Beck vs. Bunce, 1868 Moniteau Co #1 Dis.

280/9

103/1

2 of 2

In the Matter of Harvey Bunce
adm^r. of estate of Preston Beck
settle^t. in Probate Court of Cooper Co.
J B. Beck pl'ff. in error

And now comes the plaintiff in error James P Beck, adm^r &c. & assigns for errors in the record & proceedings of the District Court for the District,

First That the Court admitted illegal evidence,

Second That the judgment of the said Court was erroneous on the facts & law of the Cause -

Third that there are other errors manifest in said record & proceedings, for which errors the plaintiff asks that the judgment of the District Court aforesaid be reversed & annulled & for nought held & esteemed.

Naplow
for pl'ff. in error

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In the matter
of Bunce admr. of
Beck.
J P Beck plf. in
error

Assignment of
errors

Nuptiae

for plf.

Filed Jany 12 '69
N. C. Burch
Clerk

In the Supreme Court
January Term 1869.

Harvey Bonner Public admr. of
Cooper County and as such admr. of
the Estate of P. Beck jnr. dec.
Respondent
vs }
James P. Beck - appellant
appeal from the First
District Court.

Now on this day comes the said
Respondent and says that there
is no error in the said record
and proceedings nor in the giving
of said judgment -
And this ~~defendant~~ Respondent
denies that there is any error
in any of the matters above
assigned for error by the said
appellant - and the Respondent
prays that the court may proceed
to examine the said record
and proceedings and that the
said judgments of the Circuit
and District Courts be in all things
affirmed -

Adams
for Respt -

Harvey Burns
admr. of P. Beck
Jnr. dec'd
Respt
vs.
Jas. P. Beck
appellant

Loinder in Error

Filed Jany 12 '69
N. C. Burch
Clerk

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In the Supreme Court of Missouri.

JANUARY TERM, 1869.

IN THE MATTER OF THE SETTLEMENT OF HARVEY BUNCE, ADM'R OF THE ESTATE OF PRESTON BECK, JR.

Appeal from Probate Court of Cooper County. Dr. Jas. P. Beck, Appellant.

STATEMENT OF THE CASE, AND BRIEF FOR APPELLANT.

R. M. FIELD, of Counsel for Appellant.

In the Supreme Court of Missouri.

JANUARY TERM, 1869.

IN THE MATTER OF THE SETTLEMENT OF HARVEY BUNCE, ADM'R OF THE ESTATE OF PRESTON BECK, JR.

Appeal from Probate Court of Cooper County. Dr. Jas. P. Beck, Appellant.

STATEMENT OF THE CASE, AND BRIEF FOR APPELLANT.

Preston Beck, Jr., being domiciled at Santa Fé in New Mexico, died in the year 1858 and left a will, by which he gave his estate to his kindred, nine in number. Administration was taken of the estate at Santa Fé, and also in Cooper Co., Mo. As a large amount of personal assets, consisting for the most part of funds transmitted to this State by the administrator in New Mexico, had accumulated in the hands of the administrator here in 1860, it was agreed by the parties claiming under the will that each party might take from the administrator the sum of ten thousand dollars by giving an obligation with surety to repay the same with interest. Under this arrangement, Mrs. Juliet A. Beck as guardian for her three children, who were named as legatees in the will, took from the administrator thirty thousand dallars and gave an obligation for repayment with William Limerick as surety. David H. Silver, who claimed a share through his deceased wife, who was one of the legatees, also took out ten thousand dollars under a like obligation. This was in the year 1860.

By the law of New Mexico regulating successions, where the decedent left neither wife nor descendant, the father was the forced heir as to two-thirds of the estate, and the power

of disposition by will was limited to the third part of the estate. Preston Beck, senior, father of Preston Beck, Jr., became aware of his rights under this law in 1861, and in that year made a will bequeathing all his interest in the estate of his deceased son, and appointed Dr. James P. Beck executor of his will. He died in the same year.

In 1862, Dr. Beck filed his petition in the Probate Court of Cooper County, setting forth his rights as executor of Beck, senior, to two-thirds of the estate of Beck, Jr., and also his individual right as legatee to one-ninth of the remaining third of said estate, and praying for a decree establishing the rights of all parties to said estate. On the hearing of the petition, the Probate Court decreed that Dr. Beck as executor was entitled to the two-thirds of the estate, and that the several legatees mentioned in the will of Preston Beck, Jr., were each entitled to one-ninth of the remaining third of said estate. From this decree, Mrs. Juliet A. Beck and D. H. Silver appealed.

Mrs. Beck, as executrix of her deceased husband, had presented a claim against the estate of Preston Beck, Jr. This claim was allowed in the Probate Court and amounted to $21,336.87. Dr. Beck disputed this allowance, and was about to institute proceedings to set aside the same.

The right of Mr. Silver to a share of the estate was also in dispute; Dr. Beck insisting that, according to the law of New Mexico, the right of Mrs. Silver as legatee, upon the death of herself and child passed to collateral kindred, to the exclusion of her husband.

And in the meanwhile, the administrator in Cooper county had commenced suits against Mrs. Beck and Mr. Silver, and their respective sureties upon the obligations made to repay the advancements out of the estate, as above mentioned.

Pending all this litigation, a treaty for compromise was opened. On the 28th of June, 1865, Mrs. Beck and Mr. Limerick her surety went to St. Louis and had a long interveiw with Dr. Beck at his dwelling house, lasting, as appears from the testimony, from four o'clock in the afternoon until midnight. The result was an amicable settlement between the parties. The terms of the settlement were reduced to writing executed in duplicate and attested by a subscribing witness.

According to this written agreement, Dr. Beck withdrew his opposition to the claim allowed to Mrs. Beck as executrix of her husband and consented that she should receive the same from the estate. Mrs. Beck on her part admitted the claim of Dr. Beck to two-thirds of the estate and one-ninth of the remaining third, and agreed to dismiss her appeal and leave the decree of the Probate Court in force.

On the same occasion, Dr. Beck wrote a letter to Bunce, the administrator, stating the terms of the written agreement between himself and Mrs. Beck, and ordering the administrator not to prosecute any suit against her and her surety for any money allowed them in the settlement, and also to deliver to Mrs. Beck "any papers, notes or documents that will not infringe on my two-thirds," etc.

Mrs. Beck immediately proceeded to Boonville and put the letter and her part of the written agreement into the hands of Bunce, the administrator, who, without further correspondence with Dr. Beck, dismissed the suit against Mrs. Beck and her surety, and gave up the obligation, amounting to $43,916.66, to be cancelled.

On the 5th of July, 1865, a compromise was made at St. Louis between Dr. Beck and Mr. Silver, substantially the same as that made with Mrs. Beck. Dr. Beck withdrew his objection to the claim of Silver under the will of Preston Beck, Jr.; and Silver conceded Dr. Beck's rights as established by the decree, and agreed to dismiss his appeal from the same. This settlement was reduced to writing, and formally executed. At the same time Dr. Beck gave Silver a letter to Bunce, which was a copy of the one given to Mrs. Beck, with a change of date and names. With this letter and agreement, Silver induced the administrator, Bunce, to dismiss the suit pending against Silver and his sureties, and to give up their obligation, to be cancelled, the same amounting, with interest, to $14,599.97.

In January, 1866, Bunce presented for settlement, to the Probate Court, his account as administrator, in which he claimed credit for the obligations of Mrs. Beck and Silver,

as having been delivered up on the order of Dr. Beck. These items of credit were objected to by Dr. Beck, but were allowed by the Probate Court, and Dr. Beck appealed to the Circuit Court.

On the trial in the Circuit Court, the administrator, Bunce, introduced as witnesses, Mrs. Beck, Mr. Limerick and Mr. Silver, to prove the declarations made by Dr. Beck, at the time of the execution of the written instruments, and in general to show by oral testimony that the agreement between the parties was different from that expressed in the writings. To this testimony the appellant objected as incompetent and illegal. The court admitted the testimony, and the appellant excepted. As it is not proposed to discuss in this brief any other question than the admissibility of this testimony, it is not deemed necessary to set out the testimony in detail.

The Circuit Court gave judgment for the administrator, and on appeal to the District Court the judgment was affirmed.

It is an established rule of law that oral testimony is not admissible to vary or explain written instruments. This rule is so well known and so constantly acted upon by courts of justice, as to render any long citation of authorities unnecessary. It may be proper, however, to cite a few opinions of judges, that place the rule and the reason of it in a clear light.

In Rutland's case (5 Co. 26), which is the leading case on this subject, it is said by the court:

"It would be inconvenient that matters in writing, made by advice and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by averment of the parties, to be proved by the uncertain testimony of slippery memory. And it would be dangerous to purchasers and farmers and all others, in such cases, if such nude averments against matter in writing should be admitted."

In a recent case in the English House of Lords (Shore v. Wilson, 9 Cla. & Fin. 565), Chief Justice Tindal expressed himself in the following words:

"The general rule I take to be that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of the words as to claimants under the instrument or the subject matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such case evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument nor any party in taking under it; for the ablest advice might be controlled and the clearest title undermined, if, at some future period, parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself."

The language of Judge Taylor in Smith v. Williams, 1 Murphey, 430, has often been quoted as an able statement of the law on the subject under consideration:

"The first reflection that occurs to the mind upon the statement of the question, independent of any technical rules, is that the parties, by making a written memorial of their transaction, have implicitly agreed that, in the event of any future misunderstanding, that writing shall be referred to as the proof of their act and intention; that such obligations as arise from the paper by just construction or legal intendment, shall be valid and compulsory on them; but that they will not subject themselves to any stipulations beyond the contract, because, if they meant to be bound by any such, they might have added them to the writing, and thus have given them a clearness, a force, and a direction, which they could not have by being trusted to the memory of a witness."

The rule as declared in the foregoing opinions has been adopted in all the treaties on the law of evidence. It is tersely expressed by Mr. Phillips in these words: "It is a general rule that extrinsic evidence cannot be admitted to

contradict, add to, substract from, or vary a written instrument."

This rule has no reference to the statute of frauds or other enactment requiring certain contracts and instruments to be in writing. It is an old rule of the common law, adopted long before such enactments were made. The case quoted above from Coke was decided nearly a century before the English statute of frauds was passed.

The principal ground, taken on the other side to justify the introduction of the parol testimony, has been that the writing contained only a part of the agreement. Accordingly, when the witnesses of the administrator were asked if the agreement was in writing, they answered, "it was partly in writing and partly verbal."

Now, it is true that, where parties enter into a written agreement and on the same occasion make a verbal contract in relation to some different and independent subject matter, the writing will not prevent the parties from proving such other contract. But plainly this principle has nothing to do with the case before the court.

Again, where a written instrument on its face shows that there are terms not included in the writing, these terms may be proved by parol. But where, as in the present case, the instrument is complete in itself, it is never permitted to add to the instrument, by showing the existence of stipulations not expressed in the writing. For such a practice would effectually overthrow the rule that prohibits the varying of written instruments by oral testimony.

Several cases have been decided by the Supreme Court of this State that illustrate and confirm the positions taken above.

Thus, in Ashley v. Bird, 1 Mo. 640, a written power of attorney was read, authorizing the attorney "to act in all my business in all concerns, as if I were present myself, and to stand good in law, in all my land and other business." It was then proposed to show by parol that it was the true understanding of the parties, that the attorney was authorized to sell lands. The court said that no case could be found to justify the reception of such testimony. The point

was decided expressly under the rule of the common law, and the court in its opinion refer to Phillips' Treatise on Evidence, quoting the passage which has been set out above in this brief.

So, in Lane v. Price, 5 Mo. 101, a slave had been hired for a year by writing. An offer was made to show that at the time of hiring it was agreed that if the slave became sick, the master was to incur the expense of the sickness and the wages were to cease. The court held the evidence inadmissible, as adding terms to a written instrument.

So, in Woodward v. McGaugh, 8 Mo. 161, a defendant being sued on a note as surety, offered to show that it was agreed by the plaintiff that he would not hold him responsible on the note, as an offset to the note existed large enough to satisfy it. The court decided that the testimony was inadmissible.

In Cockrill v. Killpatrick, 9 Mo. 697, a note was payable in the currency of the State. It was proposed to prove that the real agreement was that the note should be paid in certain depreciated bank notes that were in general circulation. The court held that, under the rules of evidence, the testimony was inadmissible, and the contrary doctrine was stigmatized as "most monstrous and mischievous."

The court is also referred to Gooch v. Conner, 8 Mo. 391, and Jones v. Jeffries, 17 Mo. 577.

In most of the cases just cited, the testimony offered was consistent with the written agreement, and this circumstance gave to the offer some air of plausibility; but in the case now before the court, the agreement made out by the oral testimony is in flat contradiction to that expressed in the writings.

By the terms of the written agreement the shares of the parties were fixed precisely according to the decree of the Probate Court, that is, Dr. Beck was to receive two-thirds of the whole estate and one-ninth of the remaining third, while Mrs. Beck was to receive, as guardian of her three children, three-ninths, and Mr. Silver one-ninth of the remaining third. The administrator was advised of this agreement, and authorized to give any indulgence to Mrs. Beck and Mr. Silver

that would not impair the rights of Dr. Beck under the settlement. Under the agreement by parol as testified to by the parties on the other side, the position of the parties becomes inverted; that is to say, Silver and Mrs. Beck take $58,000, which is nearly the share of Dr. Beck, and to the latter is left $11,000, which is about the shares of Silver and Mrs. Beck.

It is said on the other side that the estate in New Mexico yet to be divided, is ample to restore the just equality that has been disturbed in the distribution here. If this be so, it is plain that no loss will be sustained by Silver and Mrs. Beck in holding them to the terms of the written agreement, and it shows with what an ill grace those parties are asking the court to break down the rules of evidence, to relieve them of what, at the worst, can only be a temporary inconvenience.

It is charged that the writings are ambiguous, and need the help of explanatory oral testimony. It is believed that this charge is unfounded. Whatever criticisms the reader may indulge in, respecting the language of the instruments, their meaning cannot be mistaken. The writing containing the compromise between the parties, adopts the decree of the Probate Court, and is not susceptible of misconstruction. The letter of Dr. Beck to the administrator, however inaccurate or unrhetorical, would be readily understood by any reader of common intelligence. Although there is considerable discretion confided to the administration in extending indulgence and favor to Mrs. Beck and Silver, in respect to their obligations to the estate, the injunction is precise and explicit to impair in no way the rights of Dr. Beck, as fixed by the decree and the compromise. It is manifest that the administrator comprehended the writings. His mistake consisted in lending an easy and credulous ear to the representations of the other parties.

Particular stress is laid by the other side on the testimony of Limerick, to the effect that when, after the surrender of the obligation to Mrs. Beck, he met Dr. Beck in St. Louis, the latter expressed gratification at the result, and approved the action of the administrator. But it is obvious that this testimony stands on the same footing as the rest, and is nothing else than an attempt to vary the terms of the written instrument by parol proof.

Something has been said in respect to the doctrine of estoppel having the effect of preventing Dr. Beck from objecting to testimony upon which the administrator has acted. But manifestly the doctrine of estoppel has no just application to the case. *That doctrine concerns the effect of testimony, and not its admissibility.* All that the case presents having any analogy to estoppel, is the very rule invoked by the appellant, that where the parties have reduced their agreement to writing, they are bound by it, and neither is permitted to vary its terms by any proofs outside the writing.

It is manifest that the judgment of the court below was affected with a sympathy for the administrator, who, having no personal interest in the matter, had become the victim of misplaced confidence. There is, however, no just foundation for such sympathy. As it is conceded that the parties are solvent, the administrator incurs no real responsibility. For, if it is decided that the obligations ought not to have been surrendered, Mrs. Beck and Mr. Silver, with their sureties, are still liable to the administrator for the amount of the obligations. So that really the present controversy is one between Dr. Beck on the one side, and Mrs. Beck and Silver on the other, in which the administrator has no interest whatever.

R. M. FIELD,
of Counsel for Appellant.

mem for Watts

The charge of ambiguity comes from Silver with a grace peculiarly bad. It is in evidence, and, from the character of the papers, not susceptible of contradiction by the other side, that Col. Broadhead, his attorney, drew up a compromise as he, Silver, wanted it. This was handed to Dr. Beck with the request that he would mark out the parts to which he, Beck, objected, and insert by interlineation any additions desired. This was done accordingly, and there thus appears on the same sheet of paper, in the respective handwriting of the parties, the original proposition of each. This was done antecedent to any compromise, in order that the exact difference between them might appear at a glance. From this interlined instrument the final compromise was drafted by Col. Broadhead. This remarkable paper was preserved, and we here insert it for inspection with the interlinations, marks and erasures made by Beck and the parties at the time.

(See agreement here interleaved.)

It will be seen on examination that Col. Broadhead inserted in this primary agreement the identical order to Mr. Bunce to deliver up the note of Silver which they now claim Beck gave. It will also be seen that Beck specially marked out this order, stating in writing on the margin opposite to the order that he *rejected it entirely*. This order, accordingly, does not appear in the final compromise, although every other part of the interlined instrument not marked "rejected" does appear, even the minutest particulars. But Mr. Silver generously offers to supply this order thus marked out and rejected by Beck, by the introduction of parol proof, consisting of his own testimony, that Beck meant the opposite from what he said; that Beck meant an order that is not only not in the compromise, but that Beck specially rejected at the time, and has left that rejection in writing. The grounds on which the court is asked to re-add this valuable order to a written instrument by parol proof are, that the striking out and leaving out this order by Beck, leaves it ambiguous and doubtful as to whether Beck meant to give the order so stricken out and left out. If in the mild case before referred to in this brief

the admission of parol evidence is deemed "monstrous and mischievous," what language is adequate to this case, where, in construing a written instrument, it is attempted to introduce parol evidence to prove that a rejection meant an acceptance?

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IN THE SUPREME COURT,

JANUARY TERM, 1869.

HARVEY BUNCE, *Administrator*,

v.

J. P. BECK, *Executor, &c.*

WM. B. NAPTON, for Appellant.

IN THE SUPREME COURT,

JANUARY TERM, 1868.

HARVEY BUNCE, *Administrator*,
v.
J. P. BECK, *Executor, &c.*

STATEMENT OF THE CASE.

Upon the death of Preston Beck, Jr., in New Mexico, a controversy arose between J. P. Beck, executor of Preston Beck, Sr., of Polk county, Mo., and the legatees of Preston Beck, Jr., as to the distribution of said Preston Beck, Jr.'s, estate—the former contending that, by the laws of New Mexico, Preston Beck, Sr., the father of Preston Beck, Jr., was entitled to two-thirds of the estate, and that only the remaining third passed under the will to the legatees therein named, of whom J. P. Beck was one, with eight others, nephews and nieces of said Preston Beck, Jr. The Probate Court of Cooper sustained this view, and entered up judgment accordingly, decreeing to J. P. Beck, executor of Preston Beck, Jr., two-thirds of said Preston Beck's estate, and one-ninth of one-third as legatee. Upon the final settlement in said Probate Court, the public administrator, Bunce, who was in charge of this estate of Preston Beck, Jr., claimed a credit for two items, marked in that settlement as Nos. 6 and 7, and thus stated, viz: "The amount of assets, being principal and interest of note of Juliet A. Beck, guardian, and William Shields and Limerick, delivered to Juliet A. Beck, in pursuance of settlement made with her by said J. P. Beck, said assets as per voucher No. 6, $43,916.66; by

assets, being amount, principal and interest of note of D. H. Silver, Silas H. Silver, and E. Winsor, delivered to said D. H. Silver, for his interest in the estate, upon the order and request of J. P. Beck, as per voucher No. 7, $14,599.97; total, $58,516.63"—which items were allowed by said Probate Court. From this judgment an appeal was taken to the Circuit Court, and from the Circuit Court, through the District Court, to this court.

It appears from the evidence produced on the trial, that on the 28th of June, 1865, J. P. Beck and Mrs. Juliet A. Beck had a settlement, or entered into a written agreement relative to the suit which had just been decided against her in the Probate Court of Cooper county, and this agreement is set out at large on the record, and is substantially to this effect: Reciting that Mrs. Juliet A. Beck, as administratrix of her husband, Simpson Beck, and guardian of the three children, had brought a suit or claim against J. P. Beck, administrator of Preston Beck, Jr., in the Probate Court of Cooper county, for $21,336.87, and had procured an allowance of this claim, which said J. P. Beck contended was unjust and fraudulent; and further reciting that another suit existed, in which J. P. Beck claimed two-thirds, and one-ninth of the other third, of the estate of Preston Beck, Jr., which claim Mrs. J. A. Beck and others were resisting; therefore, to end these disputes, J. P. Beck, in consideration of the covenants and agreement on the part of Mrs. J. A. B., agreed to "release and grant to said Juliet A. Beck, guardian, &c., all right and title to the aforesaid sum of $21,336.87"; and Juliet A. Beck, *in consideration of this release*, as guardian, &c., agreed to release and grant to said J. P. Beck two-thirds of the estate of P. Beck, Jr., of New Mexico—"this means two-thirds of said estate in New Mexico, of which J. P. Beck is administrator, *and two-thirds of said estate in Missouri*, county of Cooper, held by Harvey Bunce, Public Administrator, as assets of Preston Beck, Jr." The agreement then proceeds thus: "And in consideration of the aforesaid covenant by J. P. Beck, i. e. to release to Juliet

A. Beck the sum of said judgment, $21,336.87, obtained as aforesaid in Cooper county, by said J. A. B.," &c., &c., "the said Juliet A. Beck releases and grants to the said James P. Beck the further sum of the one-ninth part of the other third of said estate of P. Beck, Jr. The said J. A. B. hereby agrees to dismiss, free of all costs to J. P. Beck, the suit, both in New Mexico and in Cooper county, Mo., forthwith, wherein she disputes the title," &c. This paper was duly signed and sealed by both the parties, and witnessed by Edward Bulger.

At the same time and place, J. P. Beck gave to Mrs. J. A. Beck the following paper, addressed to Harvey Bunce:

"*28th June*, 1865.

"SIR: Mrs. Juliet A. Beck and myself have settled our law suit, by her allowing me the sum of two-thirds, and one-ninth of the remaining third, of the estate of Preston Beck, Jr., deceased, as claimed by me before the Probate Court of Cooper county, Mo. You will please deliver to Mrs. Beck all her equitable rights and assets in your hands, *after deducting the said* $\frac{2}{3}$ *and* $\frac{1}{9}$ *of remaining* $\frac{1}{3}$, just expenses, costs, fees, &c., when she dismisses her suit. You are, I understand, prosecuting the said Juliet A. Beck and her securities, Mr. Wm. Limerick. You will please not prosecute them for money included and allowed *them* in this settlement *of* $\frac{2}{3}$, *and* $\frac{1}{9}$ *of the remaining* $\frac{1}{3}$, *to me* as aforesaid; and dismiss any suit you may have against the parties for the sum I allowed them in our settlement, i. e. $\frac{2}{3}$, and $\frac{1}{9}$ of the remaining $\frac{1}{3}$, of P. Beck, Jr.'s, estate is allowed to me, and their portion of the remaining $\frac{1}{3}$ to them; and you will please deliver to Juliet Beck any papers, notes, or documents of said J. A. B. and Wm. Limerick, *that will not infringe my two-thirds, and one-ninth of the remaining third*, of P. Beck, Jr.'s, estate, as adjudged by the Probate Court of Cooper county, Missouri. Respectfully, J. P. BECK."

On the 7th of July, 1865, a similar arrangement was completed between J. P. Beck and Silver, and also with the

remaining four legatees under the will of P. Beck, Jr., represented by Silver under a power of attorney, all of which was reduced to writing and filed in the Probate Court of Cooper, and the appeal dismissed. From the agreement between Silver and J. P. Beck, it appeared that in the suit then progressing in New Mexico, the latter, as administrator of P. Beck, Jr., insisted that Silver did not inherit the interest of his wife, who was dead, and who was a sister of said J. P. Beck, but that Beck himself, and her other nearest of kin by blood, were her heirs; and Beck, by this agreement, covenanted to abandon this claim, in consideration of which Silver agreed to abandon his appeal in the Cooper Probate Court, and conceded said J. P. Beck's interest in the estate of P. Beck, Jr., as the two-thirds and one-ninth of the remaining third.

There was no reference in this settlement with Silver to the note of Silver and others as securities for the $14,599.97, nor was there in that with Mrs. Beck to her indebtedness for $43,916.66. But on the same day, at the same place, Beck gave to Silver a letter addressed to the plaintiff, Bunce, which was a precise copy of that given to Mrs. Beck, with the necessary change of names and of dates. It is, therefore, deemed unnecessary to copy it here.

Upon these four written documents, and the parol testimony subsequently introduced, rested the claim of the plaintiff, Bunce, to be allowed as vouchers the sum of $58,516.63 which he had delivered up to Mrs. J. A. Beck and D. H. Silver. The oral testimony consisted of the depositions of said Mrs. Juliet A. Beck and her security, Wm. Limerick, and of D. H. Silver, relative to conversations had between them and James P. Beck anterior to, contemporaneous with, and subsequent to the execution of the papers, the general tenor and purport of all of which was to prove that his intent in said writings, and their intent also, was to require Bunce, the administrator, to give up the said two notes of Mrs. Beck and Silver, amounting to the sum of $58,516.63 as aforesaid, and have the said amount charged against said J. P. Beck in

the settlement of said estate. On the other hand, there were read the depositions of Bulger, the witness to the papers executed on the 28th of June, and of H. M. Bryan, who was present at the execution of those of the 7th of July, contradicting these statements, and showing that said J. P. Beck utterly and repeatedly refused, though very much pressed and solicited, to give any such note to Bunce as these parties desired, or any paper that would interfere with his rights to the two-thirds, and one-ninth of the other third, of the estate; and the oral examination on the trial of said J. P. Beck was positive to the same effect.

Exceptions were taken to the admission of this testimony, both general and specific, the general objection being based on the ground that parol evidence was inadmissible to contradict and alter the plain signification of these papers. Specific objections were taken to Mrs. Beck's deposition, so far as embraced in questions 22, 23, 26, and 29, and the answers thereto, which, as they illustrate the whole course and character of the testimony, I will here transcribe. Question 22 was as follows:

"After you had received the letter addressed to Harvey "Bunce, and before you had delivered the same to Mr. "Bunce, did you have one or more conversations with James "P. Beck concerning *said letter and its true meaning*, and if "so, state what James P. Beck *said was the true meaning* of "said letter, and in regard to said compromise?"

Answer. "After I had received the letter referred to, and "before I had delivered the same to Mr. Bunce, I had two "or three conversations with James P. Beck about said letter, "its meaning, &c., and asked him, James P. Beck, to explain "it, so that it could be understood. James P. Beck said that "it was plain; that Mr. Bunce was a man of sense, and would "understand it, and would give me up the note on that letter, "and that was all I wanted; that if Bunce did not do this, he "would have no sense. He also stated that I should have "no more trouble about said note; that there would be still

"more coming to the children (referring to my children). "He also said he would not compromise with the other heirs "upon as favorable terms as he had compromised with me."

The objection to this question and answer was overruled, and exceptions taken.

Question 23. "In these conversations, did James P. Beck "tell you what *he intended said letter to Mr. Bunce to mean*, "and if so, what was the meaning he gave to said letter?"

Answer. "He did, and assured me repeatedly that Mr. "Bunce would give me up my note on that letter."

Question and answer 26 relate to a receipt not produced.

Question 29. "State *why* you made the compromise with "Dr. J. P. Beck on the terms stated."

Answer. "I was induced to make said compromise with "said Dr. James P. Beck in order to relieve my securities, "who were annoyed by the suit on the note in the Lafayette "Circuit Court, and to rid them and myself of this annoy-"ance, I made said compromise."

The compromise herein referred to, and the letter to Bunce, are both in writing, and explain themselves, and therefore these questions and answers were specifically pointed out and objected to, but the objections were overruled and exceptions taken.

In the deposition of Wm. Limerick, question 6 and answer thereto were objected to, and so appear on the record; but it does not appear what was done by the Court, and only objections to questions 5, 8, and 10, are reported as overruled. There is no doubt that objection to question 6 and answer was disposed of in the same way, and the omission to insert No. 6 was a clerical error; but it is immaterial, as to have overruled said question and answer would have been totally inconsistent with the other rulings in the depositions of Mrs. Beck and Silver. It will be perceived that question 6 and answer were of the same character with those admitted in Mrs. Beck's deposition:

Question 6. "State as fully as you can recollect what "passed between you and Juliet A. Beck, and Dr. James P.

"Beck, about said letter to said Bunce, *and its construction*, "and if Dr. Beck gave *his meaning to or construction of* said "letter before it was presented to said Bunce. State what "*his* (Dr. Beck's) *construction was*."

Answer. "Mrs. Beck came to me in the city of St. Louis, "one afternoon, and told me she had an appointment to meet "Dr. James P. Beck at his house, at four o'clock on said "afternoon, early in July last, for the purpose of settling all "matters of dispute between them, and requested me to ac-"company her to Dr. Beck's house. That meeting lasted "from four o'clock in the afternoon until midnight. At that "meeting, this agreement heretofore referred to, and stated "in my answer to the fourth inquiry," (already copied in substance) "was made between J. A. Beck and Dr. James "P. Beck. After the agreement was made, most of the time "consumed at said meeting was occupied by Dr. James P. "Beck in writing an article of agreement between himself "and Mrs. Beck, and a letter of instruction to Mr. Bunce, "administrator as aforesaid. On reading the letter he had "written to Mr. Bunce, as far as he had then written it, *I* "*thought it was not satisfactory*, and told Dr. Beck, as far as "he had then written said letter, he had said nothing about "the dismissal of said suit on said $30,000 note in Lafayette "county, and the delivery of said note to Mrs. Beck. He "then added to the letter what is written in said letter in "relation to the giving up of said note to Mrs. Beck, and the "dismissal of said suit thereon. At that time (the time of "said writing) we had considerable conversation about the "ambiguity and circumlocution of said letter, and I re-"quested Dr. Beck to permit me to write a direct order to "Mr. Bunce, directing him to dismiss said suit on said note, "and to give up said note to Mrs. Beck, which he (Dr. Beck) "refused to do, saying that Mr. Bunce, on that letter which "he (Dr. B.) had written, would not refuse to give up said "note and dismiss said suit; and that if the said Bunce so "refused to do, that he (Dr. B) would go himself to Boon-"ville and have the business settled as understood between

"himself and Mrs. Beck; and Dr. B. repeatedly made use of "such utterances as the one last above mentioned."

The questions and answers objected to in Silver's deposition are of the same character with those referred to in Mrs. Beck's and Limerick's, and need not, therefore, be particularly stated.

On the other hand, Dr. Beck, the defendant, stated, in reference to the occurrences of June 28th between Mrs. Beck, Mr. Limerick, and himself, that in the first place Mr. L. asked him to discharge the whole note to which Mrs. Beck and he were parties, *which he* (Dr. B.) *declined;* that Mrs. Beck had a claim against the estate of P. Beck, Jr., for $21,000 which she had prosecuted in New Mexico, but had been there dismissed, and she afterwards brought it in the Cooper Probate Court and succeeded in getting it allowed; that he (witness) regarded it as fraudulent and so declared it, and was preparing this defence to it; that by the arrangement between himself and Mrs. Beck, he agreed to abandon all claim to this $21,000 in her favor; that she was to dismiss her appeal in the case wherein he had obtained judgment for two-thirds, and one-ninth of one-third, of the estate of P. Beck, Jr.; and witness thought that the $21,000 and the three-ninths in Bunce's hands, and her three-ninths in New Mexico, would probably let her out of this note for $30,000 and interest, on which Limerick was security.

Edward Bulger, who was present during the entire interview between Dr. J. P. Beck, Mrs. Juliet A. Beck, and Wm. Limerick, testifies to the same facts stated by Dr. Beck: that Mrs. Beck and Limerick did importune Dr. Beck to order Bunce to give up the whole note for $43,916.66, but that Dr. Beck repeatedly declined, and would give no other or further order except for so much as would not interfere with his conceded portion.

Henry M. Bryan testifies as to the settlement between Silver and J. P. Beck, and as to what occurred at that settlement, and his understanding of the effect of the agreement and letter to Bunce.

In this Agreement the writing in BLACK *ink is in the handwriting of Col. Broadhead, and the writing and marks and alterations in* RED *ink are in the handwriting of Dr. Beck.*

This Agreement, *made and entered into this the 5th day of July, 1865, by and between J. P. Beck, of the one part, and David H. Silver, of the other part,* **WITNESSETH:**

That Whereas *J. P. Beck has instituted suit in New Mexico, claiming that David H. Silver is not entitled, as heir of his deceased daughter Isabella Silver, to any portion of the Estate of Preston Beck, Jr., deceased; but that all that portion of said Estate coming to the said Isabella Silver as heir or legatee of said Preston Beck, Jr., deceased, upon her death goes back to the said Estate of Preston Beck, Jr.*

And Whereas, *in a suit recently pending in the Probate Court of Cooper Co., Missouri, and in the Territory of New Mexico, James P. Beck claims the two thirds and one ninth of the other one third of the whole Estate of the said Preston Beck, Jr., deceased, both in Missouri and in New Mexico; which claim was disputed by the said David H. Silver and others, they claiming as against the said J. P. Beck that each one of the legatees named in the will of Preston Beck, Jr., is entitled to the one ninth of the whole Estate of Preston Beck, Jr., deceased, both in Missouri and New Mexico.*

Now, Therefore, *for the purpose of settling the matters in controversy between the said J. P. Beck and David H. Silver, in consideration that the said James P. Beck has relinquished and does hereby relinquish his claim against David H. Silver that David H. Silver is not the heir of his daughter Isabella Silver, as aforesaid, in New Mexico, the said David H. Silver agrees, and covenants hereby consents that James P. Beck shall have his two thirds and one ninth of one third of said Estate of Preston Beck, Jr., deceased, both real and personal, in the State of Missouri and New Mexico, and hereby binds himself to dismiss forthwith all suits, free of all costs, to J. P. Beck, wherein any opposition is made to said two thirds and one ninth of the other third of the Estate of J. P. Beck, Jr., and to that end the said James P. Beck hereby consents that the suit aforesaid in New Mexico against David H. Silver which suit denies that D. H. Silver is by the laws of New Mexico heir of Bell Silver his child, shall be dismissed.* ~~And as he will, by this agreement, have control of the larger portion of the assets of the Estate of Preston Beck, Jr., deceased, he hereby authorizes and directs that Harvey Bunce, Administrator de bonis non of the Estate of said Preston Beck, Jr., in Cooper County, Mo., dismiss the suit brought by him in the Circuit Court of Lafayette County, Mo., against David H. Silver, Winser, and others, on a note for $10,000, so far as my claim of two thirds and one ninth of one third is concerned, and to surrender said note to the said David H. Silver.~~ I reject this part entirely.

In Witness whereof, *the parties aforesaid have hereunto set their hands and seals.*

Attest—true copy.

Just. Williams, Clerk,

By E. S. Williams, D. C.

A paper was also produced at the trial, and identified by a witness, containing the original proposition of Silver for a settlement, as drawn up by Col. Broadhead, his attorney, which had been presented to Dr. J. P. Beck, with the understanding that he (Dr. B.) should erase such parts as he would not consent to; that in this paper, as it appeared in the handwriting of Col. B., that portion which contained an order to Bunce to to deliver up Silver's note was stricken out by Dr. Beck, and the paper otherwise interlined; and this paper, so interlined and so erased, was in fact the final agreement consummated between Silver and Beck, and was copied literally by Col. B. after it was so modified by Dr. B.; and is in fact the same paper or writing produced as the final compromise or written agreement concluded on the 7th July, 1865. This paper is herein copied as it was originally, and as it was after the erasures and interlineations made by Dr. B.:

(See "Agreement" here interleaved.)

There was some testimony in relation to the value of the estate in New Mexico, as stated by Dr. J. P. Beck, and as to his individual means, and also some rebutting evidence offered on this point; but neither is deemed material, and I refer to the bill of exceptions for its details.

There was also evidence of letters written by Dr. J. P. Beck to Bunce, warning him not to give up these notes, the reception of which, previous to his action, Bunce denies on the trial, but which Dr. Beck swears he admitted in conversations with him.

POINTS AND AUTHORITIES.

First. The two contracts in writing of June 28, 1865, and July 7, 1865, and the two letters addressed to Bunce at those dates, are to be construed together as constituting one transaction, or, if preferred, two transactions, and did not, either considered jointly or separately, authorize the giving up of the two notes for $58,516.63. This point is submitted as being apparent upon a bare perusal of the papers themselves. The entire assets of the estate are reported at $84,016.63, and thus it was apparent that the $58,516.63 exceeded two-thirds of said estate by $10,505.50⅓, to say nothing of the one-ninth of the remaining third, both of which, by the terms of the agreements and papers, as well as by the judgment of the Probate Court, were conceded to belong to J. P. Beck; whereas this amount, viz., $58,516.63, was given by the administrator, Bunce, to Mrs. Beck and Silver, who only were entitled under the decree and under the compromise to four-ninths of the third of said estate.

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Second. The parol evidence allowed in this case, to contradict the written contracts and orders, to establish *that Beck meant, and declared that he meant*, the very reverse of what he wrote, was improperly allowed.

On this point I refer to the 15th ch. of Greenleaf, in his Treatise on Evidence, as being the latest, the most complete and satisfactory, and the most generally received view of this subject, both in England and America.

In this chapter may be found the general rule on this subject, which, beyond all dispute, would exclude the evidence admitted in this case; but the author also particularly enumerates all the exceptions and modifications of the general rule, and if this evidence can be brought within the excepted cases, as referred to by Greenleaf or any other writer, or by any judicial opinion not known to this author, it is to be shown on the other side.

The general rule undoubtedly is, that all previous and cotemporary conversations are merged in the written contract.—Greenl. § 281; Gooch *v.* Conner, 8 M. R. 391. +

To ascertain, however, what meaning the parties intend to convey by the words they use in a written instrument, parol evidence of extraneous facts and circumstances may be admitted to a very great extent without infringing the general rule, and Mr. Greenleaf has furnished us with a very full and exact detail of all the classes of cases in which this is permitted. Let us see if the present can be brought by any sort of ingenuity within any of these classes:

1. "All cotemporaneous *writings, relating to the same subject-matter*, are admissible." This principle we adopt and use in our evidence, and the court will see that it utterly destroys the theory of the opposite party.

2. Fraud, illegality, want of consideration, duress, infancy, imbecility, &c., may be proved to avoid a written contract. There is no pretence in this case of any of these things. They propose not to avoid the contract, but to change it.

3. Where the original contract is verbal, and only *part of it* is reduced to writing, the remainder may be supplied by parol. Nothing of this is pretended here.

4. Recitals of facts may be contradicted to show that the consideration money was more than stated in the deeds. This has no bearing on our case.

5. Parol evidence may be given explanatory of the *nature and qualities* of the subject to which the instrument refers; as where a *factory* is conveyed, it may be shown what this embraced and included. Courts may put themselves in the

+ Smith v. Thomas 29 M R. 310
Rollins v. Claybrook 22 M R 406
Cauthorn v Haynes 24 M. 239.
Bradley v Bradley 24 M. 315 =
Gregory v Cowgill 19 M R 416
Ashley v. Bird 1 M R 640

place of the party, i. e., ascertain his relations and surroundings, in order better to understand what he meant. But no case can be shown, nor has any been cited by Greenleaf under this head, where proof is admissible to prove that a party *declares his meaning* to be *other than that contained in the instrument itself.* Yet this is the very thing which all the plaintiff's evidence is intended to show. All the proof introduced is, to show that *Beck meant* so and so—that *he said* his letter to Bunce meant so and so—that the paper would accomplish such and such results.

This point is fully discussed and decided by Lord Abinger in Hiscocks v. Hiscocks, 5 M. &. W. 363. There was in that case an attempt, not as here, to explain the words or meaning of the paper (which it seems would have admitted of no doubt), "but to supply some deficiency, or *remove some obscurity*, or to *give effect to expressions that were unmeaning or ambiguous.*" Now, this is the plausible pretext assumed in this case, and let us see what Lord Abinger said on this point: "There is," he observes, "but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is, when the meaning of the testator's words *is neither ambiguous nor obscure*, and where the devise is, on the face of it, perfect and intelligible, but from some of *the circumstances admitted in proof an ambiguity arises* as to which of the two or more things, or which of the two or more persons, each answering the words in the will, the testator intended to express. Thus, if a testator devise his manor of S to A B, and has two manors, of north S and south S, it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord Bacon calls an 'equivocation,' that is, the words equally apply to either manor; and evidence of previous intention may be received to solve this latent ambiguity; for the intention shows what he meant to do, and when you know that, you immediately perceive that he has done it by the general words he has used, which, *in their ordinary sense, may properly bear that*

construction. It appears to us, *that in all other cases* parol evidence of what was the testator's intention ought to be excluded, upon this plain ground, that his will ought to be made in writing," &c.

6. This exception relates to *usage*, &c., which does not concern us in this case.

7. Parol evidence is allowed to rebut an equity, and this topic is also foreign to this case.

8. Mistake and fraud may let in parol evidence.

Now the parol evidence in this case does not fall within any of the exceptions referred to by Mr. Greenleaf, and is directly opposed to the genearl rule, as will be seen by reference to § 281, and the authorities cited in support of it, and § 360, in part 6, and § 363 and 366. In this last section it is distinctly stated, that parol evidence is never admitted to prove that a party did not mean what he says.

Third. Even conceding the admissibility of the parol evidence, taking it in connection with the four instruments in writing, the preponderance of the evidence was to sustain the plain meaning of the papers.

To sustain this point, I rely on the statement of Dr. Beck, of Bulger, and of Bryan, and especially upon the written propositions of Col. Broadhead produced at the trial, and containing a clear and distinct agreement on the part of Beck to give up the notes *stricken out and erased by Beck*, and in that form ultimately adopted by both parties as the final settlement of the negotiation.

A mistake must be *mutual* to authorize a court to reform an instrument of writing and conform its terms to the real intent of both parties—if the mistake is one-sided, the most that a court can do is to cancel it and place the parties in *statu quo*—Greenl. § 363.

Fourth. The pretext upon which these notes, amounting to nearly sixty thousand dollors, were delivered up by the administrator was, that he supposed or conjectured that the New Mexico assets would be sufficient to make it all right in the final distribution of that fund; but there was not only a

total absence of all legitimate proof as to the actual condition of the estate unadministered in New Mexico, but the Probate Court in Cooper county had no jurisdiction over the subject-matter and could make no orders relative thereto, and would therefore have refused, had such an application been made, to authorize the administrator here to pay over to Beck's order, even if unequivocal and positive, an amount of the assets here exceeding by upwards of ~~ten~~ thousand dollars his two-thirds of the estate; and if the Probate Court, supposing such an order or authority to have been given by it in advance, would have clearly exceeded its power in making it, how can the administrator be justified in paying out such a sum without any order at all from the court? He is a trustee for *all* the distributees; and even if it be conceded, that he might give up to any one what manifestly was his own share, he certainly could claim no power to give up what belonged to others.

In short, we maintain that the administrator had no power to pay out $58,516.63 *without an order from the court* to which he was amenable, and this point is entirely independent of the instruction, already contended for, of the instruments of writing, and the objections to the introduction of parol testimony.

Fifth. The effect of allowing the two items, No. 6 and 7, as credits of the administrator on the final settlement, was to give Mrs. Juliet A. Beck and Silver, instead of the four-ninths of one-third of the estate, which they only claimed, a sum ~~*exceeding all*~~ *of Dr. Beck's interest in the estate;* and of this extraordinary generosity it is claimed he was guilty, whilst, at the same time, he is denounced as the most selfish and crafty of mortals. But what is equally strange, is that the Probate Judge, seeing that Dr. Beck, according to this construction of his letters, had given away all his interest in the estate, decreed to him the four-ninths which belonged to Mrs. Beck and Silver—thus construing this letter to Bunce, not only as an order to pay over about $60,000 of the assets to Mrs. Beck and Silver, but as a purchase of their interest

in the estate! How and when Dr. Beck had acquired this interest of Silver and Mrs. Beck does not appear; and how Dr. Beck's orders could affect the interest of other legatees, of whom Mrs. Beck and Silvers represented only four out of the nine, does not appear.

The answer to this will no doubt be, as it has been, that as Mrs. Beck and Silver, and the five remaining legatees, do not object, it is not for Dr. Beck to decline this gratuity. Certainly, if the donation was not accompanied with the corresponding substraction of his entire interest of two-thirds and one-ninth of a third, it is not likely the Doctor would object. But probably he cannot appreciate the singular generosity of taking from him about $60,000, and donating some ten or fifteen thousand, and then crying out that the donation don't hurt him, and he must not complain.

Sixth. An estoppel is claimed in this case. This estoppel is not based on the written documents, but on the proof of oral declarations contradicting them. It is based on supposed declarations of Beck, that in his letters to Bunce he intended to order Bunce to give up to Silver and Mrs. Beck $60,000 of the assets—that Bunce having obeyed this order, must not now be allowed to suffer by it, and that the act being done, Beck is estopped from disavowing these orders. It will be perceived that all this argument, or series of deductions, is based on an assumption that Beck did order Bunce to give up these assets. And this brings us back to the beginning, just where we started, in which we deny that any such order was given, and produce the order and rely upon it as authorizing no such action on the part of Bunce. Then they, on the other side, introduce their evidence to show that Beck meant and intended the order to be so understood, although its language is exactly the reverse; and on our side we offer evidence to contradict this. Here, then, are the points, and the only points in the case? We say, first, the written order is conclusive, and gives no authority for Bunce's action; and secondly, that, even admitting the parol evidence, the weight of testimony is in our favor. Certainly

the case shows the wisdom of the rules of evidence on this subject, and that, by losing sight of them, we strip a party of his property on conflicting parol testimony, with contracts and orders in writing clearly contradicting it. Here a written communication is brought to Bunce, specifically calling his attention to the fact that Beck was entitled to two-thirds of the estate of which he (Bunce) was administrator, and to one-ninth of the remaining third; that the Probate Court had so decided, and that the parties contesting with him had at last conceded it; that he had no disposition to have Mrs. Beck or Mr. Silver unnecessarily molested with suits, already commenced against them, for portions of this estate, and that, so far as he (Bunce) could effect it, by not interfering with his share of the estate, he (Beck) was willing to have the suits dropped, and all papers delivered to them not conflicting with his interest, which he stated over and over again specifically. ~~Their~~ This letter is brought to Bunce, which, as he knew the condition of the estate, enabled him to see at once that he could not give Mrs. Beck and Silver $58,516.63 of the estate, for that sum left Beck nothing; but along with this letter is conveyed a verbal message, which was represented as authorizing Bunce to hand over to the parties relating it, the above large sum of money, ~~exceeding~~ equal to all Beck's interest in the estate. *The message in writing is disregarded*, and the *verbal communication is obeyed.* Did ever man act so before? Was there ever an agent—supposing a public officer, as Bunce was, could be an agent—when two orders were brought to him, one in writing and the other verbal, and the two utterly irreconcilable, that obeyed the verbal directions and disregarded the written ones?

There is no question of estoppel in the case.

NAPTON, *for Appellant.*

7th Was it Beck's intention that Bunce should look into the condition of the estate in New M. & thus see whether the 60000 would interfere with his 2/3 & 1/9 there? He had no means of such an investigation. Was it his intention then to apart of his own knowledge that the N.M. estate would allow 60000 to be abstracted from this in Mo? He does not intimate such a thing. See his letter, in which

8 But how is Beck to get the 46,069.55 which is what he loses here, by this construction? What claim has he in New Mexico for the 4/9 of Silver & Mrs Beck? & how established? He has written no such letter to the N.M. admr. The earlier contracts give him no such claim — on the contrary they concede the right of Silver & Mrs Beck to 4/9 of the estate, both here & in New Mexico —

9. Upon a view of all the evidence, matter & parol, it is at least manifest that the only safe course is to adhere to the ancient & well settled rules of law, whose wisdom is very clearly demonstrated by this case.

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In the Supreme Court of the State of Missouri.

JANUARY TERM, 1869.

HARVEY BUNCE, Adm. of P. Beck, Jr., Respondent,
vs.
J. P. BECK, Appellant.

} Appeal from the First District Court.

WASH. ADAMS, FOR RESPONDENT.

In the Supreme Court of the State of Missouri.

JANUARY TERM, 1869.

HARVEY BUNCE, Adm. of P. Beck, Jr., Respondent,
vs.
J. P. BECK, Appellant.
} Appeal from the First District Court.

In the Matter of the Estate of P. Beck, Jr., deceased. Settlement of Harvey Bunce, Administrator, objected to by Defendant, J. P. Beck.

Statement.

Harvey Bunce is Public Administrator of Cooper County, and as such, is Administrator of the estate of P. Beck, deceased, late of New Mexico.

P. Beck, Jr. had his domicil in New Mexico, where, after making his last will and testament, he died. After his death some of his estate, say about one hundred thousand dollars found its way into the State of Missouri. E. N. Warfield, public administrator of Cooper County, took charge of the Missouri assets, and the defendant, James P. Beck administered on the estate left in New Mexico, amounting to largely over two hundred thousand dollars. E. N. Warfield resigned his office and Harvey Bunce was appointed his successor, and as such, took charge of the Missouri assets, which consisted mainly of money and notes. The deceased, P. Beck, Jr., left no children, or other descendants, but left a father, P. Beck, Sr., who resided in Polk county, and was well off in this world's goods, and hence his son, P. Beck, Jr., made no provision for him by his last will, but gave his property to nine nieces and nephews, of whom J. P. Beck, the defendant was one. When the estate in Missouri was first administered on, no thought was entertained by any of the legatees, but that the estates, both here and in New Mexico, would be distributed according to the provisions of the last will of P. Beck, Jr. And in view of this, Mrs. Juliet A. Beck, the mother of three of the legatees, and ——— Silvers, the father, of one of the legatees, was paid over, respectively, certain amounts

of the monies in Missouri, and their notes, as guardians taken for the same, *not with any view of being collected*, but as memorandums to be returned to them on final settlement, and their respective receipts taken. While matters stood thus, the defendant, J. P. Beck, always having an eye to *the main chance*, either from his own innate shrewdness, or by consultation with some profound jurist of New Mexico, or elsewhere, came to the conclusion that his uncle, P. Beck, Jr., had no power, under the laws of his domicil (New Mexico), to dispose of, by will, any more than one-third of his entire estate, and that P. Beck the elder, being his only direct ascendant, was, by the laws of New Mexico, made the *forced heir* to his own son P. Beck, Jr., for the remaining two-thirds of his entire estate, both in New Mexico and Missouri. As soon as he learned this he betook himself to his grandfather, P. Beck, the elder, out in Polk county, Missouri, and persuaded the old man to make a will in his favor for all his interest in the estates of his son, both in New Mexico and Missouri. The old man did not believe that he had any interest whatever in his son's estates. But his grandson, J. P. Beck, offered to pay into his estate ten thousand dollars if he would make the will making him the executor, and finally the old man executed the will in due form, bequeathing to the defendant his entire interest in the two estates of his deceased son, in New Mexico and Missouri, on those terms. Soon after this the old man died, and J. P. Beck took out letters testamentary, and complied with the terms of the will by charging himself with ten thousand dollars, so as to vest in himself the old man's entire interest in the two estates. Afterwards, being the executor of his grandfather's will, aforesaid, and being the sole legatee of his grandfather's interest in the estates of P. Beck, Jr., he commenced a suit against the other legatees of P. Beck, Jr., in the Cooper Probate Court, for distribution, in which he claimed, by virtue of his grandfather's will, two-thirds of the whole estate, and by virtue of the will of P. Beck, Jr., one ninth of the remaining third. This suit was resisted with great energy by the other legatees, Juliet A. Beck and ——— Silvers being parties thereto, as guardians of their children. But after much litigation the case was decided in favor of the defendant J. P. Beck, by the Probate Court. The other parties prepared an appeal to the Circuit Court of Cooper County, and were prosecuting the appeal, when J. P. Beck, the defendant, compromised, or made an agreement of compromise with them, embracing both the Missouri and New Mexico estates. In the meantime Bunce, as administrator, had commenced suits on the notes against Juliet A. Beck and ——— Silvers, intending to collect them. By the compromise the appeal was to be dismissed, and the suits against Juliet A. Beck and ——— Silvers to be dismissed and the notes were to be surrendered up and cancelled. But when the terms of the contract were reduced to writing, J. P. Beck insisted on using involved and mysterious language, which no one but himself could plainly interpret. He was the home administrator of the estate in New Mexico, and as the evidence shows had received in gold coin, of that estate, more than two hundred thousand dollars at a time when gold was over one hundred per cent, premium., and then had all of this, or its equivalent, in his coffers, here or in Europe. The language directed Bunce to deliver up those notes if it would not *infringe* upon his two-thirds of the whole estate, and his one-ninth of the remaining third. He knew, that taking into consideration the two estates, there could be no infringement, but still insisted on the equivocal language, and finally promised to write a plain letter of instructions to Bunce, peremptorily requiring him to dismiss the suits and surrender the notes. But when this letter was written and handed to Limerick, who was surety on the notes, and a particular friend of Mrs. Juliet A. Beck, it was found to contain the same mysterious and equivocal language, to which they objected, telling him that Bunce would not dismiss the suits and surrender the notes on this letter. But Beck insisted that that was the meaning and intention of the language used, and told the parties to tell Bunce, as coming from him, that he must dismiss those suits and surrender and cancel those notes, otherwise he would go himself, in person, to Boonville, where Bunce lived, and make him do this.

Bunce was no party to the agreement of these parties. He was a public officer, acting as administrator of the Missouri estate, and was a mere trustee for these beneficiaries, and when these parties produced Beck's letter, and gave him Beck's own interpretation of his letter to him, and also gave him Beck's outside, verbal, positive orders to dismiss the suits on the notes and surrender them to be cancelled, Bunce acted on these orders of Beck, and did dismiss the suits and the notes were, in accordance with Beck's orders thus given to Bunce, surrendered and cancelled.

The compromise was complied with by Mrs Juliet A. Beck and ——— Silvers by their causing their appeal from the judgment and order of distribution to be dismissed. When Limerick returned to St. Louis, Beck, the defendant, met him and expressed himself much gratified at what had been done, saying he knew Bunce would obey his orders in the premises.

Bunce, having acted on the defendant Beck's orders, and dismissed the suits on those notes and cancelled and surrendered the notes, presented his report of settlement as administrator to the Probate Court of Cooper County at the ——— term of said Court, crediting himself by the amount of these notes, and charging the same to Beck as distributee, under the order of distribution which had been made in his favor, giving him two-thirds, and one-ninth of the remaining one-third of said estates above referred to. When Bunce presented the account for settlement, the defendant, J. P. Beck, objected to this credit, but the

Probate court of Cooper County allowed Bunce his credit in his report as presented, and J. P. Beck took an appeal to the Copper Circuit Court. When the case was called in the Cooper Circuit Court, J. P. Beck applied for a change of venue, which was granted and the case was sent to Moniteau county, where it was tried before the Court when the foregoing facts were developed. At the trial the defendant excepted to the testimony showing what construction he gave to his letter to Bunce, &c., and also to the verbal message and orders sent to Bunce by Limerick and others. And the defendant also excepted to certain questions in some of the depositions on the alleged ground that such questions were leading in form. These exceptions were overruled by the Circuit Court. The Circuit Court again decided for Bunce, allowing him credit for those notes so cancelled and surrendered. J. P. Beck appealed to the First District Court, where the case was again decided in favor of Bunce, and the defendant has brought the case here by appeal from the judgment of the First District Court.

Points and Authorities.

1st. The estate consisted mainly of money and notes. There was an existing order of distribution by which the defendant was declared to be entitled to two-thirds of the estate as sole legatee of his grandfather and to one-ninth of the remaining third in his own right as legatee under the will of P. Beck, Jr. Bunce, as administrator, had the right to assign to the legatees or distributees, in payment of their distributive shares, notes if they desired it, or, which is the same thing, to cancel such notes and charge the amount, as so much money, to the distributee if he desired it.—See Article 2, § 37, 1st Revised Laws 1855, page 135.

2d. The construction given by Beck to his own agreement of compromise, and the construction given by him to his letter to Bunce, and his verbal messages and orders to Bunce were proper and admissible as evidence, without regard to any action had by Bunce on them. It was not offered to vary, or enlarge, or in any manner alter the written agreement or letter, but to show how Beck himself understood and construed his own letter and contract. The constructions given by parties to their own writings are always heard by the Courts as

proper guides to their meaning. See 25 Mo. Rep., 21; 1 Stobb, 479; 2 Watts & Serg., 175. – The verbal messages of Beck to Bunce were also admissible as an independent authority to be acted on by him. – See Story on Agency Sections 74- 79- 80—81

3d. But after Bunce had acted on Beck's verbal orders and messages and delivered up the notes to be cancelled, the question as to the admissibility of this evidence was put to rest. An estoppel *in pais* was thereby created. The matter passed beyond the control of these parties, and it would be an outrageous fraud and ruinous to Bunce to suffer Beck now to question the propriety of this act, which was induced by his own orders and advice. Whether right or wrong, the die is cast. He cannot "blow hot and cold," in a case like this at his own pleasure. See Taylor & Mason v. Zepp, 14 Mo. Rep., 488; Newman v. Hook, 37 Mo. Rep., 207; Choteau, &c., v. Goddin and others, 39 Mo. Rep., 250 in point. Driskill v. Matier, 31 Mo. Rep., 326; 8 Wend. 491 Darrell v. Odell 3 Hill, 219.

This doctrine of estoppel is as old as any principle of the common law, and is no infringement of the rule that parol evidence is not admissible to alter or vary a written contract, &c. The two principles are consistent with each other. Thus, when there is a simple admission that a writing must be construed in a certain way, which would evidently alter, or vary, or enlarge the writing, such evidence, of itself, is not admissible for that purpose; or where there is a written letter of Attorney, and also outside verbal orders, not communicated at all to the agent, or acted on by him, then such verbal orders might not be admissible. But when the admissions or verbal orders were intended to be communicated to the party, and to be acted on by him, and were, in point of fact, communicated to him and acted on by him, as in this case, in good faith, then, whether consistent or inconsistent with the writing, the doctrine of estoppel here intervenes; and the verbal admissions, so made, or the orders so given, with the action thereon, are not only proper evidence, but the parties are forever precluded from questioning its truth or the propriety of the act.

In the cases of Taylor and Mason v. Zepp, 14 Mo., 482; and Choteau, &c., v. Goddin and others, 39 Mo. Rep., 250, this Court adopts the rule laid down in Darrell v. Odell, 3 Hill, 219, in regard to *estoppel in pais*. This Court says, to constitute an *estoppel in pais*, there must be, "First, an admission inconsistent, with the evidence proposed to "be given, or the claim offered to be set up. Second, an action by "the other party upon such admission. Third, an injury to him by "allowing such admission to be disproved."

In the case at bar we have a concurrence of all these circumstances. First, we have Beck's letter to Bunce, and his construction of that letter, requiring Bunce to cancel and surrender the notes in dispute, and his verbal orders to the same effect. Secondly, we have the acts of Bunce on these verbal admissions and orders, surrendering up and cancelling those notes. And thirdly, in this case, an outrageous injury would result to Bunce to allow Beck to disprove, or to produce any evicence inconsistent with his own admissions so acted on by Bunce. The case of Taylor and Mason v. Zepp, was one between two landed proprietors, but the principles enunciated are equally applicable to this and all other cases of equitable estoppels or estoppels *in pais*. The case of Choteau and others v. Goddin and others is very much in point with this, and adheres to the rule above laid down as applicable to all cases of estoppel *in pais*. This point being decided for Bunce settles the whole case.

4th. But even if the construction of Beck's letter to Bunce, or the construction of the written compromise was now an open question, the acts of Bunce in dismissing the suits, and surrendering and cancelling the notes, must be sustained, because the evidence abundanty proves that, taking into consideration the whole estate both here and in New Mexico, Beck's rights were not at all infringed.

5th. The Supreme Court will not reverse a judgment because leading questions were asked a witness, whether in a deposition or at the trial. See Rogers v. McClure, 19 Mo. Rep., 420, in point; Wash. v. Agnew, 12 Mo. Rep., 520; The State v. Hughes, 24 Mo. Rep., 147 in point.

WASH. ADAMS, *for Respondent.*

10

Harvey Brown
adm^r of P. Beck
Junr
vs
James P. Beck

Brief by Adams
for Respondent

Filed Jany 13th 1.9
N. C. Burch
clk

In the Sup Ct Mo.
Jany 7, 1869.

Harvey Bunce Admr Res
vs
J P Beck &c App. } Appeal from 1st Dist Ct.

Opinion of the Court.

The controlling question in this case relates to the action of the Circuit Court in admitting testimony. It seems that Preston Beck Jr. being domiciled at Santa Fé in New Mexico, died in the year 1858, and left a will, by which he gave his estate to his kindred, nine in number. Administration was taken of his estate at Santa Fé, and also in Cooper County in this State. As a large amount of personal assets, consisting for the most part of funds transmitted to this State by the administrator in New Mexico had accumulated in the hands of the administrator here in 1860, it was agreed by the parties

claiming under the will that each party might take from the administrator the sum of ten thousand dollars by giving an obligation with surety to repay the same with interest, Under this arrangement, Mrs Juliet A. Beck as guardian for her three children, who were named as legatees in the will, took from the administrator thirty thousand dollars and gave an obligation for repayment with William Limerick as surety. David A Silver, who claimed a share through his deceased wife, who was one of the legatees, also took out ten thousand dollars under a like obligation, This was in the year 1860.

By a construction put upon the law of New Mexico regulating successions, where the decedent left neither wife nor descendant, the father was the forced heir as to two thirds of the estate, and the power of disposition

by will was limited to the third part of the estate. Acting under this view, Preston Beck, senior, father of Preston Beck, Jr. in the year 1861, made a will bequeathing all his interest in the estate of his deceased son, to J P Beck the appellant in this cause and appointed him executor.

Preston, senior, died in the same year.

In 1862, J P Beck filed his petition in the Probate Court of Cooper County, setting forth his rights as executor of Beck, senior, to two-thirds of the estate of Beck, Jr. and also his right as legatee to one ninth of the remaining third of said estate, and praying for a decree establishing the rights of all parties to said estate.

On the hearing of the petition, the Probate Court decreed that J P Beck as executor was entitled to the two thirds of the estate, and that the several legatees mentioned in the will of Preston Beck Jr. were each entitled to one ninth of the remaining

third of said estate. From this decree, Mrs Juliet A Beck, and D H Silver appealed.

Mrs Beck, as executrix of her deceased husband, had presented a claim against the estate of Preston Beck Jr. This claim was allowed by the Probate Court and amounted to $21,336,87.

J P Beck disputed this allowance, and was about to institute proceedings to set aside the same.

The right of Mr Silver to a share in the estate was also in dispute; J P Beck insisting that, according to the law of New Mexico, the right of Mrs Silver as legatee, upon the death of herself and child passes to collateral kinsfolk, to the exclusion of her husband.

And in the meanwhile, the administrator in Cooper county had commenced suits against Mrs Beck and Mr Silver, and their respective sureties upon the obligations made to

repay the advancements out of the estate, as above mentioned.
Pending all this litigation, a treaty for compromise was opened, and resulted in an amicable settlement between them. The terms of the agreement was reduced to writing. According to the written agreement, Beck withdrew his opposition to the claim allowed to Mrs Beck as executrix of her husband and consented that she should receive the same from the estate. Mrs Beck on her part admitted the claim of Beck, to two thirds of the estate and one ninth of the remaining third, and agreed to dismiss her appeal and leave the decree of the Probate Court in force.
A similar compromise was effected with Silver.
When the settlements were made ~~made~~ Beck gave to Mrs Beck and Mr Silver each respectively, a written letter addressed to Rumer administrator, stating the terms of the agreement, and authorizing him to deliver up to the bar

ties, "any papers, notes or documents that will not infringe on any ~~rights~~ two thirds," etc, and to desist from the further prosecution of the suits, for any money allowed in the settlements.

Upon the presentation of these letters, and certain verbal representations made by Mrs Beck and Silver, Bunce dismisses the suits, and in January 1866, presents for settlement, to the Probate Court, his account as administrator, in which he claimed credit for the obligations of Mrs Beck and Silver, as having been delivered up on the order of Beck. These items of credit were objected to by Beck, but were allowed by the Probate Court, and Beck appealed to the Circuit Court. The Circuit Court gave judgment for Bunce, which on appeal was affirmed in the District Court.

On the trial certain evidence was introduced on the part of Bunce, which was objected to as

inadmissible on the ground that ~~they~~ the tends to alter and contradict the letter addressed by ~~Bunce~~ Beck to Bunce, and which writing it is contended did not authorize his action in discharging the suits, and delivering up the notes.

The questions put to the witnesses, asked them directly what Beck said concerning the letters and their true meaning. The witnesses answered that after the letters were received and before they were delivered to Bunce they had conversations with Beck, and desired him to explain them, so that they could be understood; and he replies that Bunce was a man of sense and would understand them, and would give up the notes on the letters, that if he did not do this he would have no sense. He assured Mrs Beck she should have no more trouble about the notes. To Silver he said that Bunce on the presentation of the letter would not refuse

to surrender up the note and dismiss the suit; and that if Bruce did so refuse, he would go to Boonville in person and have the business settled as understood between them and after the suit had been dismissed he expressed himself as gratified at the result.

The inquiries were made and the responses given with a view to show what interpretation Beck placed upon the letters which contained his view of the agreement, and are certainly in some particulars at variance with it.

It is an established rule that oral testimony is not admissible to vary or explain written instruments. The principle is nowhere better laid down, than by Greenleaf, who says; that, where parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is con

clusively presumes that the whole engagement of the parties, and the extent and manner of the undertaking, was reduced to writing; and all oral testimony of a previous colloquium between the parties, or of a conversation or declarations at the time, when it was completed or afterwards, as it would tend, in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected. (1 Greenl Evi § 275) Phillips, tersely enunciates the rule; "It is a general rule that extrinsic evidence cannot be admitted to contradict, add to, subtract from, or vary a written instrument" (2 Phil Ev. Edwds Ed 637) The cases in this court are uniform sustaining the same doctrine. (Ashley vs Bird 1 Mo 640; Lane vs Price 5 Mo. 101; Woodward vs McGaugh 8 Mo 161; Gooch vs Conner 8 Mo 391; Cockrill vs Kilpatrick 9 Mo 697;

Jones vs Jeffries, 17 Mo 577), So it has been held that parol evidence is not admissible to prove how a written contract was under stood by either of the parties, in an action upon it at law, in the absence of any fraud, (Bigelow vs Collamore 5 Cush, 226; Harper vs Gilbert, 5 Cush, 417; Gould vs Norfolk Lead Co. 9 Cush 338. 345)

The Court, however, where the meaning is doubtful, will, in proper cases, receive evidence in aid of its judgment; (Hutchinson vs Bowker, 5 Mees & W 535); and where it is doubtful whether a certain word was used in a sense different from its ordinary acceptation, it will refer the question to the jury, (Simpson vs Margitson, 35 Leg. Obs, 172)

But where a written memorandum of a contract does not purport to be a complete expression of the entire contract, or a part only of the contract is reduced to writing, the matter thus left out of the writing may be sub

plied by parol evidence, (Rollins vs Claybrook, 22 Mo 405; Moss vs Green 41 Mo 389). And stipulations and agreements subsequent to the execution of the writing are not within the rule. Parties may by a subsequent parol agreement, upon a sufficient consideration, change the mode of payment, or other terms of their written ~~agreement~~ contract; or they may discharge it altogether (Low vs Readwell 3 Fairb. 441; Bailey vs Johnson 9 Cowen 115, 118; Thumbo vs Curtright 1 Marsh 582; Perrine vs Cheeseman 6 Halst. 174)

And it makes no difference, it appears, how soon after the execution of the written contract the parol one was made. If it was, in fact, subsequent, and is otherwise unobjectionable, it may be proved and enforced. Thus where the parties entered into a contract in writing respecting the sale of personal property, and immediately after it was signed, the vendee said he wanted a written indemnity against

all claims on a portion of it, to which the vendor replied, he would not give him a written indemnity, but that he had sold him the whole, and would see him out in it; it was held that this was a valid ~~contract~~ promise of indemnity, and having been made after a written contract, it might be sued upon, and a recovery had, and was perfectly admissible in evidence. (Brewster v. Countryman 12 Wend 446; S.P. Richardson v. Hooper 13 Pick. 446)

In the present case, it clearly appears, that the parol authorization relied upon, was made after the written agreement was signed by the parties, and if otherwise unobjectionable would be competent according to the above rule. But the difficulty in the way is, that it does not appear by the record, that the parol orders given by Beck for the dismissal of the suits were independent of the written letters, but they were explanat

-ory of, and in some respects con-
-tradictory of them, If Beck ind-
-ependent of the writings and
outside of them, orally told
Mrs Julia A Beck and Silver
to tell Bunce to dismiss the suits
~~dismiss the suit and~~
because a compromise had
been effected, the evidence
would have been entirely com-
-petent, and would have amounted to a
full justification to Bunce's
action in the premises, and
would also have constituted an estop-
-pel in Bunce's favor against
future liability, That such
was actually the fact, would
seem inferable from Becks
expressing his satisfaction
at what Bunce had done after
the suits were disimpeded.

But the evidence was clearly
incompetent and inadmiss-
-ible in the shape in which it
is presented in the record, and
the judgment will therefore be
reversed and the cause remain-
-ded for a new trial in confor-
-mity with this opinion.
The other judges concur.

David Wagner

10

Harvey Bunce Admr.
v
Jas P Beck Exrs.

Opinion of the
Court Waquer

Filed ~~Mar~~ Jan 25/19
N. C. Burch
Clerk

$3 75 paid

Reversed & Remanded

The State of Missouri, ss.

THE STATE OF MISSOURI, To the Judges of the First District Court in said State, GREETING:

Whereas, In the record and proceedings in a certain cause lately pending in the said First District Court wherein Harvey Bunce, Admr. was and James P. Beck Exec. was

in an action of manifest error hath intervened to the great damage of the said James P. Beck as by his complaint, we are informed.

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

WITNESS, N. C. BURCH, Clerk of our said Supreme Court, with the seal thereof hereto affixed, at office, in the City of Jefferson, this 6th day of May 1870, in the year of our Lord thousand eight hundred and Seventy.

N. C. Burch
Clk S. C.

State of Missouri } Sct. I Wm. R. Hopkins,
Clerk of the District Court within and
for the First Judicial District in the State of Mis-
souri, hereby return the within writ duly exe-
cuted, as appears from the annexed transcript.
Witness My hand and the Seal of
said Court at Office in the City
of Jefferson this 10th. day of
May A.D. 1870. Wm. R. Hopkins
Clerk.

In the 1st District Court of Mo.

Dec. Term 1869.

1

Harvey Bunce Admr. of
Preston Beck Jr. deceased } D. E.

Against

James P. Beck. Executor &c. } P. E.

This action arose in the Probate Court of Cooper Co. and upon Annual Settlement of Harvey Bunce Admr. de bonis non of the estate of Preston Beck Jr. Preston Beck Jr. a citizen of New Mexico died testate in 1858, leaving a large Estate which by Will he settled upon nine of his kindred naming them in equal parts. Soon afterwards, J. J. Beck took out letters of administration on his estate, and in 1860 transmitted about $125.000 in money to Cooper County in this State for distribution among the said legatees. when J. J. Beck also died, About this time it was ascertained that by the law of succession in New Mexico; Preston Beck Sen. who was the father of Preston Beck Jr. decd. and who at the time resided in Polk Co. this State, was the forced heir to two thirds of his deceased sons estate, leaving only one third to be divided among the said nine legatees. In 1861, Preston Beck Sen. made a Will bequeathing all his interest in his decd. sons estate to James P. Beck the Appellant in this cause, when Preston Beck Sen. died. So that by virtue of the law of succession in New Mexico, and the Wills of Preston Beck Jr. & his father Preston Beck Sen, James P. Beck claimed 2/3 & 7/9 of the remaining 1/3 of the whole estate of Preston Beck Jr. In 1860 administration of the estate of Preston Beck Jr. of that portion of the estate which had been transmitted to Cooper Co. this State was confided to E. N. Warfield then Public Administrator of Cooper Co. about this time it was

agreed by the nine legatees claiming under the Will of Preston Beck
2 Jr. that each party might take from the administrator E. A. Warfield
$10.000 as an advancement on each distributive share of said estate.
by each giving an obligation with security to refund the same
with interest, at this time and in pursuance of this agreement
$30,000 was paid to Juliet A. Beck as guardian for Wm. P. Anna D. &
Elizabeth Beck. Minors, who were named as legatees in said Will, when
she gave her obligation for repayment with Wm. Leverich as security
Also David H. Silvers received $10.000 as the sole heir of his de=
ceased wife, who was a legatee named in said Will and at
same time James P. Beck the appellant here, also received $10.000
the said Beck and Silvers each giving back to the administrator
a like obligation to repay as Mrs. Beck had done,

The record shows, hence it may not be amiss to notice, that
these advancements were not in money, but the several amounts were
in notes against different parties, a number of which so received
by Mrs. Beck & Silvers were worthless. It seems to have been the un=
derstanding between the parties that there was still a large estate
remaining in New Mexico unsettled, and the record shows that
as early as the 17th of April 1860, James P. Beck the Appellant here,
was appointed Administrator de-bonis-non with the will annexed
of Preston Beck Jr. in New Mexico, which trust he still held at the
commencement of this suit.

In 1862 James P. Beck filed his petition in the Probate Court of
Cooper Co. against E. A. Warfield adm'r. et al, defendants claiming
his right as executor of the estate of Preston Beck Sen. to 2/3 of the Estate
of Preston Beck Jr. as also his right as legatee to 1/9 of the remaining 1/3
of the estate of Preston Beck Jr. and praying for an order & decree —

determining the rights of the parties, Upon the hearing the Court
3 found for James P. Beck to the extent that he was entitled as executor of Preston Beck Sen. to 2/3 of the estate of Preston Beck Jr. then in the hands of Harvey Bunce, or that might thereafter come into his hands as also his right to 1/9 of the remaining 1/3 as legatee, The Court further found that the remaining legatees who were parties defendants were each entitled to receive from Harvey Bunce Adm'r. the 1/9 of 1/3 of said estate in his hands, And the said Bunce was ordered to distribute and pay to the parties in accordance with the terms of this decree, From this judgement of the Probate Court, Mrs Beck & Silvers appealed to the Circuit Court,

Again Mrs Juliet A. Beck as executrix of her deceased husband had prosecuted a claim against the estate of Preston Beck Jr. in the Probate Court of Cooper County for the sum of $21.336.87, and had obtained judgement therefor, James P. Beck disputed the claim, Again James P. Beck as Executor of Preston Beck Jr. had instituted proceedings in the Courts of New Mexico, contesting the right of D. H. Silver to inherit the interest of his deceased wife as a legatee, claiming that her estate as such legatee according to the law of New Mexico passed to her collateral kindred, Again Harvey Bunce as administrator of the estate of Preston Beck Jr. in Cooper Co. had commenced suits upon the notes of Mrs. Juliet A. Beck & D. H. Silver against them and their respective sureties to recover back the advancement made to them as above named, these several suits were pending at the same time,

Now on the 28th. of June 1865, Mrs Beck & James P. Beck entered into an agreement in writing compromising on the terms therein expressed, certain suits above named, which said agreement recites,
" And whereas James P. Beck and Juliet A. Beck Guardian tired of
" litigation and desirous of ending this legal troubles, they hereby

" sign and publish their agreement and settlement. Mr. James
4 " P. Beck for and in consideration of the covenants on part of
" Juliet A. Beck as guardian and in her own right as Executrix, agrees
" to release and grant to said Juliet A. Beck guardian, all of James P.
" Beck's right title & interest in & to the aforesaid sum of $21.336.87 it
" being the same judgement obtained by Juliet A. Beck in Probate Court
" of Cooper Co. Mo. Now in consideration of this release by James P.
" Beck to Juliet A. Beck, the said Juliet A. Beck acting as guardian
" for Wm P. Beck, Anna D. Beck and Elizabeth Beck, hereby agrees to
" release and grant to said James P. Beck 2/3 of the estate of Preston
" Beck Jr. decd. of New Mexico, of which James P. Beck is administrator
" & 2/3 of said estate in Missouri County of Cooper, held by Harvey Bunce
" Public Administrator as Agent of Preston Beck Jr. x x x and the
" further sum of the 1/9 part of the 1/3 of said estate of Preston Beck Jr."

On the 7th day of July 1865, a similar compromise was made by agreement in writing between James P. Beck & D. H. Silver in which the parties incorporated the following recital, "Now therefore for the purpose of settling the matters in controversy between the said James P. Beck and D. H. Silver, in consideration that the said James P. Beck has relinquished and does hereby relinquish his claim against David H. Silver, that David H. Silver is not the heir of his daughter Isabella Silver as aforesaid in New Mexico, the said David H. Silver agrees, & ~~covenants~~ hereby that James P. Beck shall his 2/3 and 1/9 of 1/3 of said estate of Preston Beck Jr. deceased, both real and personal in the State of Missouri and New Mexico."

When these agreements were respectively made, Beck gave to Mrs. Beck & Silver each a letter or order in writing addressed to Bunce stating the terms of the settlement with each, and authorizing him,

Bunce to deliver up to Mrs. Beck as also to Silver certain papers
5 and documents therein mentioned, The letter addressed to Bunce
given by Beck to Mrs. Beck was dated 28th June 1865. reads as follows
"Mr. Harvey Bunce".

" Sir Mrs. Juliet Beck and myself have settled our
" law suit by her allowing me the sum of 2/3 and 1/9 of the remaining
" 1/3 of the estate of P. Beck Jr. as claimed by me before the Probate Court
" of Cooper County, You will please deliver to Mrs. Beck, all her equit=
" able rights and apets in your hands after deducting said two thirds &
" 1/9 of remaining third part, expenses, costs, fees &c. when she dismisses
" her suit, you are I understand prosecuting the said Juliet A. Beck,
" and her security Mr. Wm Levenick, You will please not prosecute
" them for money included & allowed them in this settlement (of 2/3 + 1/9
" of the remaining 1/3 (to me) as aforesaid, and dismiss any suit you
" may have against said parties for the sum I allowed them in our
" settlement (i.e.) 2/3 + 1/9 of the remaining 1/3 of Preston Beck Jr. estate,
" and you will please deliver to Mrs. Juliet A. Beck any papers, Notes,
" or documents of said Juliet A. Beck & Wm Levienick, that will not
" infringe my 2/3 or 1/9 of the remaining as adjudged by said Probate
" Court respectively." Signed "James P. Beck."

The letter addressed to Bunce by Beck on behalf of Silver was in
these words, "St. Louis July 7th 1865."

Mr. Harvey Bunce

"Sir", "Mr. David H. Silver and myself have
" settled our law suit by his allowing me the sum of 2/3 + 1/9 of the other
" 1/3 of the estate of Preston Beck Jr. as claimed by me before the Probate
" Court of Cooper County, You will please deliver to Mr. Silver
" all the equitable rights and apets in your hands after deducting the

" said 2/3 and 1/9 of the other 1/3 just costs, expenses, fees &c, when he
6. " dismisses the his suit, you are I understand prosecuting the said
" D. H. Silver and his security, you will please not prosecute them
" for money allowed them in this settlement (E) 2/3 and the 1/9 of
" the other 1/3 to me as aforesaid, and his portion of the other one
" third to him, and dismiss any suit you may have against the
" said party for the sum I allow them in this settlement (E) 2/3
" and the 1/9 of the other 1/3 of the estate of Preston Beck deceased
" in that settlement is allowed to me, and his portion of the re=
" maining portion of the other 1/3 to him, and you will please de=
" liver to Mr. D. H. Silver any papers, notes or documents of said
" D. H. Silver that will not infringe or interfere with my 2/3 and 1/9 part
" of the remaining 1/3 as was adjudged by the Probate Court of Cooper
" County Mo, when said case was decided". "Respectfully".

(Signed) "James P. Beck".

Soon after these letters were written by Beck they were presented by Mrs. Beck & Silver, respectively to Bunce, and at the same time the parties delivered certain verbal instructions from Beck to Bunce, whereupon Bunce gave up to Mrs. Beck the $30.000 note as also to Silver his note for $10.000 taking their receipts therefor, Bunce dismissed the suits against Mrs. Beck & Leverick on the $30.000 note and also the suit against Silver & his security on the $10.000 note, And in Jany. 1866, filed his Annual Settlement asking for a credit therein for these two sums evidenced by said Notes with the interest thereon, which he claimed he had delivered up to Mrs. Beck & Silver on the order of James P. Beck.— Beck resisted the allowance of these two items of credit, Judgement was rendered for Bunce, And upon Appeal to the Circuit Court Judgement was

again rendered for Bunce, Now it is contended by Beck
7 had no authority or right to give up to Mrs. Beck & Silver the
obligations and dismiss the suits thereon, either verbal or written,
but on the other hand, that it was done against his express orders
and instructions, while Bunce contends he was ordered by Beck
to deliver up the said notes and dismiss the said suits. The adminis=
tration of Bunce was ancillary to the administration of Beck, and
there can ~~be~~ therefore be no question as to Beck's authority and
right to control the acts of Bunce in the premises, It was claimed
upon the trial in the Circuit Court, that it was the understanding of
Mrs. Beck and Silver, that the suits on these bonds were settled in
the agreement of June 28th and July 7th & the evidence of these witnesses
was offered to show that such was the understanding with all the
parties, but the agreements themselves must determine this ques=
tion & without reference to extrinsic evidence of prior or contem=
poraneous verbal agreements, by reference to the agreements it will
be seen that they were artfully drawn, and make no allusion to the
bonds or the suits pending on them, But concurrent with the
making of the agreement Mrs. Beck & James P. Beck, James P.
gave the order in writing above referred to, to Bunce, This written
order to Bunce when interpreted by the light of concurrent facts
is to say the least of it, anomalous, vague and uncertain, the language
of the order is, "And you will deliver to Mrs. Juliet A. Beck any papers
notes or documents of said Juliet A. Beck & Wm Livenick that will
not infringe" &c. The facts are as shown by the evidence that the
only paper or papers which Bunce held against Mrs. Beck &
Livenick was this $30.000 note, Beck well understood this to be
the fact, then what did mean by "papers, notes or documents."
taking the whole instrument together, and its meaning is only the

ambiguous, Mrs. Beck understood from Beck, that the suit was
8 to be dismissed, and that she was to have her note; the evidence is
that Beck told her this was the meaning of the order, that Bunce
would so understand it, dismiss the suit and surrender her note,
and more than this, that if Bunce did not do it, he directed her
to telegraph to him Beck, when he would come up and do it him-
self. But there is another view of this case, the evidence shows that
Mrs. Beck or Bunce did not rely upon this written order, Mrs.
Beck states in her deposition offered in evidence by the respondent,
" "I had an independant verbal message or order to Bunce from
" Beck, besides said letter, he told me to tell Bunce to give me up
" my note, and to dismiss the suit, that he and I had compromised,
" and to say that if he, Mr. Bunce would not do so, that he
" James P. Beck would come up and do so himself," this verbal
order was repeated by Beck in the presence of Leiverick, Wm
Leiverick in his deposition states, "I did hear a verbal message
" sent by Mr. Beck to Mr. Bunce, He told me to tell Mr. Bunce to
" deliver up to Mrs. Jessie A. Beck her note and to dismiss the
" suit against her, upon her dismissing the suit she had
" against him, I think in the Circuit Court of Cooper County."
This instruction was given after the order was written and
delivered to Mrs. Beck, and ~~repeated by Beck to both~~ Mrs. Beck
and Leimerick on the next day, These witnesses are both cred-
ible and their statement is uncontradicted by any other witness.
It is claimed however that this evidence is inconsistent with the
statements of Mrs. Beck & Limerick as recited in former depositions
given by them in this cause, but a careful review of both depositions
evinces the truth that there is no contradiction, but merely a statement

of additional evidence, and in answer to interrogatories differently
9 put than on the former examination. The evidence then shows further that the written order with the verbal instructions were delivered to Bunce within a few days after they were given by both Mrs. Beck and Limerick, that Bunce refused to act upon the written order but did act upon the verbal one, Bunce's evidence upon the trial corroborates this fact. Limerick in his deposition further states, "I returned to St. Louis from Bonville, I met Mr. Beck on front Street as I was returning from the Rail Road depot, he asked me what success Mrs. Beck had in Bonville, I told him that Mr. Bunce had delivered to Mrs. Juliet A. Beck an order on Ryland and Low to dismiss the suit against her, and to deliver up to her her note, he appeared very much gratified, and said it had turned out as he had told me it would." thereby by his expressed approbation, and declaration approved of and ratified the act of Bunce, It seems to me then, that there can no longer remain a doubt, that Beck gave the said verbal order, and intended thereby that Bunce should be governed by it, the act of Bunce therefore being supported by the order of Beck and affirmed by his subsequent affirmation, becomes the act of Beck the principal and he is bound by it.

But how stands the case with regard to the Silver Note, It is strenuously urged by learned counsel for the appellant that the deposition of Silver is a complete bar to a decree in favor of this allowance to Bunce, The written order which Beck gave to Silver on the 7th of July is in its terms similar, as will be seen, to the written order given to Mrs. Beck, and subject to the same criticism, but the question in regard to this note, is the same as that in regard to the Mrs. Beck

Note, admitting the insufficiency of the written order to
10 justify Bunce's action, were there any other orders or instructions given by Beck in the premises. The enquiry is what was contract between Beck & Bunce with reference to the Silver Note. The evidence preserved in the record shows, that at this time Beck and Silver were not friendly, that they were not on speaking terms. And that the settlement with Silver was negotiated by Leinnick the agent of Beck and consummated between him Beck and Sharp & Broadhead attorneys for Silver. Mr. Leinnick in his deposition (after he had related to Beck the result of his visit to Boonville with Mrs. Beck) "Mr. Beck requested me to hunt up
" Mr. David Silver and try and prevail upon him to make the
" same arrangements with him that Beck had made with Mrs.
" Beck. I found Mr. Silver at the Planters House, Mr. Beck
" manifested the greatest anxiety that I should find Mr. Silver that
" night, as late as it was, it being near Eleven O'clock, and make the
" arrangement with him, as he Beck expected the next morning to leave
" the City, and wanted the matter fixed up that night before he left. I told
" Mr. Silver what had been done; that I had accompanied Mrs. Beck
" to Boonville, had seen Mr. Bunce who had given her an order to
" have the suit against her dismissed and to get her note, that she had
" dismissed her suit, and that I thought he could make the same
" arrangement with Mr. Beck. I had a long talk with Mr. Silver
" who finally agreed to meet Mr. Beck the next morning and arrange
" the matter with him." The next morning Silver and Beck met at Col. Broadheads office when the settlement was made, and the order given Silver states that the only object he had in view in making the said settlement was to get his note out of Bunce's hands

And after the order to Bunce was given, Beck stated that it would
11 secure the note, that the order was an exact copy of the one given
to Mrs. Beck, except the changes of names, and that the order previou-
ly given to Mrs. Beck had procured her note, he assured me that
it would be all ~~that~~ I would need in order that I could procure
my note, Leinwick then writes a letter of introduction to Bunce for
Silver, and among other things states to Bunce that Silver had made
the same arrangement with Beck, that had been made with Mrs. Beck
when Silver with this written order & instructions, and the letter of
Leinwick goes to Boonville, sees Bunce, delivers his messages, when
Bunce gave up his note, and an order for the dismissal of the suit
thereon against him, Now in my judgement all the parties to this
transaction having a full knowledge of what had preceded, with
reference to the Mrs. Beck note & the declarations of Beck as to the
effect of this order upon Bunce, amount in fact to an express order
by Beck to Bunce to deliver the note &c. The purpose of the law & the
office of the judiciary is to compel men to deal fairly and honestly
with each other, and to protect the weak and the innocent from
the machinations of him who would attempt to perpetrate oppression
Then how stands the case, Beck's orders: Mrs. Beck, Silver, or Bunce
did not understand, they were ambiguous and uncertain, the parties
all testify they did not understand them, And in my judgement
when considered in reference to the matters upon which they were
to operate, they can convey to the mind of the most carefull student
no intelligent interpretation, but Beck is their author, and of course
knowing what he meant to express, explains to the parties repeatedly
their meaning and import, and more than this, what would be
the certain result; this explanation to both Mrs. Beck and Silver

was satisfactory, it would accomplish their leading object in
12 the settlements, and being thus apprised of Beck's intentions, they
each relied upon them, Bunce relied upon them, and in good
faith acted accordingly, But this is not all, a short time after
the notes were delivered to Mrs. Beck and Silver, Beck is in
Boonville, when he interrogates Bunce in this wise, "Why did
you give up the notes of Mrs. Beck & Silver", when Bunce replies
"Why did you send me such verbal messages if you did not
intend that I should give up the notes." to which Beck replied,
"that nothing else would satisfy them", I think then there can
be no doubt, but what Beck did send to Bunce the verbal
messages referred to, and at the time intended thereby that Bunce
should deliver the notes to the parties, this then at the time, being
the expressed intention of all the parties, Beck is bound by it and
estopped from denying it now.

When the power was defective, but the principal recognized
the it was held to cure the defect Buchanan vs Upshaw
1. How 56, When the terms of the power are departed from
by the parol agent of the principal, equity will sustain the act,
Webster vs Haines 16. Ohio 490.

Again the distribution by advancements between the legatees of
Preston Beck Sr. took place in 1861, James P. Beck was a party to
the distribution, this was one year after his appointment as Ex=
ecutor, I presume therefore in the absence of any showing to the
contrary that he was, at the time fully advised of the amount
of estate assets, and being thus advised I hardly think he
would consent to an advancement of a larger amount than
the legatees would be entitled to upon final distribution, on

the other hand, Beck was then of the opinion, that would
13 still be a large amount to be distributed, and estimates it at
$30.000 for each legatee. Has Beck changed his opinion as to the
extent of the Estate apets, upon what facts is that opinion founded
there is no pretense in the evidence that Beck has been or will
be injured by the act of Bunce in giving us said notes, or in the
approval of his said settlement by the Probate Court. On the other
hand there is evidence that there are abundance of apets remain-
ing in the hands of Beck as Executor to more than satisfy his
estate therein. It then not appearing that Beck or any other
person will be injured by the approval of Bunce's settlement
I cannot see why it should be disturbed.

This is an appeal from a judgement of approval, of the
Admr. Bunce annual settlement. I am not satisfied in my own
mind that the appeal will lie. Picot vs Biddle Admrs. 25th Mo. 29

The Judgement of the Circuit Court will be affirmed.
Judges Tompkins & Perry concurring.

T. M. Rice Judge.

Judge Gale is of the opinion that appeal should be dismissed
for the reason that an appeal will not lie from the
annual settlement of an Administrator.

T. M. Rice
Judge.

14 State of Missouri }
County of Cole } ss.

I, William R. Hopkins Clerk of the District Court within and for the First District of the State of Missouri do hereby certify the above and foregoing to be a true full and complete copy of the opinion of the Court delivered in the above entitled cause wherein Harvey Bunce adm'r. of Preston Beck Jr. deceased was Defendant in Error and James B. Beck Executor &c. plaintiff in Error as the same remains on file in my said Office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said Court at office in the City of Jefferson this 11th day of May A.D. 1870.

Wm. R. Hopkins,
Clerk

Fees due Wm. R. Hopkins Clerk District Court.

Copy of Opinion	$7.00
Two Certs & Seals	1.00
	$8.00

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