

Winston, T. M. et al vs. Taylor, Peter

1858

Miller Co.

1st Cir.

233/13

Old 81/5

Reversed -

W recovered $\approx$ \$3,000 from T by CA court for breach of contract but had no execution

W gave horses & mules to T to take care of on their ranch on Sutter Creek, CA
didn't properly care for & wouldn't return them

T tried to escape liability of contract by retiring from the Co. - must give notice to W
Judgement in another state on notice by publication is void outside state

J. M. Winston
Philip T. Miller
Fountain S. McKenzie
George B. Merson

3 perff

4
Peter Taylor
Left

8 Enort
Miller co

The Clerk of the Su-
preme Court will
please give a writ of
Error in this case to
Miller County for Plaintiff

E. S. Edwards
atty per perff

J M Munton et al

W J Kneipe

Peter Bayler

filed Nov 20 1888

Wm E Duncanson

Clerk

Mills

Eduard

THE STATE OF MISSOURI, ss.

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

WHEREAS, In the Record and Proceedings in a certain cause lately pending in the
Circuit Court of Miller County, in the
Judicial Circuit aforesaid
wherein J M Munton, Philip J Miller, Fountain S.
Mc Kenie and George B Munton were plaintiffs
and Peta Taylor was defendant,

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 second Monday in January
next, so that our Judges of our Supreme Court, on inspecting the record and proceedings
aforesaid, may cause to be further done therein, for correcting the error, what of right and
according to law ought to be done.

Witness, WILLIAM E. DUNSCOMB, Clerk of our said Supreme Court,

at office, in the City of Jefferson, the twentieth
day of November in the year
of our Lord one thousand eight hundred and fifty eight

Wm E Dunscomb



Wm. McHenry exal

Peter Taylor

Wm. Emerson

Filed 30th Nov. 1838

E. B. Harley Clerk

State of Missouri }
County of Miller }
of the Circuit Court in and for said
County of Miller first judicial
Circuit State of Missouri certify
That I have executed the command of the
within writ by making a full & perfect
transcript of the record & proceedings in
the within named cause as of record
on file in my office which said transcript
is herewith returned

Given under my hand & the seal
of said Court at office
This 13th December 1838
E. B. Harley Clerk

(1)
State of Missouri }
County of Miller }

Be it remembered that on the 23rd day of September A.D. 1856. There was filed in the office of the Clerk of the Circuit Court of Miller County State of Missouri a transcript from the Circuit Court of the County of Morgan in said State, which said Transcript is in the words & figures following, To wit:

State of Missouri }
County of Morgan } Set -

Be it remembered that on the 13th day of March A.D. 1855 the following Petition was filed in the office of the Clerk of the Morgan Circuit Court, which petition is in the words and figures following to wit:

In the Circuit Court of
Morgan County April Term 1855

J M Winston P. J. Miller }
J S McKenzie & G B Winston }

vs

} Civil action

J. T. German George Legan }
Peter Taylor Wm Meader } Dependents
William Amick }

Plaintiffs State that herefore to wit —
at a District Court held in and for
the County of Trinity in the State of California
at the November term of Said Court, in the year
of our Lord one thousand eight hundred
and fifty three, the said Plaintiffs recovered
against the said Defendants the sum of two
thousand, nine hundred and sixty nine
dollars and fifty Cents, which in and by
said Court were then and there adjudged
to said Plaintiffs on the fifteenth day of said
Month of November 1853, for their damages,
which they had sustained, as well by the
reason of the non-performance by the said
defendants of certain promises, and under-
takings then lately made by the said defendants
to the said plaintiffs as for their Costs and
Charges by them in that behalf laid out and
expended, whereof the said defendants were
convicted as by the record and proceedings
thereof remaining in said Court, more fully
appears, which judgment still remains in
full force and effect, not reversed, satisfied
or otherwise vacated, And the said plaintiffs
have not obtained any execution of or upon said
judgment so recovered as aforesaid, whereby
an action hath accrued to said plaintiffs,

(3)

to have and demand of and from the said defendants, the sum of two thousand nine hundred and fifty nine dollars and fifty cents, for which amount the plaintiffs ask judgment,

Plaintiffs file herewith a duly certified copy of the Record and proceedings in said Cause in said Court which is marked as Exhibit "A" and prayed to be taken as a part of this petition,

Gardner & Edwards
attys for Plaintiffs,

George B. Winston one of the above named plaintiffs, makes oath and says that he believes the above petition and the matters therein as stated are true,

Geo B. Winston

Sworn to and subscribed before me this 13th day of March 1856-

Jason Harrison J.P.

(24)

V. H. Winston & others plaintiffs
vs } Civil action
J. T. German & others defendants

Now at this day comes the
Defendant by his attorney and files herein
his motion to quash service of writ =
Which said motion is in words following to wit:

E' In the Circuit Court of
E Morgan County April term
E 1855

J. H. Winston, P. J. Miller & Plaintiffs
J. S. M. Enzie & G. B. Winston

U.S. 3
J. V. German, George Legan
Peter Taylor Wm Meader & J. Dependants
Wm Annick

Peter Taylor one of the
above named defendants, by his attorneys,
moves the Court to quash the service of the
process, in this Cause, because the same is not

(5)

served, in any mode authorized by law, and for specific objection to said service, Defendant says, the same was made by the Sheriff of Morgan County by delivering to defendant, a copy of the writ and part of the petition only, Defendant says, that he has not been served by having delivered to him, a copy of the petition and writ, nor by having the same read to him, nor by the leaving of a copy thereof at his usual place of abode, with a white member of his family over the age of fifteen years, nor by any other mode known to the law,

J. M. Ross atty's for Defendant

And during the same term & on the 6th day of said term, the following proceedings were had to wit:

J. H. Winston & others Plff

vs

J. I. German & others Deft

The motion filed herein on Monday last, to quash service of writ, in the above entitled Cause, which was by the Court taken under advisement, stands continued until the next term of this Court by consent of parties.

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(6) And afterwards at the October term of said Court 1855 and on the fifth day of the term thereof, the following proceedings were had to wit:

L. M. Winston & others } Plaintiff
VS }

J. S. German & others } Defendants

The motion filed herein at a former term of the Court to Quash service of writ, in the above entitled Cause, is by the Court overruled, Whereupon the plaintiff by his attorney, files herein his amended petition, and leave granted defendants to file his answer to said Amended petition sixty days before the next term of this Court, Which said petition is in words and figures following to wit:

In the Circuit Court of Morgan County Oct Term 1855—

J. M. Winston }
P. S. Miller } Plaintiff
F. S. McKingie }
G. B. Winston }

against

Joseph S. German Geo Legard
Peter Taylor Wm Meader } Defendants
& Wm Amick }

Amended Petition.
Plaintiff state that heretofore, to wit on or

7
about the 4th day of September 1850 in Consideration
that the said plaintiffs at the Special
instance and request of the said defendants
had caused to be delivered to the said defend-
ants, Certain goods and Chattles to wit: Eight
head of horses and seven head of mules of
great value to wit, of the value of three
Thousand dollars, to be taken care of and
ranched and herded by said defendants, on
their Ranch situated on Sute's Creek in
California to wit in the County of Morgan
aforesaid for the said plaintiffs, and to be
delivered by the said defendants to the said
plaintiffs, Then the said defendants undertook
& then & there faithfully promised the said
plaintiffs to take due and proper care, and
safely and securely keep said horses and
mules for the said plaintiffs, and deliver
the same to said plaintiffs, when they the
said Defendants should be thereunto afterward
requested, for which hiring and keeping
said horses and mules, the said plaintiffs
agreed to give, and the said defendants agreed
to receive, three dollars per head, per month
for each horse & mule so to be hired by
said defendants for said plaintiffs, and
although the said defendants received

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said horses and Mules, The particular description of which will more fully & at large appear by reference to the receipt for the same herewith filed and made a part of this petition of the said plaintiffs for the purpose aforesaid, And although the said defendants were afterwards to wit: on the first day of March 1851 at their Ranch on Suter's Creek in California to wit, at the County of Morgan aforesaid requested by the said plaintiffs to deliver the said horses and mules to the said plaintiffs yet the said defendants not regarding their said promises and undertakings, but contriving and intending to deceive & defraud the said plaintiff in this behalf, did not, nor would nor would take due and proper care of, and safely or securely keep said horses and mules for said plaintiffs, nor did, nor would at the time when so requested, or at any time thereafterwards, deliver all of said horses and mules to said plaintiffs, But on the contrary thereof the said defendants so negligently and carelessly conducted themselves with respect to said horses and mules and took so little care thereof, that by and through the mere carelessness of said defendants and by their negligence and

9.

~~Improper Conduct~~

Improper Conduct, of the said defendants
and their servants in that behalf six head of
said horses, and four head of said mules,
being of the value of two thousand dollars,
became and were wholly lost to the said
plaintiffs, whereby plaintiffs say they were
damaged to the sum of two thousand dollars
for which amount they ask judgement,

E. L. Edwards Attorney
for plaintiffs

George B. Winston one of the above
named plaintiffs makes oath and says
that he believes the above petition, and the
matter therein, as stated are true,

Geo B Winston
Sworn to and Subscribed before me
this sixth day of October 1855,

Jason Harrison J.P.

Said petition filed Oct 12th 1855
C. H. Huff Clerk

Copy of Receipt

September 4th 1850

Received of Winston McKenzie and Co,
 Eight head of horses, One bay mare 7 years
 old fifteen hands high, roached mane, one
 Dr 8 years old 14½ hands high, blaze in
 the forehead — 1 Dr 9 years old fifteen
 hands high blaze in the forehead, roached
 mane, left hind foot white 1 Dr Brown
 mare 6 years old 15¾ hands high short
 foretop, roached mane, small star in
 forehead, 1 Dr Brown 15 hands high mare
 7 years old, 1 Dr Black mare left hind
 foot white, 1 Dr Black 10 years old 14½
 high, branded on the left shoulder with "heart"
 1 Dr Dun mare 4 years old fifteen hands high
 blaze in the forehead. Small white spot on
 belly — 7 head Mules 1 Brown mule 3
 years old, branded on left shoulder "S G" — 1 Dr
 light brown mare mule, branded "H H" on
 the right shoulder split in the left ear,
 1 Picked mare mule 3 years old, branded
 "S G" on the left shoulder, One Dr sorrel
 mare mule 3 years old branded "H H" on
 right shoulder, One Dr horse mule
 black, branded "S G" on the the left shoulder
 1 Dr Mouse mule 3 years old branded S.G.

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on left shoulder, 1 Dr Brown mule 3 years
old branded 'VH' on left shoulder,
To be herded on our ranch, situate
on Suter's Creek at the rate of three
dollars per head per month, all
branded on the left shoulder with the
figure (12) which is our ranch brand,

Joseph T German
George Legan
Peter Taylor
Wm Meader
Wm Quick
By Peter Taylor

And afterwards to wit, at the April term
of the Morgan Circuit Court 1856, and on
the first day of said term, the following
proceedings were had to wit:

J. Mc Winston & others Plaintiffs
V S Civil action
J. T. German & others Defendants

Now at this day comes the
defendants by his attorney and files his
demurrer to Plaintiffs original petition
which was by the Court sustained and
said plaintiffs now here accept to the opinion
of the Court in sustaining said demurrer,

12.

and therefor files his bill of Exceptions
and plaintiffs by leave filed an amended
petition, And thereupon the said defendant
Peter Taylor by leave of the Court, withdraws
his answer filed in Vacation to the Amended
petition and on further leave of the Court
files now his answer to plaintiffs Amended
petition.

Which said bill of Exceptions is in words and
figures following to wit:

In the Morgan Circuit Court
April Term 1856
J. H. Winston & others

VS
Joseph Goughan
Peter Taylor & others

Be it remembered

that on the trial of this Cause the said
defendant Peter Taylor files his answer
to the Original petition of said plaintiffs
which said answer is in the words and
figures following to wit:

In the Circuit Court of
Morgan County April Term 1855
J. H. Winston }
J. J. Miller } Plaintiffs
F. J. McKenzie & }
G. B. Winston } Civil Action

against
 J. J. Gurnau
 George Legan
 Peter Taylor
 Wm Meade &
 Wm Amick

} Defendants

Peter Taylor one of
 the above named Defendants demurs to
 the original petition of the plaintiffs, because
 it does not state facts sufficient to constitute
 a Cause of Action, in this to wit: said petition
 is predicated upon a pretended judgment
 of a certain Court in the State of California
 against said Defendants, when it appears
 by said petition, and is manifest on the
 face thereof that defendant was not at
 the commencement of said action, a
 Citizen of, or residing within said State of
 California, that he was not served with
 process in any manner whatever, and
 never appeared to said action, either
 by attorney or otherwise, that said Court
 had no jurisdiction of the person of this
 defendant at the commencement of said
 suit, and never afterwards acquired
 such jurisdiction,
 And for a further Cause of demur to

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to said original petitioner, defendant says that plaintiffs ought to oblige and show, by their petition their inability to enforce or obtain the benefit of their said judgment by execution or otherwise than by this action which they have failed to do, but on the contrary they state & show that they have not attempted to obtain satisfaction of said judgment in the state of California when the same was rendered

Ross & Smith attys for—
Defendants

Which answer being argued and heard, ^{is sustained to the opinion of the Court} and fully understood by the Court ^{in sus-} taining said answer, the plaintiff accepts, and objects, - and tender their bill of Exception, and prays the Court to sign and read the same, And that the same be made a part of the record in this Cause, which is done, accordingly -

G. H. Miller judge *Stad*

"Copy of plaintiffs amended petition
State of Missouri
County of Morgan
In the Circuit Court
April Term 1856

15,

Thomas M Winston
Phillip T Miller
Fountain S McKenzie &
George B Winston

}
}
} Plaintiffs

Vs

George Legan
Peter Taylor
William Meader &
William Amick

}
}
} Defendants

Thomas M Winston
Philip T Miller, Fountain S McKenzie,
and George B Winston, parties doing
business under the name and style of
"Winston McKenzie & Co" plaintiffs by
leave of the Court first had and obtained
by way of Amended petition, state that the
defendants Joseph T Gorman, George Legan,
Peter Taylor, William Meader, by the name
and description of Wm Meader and William
Amick by the name and description of
William Amick defendants state that her-
etofore to wit on or about the 4th day of September
1850, in consideration that the said
plaintiffs, at the special instance and request
of the said defendants had caused to be delivered
to the said defendants, certain goods and
chattels to wit "Eight head of horses and

seven head of Mules of great value to wit: of the Value of three thousand dollars, to be taken Care of and ranched & herded by the said defendants, on their Ranch on Suter's Creek, in the State of California to wit, in the County of Morgan aforesaid, for the said plaintiffs, and to be re-delivered by the said defendants to the said plaintiffs, They the said defendants undertook, and then and there faithfully promised the said plaintiffs, to take due and proper Care of and safely and securely keep said horses and mules for the said plaintiffs, and re-deliver the same to said plaintiffs, when they the said defendants should be thereunto afterward requested, for which herding and keeping of said horses and mules, the said plaintiffs agreed to give and the said defendants agreed to receive, three dollars per head, per month for each horse and mule, so to be kept & herded by said defendants for said plaintiffs, and although the said defendants received said horses and mules, the particular description of each and all of which will more fully and at large appear by the receipts of said defendants herewith filed and made a part of this petition given by said defendants

17.

To the said plaintiffs for the horses and mules
aforesaid, and although the said defendants
were afterwards to wit, on the first day of
March 1851, at the ranch of the said
defendants on Suter's Creek, in said State
of California to wit at the County of Morgan
aforesaid, were afterwards requested by
the said plaintiffs to re-deliver said horses
and mules to the said plaintiffs. Yet the said
defendants not regarding their said promises
and undertakings but contriving and
intending to deceive and defraud said
plaintiffs in that behalf did not, nor
would not take due and proper care of and
safely or securely keep said horses and
mules for said plaintiffs, nor did not, nor
would at the time when so requested or at
any time thereafter, re-deliver, all of
said horses and mules to said plaintiffs,
but on the contrary the said defendants
so negligently and carelessly conducted
themselves with respect to said horses and
mules, and took so little care thereof, that by
and through the mere carelessness of said
defendants and by their negligence and
improper conduct of the said defendants
and their servants in that behalf, it had

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of said horses, and four head of said mules,
being of the value of two thousand dollars,
became and were wholly and totally lost
to the said plaintiffs whereby the said
plaintiffs say they are damaged, to
the sum of two thousand dollars, for
which amount they ask judgement
& also for costs.

E L Edwards atty
for plaintiffs

E L Edwards, attorney for plaintiff makes
oath and says that he believes the above
petition and the matters therein stated
are true,

E L Edwards,

The foregoing petition was filed
April 17th 1836

C H Knapp Clerk

Answer To amended petition,
In the Circuit Court of
Morgan County

L. W. Hinton, D. T. Miller
F. S. McKenzie & G. B. Hinton } Plaintiffs
against

Joseph J. Genard, George Lyman
Peter Taylor William Meader } Defendants
Wm. Arnick }

Peter Taylor one of the
above named defendants for his separate
answer to the amended petition of plaintiffs
says that he admits that defendants resided
on their Ranch, on Luter's Creek in the
State of California, the horses and mules
of plaintiffs, mentioned & described in
the writing annexed to and made part of
said petition, defendants denies that
he or his Co-defendants, or either of them
ever made any promised agreement or
contract with plaintiffs about the
care and keeping of said horses and
mules, other than as stated in said writing
defendant denies that he or his Co-
defendants or either of them ever under-
took or promised ~~promised~~ plaintiff
to secure and safely keep said horses

2v.

and Mules and re-deliver them upon request or that they were bound, so to do, defendant denies that he and his Co-defendants failed to take due and proper care of said horses and mules or that plaintiff ever requested them to re-deliver the same - defendant denies that he and his Co-defendants so negligently and carelessly conducted themselves, with respect to said horses and mules, and took so little care of them that by and through their mere negligence and improper conduct, or the negligence and improper conduct of their servants - Six of said horses, and four of said mules, or any other number of said horses and mules were lost to plaintiff - Defendant will not deny but that some of said horses and mules may have been lost to plaintiff, but if they were defendant denies that such loss was caused by any negligence or want of proper care of defendant or their servants. Defendant denies that said horses and mules were of the value stated in plaintiff's petition - Defendant further answering says that said supposed cause

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or Causes of action in plaintiff's Amended petition mentioned, if any such there were, or still are, did not accrue to the said plaintiffs at any time within five years next before the filing of the said Amended petition, and the said defendant pleads the Statute of Limitations as full answer and defense to all the matters charged in said Amended petition. Defendant further states that some three or four of said horses and mules died upon defendant's Ranch in California without any fault or negligence of defendant or their servants,

Peter Taylor for the above named defendant makes oath and says he believes the foregoing answer and matters as therein stated are true,

Peter Taylor
Sworn to and subscribed before me
this 15th April 1856

Le H. Kuffeluck

22,

And during the said April Term 1856, the following proceedings were had to wit:

E. M. Winston & others Plaintiffs
V S

Joseph S. Gorman & others Defendants

Now at this day comes the said plaintiffs by their attorney, and files a petition for a change of Venue in the above entitled Cause, which petition is in words and figures as follows to wit-

In the Circuit Court of Morgan
County Oct Term 1855

George B. Winston & others

V S

Peter Taylor & others

To the Honorable-

George H. Miller Judge of the Circuit
Court in and for said Morgan County

Your petitioners beg leave
& respectfully represent that there is
now pending in the Circuit Court of
said County a suit between your petitioners
the plaintiffs in said suit and the said
defendants— Your petitioners further
represent that they are informed &
believe that the opposite party have an

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undue influence over the inhabitants of
said County, and that they cannot have a
fair trial therein by reason thereof.

They therefore pray for a change of venue
in said cause to some other County in said
Circuit where such prejudice does
not exist.

Geo B Winston

George B Winston one of the above named
plaintiffs makes oath and says he believes
the above petition, and the matters there-
in as stated are true, and further that
said plaintiffs cannot have a fair
trial in said County, for the reasons
that the opposite party have an undue
influence over the minds of the inhabitants
of said County as he is informed and
believes.

Geo B Winston

Subscribed and sworn to before
me a Justice of the peace, within
and for Cole County Mo

This the 21st day of Sept 1856

Jason Harrison J P

And during the same term and on the same day the following proceedings were had to wit —

G B Hinson & others Plaintiffs

VS

Peter Taylor & others Defendants

Now at this day came the plaintiffs by their attorneys, and present their petition for a change of venue in the above entitled cause, in consequence as is alleged in said petition, that the opposite party have an undue influence over the inhabitants of said County, and that they cannot have a fair trial therein, by reason thereof which petition is verified by the affidavit of said plaintiffs therefore it is ordered that the prayer of the petitioner herein be granted, for the reasons set forth in said petition and it is ordered that a change of venue be decreed. herein, to the Circuit Court of Miller County, there to be tried &c — and it is ordered that the Clerk of this Court transmit to the Clerk of the Miller Circuit Court, a copy of all the Record and proceedings

25, in this cause, and all the original papers, not forming a part of the record herein—

State of Missouri
County of Morgan

I C. H. Huff, Clerk of the Morgan Circuit Court, do hereby Certify that the foregoing twenty four pages contain a full true and complete Transcript of the record and proceedings had in the Cause of J. M. Huston & others against J. T. German & others in the Morgan Circuit Court (together with all the original papers, not forming a part of the record herein,) as the same now fully remains of record in my office,

In Witness Whereof I have hereunto set my hand and Seal of Office at Office on the 20th day of September AD 1856,
C. H. Huff Clerk

(26)

And afterwards to wit. at a circuit
Court begun and held at the Court
House of Miller County in Tennessee
on Monday the 27th day of October 1856, and
x on the second day of said term x
the following proceedings were had in the
above Cause as appears of record to wit.

J M Winston P S Miller }
J S McKenzie & B Winston } Plaintiff

Against } Civil Action
Joseph T German, George Legan }
Peter Fayler William Meader } Defendants
and William Amick }

And now at this day come
the parties aforesaid and on motion of the
Defendant, Peter Fayler, this Cause is
continued at the cost of the said
Defendant, -

And afterwards to wit at the Term
of our said Miller Circuit Court last
aforesaid & on the said second day of
said term the following proceedings

(27)

were had in said cause as appears of
record Territ -

J^d M Winston & others }
vs } Civil action
Peter Taylor & others }
Motion to strike out part of
answer filed -

Which said motion is in the
words & figures following Territ -

In the Miller Circuit
Court October Term 1856

Winston & others plaintiffs }
vs }

Taylor & others defendants }

The said plaintiffs move the
Court to strike out so much of the answer
of the said Taylor, as sets up the Statute
of limitations as a bar to plaintiffs
right of recovery for the reason that the
same as pleaded by said defendant is
no bar to plaintiffs right of recovery,

E L Edwards atty

For plaintiffs

And afterwards Territ, at the term of our
said Miller Circuit Court begun and held
at the Court House of said County in

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Incumbent on Monday the 27th April 1857, and on the 3rd day of said Term the following proceedings were had in said Cause as appears of record Territ -;

"G B Winston & others }
vs } Civil Action
Peter Taylor & others }"

On motion of Plaintiffs by their Attorney this Cause is continued by the Plaintiffs at their Costs.."

And afterwards Territ at a circuit Court began and held at the Court House of Miller County on Monday the 26th October 1857, and on the 3rd day of said Term the following proceedings were had in said Cause as appears of record Territ:-

"G B Winston & others }
against } Civil Action
Peter Taylor & others, Defendants }"

On Motion of the Plaintiffs by their Attorney this Cause is continued at the costs of the said Plaintiffs."

And afterwards Territ at a circuit Court

begun and held at the Court House of Miller
County in Tennessee on Monday the 26th day of
April 1858. & on the 2nd day of said term
the following proceedings were had in said
Cause as appears of record to wit:—

J. M. Winston & J. T. Miller } Plaintiffs
J. S. McKenzie & J. B. Winston }
Against } Civil action
J. T. German George Logan }
Peter Taylor Wm Meader & } Defendants—
Wm Amick }

And now at this day came the
parties aforesaid by their attorneys and
the said plaintiffs by their attorney filed here
their motion to strike out that part of the
Defendants' Answer pleading the Statute of
Limitation, which said motion is by the
Court sustained, to the sustaining of which
Defendants by their Counsel except— And
thereupon the Defendants by their Counsel asked
leave to withdraw their answer, for the purpose
of filing motion to strike out plaintiffs amended
petition, which leave was granted by the Court,
to the granting of which the plaintiffs by their
attorneys except, — which said motion was
then filed and by the Court overruled

To the opinion of the Court in overruling the same defendants excepted - The defendants by leave of the Court then filed their answer, to which grant of leave plaintiffs excepted - and upon application of the Defendants, this Cause is continued, on account of the absence of the witness Andrew Ester, at the costs of the said defendants, -

Which said motion to strike out part of Defendants' answer is in the words & figures following to wit -

In the Miller Circuit Court
April Term 1858

J M Wriston & others
vs

Peter Taylor & others

The said plaintiffs move the Court to strike out all that part of the defendant Taylor's answer in said suit which sets up the Statute of limitations as a bar to the plaintiffs right of recovery for the following reasons -

1st Because said answer in pleading said Statute alledges and Charges that

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said Cause of action did not accrue within five years previous to the finding of the amended petition of plaintiffs in said suit, which if true, is no bar to plaintiffs right of recovery.

2^d Because said part of said answer tenders an immaterial issue to plaintiffs.

3^d Because said defense set up, is not bar to plaintiffs right of recovery

Edmunds & Ewing
Attys for Plffs."

And which said Motion to strike out plaintiffs amended petition as filed by defendants as aforesaid, is in words and figures following to wit;

In the Circuit Court
Miller County
Geo B Winston et al Plffs
Against
Peter Taylor et al Defts

And the said defendants came and moved the Court to strike out all of the plaintiffs amended petition filed in this Cause, for the following

32,

reasons, First because the said amended petition sets up an entire new and distinct cause of action in no wise germane to the cause of action set up in the original petition

Second because the second petition is not an Amendment of the first petition but is separate independent and not in any wise connected with the cause of action set out in the original petition

Third, Because if the second petition is an amendment to the first it is bad for repugnancy

Lutl Ross & Parsons
for Defts "

And afterwards Torrit as a circuit Court began and held at the Court House of said County of Miller on Monday the 25th day of October A.D. 1858, and on the third day of said term being Wednesday October 27th 1858, in the said Cause were had the proceedings in words & figures following, as appears of Record, Torrit:-

G. B. Winston & F. S. Miller 3
J. M. Winston & H. S. McKenzie 3 Plaintiffs
Against

(33)

Joseph T German, George Legaw
Peter Taylor William Meadley } Defendants
William Amick }
3

And now at this day came the parties aforesaid by their attorneys, and the said Defendants by their attorney filed their motion to suppress the reading of the deposition of George W. Bolton, which said motion is by the Court overruled to the opinion of the Court in overruling which said Defendants by their attorney except Plaintiffs then dismissed suit as to all the Defendants except Peter Taylor and thereupon came a jury Territ-Sovereign Popplewell, Alfred Dixon, Clay Breedlove, Isaac Bond, Martin D. Bond, James P. Reed, Henry A. Jacobs, Alfred M. Austin, W. G. Burks, John T. Cheal, Smith Manning and William A. Harbison, twelve good and lawful men, duly elected, tried and sworn well and truly to try the issue herein joined & were then permitted to separate under the charge of the Court until tomorrow morning at half past eight o'clock,

Said motion as filed by said Defendants is

(34)

Attorney, to Suppress the reading of the deposition of George W. Bolton, as aforesaid is in words & figures following viz:—

"In the Circuit Court of Miller
County

Winston & others

vs }

J. T. German and others

Defendant moves the Court to Suppress the reading of the deposition of George W. Bolton for the following reasons
1st It does not appear that said deposition was taken in this Cause

2nd There is no notice of the taking of the deposition in this Cause at the time & place of taking of this deposition

3rd There is no sufficient service of the notice—

Parsons & Rops

for Faylor, —

And afterwards Territ at the term of our said Miller Circuit Court last aforesaid and on the 4th day of said term being 28th October 1858, in the above Cause were had the following proceedings Territ:—

G. B. Winston & others

vs
Peter Taylor, } civil action

Now her come again as well
the parties aforesaid by their attorneys, as
the jury, herein sworn tried and elected on
yesterday, and the jury having heard
the evidence and arguments of Counsel
were, by consent, permitted to separate, under
the charge of the Court until tomorrow
morning at half past eight o'clock.

And afterwards Term at the said October Term
of the Middle Circuit Court 1858, and on the 5th
day of said Term being 29th October 1858 the
following proceedings were had in said
cause as appears of record Term:-

"G B Winston P. T. Miller } Plaintiff
J M Winston & F. L. McKenzie }
Against } civil action
Peter Taylor Defendant

Now at this day come again
the parties aforesaid by their attorneys
and the jury heretofore sworn and empan-
nelled in this cause return their verdict in
words following Term:- "We the jury
find for the defendant," - Therefore it

(36) is considered by the Court that the said
plaintiffs take nothing thereby and that
the said defendant have and recover of the
said plaintiffs his costs and charges in this
behalf laid out and expended and that
execution issue therefor. And thereupon
came the said plaintiffs by their attorney
and file here their motion for a new
trial "

And afterwards to wit at
the said October Term of our said Middle
Circuit Court 1858, and on the 6th day of said
Term being October 30th 1858, the following
proceedings were had in said cause as
appears of record to wit:-

"J B Winston & J Miller }
J M Winston & F S McKenzie } Plaintiffs
Against } Civil Action
Peter Fayler Defendant

Now here come the parties ofen-
said by their attorneys and the Motion for
a new trial filed on yesterday is by the
Court, overruled, - to the opinion of the
Court in overruling which, Plaintiffs except
and here file their bill of exceptions "

which said bill of exceptions is in words & figures following to wit - -

"In the Circuit Court
October Term 1858
Winston McKenzie & others, Plaintiffs

vs

Peter Taylor Defendant -

Be it remembered that on the trial of the above cause, that the plaintiffs, after reading the Petition and certificate accompanying the same - read the depositions of Richard T. Miller, and George W. Botten to the jury, except those parts, underscored in pencil which were excluded by the Court, which said depositions are in the words and figures following to wit: - (That part underscored in pencil not being deposited)

"I M Winston Geo. B Winston	}	In the Circuit Court of Miller County in the State of Missouri
J T Miller & J S McKenzie		
vs		
Peter Taylor J. D. German	}	State of Missouri
William Meader, Geo. Legan		
& William Arnick		

Deposition of R T Miller a witness produced sworn and examined on the tenth day of February AD 1858, between

(38.)

the hour of eight O'clock in the forenoon
and six O'clock in the afternoon of that day
at the Court House in the Town of Weaver ville
in the County of Trinity in the State of California
before me J. P. Jones, a Justice of the Peace in
and for Weaver ville Township in said
County of Trinity, duly elected and qualified
in a certain cause now pending in the
Circuit Court of Miller County in the
State of Missouri, between J. M. Winston
P. S. Miller F. S. McKenzie and George B.
Winston Plaintiffs, and Peter Taylor and others
Defendants, on the part of the Plaintiffs

P. S. Miller of lawful age, being produced
and sworn and examined on the part of the Plain-
tiffs deposed and said — I reside in the
Town of Weaver ville, in the County of Trinity in the
State of California, I am the County Judge of
Trinity County, I know the parties to this suit,
I first became acquainted with the parties
plaintiffs, in the State of Missouri, previous to
the year 1850, and with the defendants, at
the County of ^{Eldorado} ~~Colorado~~, in the State of California
in the year AD 1850 in Company with two of
the plaintiffs, Geo. B. Winston & F. S. McKenzie,
We arrived in Eldorado County in the

(39)

State of California, about the 10th day of September
AD 1850, and Camped at Hangtown, or Placer
ville in said County for several days, On the day
on which we arrived at Hangtown Peter Taylor, or
J. S. German, or, came to where Winston McKenzie
Hoo, and myself were Camped, and solicited
of us a Contract for herding or ranching our
Stock - I can not now recollect, whether
it was German or Peter Taylor, that came to
the Camp, at that time, but think it was
Peter Taylor, I am sure it was one or the
other of them, The one that came to the
Camp told McKenzie and myself, that
he and the other defendants to this suit,
had a Ranch or farm, on Dry Creek
in this State (California) about thirty or
forty Miles from Hangtown, where we
then were, on which there was fine grass -
and on which they were then herding or
ranching, a large number of Stock -
He advised us to put our Stock on their
Ranch, saying that it would soon fatten
them, and be in good order for sale or
Service, He offered to take our Stock to the
Ranch and herd it for us, for the consid-
eration of four dollars per month, for
each animal, We did not conclude

(40)

a bargain, that evening, but on the next day, (which I think was the 11th or 12 of September AD 1850) Mr McKenzie and myself, went to the house of Peter Taylor, and then made a contract with him for herding or ranching our stock - I was present when McKenzie made a contract with Peter Taylor, for ranching or herding Winston McKenzie & Co's Stock Taylor agreed to take McKenzie's Stock at Haughton where it then was, drive it to their Ranch on Dry Creek, and then herd and graze the animals, and return them to McKenzie at the said Ranch, when they should be demanded, -

I do not mean to say that this the precise language used by the parties in making the contract, I cannot now recollect the precise language used, but I think the above was the contract, made between McKenzie and Peter Taylor at the time and place above mentioned, Mr J. S. German and William Arnick was present at the time the contract was made, but Peter Taylor did all of the talking and seemed to be the leading business man of the firm -

The condition of these animals at that time was not good they had been

brought across the plains from the State of Missouri, that summer and were poor - We had traveled slow in crossing the plains and ~~Winston~~ M. McKenzie & Co's Stock was in much better condition than stock usually is immediately after reaching California from the plains - Good fat mules and horses were worth at that time in California (September AD 1850) from one hundred and fifty to three hundred dollars, according to the size and quality - Good Horses and Mules just arrived across the plains were worth in California at that time, from, seventy five to one hundred and fifty dollars per head, according to size and quality -

I knew the value of all kinds of stock at that time, in California, I think that McKenzie Winston & Co's animals were worth at the time they were delivered to Peter Taylor & Co one hundred dollars per head, some time during the month of October AD 1850. I went to the Ranch of Taylor & Co, on Dry Creek, in this State, to examine some stock which I had placed on it, to be herded at the same time, that McKenzie sent his there, When I started to go to the Ranch, McKenzie told me to examine his stock on the Ranch, and let him know

when I came back, as to their condition &c
 When I got to Taylor & Co's Ranch, I found
 William Amick and George Legan in charge
 of it, I spent two days upon the Ranch, hunting
 for my stock, Mr Amick and Legan assisted
 me, in hunting up my stock, Amick, I think
 told me that Taylor and German were still
 at Kang Town, I found the stock on the ranch
 much scattered, there was no one herding it
 or attempting to keep it together on the Ranch,
 there was no corral or fences of any kind
 on the Ranch, Some of Winston McKenzie's
 animals I saw straying about on other Ranches
 four or five miles from Taylor & Co's Ranch,
 About the latter part of November, or the first
 part of December of the year 1850, I again went
 back to the Ranch of Taylor & Co, in company
 with Geo H. Bolton and F. S. McKenzie,
 We all had stock upon the Ranch, and we went
 there to take it away - We found Mr William
 Amick and his brother, in charge of the Ranch,
 McKenzie asked Amick where German and
 Taylor were, Amick said that Peter Taylor
 had gone home, to Missouri, I do not recollect
 what his answer was as to German, McKenzie
 then told Amick that he had come after his
 stock, Amick told us that some of the stock was

gone, that some had strayed off, and some had been stolen by Indians — Amick complained to McKenzie and myself of the conduct of his partners, Gorman and Taylor in particular, said they had treated him badly in going off and leaving him without the means of taking care of the stock upon the Ranch — that Taylor had acted in bad faith towards him, and that — that was the reason the stock had been lost — McKenzie Bolton and myself hunted over the Ranch, in that neighborhood for several days for our stock, but found only a few heads — McKenzie then insisted on Amick's hunting up his stock, and delivering them as they had agreed to do — Amick said that he would hunt for the stock if we would help him — We then all commenced to hunt for the stock — McKenzie spent about eight days altogether in hunting his stock, I rode with him during that time, over all the country within twelve or fourteen miles — of Taylor & Co's Ranch — Amick refused to help us, any longer and we gave up the search — McKenzie found and took away from the Ranch, either six or seven head of the animals he had delivered to Taylor & Co at Hangtown before mentioned, I cannot say positively the number of animals McKenzie recovered — but think it was either six or seven

I assisted McKenzie in driving these from the Ranch to his home. I cannot tell exactly how many of animals he recovered were horses or how many were mules, but think that three of the number were mules and the others horses. These animals which McKenzie recovered had improved much while they were on the ranch, I think they had improved fifty per cent at least. - as we did not see that portion of Winston McKenzie's stock which was lost from the Ranch, I, of course, cannot say whether it had improved or not, but I suppose it had improved as much as that portion which was recovered - Amick told me that one horse which I had sent to the ranch had died, but I think that he said that none of Winston McKenzie's animals had died. It was usual and customary for Ranchers or Ranchmen in California at that time to keep persons with their stock all the time to herd it and prevent it from being stolen, or from straying off - It was possible for Ranchmen at that time in California to herd, and take care of stock in such a manner as to prevent it from straying off, or from being stolen - No one was employed or kept with or employed to herd the stock - or look after it, and it was allowed to roam at pleasure wherever the animals chose to go - it was in consequence of this

neglect that the animals which McKenzie had placed upon the Ranch of Taylor & Co were lost, Winston McKenzie & Co never received but six, or seven head of the stock, which they delivered to Taylor & Co at Hangtown to my knowledge— I lived with McKenzie & Winston during the fall and winter of A D 1850—and the spring of 1851, and if they had ever gotten more of this stock than the six or seven head which I have mentioned, I think I would have known it— Neither McKenzie or myself knew that any of our stock was lost, until we went to the Ranch to get it! nor did we know that Peter Taylor or J S German had disposed of their interests in the Ranch or that ~~or that~~ they had left California, until we went to the Ranch to get the stock, Taylor nor German never apprised us, that they had sold out their interests in the Ranch or business of the firm of Taylor & Co— Labor was worth in California at that time that is in the winter of A D 1850, at least five dollars per day— the usual rate of interest, at that time, in California was five per cent per month,

I have no interest whatever in this suit— All I know in regard to the partnership between the defendants is what I heard Peter Taylor and German and Amick say about it— I gave some stock to Peter Taylor & Co to Ranch at the

same time that McKenzie delivered his to them —
 And at that time Peter Taylor said that Amick
 and German and Meader and Legan, were
 his partners in the Ranching business — or words
 to that effect. They (the defendants) held themselves
 out to the public as partners — I did have in my
 possession some receipts which Peter Taylor gave
 me, for stock at that time, but I have lost them —
 I think and believe that they are destroyed, the
 receipts were signed "Taylor & Co By Peter Taylor"
 R. L. Miller

Subscribed and sworn to before me, at the Court
 House in the County of Trinity in the State of
 California between the hours of Eight O'clock
 of the forenoon and Six o'clock of the afternoon
 on this 10th day of February A D 1858 —

John P. Jones J. P.

State of California }
 County of Trinity }

I J. P. Jones a Justice of the peace within
 and for the County of Trinity in the State of
 California, duly elected Commissioner
 and qualified, do hereby certify that in
 pursuance of the annexed Commission
 and notice, came before me at the Court
 House in the County and State last aforesaid

between the hours of eight O'clock, in the forenoon
and six O'clock in the afternoon on this 10th
day of February A.D. 1858. R. T. Miller, who was
by me duly sworn, to testify the truth of his knowl-
edge, touching the matter in controversy aforesaid
wherein J. M. Winston and others are plain-
tiffs and John Taylor and others are defendants,
That He was examined and his said exam-
ination reduced to writing, and subscribed
by him in my presence on the day and between
the hours and at the place in that behalf
first above mentioned, and his deposition
is annexed, and he with returned

Given at the County and State last aforesaid
This 10th day of February A.D. 1858

John P. Jones, J.P. "

Annexed to the foregoing deposition & Certificate
is a certificate in words & figures following
to wit -

State of California }
County of Trinity }

I John A. Watson Clerk
of the District Court in and for the County of
Trinity in the State of California, hereby certify
that J. P. Jones, Esq., on the 10th day of February
A.D. 1858 was, and still is a Justice of the

peace within and for Trinity County in the State
of California, duly qualified, commissioned,
and acting as such, and That full faith and
credit are due and ought to be given to all
his official acts,

Witness John A Watson Clerk and the
L. S. Seal of our said Trinity County District
Court here to affixed at office this
10th day of February AD 1858
John A Watson Clerk

Attached to the said Deposition of R. J. Miller are
a notice and return - which said notice
is in words & figures following to wit: -

"In the Circuit Court of Miller
County State of Missouri
J M Winston & R J Miller
vs
J. S. McKenzie & G B Winston Plaintiffs

Peter Taylor, William Meader
J T German George Lyan &
William Amick Defendants

To the above named defendants and
to James P. Prop Attorney of Record for said
Peter Taylor, -

You are hereby notified That deposition

of witnesses to be read in evidence on the trial of the above entitled cause, now pending in the Circuit Court in and for the County of Miller in the State of Missouri, in which we are Plaintiffs and against the said Taylor and others are defendants will be taken at the Court House in the Town of Weaverville, in the County of Trinity in the State of California on the 10th day of February 1858, between the hours of eight O'Clock in the forenoon and six O'Clock in the afternoon of that day, to be used in evidence on the trial of said cause on the part of said plaintiffs; And you are further notified that if the taking of said deposition is not completed on that day, the taking thereof will be continued from day to day at the same place & between the same hours until completed

J. M. Winston & others, Plaintiffs
By Edward Their Attorney

Endorsed upon the back of said notice is the certificate of the Sheriff of Morgan County in words & figures following to wit:-

"I W A Goddard Sheriff of Morgan County Missouri certify That I executed the within notice on the within named Peter Taylor, by delivering to him a true copy

on the 24th day of November 1857. in Morgan
County Missouri, also on the within named
Jas. P. Rop by reading the within to him in
his presence and hearing in Morgan County
Missouri on the day and year aforesaid - The within
named William Meader J S German, George
Legan & William Arnick cannot be found
in Morgan County Missouri
Nov. 24th 1857

W H Goodard Shff M.C. Mo.,

Said Affidavit or Commission, is in the words
of figures following to wit ~ ~

County of Miller Bp

The State of Missouri to any Judge Justice
of the peace or other judicial officer of the
State of California Greeting:-

Know ye that we in confidence of your
prudence and fidelity, do by these presents authorize
you to Cause to come before you to be examined
as witnesses in a cause pending in our Circuit
Court of Miller County in the State of Missouri
Wherein T M Winston P S Miller F S McKenzie
& G B Winston are plaintiffs and J S German
George Legan Peter Taylor, William Meader, and
William Arnick, are defendants, all and

(31)

every such person and at such time and place, as shall be named to you for that purpose by the said plaintiffs, their attorney or agent, and we command you to examine all and every such person upon his oath or solemn affirmation, first made or taken before you, to testify the whole truth, touching his knowledge of any thing relating to the said matter in controversy, between the said parties, and that you do take his said examination and reduce the same to writing. When you shall have taken his examination, you are to cause the witness to sign the same, and to that and each examination at the foot thereof you are to append your certificate, setting forth the facts, that the examination was subscribed and sworn to, or affirmed by the witness, and the day as well as between what hours of the day on which it was done, and also the place of residence of the witness (if known to you) Should any paper or exhibit be produced or proven, or be referred to by the witness, you are to describe the same, in his examination or cause it to be so marked, by him as to establish its identity and attach the same to his examination -

The examination thus taken you will

Cause to be accompanied by a Certificate of your official Character, attested by the Seal of ~~said~~ State, or Should it be more convenient, such authentication and proof of your official Character, may be by the Certificate and Seal of the Clerk of any Court of record of any County of the State District or Territory in which you reside, Stating also in addition to the facts of his being Clerk and That the Court is one of record, That at the Time when the depositions were taken, you were an acting Judge, Justice of the Peace or other Judicial officer, as the case may be, and duly commissioned as such,

And you will return the same and all exhibits produced to you annexed hereto carefully enclosed up under your seal, directed to the Clerk of the Circuit Court of Miller County, in care for the County of Miller Missouri with the names of the parties litigant endorsed Thereon, with all convenient Speed -

Witness O B Farley Clerk & the Seal of our
 D. S. Said Miller Circuit Court hereto affixed
 at office This First day of December
 AD 1857 O B Farley Clerk -

The said Deposition of the said George W
 Bottoms ^{Accepting that part included by the Court} in words & figures following to wit -

'Deposition of witnesses, produced
 sworn and examined on the 6th day of October
 in the year of our Lord 1858, between the hours
 of six O'Clock in the forenoon and six
 O'Clock in the afternoon of that day, at
 the old Court House, at the Town of Papinsville
 in the County of Bates and State of Missouri
 before me a Justice of the Peace within and
 for said County and State, in a certain Cause
 now depending in the Circuit Court, of the
 County of Miller in the State of Missouri, between
 Thomas M Winston George B Winston Philip
 J Miller and Fountain J McKenzie as
 plaintiffs and Peter Fayler defendant -
 on the part of the plaintiffs

George W Bottom of lawful age being
 produce ~~and~~ sworn and examined on the
 part of the Plaintiffs deposed and said

That he now resides in the County of Monroe
 in the State of Missouri, and that on or about
 the 12th day of September 1850, he, deponent
 was at Huntington in the County of Eldorado
 in the State of California, that said Defendant
 did receive and take into his possession

said horses and mules and all of them from said plaintiff McKenzie. That said Taylor took said horses and mules to his Taylor's Ranch, some miles distant from said Haugtown, and that on or about the 11th day of December 1860, he deponent went with said Fountain S. McKenzie one of the Plaintiff aforesaid to the ranch of said Taylor (as aforesaid) and that said McKenzie then and there demanded the said horses and mules of an Amick, who was one of the partners of said Taylor, and the person having charge of said Taylor's Ranch as aforesaid, that when the horses and mules were demanded, said Amick remarked, that there were no horses or mules belonging to said plaintiff at the ranch or upon the ranch, and that neither Taylor or Amick did deliver said horses and mules to plaintiff, when so demanded, or any part thereof, or any number ~~thereof~~ of them, but failed altogether to deliver to plaintiff, the horses and mules aforesaid, or any part thereof, that said ~~plaintiff~~ Amick refused either to deliver said horses and mules or to assist in hunting them up. - Deponent states

That neither Faylor, or Arnick, or any one else did take such prudent care and keeping of said Horses and Mules, as a prudent and diligent rancher or Herder would, or did usually take in that country or any other country, but that said Horses and mules were permitted to stray off and run at large and that in consequence of the gross negligence carelessness and neglect of said Faylor and his agents and Herdsmen said stock was lost - Deponent States That he assisted Fountain S. McKenzie one of the plaintiffs aforesaid in looking for said Horses and mules, that they searched in every direction for the space of eleven days and that they found seven head, (3 mules and 4 horses,) belonging to said lot so delivered as aforesaid which was all that they could find. That those so found were, scattered for a distance of twenty five miles from said ranch, and that no one of the mules found, was found at or upon the Ranch of Faylor, Deponent States that the average value of the mules and horses so delivered by plaintiff to Faylor as aforesaid, and not found nor delivered back to plaintiff, was one hundred and fifty dollars each

And deponent thinks that there were either 14 or 15 head so delivered to defendant that were not returned by defendant to plaintiffs

G W Bolton

Subscribed and sworn to before me on the day, at the place and within the hours first aforesaid

A A Thurman Justice of the Peace —

I A A Thurman a Justice of the Peace within and for the County of Bates in the State of Missouri do certify that in pursuance of the annexed notice came before me at the old Court House at the Town of Papinsville in the County of Bates in the State of Missouri, George W Bolton who has by me duly sworn according to law, to testify the whole truth of his knowledge touching the matter in controversy aforesaid, that he was examined and his examination reduced to writing and subscribed by him in my presence on the day between the hours and at the place in that behalf first aforesaid — and that his said deposition is herewith now returned — And I further certify that ^{x signed x} the George W Bolton is a resident of the County of Vernon in said State of

Missouri

Given under my hand at the old
Court House at the Town of Popinsville in
the County of Bates, State of Missouri this
6th day of October 1858

A A Thurman Justice of the peace -

State of Missouri

County of Bates } O P B Strutton Clerk
of the County, Clerk within and for Bates
County, Certify that A. A. Thurman, whose
genuine signature appears to the foregoing
Certificate as having taken the foregoing
deposition was at the date thereof an
acting justice of the peace within
and for Bates County, duly elected, com-
missioned and sworn, as such & that
his official acts as such are entitled to
full faith and credit -

On witness whereof I have hereunto
set my hand and Seal of said
Court at office in the Town of
Butler the 8th day of October
1858

Peter B. Strutton Clerk

Annexed to said Deposition is a notice

in words & figures following to wit:—

In the Miller Circuit Court
Thomas M Winston & others

vs

Peter Faylor,

To the above named Defendant

Peter Faylor;

You are hereby notified that depositions of witnesses to be read in evidence on the trial of the above entitled Cause, now pending in the Circuit Court in the County of Miller in the State of Missouri, on the part of the plaintiffs will be taken at the old Court House building in Poplarville in the County of Bates, in said State of Missouri on the 6th day of Oct, 1858 between the hours of Six O'Clock in the forenoon and Six O'Clock in the afternoon of that day and if the taking of the said depositions is not completed on that day, the same will be continued from day to day at the same place and between the same hours until completed

J M Winston & others

By E S Edwards atty.—

upon the back of said notice is the following endorsement to wit:-

"State of Missouri }
County of Miller } I Frederick J Miller
do Swear That I served the within notice on
Peter Taylor by leaving a true copy of the same
at the usual place of abode of said Taylor
on the 20th of Sept 1858, with the wife of the said
Peter Taylor, a free white person of his family
above the age of fifteen years

Frederick J Miller

Subscribed and sworn to before me the un-
designated Clerk of the Circuit Court of
Miller County Mo. This 24th Oct 1858

E B Farley Clerk

By W. M. Humphreys D.C.,

And Plaintiffs have rested their case -

The Defendants read to the jury the depositions
of S D German and Alfred J Amick, which
said Depositions are in the words &
figures following to wit -

The State of Missouri }
County of Miller } P

Deposition of witness produced,

affirmed and examined, on the 10th day of
 April in the year of our Lord 1858, between
 the hours of Eight O'Clock in the forenoon
 and Six O'Clock in the afternoon of that
 day, at the Court House in the Town of
 Fremont, in the County of Cedar, and
 State of Missouri before me H B Suiday
 Judge of the probate Court in and for
 said Cedar County, in a Cause now
 pending in the Circuit Court of Miller
 County in the State of Missouri, between
 Thomas W Winston Phillip T Miller
 Fountain S. McKenzie & George W Winston
 are plaintiffs, and Joseph T German
 George Legan Peter Tayler William Meader
 & William Arnick are defendants - on
 the part of the defendant Peter Tayler, one
 of the defendants, Bacchus D. German
 of lawful age being produced, affirmed
 and examined, on the part of the defendant
 Peter Tayler, deponent and sayeth, That
 in the fall of the year 1850 in the State
 of California I was personally acquainted
 with Joseph T German Peter Tayler, George
 Legan William Meader & William
 Arnick, who were then and there the
 owners and keepers of a Ranch, which

was situated on Dry Creek in California
 some fifty odd miles from Hang-
 Town, at which place Joseph D. German
 & Peter Fayler received Stock, & had them
 drove to said ranch to be herded and kept,
 William Meader and Alfred Arnick
 brother to Mr Arnick herded the Stock
 on the ranch the most of the time,
 I aided in the herding of the Stock about
 one month, and during that time
 ordinary diligence was used in taking
 care of the Stock, on the ranch, The
 herders were in the habit of looking up
 the Stock once every day while I was
 there, I do not know how they were
 taken care of after I left, I think I
 left about the last of September 1850.
 It is a very difficult matter on those
 ranches in California to keep Stock
 from straying off, or being stolen,
 The ranches, aforesaid kept Stock
 from three to five dollars per month-
 per head, and that was the customary
 price, for keeping Stock in that country
 as I learned then when the Stock was
 not insured, further deponent
 saith not,

J D German

(62) Subscribed and affirmed to before me on the day
at the place, and within the hours first aforesaid
Witness my hand and official seal here to
L.S. Affixed This 10th day of April A.D. 1858
A. B. Lindsey Probate Judge

State of Missouri 3p
County of Miller 3p

I A. B. Lindsey Probate Judge within
and for the County of Cedar in the State of Missouri
do certify that in pursuance of annexed notice
came before me at the Court House in the Town of
Freemont in the County and State last aforesaid
Zaccheus D. German who by me affirmed to
testify the whole truth of his Recollections touching
the matter in controversy aforesaid, that
he was examined, and his examination
reduced to writing and subscribed by him
in my presence, on the day between the hours
and at the place in that behalf first aforesaid
and that his said deposition are
now herewith returned, and I further
certify that said Zaccheus D. German is
a resident of said County of Cedar, in said
State of Missouri, In Testimony whereof
L.S. A. B. Lindsey Judge of the Probate Court in
and for said County & have here to

set my hand and official Seal This 10th day of
April AD 1858

A. B. Lindsey Probate Judge

The said notice attached to & filed with said
deposition, is in the words & figures following
Viz:

"On the Circuit Court within and for
Miller County and State of Missouri
Thomas M Winston Phillip S Miller
Fountain S M McKenzie and
George W Winston Plaintiffs
Against By Civil action
Joseph D Herman George Legan
Peter Taylor William Mader &
William Amick, Defendants

To Thomas M Winston Philip S Miller
Fountain S M McKenzie and George W Winston
Plaintiff in the above Cause —

You are hereby notified that depositions
of witnesses to be read in evidence in the above
cause, on the part of the Defendant Peter Taylor
will be taken at the office of the Clerk of the
Circuit Court, within and for the County
of Cedar, on the 10th day of April 1858,
between the hours of Eight A. Clock in the

forenoon and six O'clock in the afternoon of
said day, and that if the taking of said deposi-
tion, be not completed on said day, will be con-
tinued from day to day at the same place and
between the same persons until the same be
completed

Peter Taylor

By Pp & Tull his attys;

on the back of said notice are the following
endorsements - To wit: -

"I acknowledge service on the within
notice, March 24 1858

G B Winston

J T Miller

J M Winston

J S McKenzie "

"I served the within notice on the within
named Thomas M Winston George B Winston
J T Miller and J S McKenzie on the 24th day
of March 1858 by Their acknowledging service
in the County of Cole State of Missouri

William D Kerr Shff C. C. Mo,
By W W Bolton D. S. "

The said Deposition of said Affid J Amick is
in words & figures following Viz -

Depositions of witnesses produced sworn and examined at the Circuit Clerk's office in the Town of Versailles, County of Morgan State of Missouri, before me Wallace W. Williams, a Justice of the Peace within and for the County and State aforesaid, in a certain suit now pending in the Circuit Court of Morgan County, and ordered to be sent to Miller County on the application of Defendant, for change of Venue, wherein J. M. Winston & J. Miller, F. S. McKenzie & G. B. Winston are plaintiffs, and Peter Taylor, J. J. Gorman, George Legan, Wm Meader & Wm Amick are defendants on the part of the defendant, Peter Taylor.

Alfred J. Amick & lawful age being produced sworn and examined on the part of the defendant doth and saith as follows to wit: I was in California in September 1850, I remained there until January 1856. I was on the Ranch kept by Taylor Gorman Legan & Amick, I was upon the Ranch at the time Winston McKenzie & Company's Stock was on the Ranch, I was assisting in taking care of the Stock, and remained upon the Ranch until the Stock was taken away. The Stock was herded and Ranched with the care and attention usually taken in the Country, none of this Stock was lost off the Ranch by neglect, at that time it was

almost impossible to prevent the loss of Stock, occasionally there was a good many Stock died on the Ranch, But I Can't say that any of the Winstan McKenzi's Stock died or not, there were two persons kept on the Ranch to attend to the Stock and very often more than two, It was our custom to try and see them every day, and to herd them up and keep them from scattering - The Company had a considerable amount of Stock of their own on the Ranch at the same time, and the Stock all received the same care & attention, When I say Company, I mean Peter Taylor and the other dependants, it was not customary for Ranchers to pay for Stock lost on their Ranch, unless, by their neglect, I expect to start back to California between this and the first of next month,

Alfred J. Amick

Sworn to and Subscribed before me, 19th day of
April 1856

W. W. Williams J. P.

State of Missouri
Morgan County, I, Wallace W. Williams
an acting Justice of the peace, within and for
the County of Morgan and State of Missouri, do
Certify that in pursuance of the annexed
notice, came before me, at the Circuit Clerk's office

67.

in the Town of Versailles, County of Morgan, State
of Missouri, on the 19th day of April A.D. 1856,
Alfred J. Amick the deponent who was
there by one Sworn, to testify the whole truth
of his knowledge touching the matter in
controversy in the cause aforesaid, that said
deponent was there examined and his
examination reduced to writing, and
subscribed and sworn to by said deponent
in my presence, on the day herein last
above stated, between the hours of Eight
O'clock in the forenoon, and Six O'clock
in the Afternoon, of said day—

Given under my hand this 19th day
of April A.D. 1856—

W.W. Williams J.P.

The said notice attached to & filed with
said deposition is in the words & figures
following to wit—

In the Morgan Circuit Court
J. M. Wurstow, P. T. Miller }
F. S. McKenzie & G. B. Wurstow } plaintiffs
vs
Peter Taylor, Wm Meader }
J. L. Gorman & George Legan } defendants
& Wm Amick }

68,

To J. M. Winston, J. T. Miller, J. S. McKenzie,
G. B. Winston and E. L. Edwards, your attorneys
of record in the above cause,

You are hereby notified that depositions
of witnesses to be read in evidence in the
above cause on the part of the defendant
Peter Taylor will be taken at the Circuit
Clerk's office in the Town of Versailles in
County of Morgan, State of Missouri, on
the 19th day of April 1856 - between the
hours of 8 o'clock in the forenoon
and 6 o'clock in the afternoon, and
that the taking of said depositions, if not
completed on that day will be continued
from day to day at the same place, and
between the same hours till completed,
Peter Taylor by
Ross - his atty,

On the back of said notice ~~is~~ the fol-
lowing endorsement to wit -

"I return the within notice as served
by leaving a copy of the same with,
J. T. Miller, J. M. Winston, G. B. Winston &
E. L. Edwards, this 7th day of April 1856, J. M.
McKenzie in State of California,

Levi Guasallas, Sheriff of Boone
County, W. H. Pratt D. C."

They (defendants) then introduced Andrew Estes as a witness who testified that he was in California in the year 1854, on dry creek about twenty five or thirty miles from Hangtown on dry creek, that most ranches were claims that Ranchers had, where stock was ranched without enclosure. They had a small enclosure, or corral, used for catching stock. It was customary for ranchers to notice the stock generally that was about the ranch — He could not say how many hands were generally used in ranching — Only two attended to the ranch where his stock was ranched — He stated that his knowledge was that stock was liable to run away — be lost — stray off — or be stolen —

This testimony was objected to by plaintiffs. The above testimony was ^{x elicited} ~~elicited~~ by the following questions, propounded to the witness by the defendant (after he had stated he had been in California) To wit: "State if you know the manner of herding stock on Ranches in California?" To this question the plaintiff objected and excepted, To the opinion of the Court in overruling his objections to the same —

George H. Claybrook, testified that he was in California in 1850 at Hangtown that when people put Stock on the ranch some one was to look after it once or twice a day — Stock run on the commons — It was not customary to look after them at night to his knowledge, objected to by the plaintiffs — He knew the Stock took across the plains by plaintiffs — Did not recollect ever looking at it after it reached California — All Stock was thin after it got in — Taylor left California in Oct 1850, while I was staying at Hangtown — F. S. McKenzie and Philip Miller came to Hangtown — I heard Taylor tell them he was coming home — He was talking about the Stock — Taylor was telling them he saw the Stock when he was down there — Taylor had sold his interest in the ranch — After he had had this talk, Taylor went to where they were and told Miller and McKenzie that he was going home, and to go down and see about their Stock — To my best recollection they talked like they would go down — I don't know that Taylor gave them any reason for going home — This was about the first of October that this conversation took place —

71. On Cross examination he said that Philip Miller who was then present in Court, and a witness in this cause, and Fountain S McKenzie one of the plaintiffs in the Suit were the persons he alluded to as being spoken to by Taylor in Hangtown in the conversation above alluded to,

Joseph Humes Says— "I was in California in 1850, and remained there 5 years & 3 months— I was all over the State, I was acquainted with the general Custom of ranching— It was the Custom to keep one or two persons on the ranch to keep up the Stock— They generally looked after it once a day— if any was gone it was the Custom to hunt it up— if it was not found and if was convenient to do so— the loss was reported to the owner— It was not customary for Ranchers to give themselves much trouble about it— I kept a Ranch on the Sacramento, below the City about 18 months— it was not customary to keep a watch over the Stock at night or care it at night— It was customary to drive up horses & mules once a week into a corral to count and see if all were there—

72,

I never lost but four, and did not pay for them — It was not in the bargain —

The plaintiffs object to that part of the witnesses testimony, in relation to the Custom of ranching — The testimony of the above witness in relation to ranching was elicited upon alike question as propounded to witness Estes under the same objections and exceptions of plaintiffs —

John Stephens testified to the same as Humes in substance, as to the general Custom which was objected to by plaintiffs — This evidence was also, in answer to a like question as put to Witness Estes stated above —

Defendant here closed his case —

Plaintiffs then introduced William & Elisha Shelton neither of whom testified to any matter material to the issue —

Philip Miller testified that he was in California in 1850, in the neighborhood of Hangtown — That he did not know any thing of the Custom of ranching in California — That he knew the stock of Plaintiffs — They started with 27 head

(73)

bought 2 of John Perry on the way and one at Salt Lake - that he knew nothing of the delivery of the stock to Taylor - that he saw that portion which McKenzie got back - There were 6 or 7 head but he could not state what portion were horses & what portion mules -

Richard J. Miller & George W. Bolton were with McKenzie when he got the stock back - He further testified that he never was in Haughton with the plaintiff McKenzie at any time - that he has no recollection of ever having seen Taylor in California - Has no recollection of being in Haughton with ~~him~~ Claybrook and McKenzie at any time - That he first heard of Taylor's absence about the last of December or first of January - that his impression was they sent for their stock as soon as they could, after hearing he had left -

On Cross examination he stated that he did not know Taylor in Missouri - that he might have seen him and forgotten it - but does not think that he did - He was much worn down when he got there, with the fatigues of the journey - That Dr. Miller is a nephew of his - He resided in Haughton & witness

(74)

went for him to see him. about a negro - who was sick and afterwards died - his shop was on the end of the street near a cliff of rock. This was all the evidence given in the case -

The Plaintiffs then asked the Court to declare the law as follows:-

1st If the Jury believe from the evidence, that the defendant received the Stock sued for & described in plaintiffs petition, to be kept by defendant on his ranch at pasture, and that defendant - his agents or servants failed to return said Stock, or any part thereof to plaintiffs, when demanded by plaintiffs of defendant his partners or agents, the Jury will find for plaintiffs, the value of such Stock as was not delivered or not received by plaintiffs unless they further find, That the said defendant used due diligence in taking care of said Stock, and the same was ^{not} lost for the want thereof.

2nd If said property was received by defendant & his partners to be ranched or herded for hire it devolves on the defendant to show that he used due diligence in taking care of said Stock - and that the same was lost by unavoidable

75, accident, and unless the jury find said stock was so lost, they will find for the plaintiffs, the value of the stock so lost,

3^d The measure of damages in this cause is the value of stock, not returned to plaintiffs at the time the same was demanded, and the jury may allow interest, from the time of the demand,

4th The jury are the sole judges of the Credibility, Furtiveness, and the weight of testimony before them, and may receive or reject any testimony before them, according as they may believe worthy of Credit or not —

5th The receipt of the stock mentioned in the petition, & described in the receipt read to the jury, is admitted by the defendant; and no proof is necessary to prove its delivery —

6th The defendant having admitted the receipt of the horses and mules, mentioned in the petition, it devolved on him to use reasonable care and diligence, in taking care of said stock for plaintiffs, & if he

failed to do so - and any part of said stock was lost, for want of such reasonable diligence in taking care of the same, said defendant is liable to plaintiffs for the value thereof,

7th Although Taylor may have sold his interest in the ranch, after receiving the property of plaintiffs, and may have told McKenzie that he was coming to Missouri, this will not release him from his liability to plaintiffs."

All of which were objected to by defendant, except the 4th and 5th - The Court gave all the instructions as by the plaintiff except the second - To the refusal of the Court to give the second instruction, asked by plaintiffs, they objected & excepted,

The defendant asked the following instructions:-

1st The defendants by their agreement with plaintiffs, were only bound to use ordinary diligence in the care of plaintiffs stock; & the burden of proof to show the absence of such diligence, is upon the plaintiffs -

2nd The defendant is not liable for any stock

177.

lost from said Ranch, unless they are satisfied that such loss resulted from the negligence of the defendants.

Ref

3^d If defendant Taylor sold his interest in said ranch, whilst plaintiffs' stock was in the same—and notified defendants or either of them of such sale, and requested them to go and attend to said stock, then he is not liable for any loss, happening after such sale and notice.

Ref

4th The jury will disregard all the declarations of Alrick, made after Taylor's sale of his interest, in said Ranch.

5th If Taylor sold his interest in the Ranch and notified defendants, or either of them of such sale, and requested them or either of them, to go and get their stock, the defendant cannot be affected by the declarations of Alrick or any other of the partners after such sale, notice, and request. As to any thing which happened after such sale.

6th If the defendant sold out his interest in the ranch, and notified plaintiffs or

either of them of such Sale, and requested them to go and take charge of their Stock he is not liable for any loss of the same, if such loss happened, after such sale, notice and request

7th That the writing of defendant as aforesaid, is the sole evidence of the Contract between the parties, And the Jury will exclude from their Consideration all the evidence, tending to establish a different Contract—

To all of which the plaintiff objected, Except the Seventh,

The Court refused the Third & Fourth instructions asked by defendant & gave all the others— The plaintiff objected to the giving of the 1st 2^d 5th & 6th instructions given on the part of the defendant, & excepted—

Defendant excepted to the refusal of his instructions by the Court and also to the giving of the instructions given the Court on the part of the plaintiff,

The Cause being submitted to the Jury they returned a Verdict for the defendant

The plaintiff filed a motion to set aside the Judgment & Verdict, and

79.

grant them a new trial, which said Motion
is in the words and figures following To wit:

In the Miller Circuit Court
October Term 1838

Winston McKenzie & others

VS

Peter Taylor

The said plaintiffs move, the
Court to set aside the judgment & verdict
in said Cause - for the following reasons:-

First - Because said Court permitted said
defendant to give illegal and incompetent
evidence to said jury on the trial of said
Cause

Second, Because the verdict of the jury is
against the evidence in said Cause

Third - Because said verdict is against the
weight of Evidence -

Fourth - Because the Court erred in refusing
the second instruction asked by plaintiffs

80 5th - Because the Court erred in giving
the instruction, given on the part of
the defendant.

Edward Atty for Plaintiffs,

Which said motion being seen and heard
by the Court, was overruled by the Court —
To the opinion of the Court in overruling
said Motion the plaintiffs objected &
excepted and tendered this their bill of
exceptions & prayed the Court to sign and
seal the same which is done accordingly

G. W. Miller Clerk

87
81

State of Missouri 3p
County of Miller 3p

I E B Farley Clerk of the
Circuit Court within and for the
County of Miller, first judicial Circuit
in the State of Missouri, hereby certify that
the foregoing Eighty pages ~~full & perfect~~ contain
a full & perfect copy of the record ~~in~~ and
proceedings in the cause of J M Winston Philip
J. Miller Fountain J McKenzie and
George B Winston Plaintiffs against Peter
Taylor Defendant, as the same appears of
record and on file in my office

Given under my hand and the seal
of said Court at office in
Columbia this ~~thirtieth~~ day
of December AD 1858
E B Farley Clerk

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J W Winston, P.

J Miller, J. S.

Mc Kenzie & B Winston J.E.

4 } Record

Peter Taylor

filed Dec. 15th 1858

Wm E. Drury clerk

Clerk

Jan'y J. 1859
 Miller H O to 52
 1st

In the Supreme Court of Missouri
January Term 1859.

T. M. Winston & other Plaintiffs in Error
vs

Peter Saylor Respondent.

And the said Plaintiffs in Error
by their Attorney come and say that
in the record and proceedings in
said Cause and in the judgment of
the Circuit Court therein there is
manifest this

That said Court erred in declar-
ing the law of the case to the jury.

That said Court erred in refus-
ing instruction asked by Plaintiffs

That said Court erred in giving the
instructions given on the part of Respondent

That said Court gave instructions
contradictory on their face—

That said Court permitted the
Respondent to give improper evidence
to the jury

That said Court erred in refusing
to grant a new trial to the Plain-
tiffs.

That said judgment is otherwise
defective, informal, insufficient
and void—

wherefore said Plaintiffs pray that said
judgment may be reversed, annulled, set
aside and held for naught.

E. L. Edwards atty
for Plaintiffs

No 5

Mistow & others

v

Taylor

Applicants for Error

Filed Jan'y 10. 1859
W. E. Duncanson Clk

Edwards atty

No 5.

Winstan et al vs Taglos

The defendant and his partners, who kept a 'ranche' in California, received of the plaintiffs in ~~the~~ September 1858 eight horses and seven mules, to be herded on their ranche, for which the plaintiffs were to pay three dollars per head each month. By this contract the defendant did not ensure the safety of the stock, but was only bound to take ordinary and reasonable care of it, and was only responsible for ordinary negligence. Noy. Bail. Dec. 443.

The amended petition, on which the action was tried, after setting out the contract, and its legal effect, averred that though the plaintiffs demanded the horses and mules of the defendant, only six of the horses and four of the mules were delivered, and that the others were lost by reason of the negligence and improper care of the defendant.

The defendant admitted that some of the horses and mules were lost, but denied that they had been demanded by the plaintiffs, or that they were lost by the carelessness or negligence of the defendant. The only issue raised by the answer, was whether the property was lost by the defendant's negligence. No new matter was introduced or relied on, and there was nothing to warrant the admission of Claybrook's testimony, or the giving of the fifth and sixth

instructions asked by the defendant. The defence, made for the first time at the trial amounted to a release, which was inadmissible, if for no other reason than because it was not set up in the answer.

The defendant could not absolve himself, without the consent of the plaintiffs, from the liability the contract imposed on him and his partners, by retiring from the firm. *Holden v. M. Lamb*, 21. Mo. 2132

But as the stock was not placed in the defendant's custody for any definite time, and the plaintiffs could have removed it at their pleasure, the defendant on the other hand could have required the plaintiffs to take it away, by giving them a reasonable notice; and in my opinion if Taylor had advised them that he intended to give up the business and leave the country, and had requested them to remove their stock, there could be

no hardship in holding ~~that they~~ if they permitted it to remain after the expiration of a reasonable time within which they could have taken it away, that they looked to the other partners to take care of their property, and discharged him from the contract. Such a defence however ought to be clearly made out, not only as to the request but that reasonable time was given after notice

for the removal of the stock, and that
a cause of action against him had been
already accrued.

There is perhaps, no absolute rule
for determining in every case upon whom the
burden of proof rests, whether upon the bailor
to establish the negligence by which the property
was lost, or upon the bailee to show that the
loss has been without any neglect on his part.
Sometimes it depends on the form of the action
and ^{upon} the stage of the cause at which the question
arises. In an action of trover the plaintiff
may rely on a demand and refusal of the
property, and thus put the opposite party
on the defence. But in an action of assumpsit
or an action on the case founded on negligence
the plaintiff must make out a prima facie
case as he charges it, for it is a general

Common law principle that every person
is presumed to do his duty until the contrary
is shown. Story Bail. Sec. 213, 278, 410-434.

It is also said that when the thing bailed is lost
or injured, the bailee is bound to account for such
loss or injury, but when this is done, the proof of
negligence or want of due care is thrown on
the bailor. 1. Parsons. Cont. 606.

In this case however the question did not arise
and there was no propriety in giving the instructions.

acted by either party on the subject: for
the pleading, admitted the fault and
the loss of the property, and both parties gave
evidence bearing on the subject of negligence
and as the whole case was before the jury, the
only question to be decided was, whether the
loss resulted from the want of ordinary
care and attention

The demurrer was properly ~~sustained~~
Sustained to the original petition, for as the
defendant never appeared to the suit in
California, the notice by publication was
insufficient to authorize an action in this
State on the record of the payment. Street
of Shannon 1. Mo. 375. Sallee, May 3. Mo 84.
Smith & Ref. 7 Mo. 463.

Myself can curing the payment will be
reversed and the cause remanded.

Done & signed at

J. C. Richardson

No 3

Winstanley

Jaylor

Phenomenon of the Court

Not Remanded

Filed March 17 1889

Wm E. Brown

Clk

Richardson

J M Winston & J B Miller
 J. S. McKenzie & J B Winston Plaintiffs
 against The Bill
 Peter Taylor Defendant

1858
 Nov. To J B Harley Clerk Miller Circuit Court
 Filing writ of Error .05
 Making Transcript to Supreme
 Court containing 15500 Words @ 15 ¢ 2.25
 Certificate & Seal to Transcript .50
 Certificate & Seal to writ of Error .50
 Total — \$4.30

State of Missouri
 County of Miller

I J B Harley Clerk of the Circuit
 Court in and for said County Certify
 that the above is a correct bill of the costs
 due the Clerk of the Miller Circuit Court
 incurred in the above case by reason
 of said cause being taken by Error to
 Supreme Court of Missouri - and
 that the same remains due and
 unpaid

Given under my hand and
 The seal of said Court at
 office this 12th January
 1860

J B Harley

No 5 Jan 5/59

Winston et al

vs

Peter Taylor

Motion to retax
costs

Filed Jan 16 1860
Wm E. Duncum
clk

In the Supreme Court
January Term 1859
T. M. Winston & others Plaintiffs in Error
vs

Peter Taylor Respondent,

The Plaintiffs in Error (who were the Plaintiffs below) brought their suit against the Respondent and others upon a judgment rendered in their favor against the original parties to this suit in a District Court in and for Trinity County, in the State of California. This judgment was without personal service on the Defendants. They were notified by publication in a newspaper as required by the Statute of California. The Defendants failing to appear judgment was rendered against them by Default—afterwards the Plaintiffs sued on the judgment in this State and failing to get personal service, (or any other kind) on any of the ~~Respondents~~ Defendants except the Respondent the suit was discontinued as to those not served, at the next term. The suit was commenced at the April Term 1855 of the Morgan Circuit Court, at the October ^{Term} the Plaintiffs filed an amended Petition declaring on the Original Contract.

At the April Term 1856 the Defendant filed a
a Demurrer to the original petition. The ground
of demurrer relied upon was that the de-
fendants were not in Court except by
publication, & that the plaintiff could
not maintain an action upon a judgment
obtained in that manner. The demur-
rer was sustained and exceptions la-
ken - (see Demurrer at page 13 Record)
The Plaintiff then, by leave of the
Court filed an amended petition in
which they declare on an certain in-
strument of writing executed by Re-
spondent and others to Plaintiffs by
which Defendants acknowledged the
receipt of certain horses & mules there-
in mentioned, from Plaintiffs to be
ranchd by Defendants on their ranch
on Sutter Creek in California. The
Plaintiffs allege that a part of the horse
& mules were lost by the improper con-
duct of the Defendants, and ask for
judgment for the value of the mules
and horses so lost. (See copy of receipt
given by Defendants to Plaintiffs for the hor-
ses and mules at page ten of the Record)

The answer to the amended Petition admits the receipt of the horses and mules charged to have been received by them and denies all the other allegations in the petition. The Respondent also pleads the statute of limitations to the amended petition. (The original suit was commenced in March 1855. The first Amended petition was filed on Oct. 12, 1855, the second Amended petition was filed April 17, 1856. The receipt given by Defendants to Plaintiffs is dated Sept 4, 1850.)

After the Cause was at issue the Plaintiffs took a change of venue from Morgan to Miller County.

A motion was made in the Miller circuit Court to strike out that part of Defendants answer, setting up the Statute of limitations. The motion to strike out was sustained & Respondent excepted. Respondent then asked leave to withdraw his answer which was granted and the answer withdrawn. Respondent then filed a motion to strike out Plaintiffs Amended petition which was overruled - and Defendants excepted. Defendants then refiled his answer by leave of the Court to which Plaintiffs excepted.

A motion was made by the Respondent to set
aside the Deposition of G. W. Bolton which
was overruled by the court and Defendant
excepted. The cause was tried by a jury and
a verdict for the Defendant. Plaintiff filed
a motion for a new trial ~~and in arrest~~
~~of the judgment~~ which was overruled,
and exceptions taken.

At the trial of the cause the plain-
tiffs read to the jury the deposition of
R. D. Miller (see Record page 37 to 43)
and the Deposition of G. W. Bolton (see Re-
cord page 53 to 56) and rested their case.

The Defendant then read the depo-
sition of Alfred Arnick and J. D. German
(see Record page for Arnick's deposition page 65
to 66 and German's 59 to 61) The Defendant
then introduced Andrew Ester who testified
as to the custom of Ranchers in California
(Record page 69) This testimony was objected
to by Plaintiff, also.

George W. Claybrooke who testified as to
the custom of Ranchers in California, he
also stated in substance that he heard
Dayton tell McKenzie one of the Plaintiffs
and Philip Miller that he had sold
his interest in the Ranch near Com-

ing to Missouri and for them to go down &
see about their stock, This was at Hargetown

Joseph Hunter testified as to the customs
of Ranchers in California, Record page 71

John Stephens testified to the same point

The Defendant here closed his Evidence

The Plaintiffs then introduced Philip Miller
who testified in substance that he knew Plaintiffs
stock, but that he knew nothing of its delivery to
Defendant. That he never was in Hargetown
with McKenzie at any time. That he had
no recollection of ever seeing Taylor there.
Had no recollection of ever seeing, Clayton
McKenzie in California together. That
he first heard of Taylor's absence from
California in the latter part of December or
first of January. He stated on cross
examination that he did not know Taylor
in Missouri. He. See his Evidence Record
page 73—

This was all the evidence given

The Plaintiffs asked the Court to instruct the jury as follows:

First If the jury believe from the evidence that the Defendant received the Stock sued for and described in the Plaintiffs petition to be kept by Defendant on his ranch, at pasture and that Defendant, his Agents or servants failed to return said Stock or any part thereof to Plaintiffs when demanded by Plaintiffs, of Defendant, his partners or agents, the jury will find for the Plaintiffs the value of such Stock as was not delivered or not received by Plaintiffs unless they further find that the said Defendant used due diligence in taking care thereof said Stock and that the same was not lost for the want thereof

Second If said property was received by by said Defendant and his partners to be ranched or herded for him, It devolves on the Defendant to show that he used due diligence in taking care of said Stock and that the same was lost by unavoidable accident, and unless

the jury find that said stock was so lost they will find for the Plaintiffs the value of the stock so lost.

Third The measure of damages in this case is the value of the stock not returned to Plaintiffs at the time the same was demanded, and the jury may allow interest from the time of the demand.

Fourth The jury are the sole judges of the credibility of witnesses, and the weight of testimony before them, and may receive or reject any testimony before them according as they may believe it worthy of credit or not.

Fifth The receipt of the stock mentioned in the petition and described in the receipt read to the jury is admitted by the Defendant and no proof is necessary to prove its delivery.

Sixth The Defendant having admitted the receipt of the horses and mules mentioned in the petition, it devolved on

him to use reasonable care and diligence in taking care of said stock for Plaintiffs if he failed to do and any part of said stock was lost for want of such reasonable care and diligence in taking care of the same said Defendant is liable to the Plaintiffs for the value thereof

Seventh Although Taylor may have sold his interest in the ranch after receiving the property of plaintiffs, and may have told McKewie that he was coming to Mipouri, this will not release him from his liability to Plaintiffs

All these instructions were given except the 2d which was refused & Plffs excepted - Defendant excepted to the giving of the Plffs instructions,

The Court gave the following instructions on the part of the Defendant,

First The Defendants by their agreement with the Plaintiffs were only bound

to use ordinary diligence in the care of Plaintiffs stock and the burden of proof to show the absence of such diligence is upon the Plaintiffs

Second The defendant is not liable for any stock lost from said Ranch, unless they are satisfied such loss resulted from the negligence of the Defendant.

Third If the Defendant Taylor sold his interest in said ranch while plaintiffs stock was on the same, and notified Defendants or either of them of such sale and requested them to go and attend to said stock, then he is not liable for any loss happening after such sale and notice.

Fourth The jury will disregard all the declarations of Smith made after Taylor's sale of his interest in said Ranch.

Fifth If Taylor sold his interest in the ranch & notified the Defendants or either of them to go and get their stock The defendant cannot be affected by the declarations of Smith, or any other of the parties after such sale, notice & request as to any thing which happened after such sale —

Sixth If the Defendant sold out his interest in ranch and notified the plaintiffs or either of them of such sale and requested them to go and take charge of their stock he is not liable for any loss of the same if such loss happened after such sale notice and request —

Seventh The writing of Defendant said upon is the sole evidence of the Contract between the parties and the jury will exclude from their consideration, all the evidence tending to establish a different Contract —

To all of which Plaintiff objected except the 7th — The ^{Court} refused the 3rd & fourth and exceptions taken on both sides — The jury found a verdict for the Defendant and Plaintiffs filed a motion to set aside the verdict and judgment and for a new trial — This motion was overruled and exceptions duly taken. The cases argued are first that the Court permitted illegal and incompetent evidence to be given to the jury on the trial of said Cause, by Defendant

Second, Because the verdict of the jury was against the evidence in said Cause

Third, Because said verdict is against the weight of evidence —

Fourth Because the court erred in refusing the second instruction asked by Plaintiffs

Fourth Because the court erred in giving the instructions asked by Defendant

Which motion being overruled the Plaintiff excepted, and presented his bill of exceptions which was signed by the court,

The Plaintiffs in Error make the following points upon which they rely for the reversal of the judgment of the Circuit Court.

First The Circuit Court gave contradictory instructions to the jury. The 7th instruction asked and ^{given} for the plaintiffs is in conflict with the 5th & 6th instructions given for the Defendant and ~~was~~ calculated to mislead the jury

And The court erred in restricting the jury as to the burden of proof in the case as declared in Defendant's first instruction. The Defendant having received the property of Plaintiffs he was bound to account for it when called upon by Plaintiffs and the burden of proof was on him to

to excuse himself for such failure—

The court erred in permitting the evidence to go of Geo W. Claybrooke to go to the jury— No such defense is set up in Defendants Answer as is made by that evidence, and the evidence was therefore incompetent—

The verdict of the jury was in violation of law and directly in the face of the evidence and the court should have set aside the verdict for that reason and granted Plaintiffs a new trial

The court erred in sustaining the Defendants Demures to Plaintiffs original ~~petition~~. The plaintiff declared on a judgment between the parties rendered by a court of competent jurisdiction in the State of California. The service was by publication, under the Statute of that State, see Demurer Record page 12, also Story conflict of laws page 507. § 608 2nd Edition, § 608.9 3d Ed. 1 authority there cited

Smith - Ref 7 no 663
Smoked - Ham 1 no 373 -
Saler - 3, 64

No 5

Winston O. A.

"

Taylor

Phenotypic Bump

Edward Sewing
utys

In the Supreme Court
at the City of Jefferson
January Term 1859.

J. M. Winston
P. J. Miller
F. S. McKenzie &
G. B. Winston. } Plaintiffs

vs
Peter Taylor, defendant.

Brief of defendant in error.
The plaintiffs brought their suit on a foreign judgment rendered in the State of California without personal service on the defendant in error. The defendant in error had no personal service, neither did he appear to the action instituted in California. A demurrer was filed to the plaintiffs petition for which see page 13 of the record. which was sustained by the Court and leave given the plaintiffs to file an amended petition they having in the mean time excepted to the opinion of the Court in sustaining the demurrer. The plaintiffs then filed their amended petition which set up for cause of action the instrument of writing upon which the original judgment was recovered in California which was a receipt for and a promise to ranch certain

horses and mules for which see page 10, of the record. The defendant answered the amended petition denying that he was wanting in proper care and diligence in the taking care of said stock, and further pleading the statute of limitation as a bar to the plaintiffs action. A motion was made by plaintiffs to strike out all that part of defendants answer setting up the state of limitations which was by the court sustained and the defendant excepted. The defendant then by leave of court withdrew his answer for the purpose of demurring to the plaintiffs amended petition defendant filed his motion to strike out the amended petition which will be found at pages 31 & 32 of the record. which motion was by the court overruled and the defendant excepted. and then by leave of court refiled his answer. The defendant filed a motion to suppress the deposition of L. M. Bolton which was by the Court overruled and he excepted which motion see at page 34 of the record. See deposition at pages 53 & 54 and notice of plaintiff to defendants

at page 58, On the trial of the cause evidence was introduced to show what was meant by ranching as done in California. The question was put to the witness thus 'State if you know the manner of herding stock on ranches in California?' To this question the plaintiffs objected and excepted. The plaintiff asked seven instructions all of which were given except the second which reads as follows, "If said property was received by defendant and his partners to be ranched or herded for hire it devolves on the defendant to show that he used due diligence in taking care of said stock and that the same was lost by unavoidable accident. and unless the jury find that said stock was so lost they will find for the plaintiff the value of the stock so lost.

The defendant asked seven instructions and the court refused the 3rd and 4th and gave the remainder for which see pages 76 and 77 of the record the plaintiffs excepted to the giving of the defendants instructions except the 7th. There was a verdict for the defendant. the plaintiff made an unsuccessful motion for a new

trial and excepted to the opinion of the Court in overruling his motion and brings his case here by writ of error.

Parsons for defendant insists that no error was committed against the plaintiff, but to the contrary errors were committed against the defendant as follows:

1st The Circuit-Court erred in striking out that part of defendants answer setting up the statute of limitations in bar of the recovery sought. The foreign judgment was the foundation of the action, it not appearing that such judgment is regular or authorized by the laws of California, the demurrer was sustained to the original petition. The amended petition set up another cause of action and it was competent for the defendant to plead the statute to such action if it had not occurred within five years, which was a question of fact for the jury.

2nd The Circuit-Court should have sustained the defendants motion to strike out all defendants amended petition. It was a new cause of action, ^{different from that} set out in the original petition.

There was no error in admitting the

vidence of G. W. Lelaybrook which was competent to show care and diligence on the part of the defendant which was the gist of the matter in controversy and any evidence tending to show care and prudence in regard to the property of plaintiffs while in charge of defendant was competent in this defence. 1 Parsons on Contracts p 621

3rd The second instruction asked for by plaintiff was contrary to law the defendant was only bound for ordinary care and diligence and was not bound to show that the loss occurred by unavoidable accident 1 Parsons on Contracts 621.

4th The burden of proof in this case as to negligence or want of care was upon the plaintiff and the defendant was not bound to prove affirmatively that he used reasonable care. See Parsons on Contracts p 606 621, The defendants first instruction was therefore proper,

5th There is no conflict between the plaintiffs seventh instruction

and the 8th and 9th instructions
asked for by defendant the promise to ranch
the stock was for an indefinite time
defendant therefore had the right to require
plaintiffs to secure the stock and they
having failed to do so, defendant was
discharged from further liability. If
there was a conflict in the instructions
it resulted to the injury of defendant
for no instruction maintaining the
opposite of the above should have been
given.

6." There being evidence to sustain the
verdict this Court will not undertake
to weigh it, but will let the verdict of
the jury remain undisturbed.

J. M. Winston et al

vs

Peter Taylor

Brief of defendant

in error

In the Supreme Court
January Term 1860

Winston et al } Plaintiffs in Error
against }
Taylor } Defendant in Error

E. B. Farley Clerk of Miller Circuit Court comes and moves this Court to retax the costs in the above entitled cause and authorise the Clerk of this Court to issue execution therefor, for the following reasons

1st Because the bill of costs hereto attached was by mistake left out of the transcript in the above cause when sent up to this Court and therefore not contained in the execution issued from this Court

E. B. Farley
By Edward Herwig
his attys.