be derived in 1855 & 6 —
See 8 Mo. R. Draffenter Vs City of Bronville — 395
& authorities there referred to —

Respondents 3rd Instruction was right —

Respondents Smith, Robidoux & Poulin were the Securities of Merlatt on his Bond for 1855 — previous to that he was collector for 1854, with other and different Securities —

The question in all the instructions given for Respondents is fairly put to the Jury, leaving it to them from the evidence to ascertain whether the payments in proof were denied from the Revenue of 1855, and if so Respondents were entitled to it — And it would be a fraud on them to appropriate such payments to the previous default of their principal —

See — U.S. vs. January & Patterson	7 Cranch		572
" U.S. vs. Eckford's Executors	1 Howard		263.
" Draffen & als vs. City of Bonville	8 Mo. R		395
" Nolley & als vs. The Calloway County Court	11 Mo	" 12th Ins.	459.
" " " " " " "	11 Mo 9 & 10	" Instructions	458

The 5th Instruction was not intended to be objected to, as the ordinances of the city provide the compensation for collecting and paying over the Revenue, which is 6 per cent —

6th Instruction is right — If Merlatt had overpaid on the Revenue, he had the right to a set-off —

Allen H. Voris —
Atty for Respondents

59

Jonathan M. Bassett & others
appellants
against
George Mercatt & others, Respondents

Brief of Allen H. Vories
Attorney for Respondents

filed July 4th 1857
Wm E Drummond
Clerk

Jonathan M Bassett & others
to the use of the City of St Joseph
Plaintiffs in Error
against } Error to the Buchanan Court of C Pleas
George Mentatt Frederick W Smith Joseph
Robidoux and Isadore Poulin
defendants in Error
In the Supreme Court — January Term 1858

And now come the said plaintiffs in error and say that in the said record and proceedings there is error in this to wit

1. That the court erred in refusing and giving instructions

2 The court erred in overruling the motion to set aside the verdict of the jury and for a new trial

Wherefore they pray that the said judgment may be reversed and that they may be restored to all things they have lost by reason thereof

Ben Loan
atty for Plffs in Error

And the said defendant in Error joins in Error

Davis

No 59.

In the Supreme Court

January Term 1858

Jonathan M Bassett
& others to the use of
The city of St Joseph
Plaintiffs in Error

against

Geore Merlatt & others
Respondents

Assignment of Errors

filed day 15. 1858
Wm E. Dunscomb
Clerk

Jonathan M Bassett & others
to the use of the C.
The City of St. Joseph Plaintiffs in Error
against } Error to the Buchanan Court of Common Pleas
Geore Merlatt & others — Respondents

In the Supreme Court January Term 1858

This was a Civil action commenced in the Buchanan Court of Common Pleas by the plaintiffs in error against the respondents upon the bond of the said Merlatt as Collector of the revenue of the City of St. Joseph for the fiscal year 1855. (— Commencing on the 11th day of April 1855 —)

The bond bears date on the 11th day of April 1855 and is subject to the Condition "that if the said George Merlatt shall well and faithfully discharge and perform all acts and duties required of him in his official capacity as Marshal and ex officio Collector of the City of Saint Joseph by any law of the State of Missouri or ordinance of the City of St Joseph existing at the date of this bond or subsequently passed then the bond to be void" proper averments were then made in the petition to charge him as collector for the various sums hereinafter mentioned and concerning which averments there is no Controversy

The 1st breach assigned charges him with having received the tax book of the City of St Joseph for the year 1855 on which was charged taxes amounting to the sum of $4990.63 (— Gen: administration fund —) and the further sum of $1075. for poll tax (— Street fund —) that of said tax of $4990.63 the said Merlatt Collected $4928.47 (over)

(from taxes $4928.47

that from other sources of the revenue of said City he collected the sums following

For retailers licenses	$190.00
Exhibition Licenses	92.50
Pedlars "	15.00
Hawkers "	5.00
Auction "	33.64
Money Brokers "	80.00
Billiard Table "	9.00
Dram Shop	2250.00
6 per cent on 264.25 Taxes	16.08
Taxes on delinquent lots advertised -	264.25

That of said sums the said Merlatt paid into the treasury at various times in the aggregate the sum of $4904.57 and has otherwise legally accounted for $16.90

That the residue of said sums so collected by the said Merlatt ~~he was by the terms of said~~ amounting to the sum of $3348.33 he was by the terms of said bond required to pay into the treasury prior to the 12th day of April 1856 to do which he had wholly failed

The 2nd breach assigned was that the said Merlatt was required to collect & pay over ~~the poll tax~~ & prior to the 12th April 1856 the poll tax charged upon the tax books - That he legally accounted for the sum of 673.$ - that the residue thereof being the sum of $401.58 he failed to pay or account for

The 3rd breach charges that he collected ~~fower~~ of the revenue of said city & which by the condition of said bond he was required to collect fines amounting to $668.40 (– Mayors Court fund –) that thereof he accounted for the sum of $507.55 the residue whereof he failed to pay or otherwise account for.

The only material issue made by the answer is payments

The Specifications in the answer are lengthy and it is not necessary to refer to them further to understand the questions presented by the record

Merlatt was Marshal & Collector for the Year 1854 and there was a balance due of near 3000$ of the revenue of that year when he executed the bond sued – and the question rests upon the application of the payments – these respondents – claiming that all payments made after the date of their bond should as a matter of law be ~~credited~~ applied to the extinguishment of the liabilities incurred under the bond –

On the trial of the cause the plaintiff proved the execution by George Merlatt as collector of the city of St Joseph of a receipt for the tax book of said city for the year 1855 and then gave said book in evidence on which was charged

taxes amounting to	$ 4990.63
also poll tax	1075.00

They then gave in evidence the Statements and Settlements made by said Merlatt as such Collector showing that he had received for (taxes) $4990 63

Retailers licenses	$190 00
Exhibition	92.50
Pedlars	15.00
Hawkers	5 00
Auction	33.64
Money Brokers	80.00
Billiard Table	90.00
Dram Shop	2250.00
6 pr ct on $267.25 for lots advertised	16 03
	$8362.80

On which there was credits allowed for payments & for money otherwise accounted for amounting to 1437.06

$6925.74

And also by payments 4240.76

Bal. $2684.98

And also for Poll tax $1045.50 with credits amting to 709.64

Bal. $335.86

Also for fines received $668.40

with Credits amounting to 547.65

Balance $120.75

And here closed their Case

The defendants then gave in evidence receipts for payments made for the amts and at the times following (to the revenue fund)

no					
2	1855	May 11	for		$530.
4	"	April 25	"		286.26
5	"	May 10	"		105.50
6	"	April 12	"		1511.49
7	1856	" 22	"		319.88
8	"	May 8	"		324.67
9	"	June 9	"		86.20
10	"	Augt 9	"		30.00
11	1855	Oct 18	"		863.01
12	"	Augt 2	"		268.43
15	"	" "	" (fund not named)		273.76

Also the following to the Street fund

1	1855	April 25	for	$6.00
3	"	May 10	"	69.09
13	1856	April 22	"	310.42
14	"	June 9	"	23.00

And also the following to the Mayors Court fund

16.	1855	Oct. 18.	for	$299.75
17	1856	April 26		207.80
18	1855	Augt. 2		233.62

Note – The Nos on the left indicate the No of the receipt as copied in the record

The defendants here closed their case

The plaintiffs then read in evidence from the settlement of said George Merlatt for the revenue of 1854 the following

Credits

no					
6	1855	April	12	By Treasurer receipt	$ 1571.49
4	"	"	25	" " "	286.26
5	"	May	10	" " "	105.50
2	"	"	11	" " "	550.00
12	"	Augt	2	" " "	268.43

Note - See Corresponding numbers on the preceding page

From the settlements for the Street fund as follows

1	1855 -	April	25	By Treasurers receipt $ 6.00
3	"	May	10	" " " 69.09

It was also proved on the trial that the fiscal year of the Corporation of St Joseph Commenced on the 2nd Monday in April in each year and that the securities of Merlatt on his bond for 1854 were different from these respondents

The evidence was here closed

Thereupon the plaintiffs prayed the following instructions

1. That the pleadings admit that the said George Merlatt as Marshal and ex officio Collector of the city of St Joseph for the year 1855 was required to collect all accounts for taxes placed in his hands for collection and on the 1st Mondays in each month pay to the Treasurer all

monies collected by him

Given

1. That the pleadings admit that the plaintiffs as named in the petition were the Mayor and Councilmen of the City of St Joseph and that the bond sued on was executed to them by the style and description of the Mayor & Councilmen of the City of St Joseph

Given Refused

2. That the pleadings admit that the said George Merlatt as Marshal and ex-Officio Collector of the City of St Joseph for the year 1855 was required to collect all accounts for taxes placed in his hands for collection and on the 1st Monday in each month to pay to the Treasurer all monies collected by him on account of the City of St Joseph and that he has failed to do so

Given

3 That the receipt for the tax book for the year 1855 and the Settlements of the said Merlatt for the Year 1855 read in evidence to the jury prima facie render the defendants liable on the bond sued for the amount charged upon said tax books and in said Settlements and it devolves upon the defendants to show that the said Merlatt has collected and paid over the same or has otherwise legally accounted therefor

Given

4th If the jury believe from the evidence that the said George Merlatt as collector of the City of St Joseph for the year 1855 has failed to collect any of the taxes charged and assessed upon the tax books for the year 1855 except the delinquent list returned to the city Council they

will find for the plaintiffs and assess the dama
ges at such sum as the said Merlatt failed to
collect other than such delinquent list

5th If the jury believe from the evidence that
the said Merlatt at any time during the period
between the time of the date of the bond sued and
the 12th day of april 1856 as collector of the city
of St Joseph collected any revenue of said
city which he has failed to pay into the treasury
of said city or otherwise legally accounted for
they will find for the plaintiffs and assess the
damages at such sum as was so collected
of said revenue and that has not been paid
into the treasury or otherwise legally accounted for

fifteen

6 For all monies collected by said Merlatt
during the fiscal year of 1855 for the revenue of, and
for all other monies collected for said city during
that year and paid into the treasury the jury
will allow as credits on defendants liabilities and
for all moneys for which the receipts read in evi
dence or any of them was given which were
monies collected on the revenue which had
accrued prior to the 11th day of april 1855 ~~and~~
or which were of the private or other means of
the said Merlatt other than ~~the~~ money collected
for said city after the 11th day of april 1855
and had been applied by him on his indebtedness
for the year 1854 they will exclude from their con
sideration Nor will the jury allow the same or any
part thereof as credits on the liabilities incurred by the
said Merlatt since the 11th of apnil 1855

fifteen

all of which the Court gave except the 2nd

The defendants asked and the Court gave the following instructions

Given

1. That all payments made by Merlatt as collector - during the fiscal year of 1855 to the treasury of the City will be presumed in the absence of proof to the contrary, to be made in the extinguishment of the liabilities of that year

Given

2 That payments made by the Collector as stated during the fiscal year 1855 will be presumed to be made out of moneys collected by him during that year for the city out of the various sources of revenue for that year unless the contrary is shown by the plaintiff,

Given

3 That if any of the sums of money credited to Merlatt by the Register on his liabilities for the fiscal year 1854 was derived by him from the various sources of revenue which he had authority to collect for the city for the fiscal year 1855 neither said Merlatt nor said Register had any right to appropriate the same to any default or balance or sum due on his liability as Collector for the year 1854 and the same should be credited to his liability as collector for the fiscal year 1855

4 That if the jury believe from the evidence that said Merlatt did not collect out of the revenue of the city of St Joseph for the year 1856

Given

the amounts of money or any part thereof paid into the Treasury since ~~the~~ April 11th 1856 they will give defendants credits for all such amounts so paid unless the same was collected out of the revenue of 1854

Given

5 The jury will allow defendants Six per Cent Commissions on all money collected and paid over by Merlatt into the City Treasury before the Commencement of this suit and up to the time of filing defendants answer which were collected from and belonging to the revenue of the city of St Joseph for the fiscal year 1855

Given

6 That if Merlatt has paid of the revenue of the City of St Joseph for the fiscal year 1855 any money over and above the amount of his liabilities for said year they will allow defendants such over plus so paid

To the giving which the plaintiffs objected and exceptions were duly taken

There was a verdict for the plaintiffs for $1540.42

The plaintiffs afterward in due time filed a motion to set aside the verdict of the jury and for a new trial and therein assigned the following causes therefor

1. Because the Court misdirected the jury as to the law governing the case

2. Because the jury disregarded the instructions

of the Court

3. Because the verdict is against the evidence and against the weight of evidence

4 Because the jury disregarded the law & evidence

The Court overruled this motion and exceptions were duly taken

The plaintiffs bring the cause into this Court by writ of Error and for errors assign the various rulings of the Court excepted to.

Go on for plaintiffs in Error

1. The Court misdirected the jury

The 6th Instruction given on the part of the plaintiffs is based upon the principle adopted in the case of Drabbem vs City of Boonville 8 Mo Rep. 399-400 in the application of payments — that the law applies payments into the treasury of money accruing and received during a term to the liabilities of that term — but that revenue collected or paid during a term ~~but~~ being revenue belonging to a previous term or year — should be applied to extinguish the liabilities of such preceding term

If this instruction was properly given the 1st & 2nd given on the part of the defendants should have been refused — They assert in

in substance – that where a collector who had served two terms and who was liable for a large unpaid balance, due upon the 1st term – makes on the 2nd day after the expiration of such term and the first after the date of his bond for the second term a large payment into the Treasury, as in this case to wit 1511 ~~[illegible]~~ (– paid on the 12th the bond sued bearing date on the 11th April 1855 –) – it is a presumption of law, in the absence of proof to the Contrary, that such payment was made to extinguish liabilities incurred under the last bond and that the "proof to the Contrary" must be furnished by the plaintiffs to rebut this presumption

The 3rd Instruction was improperly given

It assumes that if the money for the revenue of 1855 was paid into the Treasury that Merlatt at the time of the payment could not appropriate it to any other liability that ~~[illegible]~~ the payment into the Treasury is an appropriation of the same by the law to the proper fund and from which the payer cannot divert it

– It has been held in Massachusetts in Colerain vs Bell & others 9 Metcalf Rep 504 – "That money received for taxes is the money of the Collector" – "and that payments thereof being received for liabilities of the previous year it cannot be said to be such a misapplication that it should be withdrawn and applied to subsequent liabilities"

The undertaking of these securities is that

Merlatt shall appropriate the revenue of 1855 to the fund to which it belongs and if he mis-applies it either to the extinguishment of the liabilities of a different fund or otherwise disposes of it improperly it is a violation of their undertaking and there is no law that will make an arbitrary application of the payment against the direction of Merlatt to relieve them from this liability

The 6th Instruction should have been refused

The collector is entitled to his commissions for collecting and paying over before suit brought - but not afterwards.

The 4th Instruction was improperly given

1 These defendants could not be entitled to a judgment against the city by way of set off for any excess the collector had paid into the treasury

2 There was no evidence upon which to base the instruction

3. It was calculated to mislead the jury

II The motion to set aside the verdict and for a new trial should have sustained

Because of the misdirection of the jury

No 59.

In the Supreme Court

January Term 1858

Jonathan M Bassett to
to the use of
The City of St Joseph
Plaintiff in Error

against

George Merlatt & others
Respondents

Brief for Plaintiffs in Error

Filed day 20. 1858
Wm E. Dunscomb
Clerk

J. M. Bassett & others
Use of the City of St Joseph
vs
George Merlatt & others

Error to
The Buchanan
Court of Com
mon Pleas

The opinion in the case of the State to the use of Buchanan County vs. J. B. Smith & others will enable the Court to determine the questions of law arising in this suit.

The first & second instructions given for the defendants under the circumstances were clearly erroneous: These instructions were to the effect that payments made by a collector during a fiscal year will be presumed of moneys collected for that year. ~~will~~ They were directly against the case of Drapper vs. City of Booneville 8. Mo. Rep.

There was no case made in the pleadings for the recovery by the defendant of any ~~surplus~~ excess of revenue overpaid for the year 1855

The other Judges concurring the judgment will be reversed & the cause remanded.

Wm Scott

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J. M. Bassett To the use &c

vs.

J. Merkall & others

Rend.

filed March 11 1858

Wm E Dunscomb

Clerk