Picot, Louis vs Signaigo, James 1855 St. Louis Co. 364/9
(trustee under
will of Biddle, Ann)

581/3

Scott-

R&R

P in articles of agreement entered into Bush, Porter
to do brick work for $1000

The State of Missouri, ss.

The State of Missouri, *To the Honorable the* Saint Louis Court of Common Pleas *in said State, GREETING:*

WHEREAS, In the record and proceedings in a certain cause lately pending in the Court of Common Pleas held in and for the County of Saint Louis

wherein Lewis G. Picot was plaintiff, and James Signiago was defendant

~~in an action of~~ in a civil action manifest error hath intervened, to the great damage of said plaintiff as by his complaint we are informed.

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

Witness, WILLIAM S. GLANVILLE, Clerk of our said Supreme Court, at office, in the City of Saint Louis, the twenty seventh day of September in the year of our Lord one thousand eight hundred and fifty five.

Wm S. Glanville

CLERK.

$1.50 Paid by

State of Missouri }
County of St. Louis } ss

I Charles H Hicks Clerk of the St. Louis Court of Common Pleas within and for the County aforesaid, in obedience to the command of the within writ, herewith transmit a full true and complete transcript of the record and proceedings in the within named cause as fully as the same remain in my Office

In Testimony Whereof I hereto set my hand and affix the seal of said Court at Office in the City of St. Louis this 28th day of September A D 1858

C H Hicks Clk

State of Missouri } ss
County of St Louis } Be it remembered that heretofore to wit on the 6th day of January A. D. 1855. there was filed in the Office of the Clerk of the St Louis Court of Common Pleas in and for said County a transcript from the Office of the Clerk of the St Louis Circuit Court which is in the words and figures following to wit

13

State of Missouri } ss
County of St Louis } Be it remembered that heretofore to wit on the 4th day of April A. D. 1851 there was filed in the Office of the Clerk of the Circuit Court within and for the County aforesaid a petition which is in the words and figures following to wit:

Petition

Louis L. Picot Trustee under the will of Mr Ann Biddle - plaintiff	In Circuit Court for St Louis County
against	State of Missouri - April Term
James Signiago - Defendant	A. D. 1851.

Plaintiff states that on the sixteenth day of September A. D. 1850 certain articles of agreement were made and entered into between him said plaintiff and one Porter Bush then of the City and County of St Louis wherein and whereby said Bush agreed and covenanted for a consideration in said articles expressed, to undertake, do and complete the brick work of a certain building in said articles described to be used as a Market House and plaintiff files herewith said articles of agreement and refers to the same for the particulars of said Agreement. Plaintiff states further that the

2

agreement and contract between plaintiff and said Bush was that plaintiff was to furnish the brick and nothing else, and that said Bush was to furnish all labor and other things materials and machinery for the erection of the walls of said building. Plaintiff states further that said Porter Bush and James Siguiago the defendants in this suit in and by said articles of agreement duly executed under their hands and seals, bound themselves as principals their executors, administrators and assigns for the faithful performance of all and singular the terms of the said Contract and for the securing of plaintiff from all liens, claims and losses in the penal sum of One Thousand dollars as will appear by reference to said articles of agreement. But the said Bush and Siguiago have not secured plaintiff from all liens, claims and losses as plaintiff avers, but a large number of liens upon said building have been filed in the Office of the Clerk of this Court by mechanics and laborers employed upon said building by said Bush as appears from the records of this Court to which plaintiff refers, which said liens are claims and charges upon said building valid in law. Plaintiff states further that he has paid out at different dates and times sums amounting to One hundred and four dollars and thirty eight cents as nearly as plaintiff can now state on account of said liens for the purpose of discharging the same

3 including costs and that there are valid liens filed in the office of said Clerk against said building by mechanics and workmen employed on said building by said Bush to do the brick work of the same remaining unpaid and undischarged at the time of commencing this suit to the amount of Two hundred and Seventy seven 50/100 Dollars exclusive of the costs which have accrued thereon. Plaintiff states further that he has paid to said Bush all of the money agreed upon in said articles as the consideration for said Bush's services and labor and materials used in and upon said building except a small sum amounting as plaintiff believes to about forty six dollars and plaintiff states further that said moneys being the consideration aforesaid were paid to said Bush at his urgent and often repeated solicitations by plaintiff and before plaintiff had notice that any liens had been filed against said building. Plaintiff states further as another breach of the bond or articles herewith filed that the said Bush did not finish and complete the work undertaken and covenanted to be performed by him, but that the said Bush left the same unfinished and plaintiff was obliged to hire other persons to do the same and to pay them for the doing of the same twenty dollars over and above the sum to which said Bush would have been entitled by the said Contract for the doing of the said

43

work. Plaintiff stakes further that he duly performed all the conditions on his part required to be performed. Plaintiff stakes also that said Porter Bush has left this City for some place unknown to plaintiff so that the process of this Court cannot be served on said Bush. For the above alledged breaches of the said Contract plaintiff asks judgment against said James Siguiago defendant, for the sum of three hundred and ninety one 95/100 Dollars less whatever amount if any shall be found due to said Bush, and for interest on so much of this amount as the plaintiff may have paid out for the purpose of discharging any of said liens and costs from the time any such payments have been made and also for all costs that have accrued on account of said liens - Louis G. Picot - by J. M. & D. C. Haight Attys. William G. Webb being duly sworn says upon oath that he is clerk of the plaintiff and acquainted with the facts and circumstances set forth in foregoing petition and that the matters and things set forth above are true according to his best knowledge and belief.

Sworn to before me this first day of April A. D. 1851. M. S. Cere Clk. } W. P. Webb

Summons

County of St Louis ss

The State of Missouri, To the Sheriff of St Louis County, Greeting: We command you to summon James Siguiago to appear before

5 3 the Judge of our Circuit Court on the first day of the next term thereof, to be held in the city of St Louis within and for the County of St Louis, on the third monday of April Inst, then and there to answer the complaint of Louis G. Picot Trustee under the will of Mrs Ann Biddle as set forth in the annexed petition and have you then there this writ [Seal] Witness Michael S Cerré, clerk of said Court with the seal thereof hereto affixed, at office in the City of St Louis this first day of April in the year of our Lord eighteen hundred and fifty one - M. S. Cerre clerk

Sheriff's return Executed this writ on the 1st day of April by delivering to James Signaigo a true copy of the petition and writ in St Louis County - Henry B. Belt Sheriff

by Geo Stevens Dpy

and afterwards to wit: at the April term 1851 of said Court on the 23rd day of April 1851 the following proceedings were had - to wit:

Time for pleading extended 1 week Louis G. Picot - trustee &c

vs

James Signaigo } On motion of said defendant by his attorney the time of pleading herein is extended one week.

And afterwards to wit: at the term last aforesaid, on the 1st day of May 1851 the following answer was filed - to wit:

Answer Defendant comes and in answer to the plaintiff's petition says that he does not deny that he executed with Porter Rush.

63

the agreement mentioned in the plaintiff's petition but defendant says that he is not liable to the plaintiff for any amount whatever upon said agreement or any condition in said agreement, because he says that according to said agreement, the said plaintiff had in his possession moneys belonging to said Porter Bush and retained from said Porter Bush more than sufficient to pay every liability, lien, claim and demand against said Market House mentioned in plaintiff's petition due or to grow due or arising from the work done by said Bush. Defendant further says that the said plaintiff at the time of the bringing of said cause of action aforesaid had retained, and in his possession from the value of the work done on the said Market House more than sufficient to pay all debts, due, demands against said Market House by means of any failure on the part of said Porter Bush to faithfully perform all and singular the terms, conditions and stipulations in said agreement, if any such failure exists or exists on the part of said Bush for this defendant says that as to the allegations in plaintiff's petition that the said Bush and this defendant have not secured him from all liens, claims and losses and that a large number of liens upon said building meaning said Market

73

have been filed in the office of the Clerk of this Hon. Court by mechanics and laborers employed upon said building by said Bush - this defendant says that he has no knowledge thereof sufficient to form a belief so as to make direct answer thereto, but requires from plaintiff strict proof. Defendant further says that as to the further allegations in plaintiff's petition that he plaintiff has paid out at different dates and times sums amounting to one hundred and four Dollars and thirty eight cents on account of said liens he has no knowledge thereof sufficient to form a belief but requires strict proof on behalf of plaintiff before he, this defendant, will credit the said allegation - that he, this defendant, does not know whether any liens at all have been filed against said Market House but if there has been this defendant says that the said plaintiff had at the time of the bringing of this suit retained in his hands out of the value of the work done by said Bush more than sufficient to pay all the liens or other liabilities unsatisfied or unpaid against said building if any was unsatisfied or unpaid by said Bush. Defendant says that said Bush did leave some work unfinished on said Market House that was required by said Agreement, but defendant says that it is not true as stated by plaintiff

83

that the work left undone or unfinished by said Bush cost twenty dollars to finish and complete this defendant alledging that he has good reason to believe that the said work undone and unfinished cost about five dollars to complete. Defendant says that he has no knowledge sufficient to form a belief so as to answer if the said Bush was guilty of the breaches of the agreement as mentioned in plaintiff's petition and requires strict proof of the same this defendant averring that if the said Bush has been guilty of said breaches the said plaintiff has retained from the work of said Bush more than any and every damage he may have sustained by the same and this defendant further says that the plaintiff did not comply with his part of the Contract as he verily believes in this that said plaintiff did not pay the said Bush as the work progressed according to the true intent and meaning of said Agreement to the damage of defendant One Hundred dollars which he puts up as an offsett in this suit against any demand the plaintiff may perchance have against him.) Henry N. Clark

Atty for Deft

State of Missouri }
County of St Louis } ss. James Sigmiago being duly sworn upon his oath says that he believes the above answer and the

9 3 matters therein as stated are true

Sworn to & subscribed before me this 1st day of May A.D. 1851 } James Signaigo

Peter W. Johnson Justice of the Peace

And afterwards to wit: at the term last aforesaid on the 14th May 1851 the following reply to offsett was filed to wit:

Reply to offsett Plaintiff in reply to the demand set up as an offsett by defendant denies that defendant has any offsett to plaintiff's action for the reason and on the ground alledged in defendant's answer

J. M. & D. C. Naight Attys for plaintiffs

William G. Webb being duly sworn says upon his oath that he is clerk for the plaintiff abovenamed and acquainted with the facts of this case and believes the matters and things set forth in the foregoing reply to be true

W. G. Webb

Sworn to & subscribed before me this 14th April 1851 }

M. S. Cerri clerk }

And afterwards to wit at the April term 1854 of said Court on the 27th May 1854 the following proceedings were had to wit:

Jury & trial progressed Now at this day come the parties aforesaid by their respective attorneys and thereupon come a jury to wit: William Garris, W. H. Robinson, David S. Jamison Edward Warren, John J Pritchard, George W. Sutherland, Emanuel Block W. P. Flint, Thos Nitz, J. Hangmeyer, Patrick

Condors & John Middleton, twelve good and lawful men, who being duly sworn, tried and sworn the matters in controversy well and truly to try, the trial of the cause having progressed but not being finished, the Court adjourned until nine o'clock on monday morning. And afterwards to wit: at the term last aforesaid, on the 30th May the following further proceedings were had to wit:

Trial progresses jury retire

Now at this day came the parties by their respective attorneys, and thereupon come the Jury duly empannelled and sworn herein; and the trial of this cause having been finished the jurors aforesaid retired to consider of their verdict. And on next day following judgment was had – to wit:

Judgment

Now at this day came again the parties aforesaid, by their respective attorneys, and thereupon come a Jury duly empannelled and sworn herein, the matters in controversy well and truly to try, the trial of the cause having been finished the jurors aforesaid, upon their oaths aforesaid, do find for the defendant. It is therefore considered and adjudged, that said plaintiff take nothing by his said suit, and that said defendant go hence without day and recover of said plaintiff his costs and charges herein expended, and that execution issue therefor.

And afterwards to wit: at the term last aforesaid on the 31st day of May 1857 the

11 35

Motion for new trial

following motion for new trial was filed to wit:
And now comes the plaintiff and moves this Court to set aside the verdict herein and for a new trial for the following reasons. Because the jury utterly disregarded the instructions of the Court. Because the finding of the jury is against Law. Because the finding of the jury is against the evidence. Because the jury entirely disregarded the evidence in this case. The finding of the jury was directly in the face of proper and legal instructions given to them by this Court — C. B. Lord.
And afterwards to wit: at the term last aforesaid on the 21st June 1854 the following proceedings were had to wit:

Motion sustained

The Court having duly heard and considered the motion of said plaintiff for a new trial, and being thereof fully advised doth order that said motion be sustained.
And on the next day the following affidavit for change of venue was filed to wit:

Affidavit

County of St Louis } ss James Bignigo the above named
State of Missouri } defendant makes oath and says that he has good reason to believe and does believe that the Honorable Alexander Hamilton Judge of the St Louis Circuit Court St Louis County has been and is so prejudiced against the rights of defendant in the above entitled cause that he verily believes he cannot have justice at his hands and therefore prays a change of venue from the said Circuit Court of St Louis County to the

St Louis Court of Common Pleas as provided by law. James Signaigo
Sworn to and subscribed before me this 22nd June 1864
Wm J. Hammond Clerk

And on the same day the following proceedings were had to wit: Now at this day comes the said defendant by his attorney and files his petition praying a change of venue in this cause upon the ground that the Judge of this Court is prejudiced against him: and upon consideration of the premises, it is ordered by the Court, that the prayer of said petition be granted and the Clerk of said Court make out a full and complete transcript of the Record and proceedings in this cause, and that he transmit the same duly certified together with all the original papers not forming a part of the record, to the Clerk of the St Louis Court of Common Pleas.

Change of Venue

State of Missouri } ss
County of St Louis } Wm J. Hammond Clerk of the Circuit Court within and for the County of St Louis Certify the foregoing to be a true and correct transcript of the Record & Proceedings, together with the original papers not forming part of the Record, in the case of Picot vs Signaigo as fully as the same remains of Record in my office

183

In Testimony whereof I hereto set my hand and affix the seal of said Court at Office in the City of St Louis this 3rd day of January A.D. 1855

L. S.

Wm T. Hammond Clk

And afterwards to wit at the February Term of the St Louis Court of Common Pleas the following proceedings were had

Tuesday June 12th 1855

Louis G. Picot trustee under the will of Mrs Ann Biddle vs James Sigmiago

Petition

Now at this day came the parties by their respective Attorneys and thereupon came also a jury to wit Charles N. Lewis, A. T. Ritter, G. L. Vogel, Wm E. Jackson, J. D. Hutchinson, H. Deiker, N. Fisher, H. N. Deikman, Frederick Hattendorf, J. Garner, John Mast and John C. Colby twelve good and lawful men who being duly elected tried and sworn the issues joined between the parties aforesaid well and truly to try the trial progressed and being finished the plaintiff says he will not further prosecute his suit in this behalf against the defendant but voluntarily takes a non-suit, therefore it is considered by the Court that the defendant go hence without day and recover of the plaintiff his costs and charges herein expended and have thereof execution. Leave is given the plaintiff to move to set the aforesaid non-suit aside.

Jury trial & Nonsuit

And afterwards on the 14th June 1855

143 the plaintiff filed a motion to set aside the non-suit herein and Tuesday June 26. 1855 the following other proceedings were had to wit:

Louis G. Picot Trustee &c
vs
James Signiago

Motion set aside Nonsuit Ovd.

The plaintiff's motion to set aside the non-suit herein being submitted to the Court and by the Court fully understood it is ordered that said motion be overruled.

The following bill of exceptions was filed June 29. 1855.

Louis G. Picot trustee &c
vs
James Signiago

In Common Pleas of St Louis County February Term 1855

Bill of Exceptions

Be it remembered that on the trial of this cause, at this same term of February 1855. The plaintiff to maintain the issue on his part, offered and read in evidence a contract in the words and figures following:

Contract.

Articles of agreement made and entered into this sixteenth day of September A. D. Eighteen hundred and fifty by and between Porter Bush of the City and County of St Louis State of Missouri party of the first part and Louis G. Picot trustee under the will of Mrs Ann Biddle party of the second part all of the City and County of St Louis State of Missouri in manner following that is to say the said Porter Bush for and in consideration of the covenants and agreements on the part of said Louis G. Picot hereinafter contained

153

does hereby for himself his heirs and assigns covenant and agree to and with the said Louis G. Picot that he the said Rush shall and will at his own proper cost and charge according to the plan numbered one of the Market House to be erected by said Louis G. Picot on Block five hundred and fifty six of said City of St Louis on Biddle Street between Broadway and Sixth Streets (and which plan is signed by the said Louis G. Picot and by the said Rush and is filed in the said Louis G. Picot's office) and under the control of the said Louis G. Picot and under the Superintendence and according to the directions of the Superintendent of said building do all the necessary brickwork of said building all as detailed in said plan in a good substantial and workmanlike manner and to finish the ornamental part of said brick work in compliance with said plans and the direction of said Superintendent and all according to the following specification to wit: The walls to be of such thickness as may be directed - the pillars on both sides of the building to be one foot nine and a half inches (1.9½) by two feet two inches to have corner irons well and securely built in to said pillars - the Pilasters on both sides and North end to project four inches in front of wall the Pilasters on the South end to project nine (9) inches from the face of the walls the chimneys to be

163 topped out and particular care to be taken in the building of the flues and plastering them on the inside so that they shall be of the same size from bottom to top inside and to be free of obstructions at the end of the work arches to be turned over all the openings iron or wood pipes or other fixtures to said building to be walled in wherever required the whole of the brickwork throughout the exterior to be built of good red bricks laid in the best manner in good mortar (made of good white lime and the best of coarse sand to be well mixed at least three days previous to being used in said Brick-work) and bonded with headers every fifth course all the walls to be neatly painted on the inside the outside of the walls to be painted in the best and neatest manner all of said walls pillars ~~and~~ pilasters antics projections Eavals and chimney tops to be built straight square level and plumb the inside of walls to be of hard brick the said walls to be well filled in the centre with brick laid in the mortar (not dry) and every course well slushed and level throughout and all iron-mouldings or plates of every description to be well and securely built into said walls and all bond timbers or blocks of wood to be walled in as directed by the Superintendent. And the said Bush further agrees that if the said Superintendent aforesaid with the consent of the said Louis G. Picot

173

should deem it necessary to make any variations from the Plan of the building or any part thereof such variations shall be made by said Bush and that such variations be considered as not annulling or in any wise violating the agreement and that the said Louis L. Picot's opinion as to the value of such variations shall prevail and be binding on both parties to this agreement the said Bush to furnish all the lime & brick & sand to be used in said brick work and to furnish his own scaffolding. And inasmuch as it is contemplated by the said Louis L. Picot to erect said building by the first day of November next and accordingly has already entered and is about to enter into Contract for the performance of all work and furnishing of all materials necessary thereto though said Bush agrees that he will carry on and do the said brick work at such time and with such expedition ~~and~~ in such manner as may be required to complete the said building by the respective dates mentioned and also so as not to give or cause any unnecessary delay in the progress of said building or any other work connected therewith and the said Bush further agrees that if he the said Bush should fail or neglect to progress with the said brick work in the manner herein contracted for so as to lead to the belief that this agreement or any part thereof cannot be carried out or completed in due time in accordance with its stipulations or that the progress of the building or any other work connected therewith will be delayed

183

thereby or that said building or any part thereof will be damaged thereby the said Superintendent may cause any of the said Brick work to be done at the expense of the said Rush and may moreover make a deduction of ten per cent on all work due by him under this agreement and that he the said Rush will hold the said Louis G. Pick harmless against any damages which may accrue to himself or any other contractor employed on said building by reason of such delay and the said Rush further agrees that he shall and will discharge from doing any part of the work herein contracted for any man whom the said Louis G. Pick may consider as incompetent or unfit for the same and the said Rush further agrees that he will strictly follow the directions to be given to him by the said Superintendent as to the manner or place of depositing the materials necessary for said brick work and the said Rush further agrees that he will not leave the work but be on or about and in the immediate vicinity of said building at all working hours of each and every day until said brickwork shall be completed (And the said Louis G. Pick on the second part does hereby covenant and agree with the said Rush that he shall and will pay to the said Rush his heirs or assigns for the entire completion of the work mentioned to the satisfaction of the said Superintendent

193

at the rate of Three dollars and fifty cents per one thousand Bricks measured when in the walls without any extra allowance whatsoever payments to be made the work progresses retaining twenty five (25) per cent on the amount of work done and the balance after the entire completion of the work to the satisfaction of the said Louis G. Picot or Superintendent and after the settlement of all lawful claims liens or demands against said work on account of materials furnished or work done. And whereas the said Louis G. Picot wishes to have a fair up job and no botheration it is expressly covenanted promised and agreed by and between the said parties to these presents are upon this condition that the said Picot retains entire control of the said work and has now and at all times full right and liberty to stop the progress of the work at any time day and hour whatever and if he shall so stop said work he shall pay said Rush for what he may have performed in the good manner and condition this contract requires a reasonable price for the same not exceeding in any event the rate of the contract price per thousand and also a reasonable price for all lime sand and mortar suitable for and necessary for the work herein contracted for and that after the said work be done it shall be measured in this common-sense

203 manner; the walls piers corners cornices
arches jams and every part of said
brickwork shall be measured in no
place but once so as to show the actual
number of cubic feet with this exception only
that a chimney or flue shall be measured
as if the chimney or flue was solid and
no sill cap opening or other thing shall
be measured as Brick. And the simple
meaning of this Contract is that said Pierce
is to furnish the bricks and nothing else
and that said Rush is to furnish all
labour and other things materials and
machinery for the erection of said walls
and to build a first rate house at least
equal to the best parts of the butchers
market lately erected by the City of
St Louis near Main & Market Streets with
the improvements of fine joints of mortar
on the outside and finally the whole of
said work shall be done to the entire
satisfaction of Pierce.

And for the faithful performance
of all & singular the terms of this
Contract and for the securing of said
Pierce from all liens claims and losses
the said Rush and James Sigourney and
_____ all as principals do hereby
bind themselves their executors administrators
and assigns unto the said Pierce in the
penal sum of One thousand dollars
firmly by these presents. Witness our
hands and seals this 16th of September

213

1850.

Porter Bush {Seal}

James Signaigo {Seal}

Bill of Exceptions Cont'd.

The plaintiff then gave testimony tending to show the measurement and value of the work done under said contract by Porter Bush, and the amount paid by said plaintiff to said Bush on account of the same, the plaintiff then proved that a number of liens claims on said building mechanics on said contract were filed in the St Louis Circuit Court that judgements were obtained on said liens in the Circuit Court in favor of the persons claiming the same and that said judgements were paid by the plaintiff. The plaintiff then offered to prove that a number of liens claims on said building were filed by different individuals they filing their claims in the Circuit Court; that the same claims were prosecuted to judgement against Porter Bush before a Justice of the Peace for St Louis County and that the same judgements were paid by plaintiff without the filing of any transcripts in the Clerks office of the Circuit Court, & without the issue of any execution thereon, and offered in this connexion to prove that the payments were made by plaintiff upon the representation made to him by the respective claimants that they would file a transcript and take out execution on their respective claims unless they were paid and that such payments were made by the

223 plaintiff to save the accumulation of costs. This testimony was ruled out by the Court, to the decision of said Court in ruling out said testimony the plaintiff did then & there at the same time except. The plaintiff further gave evidence tending to show that said Porter Bush left the country about or before the time of the completion of the said building and that a few evenings prior thereto the plaintiff paid to said Bush most of the 25 per cent then in his (plaintiff's) hands, at the request of said Bush and without the knowledge or consent of the defendant and that plaintiff gave defendant notice that Bush had left and that he left unsettled claims against plaintiff on account of said building and notified defendant to settle the same. This was all the testimony in the case. The plaintiff then asked and the Court refused to give the following instruction

Plaintiff instruction refused

If the Jury believe from the evidence in this case that the plaintiff paid the judgements obtained in the Circuit Court upon the lien filed against the Harvey market, they will find for the plaintiff the amount so paid (deducting therefrom the amount if any still due from plaintiff to said Bush) with interest from the time when said amounts were paid.

to which decision by said Court in refusing to give said instruction the plaintiff did then and there at the time except. The Court then gave the following instructions

Instructions given

If the jury believe from the evidence that the plaintiff paid all the judgements in the

by Court
233

Circuit Court read in evidence any sums of money, they will find for the plaintiff, unless they further find that twenty five per cent of the Contract price of the work done by Bush under the Contract sued upon, together with the amount due Bush still in the hands of plaintiff equals or exceeds the amount so paid by the plaintiff.

By the terms of the Contract sued upon, the plaintiff was to retain 25 per cent of the Contract price ~~of the Contract price~~ of the work and materials furnished by Bush on the building in question, until the work was completed and until all lawful claims liens and demands against said work on account of materials furnished or work done, was settled; and if the plaintiff, before the completion of said work and settlement aforesaid, paid over to said Bush any portion of said twenty five per cent, then the Defendant is entitled to have the portion of said twenty five per cent so paid over, and also whatever is still due to said Bush deducted from the amount of payment made by the Plaintiff on the liens offered in evidence. If after making such deductions the balance is in favor of the plaintiff, they will find for the Plaintiff and assess his damages at the amount of said balance. If there is no balance in favor of the Plaintiff, they will find for the Defendant.

to the giving of which the plaintiff by his Counsel did then and there at the time except And thereupon the plaintiff became nonsuit

243 with leave to move to set the same aside, and afterwards and within the time required by law, filed in said Court a motion to set the non-suit in this case aside which motion and reason are as follows

Motion to set aside Non Suit

Louis G. Picot trustee &c
vs
James Signaigo

In St Louis Court of Common Pleas

And now comes the plaintiff by leave of the Court first had and obtained, and moves to set aside the non suit herein for the following reasons

1. The Court excluded proper and relevant testimony.
2. The Court misinstructed the Jury.
3. The Court erred in refusing to give proper & legal instructions asked for by plaintiff.
4. The instructions given by the Court were improper & illegal
5. The Court erred in deciding that defendant was not bound as principal in the Contract sued upon.
6. The Court erred in instructing the Jury, that under the Contract in question, plaintiff was bound to retain 25 per cent of the amount agreed to be paid for the work to be done under said Contract

C. B. Lord
Atty for plff

which being heard by the Court said motion was overruled and to the decision of said Court in overruling said motion the plaintiff by his Counsel did then and there

253 at the time except. And because none of said exceptions do appear of record in this case the Court is asked to sign and seal this bill of exceptions which is done accordingly. June 30. 1855.

Samuel Treat. Judge.

State of Missouri }
County of St. Louis } I, Charles H. Hicks clerk of the St. Louis Court of Common Pleas within and for the County aforesaid certify that the above and foregoing is a full true and complete transcript of the record and proceedings in the above entitled cause as fully as the same remains in my Office

In Testimony Whereof I hereto set my hand and affix the seal of said Court at Office in the City of St. Louis this Twentieth day of August A. D. 1855

C. H. Hicks Clerk

Index to Transcript

Transcript from Circuit Court. Petition	page	1
Summons	"	4
Shff's Return Answer	"	5
Reply to Offalt. Jury trial prayed	"	9
Judgment	"	10
Mo for New trial & Same Sustained	"	11
Change of Venue	"	12
Jury trial & New Suit in Common Pleas	"	13

Motion to set aside Non Suit Ord. Bill of Exceptions } page 14
Contract " 14
Bill of Exceptions Continued " 21
Plaintiffs Instructions refused " 22
Courts Own Instructions " 22
Motion to set aside Nonsuit " 24

83 ~~[illegible]~~

(3)

March. T. 1856

Louis G. Picot trustee
1c Pltff in Error

vo Transcript

James Signaigo
Deft. in Error.

Error to St. Louis Court
of Common Pleas

Filed 3d October 1855
Wm. S. Glanville
Ck.

C. B. Lord

Exd

$9 90/100 Clks fee

~~[illegible]~~ 83

Ex Sec $2.00 / [illegible]

Louis G. Picot &c.
v.
James Sigmiago

In Sup. Court.
Oct. Term 1855

and now comes the plaintiff and says that in the record & proceedings aforesaid, & the aforesaid Judgement there is manifest error in this, to wit.

1. The Court erred in excluding proper & relevant testimony.

2. The Court in refusing to give proper and legal instructions to the Jury.

3. The court erred in instructing the Jury.

4. The Court erred in deciding that defendant was not bound by his contract as principal, but that in the contract sued upon he was only surety -

5. The Court erred in deciding that under the contract in question in this Cause, plaintiff was bound to retain 25 per centum of the amount agreed to be paid for the work to be done under said Contract -

6. The Court erred in refusing to set aside the non suit in this Cause.

For which error & other errors manifest therein this Court is asked to reverse & annul the said Judgement

and to restore plaintiff to all that he hath lost by the same &c

C. B. Loed
for plff

124

In Sup. Court

Louis G. Picot
Plaintiff in Error

v.

James Signiago
Deft. in Error

Assignment of
Error ——

C. B. Lord
for [illegible]

Filed 20th October 1855.
Wm. S. Glanville
Clk.

Louis G. Picot appellant
vs.
James Signiago Respondant

In Sup. Court.

Statement of the case by Appellant.

On the 16th day of September 1850 Louis G. Picot the appellant entered into a contract with one Porter Bush to do all the necessary brick work according to certain specifications of a Market House then about to be erected by appellant. The contract amongst other stipulations contained the following, "And the said Louis "G. Picot on the second part does hereby "covenant and agree with the said Bush "that he shall and will pay to the said "Bush his heirs or assigns for the entire "completion of the work mentioned to the "satisfaction of the said superintendant "at the rate of Three Dollars and fifty "cents per one thousand of Bricks measured "when in the walls without any extra "allowance whatsoever payments to be "made as the work progresses retaining "twenty five (25) per cent on the amount "of work done and the balance after

"the entire completion of the work to the
"satisfaction of the said Louis G. Picot
"or superintendant and after the settle-
"ment of all lawful claims liens or
"demands against said work on account
"of materials furnished or work done."
To insure the due performance of the
contract, the respondant, together
with said Bush signed the contract,
the last clause of which is as follows:
"And for the faithful performance of
"all and singular the terms of this
"contract and for the securing the
"said Picot from all liens claims and
"losses the said Bush and James
"Signiago and _____ all as prin=
"cipals do hereby bind themselves their
"executors administrators and assigns
"unto the said Picot in the penal sum
"of one Thousand Dollars firmly by
"these presents. Witness our hands and
"seals this 16th September 1850 Porter
"Bush (seal) James Signiago (seal)."
Plaintiff assigned as a breach of said
contract, that the said Bush and
Signiago had not secured plaintiff
from all liens, claims, and losses, but
averred that a large number of liens

upon said building had been filed in the office of the clerk of the circuit court, by mechanics & laborers employed upon said building by said Bush, which liens were claims & charges upon said building valid in Law, that appellant had paid one hundred & four dollars & thirty eight cents of said liens & that the remaining valid liens against said building amounted to $277.55/100. The petition further alleges that plaintiff at the urgent solicitation & request of said Bush paid to him all the money due to him on account of said contract, with the exception of about forty six Dollars, and that such payments were made without any knowledge that any liens had been filed.

Respondant in his answer admits the execution of the contract, but very loosely denies most of the other material allegations of the Petition, and alleges that the appellant has retained in his hands "moneys belonging to said Porter Bush more than "sufficient to pay every liability, lien, "claim & demand against said Market

House" &c., upon the trial of this cause, the following evidence was given.

The plaintiff ~~then~~ gave testimony tending to show the measurement & value of the work done under said contract by Porter Bush, & the amount paid by said plaintiff to said Bush on account of the same, the plaintiff then proved that a number of liens & claims on said building named ~~in~~ said contract were filed in the St. Louis Circuit Court, that judgments were obtained on said liens in the Circuit Court in favor of the persons claiming the same & that said judgments were paid by the plaintiff. Plaintiff then offered to prove that a number of liens, claims, on said buildings were filed by different individuals they filing their claims in the Circuit Court; that the same claims were prosecuted to judgment against Porter Bush before a Justice of the peace for St. Louis County & that the same judgments were paid by the plaintiff without the filing of any transcripts in the clerk's office of the Circuit Court and without the issue of any execution thereon, and offered in this connection

to prove that the payments were made by plaintiff upon the representation made to him by the respective claimants that they would file a transcript & take out execution on their respective claims unless they were paid & that such payments were made by the plaintiff to save the accumulation of costs. This testimony was ruled out by the Court, to which plaintiff then excepted.

The plaintiff further gave evidence tending to show that Porter Bush left the country about or before the time of the completion of the said building & that a few evenings prior thereto the plaintiff paid to said Bush most of the 25 per cent then in his (plaintiff's) hands at the request of said Bush & without the knowledge of or consent of defendant & that plaintiff gave deft. notice that Bush had left & that he left unsettled claims against plaintiff on account of said building, & notified deft. to settle the same.

This was all the testimony in the cause

Plaintiffs then asked the Court to give the following instructions, which the

Court refused.

If the jury believe from the evidence in this case that the plaintiffs paid the judgments obtained in the Circuit Court upon the lien filed against the Harney Market, they will find for the plaintiff the amounts so paid (deducting therefrom the amount if any still due from plaintiff to said Bark) with interest from the time when said amounts were paid.

The plaintiff excepted to the decision of the Court in refusing the above instruction.

The Court then gave the following instructions.

If the jury believe from the evidence, that the plaintiff paid on the judgments in the Circuit Court, read in evidence, any sums of money, they will find for the plaintiff, unless they further find that 25 per cent of the contract price of the work done by Bush under the contract sued upon, together with the amounts due Bush, still in the hands of plaintiff, equals or exceeds

the amount so paid by the plaintiff.

By the terms of the contract sued upon, the plaintiff was to retain 25 per cents of the contract price of the work, and materials furnished by Bush on the building in question, until the work was completed & until all lawful claims, liens & demands against said work on accounts of materials furnished or work done, was settled; and if the plaintiff before the completion of said work & settlement aforesaid, paid over to said Bush any portion of said 25 per cents then the deft. is entitled to have the portion of said 25 per cent so paid over, & also whatever is still due to said Bush, deducted from the amount of payment made by the plaintiff on the liens offered in evidence. If after making such deductions the balance is in favor of the plaintiff, they will find for the plaintiff & assess his damages at the amount of said balance. If there is no balance in favor of the plaintiff, they will find for the defendant.

To the giving of which plaintiff by his counsel duly excepted

whereupon the appellant became nonsuit, with leave &c. The motion made to set aside the non suit being overruled the case is brought here.

C. B. Lord
Atty. for Appellant

83

In Sup. Court

Louis G. Picot
Master &c.
v.
James Siguiago

Statement of the Case filed by Appellant

C. B. Lord
for Apptt.

Filed 27 March 1856
W. S. Glanville
Clk

Louis G. Picot
appellant
vs.
James Lignaigo
Respondant

In Sup. Court

Statement of the case by appellant

& Brief

On the 16th day of September 1850 Louis G. Picot the appellant entered into a contract with one Porter Bush to do all the necessary brick work according to certain Specifications of a Market House then about to be erected by appellant. The contract amongst other stipulations contained the following, "And the said Louis "G. Picot on the second part does here= "by covenant and agree with the said "Bush that he shall and will pay "to the said Bush his heirs or assigns "for the entire completion of the work men= "tioned, to the satisfaction of the said "superintendant, at the rate of Three "Dollars and fifty cents per one thous= "and of Bricks, measured when in the "walls without any extra allowance "whatsoever, payments to be made "as the work progresses, retaining "twenty five (25) per cent on the

"amount of work done, and the balance
"after the entire completion of the
"work to the satisfaction of the said
"Louis G. Picot or superintendant,
"and after the settlement of all lawful
"claims, liens, or demands, against
"said work on account of materials
"furnished or work done." To insure the
due performance of the contract, the
respondant, together with said Bush
signed the contract, the last clause
of which is as follows: "And for
"the faithful performance of all
"and singular the terms of this con-
"tract and for the securing the said
"Picot from all liens claims and los-
"ses the said Bush and James
"Signaigo and ——— all as prin-
"cipals do hereby bind themselves
"their executors administrators and
"assigns unto the said Picot in the
"penal sum of one thousand Dollars
"firmly by these presents. Witness our
"hands and seals this 16th Septem-
"ber 1850 Porter Bush (seal) James
"Signaigo (seal)". Plaintiff assigned
as a breach of said contract, that the
said Bush and Signaigo had not

secured plaintiff from all liens, claims, and losses, but averred that a large number of liens upon said building had been filed in the office of the clerk of the Circuit Court, by mechanics & laborers employed upon said building by said Bush, which liens were claims & charges upon said building valid in Law, that appellant had paid one hundred & four Dollars & thirty eight cents of said liens & that the remaining valid liens against said building amounted to $277.55/100. The petition further alleges that plaintiff at the urgent solicitation & request of said Bush paid to him all the money due to him on account of said contract, with the exception of about forty six Dollars, and that such payments were made without any knowledge that any liens had been filed.

Respondant in his answer admits the execution of the contract, but very loosely denies most of the other material allegations of the Petition, and alleges that the appellant has retained in his hands —

"moneys belonging to said Porter Bush more than sufficient to pay every li= ability, lien, claim & demand against said Market House" &c. Upon the trial of this cause the following evidence was given: The plaintiff gave testimony tending to show the measurement & value of the work done under said contract by Porter Bush, & the amount paid by said plaintiff to said Bush on account of the same, the plaintiff then proved that a number of liens & claims on said building named in said contract were filed in the St. Louis Circuit Court, that judgments were obtained on said liens in the Circuit Court in favor of the persons claiming the same & that said judgments were paid by the plaintiff. Plaintiff then offered to prove that a number of lien claims, on said building were filed by different individuals they filing their claims in the Circuit Court; that the same claims were prosecuted to judgment against Porter Bush before a justice of the peace for St. Louis County & that the same judgments were paid by the plaintiff

without the filing of any transcripts in the clerks office of the circuit court and without the issue of any execution thereon, and offered in this connexion to prove that the payments were made by plaintiff upon the representation made to him by the respective claimants that they would file a transcript & take out execution on their respective claims unless they were paid & that such payments were made by the plaintiff to save the accumulation of costs. This testimony was ruled out by the court, to which plaintiff then excepted.

The plaintiff further gave evidence tendings to show that Porter Bush left the country about or before the time of the completion of the said building & that a few evenings prior thereto the plaintiff paid to said ~~to said~~ Bush most of the 25 percent then in his (plaintiff's) hands at the request of said Bush & without the knowledge of or consent of defendant & that plaintiff gave deft. notice that Bush had left & that he left unsettled claims against —

plaintiff on account of said building & notified deft. to settle the same.

This was all the testimony in the cause.

Plaintiffs then asked the Court to give the following instructions, which the Court refused.

If the jury believe from the evi= dence in this case that the plain= tiff paid the judgments obtained in the Circuit Court upon the lien filed against the Harney Market, they will find for the plaintiff the amount so paid (deducting therefrom the amount if any still due from plaintiff to said Bush) with inter— est from the time when said amounts were paid.

The plaintiff excepted to the decision of the Court in refusing the above instruction.

The court then gave the following in= structions.

If the jury believe from the evidence, that the plaintiff paid on the judgments in the Circuit Court, read in evidence

any sums of money, they will find for the plaintiff, unless they further find that 25 per cent of the contract price of the work done by Bush under the contract sued upon, together with the amount due Bush, still in the hands of plaintiff, equals or exceeds the amount so paid by the plaintiff.

By the terms of the contract sued upon, the plaintiff was to retain 25 per cent of the contract price of the work, and materials furnished by Bush on the building in question, until the work was completed & until all lawful claims, liens, & demands against said work on account of materials furnished or work done, was settled; and if the plaintiff before the completion of said work & settlement aforesaid, paid over to said Bush any portion of said 25 per cent then the Deft. is entitled to have the portion of said 25 per cent so paid over, & also whatever is still due to said Bush, deducted from the amount of payment made by the plaintiff on the liens offered in evidence. If after making such deductions the balance is in favor of the

plaintiff, they will find for the plaintiff & assess his damages at the amount of said balance. If there is no balance in favor of the plaintiff, they will find for the defendant.

To the giving of which plaintiff by his counsel duly excepted. nonsuit &c. &c.

The appellant will insist

1. That Siguiago was a principal in the contract

2. That appellant was not bound to retain 25 per cent of the contract price of said work.

3 That appellant was entitled to recover the amount paid by him, on all the liens, on which judgement was obtained before the Justice -

I. When a man contracts to make himself a principal, the law will not make him a surety -

10. Barnwell & Cresswell 578.

1. M. & W. 568. 10. Pet. 257.
14. Pet. 201. Am. leading cases
vol. 2. P. 180.

It was expressly stipulated that the liability of Bigniago was to be that of a principal. Modus et conventis vincunt legem.

Where several parties sign an instrument, as if all were principals, but the relation of principal & surety really exists, as between the parties, that fact may be proved, but where, as in this case, the surety in fact, agreed to become principal, his legal liability is that of a principal -

The Court below, in giving and refusing instructions, assumed that the relation of Bush and Bigniago as between themselves controlled the rights of appellant against the express agreement of Bigniago. If the liability of

Signiago was that of a principal the Court erred in refusing the instruction asked for by appellant, and in assuming by the instructions given that appellant was bound to retain 25. per cent of the contract price in his hands.

III. Appellant was not bound to retain 25. per cent of the amount of the contract price in his hands, It was a privilege only reserved to himself, - No liens were filed at the time.

The object of the appellant in requiring Bush to join Signiago with him as principal was to secure himself against all "liens claims &c." yet the Court below undertook to do away with the legal force of the written convention of the parties, because appellant had reserved the privilege of retaining 25. per cent of the contract price. The reservation was by its terms only until the completion of the building to the satisfaction of appellant, & he was bound to pay all the contract price when he accepted

the building -

By the second instruction, the court expressly tells the jury that by the terms of the contract sued upon appellant was bound to retain 25 per cent until all liens &c were paid. I submit that no such construction can be put upon the contract. - None of the liens were filed at the time; they were not filed until after Beck had left -

III. The appellant can recover for all moneys paid upon the judgment, obtained before a Justice of the peace on liens duly taken.

The court below thought that the payment, without the issue of Executions, of the judgments in all cases when liens had been taken, was voluntary - It was in no sense a voluntary payment, nor does the doctrine of voluntary payments apply to the case. The

payments were made as appears by the record, after lien filed, & ascertainment of the amount by the judgment of a tribunal of competent jurisdiction, all the subsequent proceedings required by the statute are in the ~~nature~~ nature of Execution, the payment was made to save costs. Now suppose a suit brought against Bush for money paid on these liens, would there be any doubt about a recovery against him? Signiago stands precisely, as Bush would have stood had he been sued.

C. B. Lord

83

In Sup. Court

Louis G. Picot
v. Appelt.

James Signiago
Respdt.

Brief & Points
for Appellant

C. B. Lord
for Appelt.

Filed 3d April 1856
W. S. Glanville
Clk

Louis G. Picot trustee under the Will of Ann Biddle
vs
James Signaigo

appellant
Respondent

In Supreme Court of Missouri March Term 1856

Brief on behalf of Respondent.
Hart & Jecko attys.

Appellant filed in the St Louis Circuit Court a petition against Respondent. alleging that ~~Re~~ certain articles of agreement were made and entered into between appellant and one Porter Bush whereby said Bush for a consideration in said articles expressed - agreed and covenanted to undertake do and complete the Brick Work of a certain Market House, the appellant to furnish the brick and the said Bush all the labor, & other materials & machinery for the erection of the walls of said Market House, the petition then goes on & states that said Bush & respondent in & by said articles under their hands and seals bound themselves as principals their executors, administrators and assigns for the faithful performance of all & singular the terms of said contract and for the securing appellant from all liens, claims and losses in the penal sum of One Thousand Dollars petition then alleges that Bush & Signaigo have not secured appellant from all liens claims and losses, that a large number of liens

upon said building have been filed in the office of the Clerk of the St Louis Circuit Court by Mechanics & Laborers employed upon said building by said Bush, that said liens are claims and charges upon said Building valid in law. That appellant has paid out as nigh as he can recollect at different dates and times one hundred and four dollars and thirty eight cents on account of said liens for the purpose of discharging the same including costs, and that there are other valid claims against said building upon which liens have been filed by Mechanics & Workmen employed by said Bush on said building to do the brick work on the said building unsatisfied amounting to Two hundred and seventy seven $\frac{55}{100}$ Dollars exclusive of costs

Petition further states that appellant has paid to said Bush all of the money agreed upon in said articles as the consideration for said Bush's services and labor and materials used in and upon said building excepting a small sum amounting to about forty six dollars that said Money so paid to said Bush was paid at the urgent solicitation and request of said Bush and before appellant had any notice that any liens had been filed against said building

Petition states as further breach of said bond

in this that said Bush left the said building unfurnished & that the appellant was compelled to hire other persons to do the same & pay Twenty Dollars for the doing of the same

Petition then concludes with the assertion that appellant has duly performed all the conditions on his part required under said agreement, that said Bush has left the City of St Louis for parts unknown so that process cannot be served upon him & prays judgment against respondent for the sum of Three hundred and ninety one $\frac{93}{100}$ Dollars less what amount if any be found due to said Bush

Answer

Sets up, that respondent does not deny that he executed with Porter Bush the agreement mentioned in the petition.

alleges that respondent is not liable to the plaintiff for any amount whatever upon said agreement or any condition in said agreement because he says that according to the said agreement the appellant had in his possession monies belonging to said Porter Bush and retained from said Bush more than sufficient to pay any liability, lien claim and demand against said building mentioned in the petition due or to become due or accruing from the work done by said Bush

Alleges that at the time of the institution of the cause of action the appellant had retained and in his possession from the value of the work done by Bush on said building more than sufficient to pay every debt lien or demands against said Market House by means of any failure of Bush to faithfully perform all & singular the terms conditions and stipulations in said agreement if any such failure existed or exists on the part of said Bush

Puts in issue the allegations in pl Ffs petition of any liens being filed against said Market House by Mechanics and workmen & others employed by Bush

of any money being paid by appellant to satisfy any liens whatever

of any liens remaining against said building unsatisfied

denies that the work left undone & unfinished by Bush - cost Twenty Dollars to complete & alleges the same not to cost over five dollars.

And in plain and unequivocal terms alleges that by the terms, stipulations and conditions in said agreement set forth the appellant has in his hands more than sufficient to cover every item, allegation ~~[illegible]~~

of payment, lien or liability of every character set forth in petition & denies breach of contract
a trial was had in the Circuit Court and judgment then rendered in favor of the respondent, which judgment the Circuit Court set aside - the respondent took a change of Venue to the St Louis Court of Common Pleas - when a second trial was begun but before the same was submitted to the jury - the appellant took a nonsuit with leave of the motion to set aside nonsuit was overruled by the Court & the case brought into this Hon Court by appeal.

The contract upon which the appellant seeks to recover against Respondent is a very lengthy document and respondent will therefore only set forth, so much of it as important to the instructions given by the Court below. "And the said Louis G. Picot on the second part does hereby covenant and agree with the said Bush, that he shall and will pay to the said Bush his heirs or assigns for the entire completion of the work mentioned to the satisfaction of the said superintendant at the rate of Three dollars and fifty cents per thousand of Bricks measured when in the walls without any extra allowance whatever payments to be made as the work progresses retaining twenty five (25) per cent on the amount

of work done and the balance after the entire completion of the work to the satisfaction of the said Louis G. Picot or Superintendant and after the settlement of all lawful claims, liens and demands against said work on account of materials furnished or work done"

The evidence in the case went to shew that Porter Bush left the County about or before the time of the completion of the said building and that a few evenings prior thereto the appellant paid to said Bush most of the twenty five per cent then in his appellants hands at the request of said Bush and without the knowledge or consent of the respondent. That appellant gave notice to respondent that Bush had left the County & had left unsettled claims against said building & notified respondent to settle them, ~~that such amount~~ ~~respondent to the~~ That a number of liens had been filed in the Circuit Court on said building, that judgments were rendered in favor of the persons claiming the same & that said judgments were paid by appellant.

Instructions given

1st. If the jury believe from the evidence that the plaintiff paid on the judgements in the Circuit Court read in evidence

any sum of money, they will find for the Plaintiff unless they further find that twenty five per cent of the contract price of the work done by Bush under the contract sued upon together with the amount due Bush still in the hands of plaintiff equals or exceeds the amount so paid by the plaintiff

2d By the terms of the Contract sued upon, the Plaintiff was to retain twenty five per cent of the contract price of the work and materials furnished by Bush on the building in question until the work was completed and until all lawful claims, liens and demands against said work on account of materials furnished or work done was settled and if the Plaintiff before the completion of the said work and settlement aforesaid paid over to said Bush any portion of said twenty five per cent, then the defendant is entitled to have the portion of said twenty five per cent so paid over; and also whatever is still due to said Bush deducted from the amount of payment made by plaintiff on the lien offered in evidence, If after making such deductions the ~~plaintiff~~ balance is in favor of the plaintiff, they will find for the plaintiff and assess his damages at the amount of said balance - If there is no balance in favor of the plaintiff they will will find for the defendant.

Instruction refused

If the jury believe from the evidence in this case that the plaintiff paid the judgment obtained in the Circuit Court upon the lien filed against the Hanny Market House they will find for the plaintiff the amount so paid deducting therefrom the amount if any still due from plaintiffs to Busch with interest from the time when said amounts were paid. to the giving of the aforesaid instruction & refusal of the last one are by the appellant relied upon as error.

The appellant also on the trial of this case offered to prove that a number of lien claims on said building were filed by different persons in the St Louis Circuit Court, that the same claims were prosecuted to judgment against Porter Busch before a Justice of the peace of St Louis County and that said judgments were paid by appellant without the filing of any transcript in the Clerks office of the Circuit Court and without the issue of any execution thereon and offered in this connexion to prove that the payments were made by appellant upon the representation made to him by the respective claimants that they would file a transcript and take out execution on their respective claims

unless they were paid and that such payments were made by appellant to save the accumulation of costs the Court ruled out this testimony and this we believe constitutes the last ~~and only~~ ground of complaint on the part of the appellant.-

---

Points & Authorities relied upon by Hart & Jecko Attys for respondents

"No transcript having ever been filed of the judgments before the Justice ~~in the Circuit~~ against Bush in the Circuit Clerks office"

1st. The court below properly excluded the testimony offered by appellant, the judgments before the justice was against Bush and no act was done by the plaintiffs to perfect said judgment, so as to make it a lien on the building. and the voluntary payment of a judgment against Bush which might or might not have been sufficient to have made it a judgment against the building. If the said transcripts of said judgts had been filed in Circuit Court does not in any way bind Signaigo to account to Picot for said Payment so voluntary made they being judgments against Bush & not liens of the building

The judgments before the justice were judgments against Bush & did not even operate as a lien on the real estate of Bush. no act was done to perfect by means of said judgments which could only be done by filing transcript of judgment in Cir Court a lien against the Harry Market. and

the payment by Picot of these judgments amounts to the fact that Picot has paid some debts against Bush - and as further can such testimony go - certainly it is incompetent testimony to charge Seguaigo -

3 The instructions given by the Court were proper & legal - The contract was made between Picot as Trustee with Bush and one of the conditions in said agreement is that the said Picot is to retain twenty five per cent on the amount of work done, and hold the same until after the entire completion of the work to the satisfaction of Picot or the superintendant and after the settlement of all legal claims, liens or demands against said work on account of materials furnished or work done, Picot then was bound to retain the twenty five per cent of the amount of work done until the completion of the building and all legal liens, claims or demands agt said building were satisfied, and having that in his hands & possession and parting with it by surrendering it to Bush without the knowledge or consent of Seguaigo he Picot, loses his claim against Seguaigo to the amount of the said twenty five per cent so surrendered to Bush.

See Baker vs Biggs 8 Pickering 122.
Mahew vs Crickett 2 Swanst 185

Hayes vs Ward 4 John Chancery Reports 129
Law vs E. I. Company 4 Vesey 824
Capel vs Butler 2 Simons & Stewart 457
Campbell vs French 6 Term Reports 200
and a very large number of other cases
cited by Theobold on Principal & Surety
under the head of Extinguishment of the Surety
commencing at page 95. up to 109-

We maintain that through the word
security is not annexed to the name
of signers in the penal part of the
agreement. yet that from the instrument
itself, its nature, & character. signers
being sued alone will be legally considered
as a Surety for Bush's faithful performa-
nce of the contracts, and that signers
~~will~~ - notwithstanding the word security
is not used in the instrument itself. ~~the~~
may properly hold that have signed as Surety
for Bush. We call the attention of the
Court particularly to the case of Baker
vs Briggs. 8. Pickering 122. in support of
this position-

Hart & Jeko
for Respondent

83

In Supreme Court
of Missouri

Louis G. Picot, Trustee
Appellant
vs
James Signaigo
Respondent

Brief with Statement of
Case, & points & au-
thorities by
Hart & Jecko
for respondent

Filed E. April 1836
W. S. Gamble
Clk.

Lewis G. Picot
vs } Error to the St. Louis Court
James Lignigo } of common pleas

The instruction on which the cause went off in the court below, was not based upon any defense set up in the answer of the defendant, but as the point may come up again after an amendment, and as it was the only matter that was argued before us, it may be necessary to express an opinion in relation to it.

The question is, whether one who becomes a party to a bond as surety in reality, and who would be regarded as such, but for binding himself "as principal", can claim the rights or set up the defense growing out of the relation of principal and surety?

There is no rule of law which prohibits a surety from waiving the rights belonging to him as such. Such a waiver has nothing in itself offensive to the policy of the law. Nor is there any thing in the situation of the surety in regard to the party with whom he contracts, which ~~provokes~~ excites the vigilance or arouses the jealousy of the law. Usually the surety is less subject to the influence of the ~~party~~ person with whom he deals, than any other contracting party. There is nothing of surprise or mistake alleged in the transaction. When the relation of surety has been created, there are certain safeguards thrown around it, for its protection, but the law, throws no obstacles in the way of a renunciation of those rights. If the surety here, has not stripped himself of that relation, by the contract he has entered into, it is not easy to see, in what manner, that object can be accomplished. He expressly binds himself "as principal". Now there must have been some purpose in

adopting that word. When the term "principal" is used in a contract it must be intended in a sense opposite to that of "surety". The defendant might have become a mere surety to the contract, but when he renounced that character and expressly bound himself as principal, with what face can he afterwards insist, that he is only a surety? When the plaintiff would not take his obligation as surety, but required him to be bound as principal, where is the justice in depriving him of the fruits of his vigilance and imposing on him a contract directly contrary to that for which he expressly stipulated? To hold, that the defendant is not bound as principal in this contract, is tantamount to declaring, that one who really occupies, the relation of surety in a contract, cannot be bound as principal. A proposition for which there is no support in the law. We are not without authority on this point. In our highest tribunal, the Supreme Court of the United States, this question has undergone elaborate discussion and the principle announced there, harmonizes, with the views here expressed.

In the case of Spring vs. The Bank of Mount Pleasant 10 Pet. 257, those who were sureties in reality bound themselves "as principals", to pay a sum of money and attempted a defense growing out of their relation as sureties. The defense did not prevail: The court said, when one who is in reality only surety, is willing to place himself in the situation of a principal, by expressly declaring upon his contract, that he binds himself as such, there can not be any hardship in holding him to the character in which he assumes to place himself.

As to that particular contract, he undertakes as a partner with the debtor, and has no more right to disclaim the character of principal, than the creditor would have to treat him as principal, if he had set out in the obligation that he was only surety. The same parties afterwards renewed their defense in a Court of equity and the case was up in 14 Pet. 207, The Court there remarked, that all the evidence showing that the party was surety, can have no influence against ~~their~~ his direct admission in the obligation, that he was a principal; and there being no pretense of any mistake or surprise, there can be but one meaning attached to this admission; which is, that as between the obligors & the bank all were principals, whatever might be their relation between themselves. They had undoubtedly a right to waive their character & legal protection as sureties and assume the character of principals. This admission in the obligation must have been for some purpose; and none can be reasonably assigned except that it was intended, to place all the obligors upon the same footing, with respect to their liability.

It may be said, that there is a difference between the case under consideration & that to which reference has been made, inasmuch as by the bond before us it appears, that the defendant was a mere surety, whereas in the case referred to, it did not appear by the terms of the obligation, but that all were principals. But when we reflect, that the case in Peters is made to stand on the contract by which the parties bound themselves as principals, the difference amounts to nothing. The court says expressly, all the evidence only established the fact, that the party was surety and that can have no influence, against his direct admission in the obligation that he was principal.

If what has been maintained above, be correct, there can be nothing in the argument, that the plaintiff was bound by the terms of the contract, to retain in his hands 25 per cent of the money due for the work, until the building was completed and all liens satisfied. It is a begging of the question, and assuming that the defendant was a surety, when by the terms of his contract he was a principal. Being a principal he was not injured by a renunciation of his right by the plaintiff to retain the 25 per cent. The plaintiff was under no obligation to do so and his neglect cannot affect his rights under the contract. The case is, as if a principal in the bond, ~~the plaintiff~~ was complaining ~~when~~ that the money had not been retained, when it was optional with the obligee whether he would retain it or not.

The plaintiff is entitled to recover the amount of all valid liens on the building which he has satisfied. If the lien was valid and subsisting, he is entitled to recover its amount though its payment was not coerced by the process of the law. It would serve no useful purpose to subject the parties to the expense of an execution. Judge Ryland concurring the judgment will be reversed and the cause remanded

Wm Scott

83

Picot
vs
Ignacio

Opinion

Filed 7 June 1856
Wm. S. Glanville
Clk

XX