

Barclay, Robert M. v The Globe Mutual Insurance Company

1858 St. Louis

399/7

593/17

1457/1458
2040490

Barclay - resp

insured a steamboat
Barclay owns sunk

~~one dude cancelled fee~~
~~company says all policies~~
company says policy was cancelled
Judge Scott - reversed - President's evidence rejected
he is of no immediate benefit

Globe Mutual - app
appealing because their witness
(a stockholder) was ruled
incompetent
- argue that he was not a
recipient of immediate benefit to
outcome of case

State of Missouri }
County of St. Louis } It is remembered that
herebefore to wit; on the Twenty
Seventh day of March AD 1855. there was filed in
the Office of the Clerk of the St. Louis Court of
Common Pleas within and for the County afore-
said a certain petition which is in the words and
figures following to wit;

Petitioner, Robert W Darclay, Plt } In the St. Louis Court
against } of Common Pleas
The Globe Mutual Insurance } October Term 1855
Company Defendant }
D.

Plaintiff states that the
defendant by its President together with the secretaries
of the Citizens Insurance Company of Missouri and
the St. Louis Lumbermen and Mechanics Insurance
Company executed and delivered to the plaintiff the
the instrument of writing hereto annexed and which
is in the following words and figures to wit;
"Whereas protest has been entered this 28th day of
October 1854 before Wm H. Pritchard Mayor
Public of the City of St. Louis, declaring that the
Steamboat *Neosho* R W Darclay Master was
sunk near Augusta on the Missouri River on
Friday 27th October 1854 and whereas the Globe
Mutual Insurance Company the Citizens Insurance
Company and the Lumbermen & Mechanics Insur-
ance Company of the City of St. Louis have issued
policies each in the sum of four thousand five
hundred and sixty six dollars covering together
two thirds of the Steamboat *Neosho* against loss
to Jones W. Churg Co of Linn Beck W. &

(2)

" J. W. Barclay as owners of said vessel, in view of the
" truth of the declaration of said protest and in order
" to a settlement it is agreed that on full cancellation
" of said policies with George Partridge Co of St. Louis
" as guarantor for full cancellation thereof, the
" said Insurance Companies agree to pay each the
" sum of two thousand dollars to the said insured
" parties, or to said J. W. Barclay as the assignee
" for them. St. Louis October 28th 1854

" H. W. Green President Globe Mutual Ins. Co
" H. W. D. Wood Secy Citizens Ins. Co of Mo
" Jas. H. Patchard Secy St. W. Ins. Co "

The parties to said agreement meant & intended by
George Partridge Co a firm in St. Louis under the
name and style of Partridge Co of which George Par-
tridge was a member. Plaintiff states that on the
14th day of February 1855 W. C. Cherry & Murphy
who were partners in said firm of Jones W. Cherry
Co and were and are sole surviving partners of said
Jones and his administrators assigned to the plaintiff
all their interest in or under said agreement and
to the sums of money therein named, and all and
every cause of action which the said Jones W.
Cherry Co had against the defendant and the other
insurance Companies named in said agreement which
said assignment is written on the back of said agree-
ment and is also here set annexed. Plaintiff states
it is true as recited in said agreement that the
said Steamboat "Wenona" "has sunk near Augusta
on the Mississippi River on Friday 27th October
1854" Plaintiff further states that on the 19 day
of March 1855 he tendered to said Globe Mutual

(3)

Insurance Company the said policy issued by the defendant on the said steamboat the same mentioned in said agreement to be cancelled, and at the same time tenders to the defendant the written guarantee of the said George Partridge & Co of St. Louis executed in the name of and by said Partridge & Co which is also hereto annexed, wherein and whereby they understood and agreed with the defendant that any cancellation or delivery of said policy by said Jones W. Cury Co or the plaintiff should be a full cancellation of said policy, and indemnified the defendant on the payment of the said sum of two thousand dollars against any further liability on said policy and said agreement and at the same time the plaintiff demanded the payment of the said sum of two thousand dollars, but the defendant refused to cancel said policy or to accept said guarantee or to pay said sum of two thousand dollars or any part thereof. Plaintiff further states that the said defendant is indebted to him the said sum of two thousand dollars for which with the interest he asks judgment.

Glover & Richardson attorneys
for plaintiff.

O W Barclay, the above named plaintiff or his
oath states, that the foregoing petition and the
matters therein as stated are true as he believes
I sworn to before me this 30th O. W. Barclay,
27 March 1855

C. F. Hicks, cler.

Thereupon issued the following summons to wit;

County of St. Louis of

The State of Missouri

To the Sheriff of St. Louis County, Greeting;

Summons

4

We command you to summon The Globe Mutual Insurance Company, to appear before the judge of our Court of Common Pleas on the first day of the next term thereof to be held in the City of St. Louis within and for the County of St. Louis on the second Monday of October next then and there to answer the Complaint of Robert M Barclay as set forth in the annexed petition; and have you then and there this writ;

Seal Witness Charles W Hicks Clerk of our said Court with the seal thereof hereby affixed at office in the City of St. Louis this 27th day of March in the year of our Lord eighteen hundred and fifty five.

Attest Charles W Hicks Clerk.

Whereupon the Sheriff made the following Return Executed on the 30th day of March 1855 by delivering to W. W. Green President of the Globe Mutual Insurance Company a copy of the writ and petition as furnished by the Clerk in St. Louis County.

Turner Wadgors Sheriff

By Geo. H. Stevens Dpty.

And afterwards on the Sixth day of May 1857 the following amended answer was filed by leave of Court

By leave of Court the defendant for amended answer to plaintiffs petition states that it is not true that plaintiff tendered to defendant on the 19th day of March 1855 or at any other time the Policies of Insurance issued by defendant on said Steamboat for cancellation and at the same or at any other time tendered to defendant the written guaranty of said George Partridge & Co according to the requirements of said agreement guarantying

Shff's Return

Amended Answer,

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defendant for the cancellation of said Policy and in
demurring defendant against further liabilities on
its said Policy & agreement.

And defendant further states that the instrument
of writing & agreement spoken of in plaintiffs petition
was procured to be executed by means of the fraud and
misrepresentations of plaintiff to defendant, and also
that said instrument in writing was obtained by and
delivered to plaintiff through the misrepresentations
of said plaintiff for which causes said agreement is
void. Defendant denies any indebtedness to plaintiff
Hudson Thomas & Sharp & Bidell
for Debt.

And afterwards the following further proceedings
were had in this cause to wit;

Friday, May 29th 1857

Trial by
Court &
Judg^t for
\$2256.30

Now at this day came the parties by their respec-
tive attorneys, and waiving a jury submit this cause
to the Court, and the Court after hearing the evidence
being fully advised in the premises, doth find
the verdict herein joined in favor of the plaintiff and
assesses his damages at the sum of two thousand two
hundred and sixty three dollars and thirty cents
therefore it is considered by the Court that the
plaintiff recover of the defendant the damages afore-
said in form aforesaid, as assessed and also his costs
herein expended and have execution therefor: (De-
cision of the Court filed.)

And afterwards the following further pro-
ceedings were had in this cause to wit;

Friday, June 26th 1857

Mo for
Review Or. 6

The defendant's motion for a review herein, being
heard and fully understood by the Court, it is

(6)

ordered that said motion be overruled.

And afterwards on the 30th day of June 1857 the following Bill of Exceptions was filed to wit;

Bill of
Exceptions.

This cause came on to be tried on the 29th day of May 1857 before the Court a jury having been waived on the issues made by plaintiff's petition & defendant's amended answer.

And on said trial plaintiff produced & read in evidence a Policy of Insurance executed by defendant February 11th 1854 by which policy defendant caused James W. Clark & Co. plaintiff's agent in the sum of \$4666 on the hull engine tackle &c of the Steamboat *Neuma* of which plaintiff was master for the term of One year Amount of insurance being limited to \$14000 on whole boat.

Plaintiff then read in evidence the agreement of defendant & other Co. insurers mentioned in plaintiff's petition together with the apportionment thereon by James W. Clark & Co. which agreement & apportionment are as follows:

Agreement & apportionment Whereas protest has been entered this 28th day of October 1854 before Wm. H. Pritchett Notary public of the City of St. Louis, declaring that the Steam Boat *Neuma* of J. W. Barclay Master was sunk near Augusta on the Missouri River on Friday 27th October 1854 and whereas the Globe Mutual Insurance Company the Citizens Insurance Company and the Lumbermen and Merchants Insurance Company of the City of St. Louis have issued policies each in the sum of four thousand and six hundred and eighty six dollars, covering together two thirds of the Steamboat *Neuma* against loss to James W. Clark & Co. of Lincoln Mo.

(7)

Me & R. W. Barclay as owners of said vessel, in view of the truth of the declaration of said protest and in order to a settlement, it is agreed that our full cancellation of said policies with George Partridge & Co of St. Louis as guaranties for full cancellation thereof the said insurance companies agree to pay each the sum of two thousand dollars to the said insured parties unto said R. W. Barclay as the assignee for them St. Louis October 28th 1854

W. H. Green President Globe Mutual Ins Co
Wm D Wood Secy Citizens Ins Co of Mo
Jm A Ditcharth Secy L & M Ins Co
(Endorsed)

For Value received of Robert W Barclay we do hereby assign transfer and make over to said Barclay, all and every cause of action whatever against the Globe Mutual Lumbermen & Mechanics and Citizens Insurance Companies of the City of St. Louis growing out of any policies of Insurance, issued by said Insurance Companies or either of them on the Steamboat Wenona or any part or parcel of said boat her machinery apparel furniture &c and for all liability of said insurance Companies on said Policies in which we have any interest. And we do also assign transfer and make over to said Barclay every and all cause of action which we have against said Insurance Companies or either of them growing out of the instrument of writing on the first page hereof and we do hereby assign to said Barclay all our interest in said agreement and the said ^{sum of} two thousand dollars therein named, and we do hereby request and direct the said Insurance Companies to pay to said Barclay the said Two Thousand

(8)

dollars.

This 14th February 1855 Jones W^o Churg Co
Witness Edw Murphy & W^o Churg surviving
George Cartridge, partners of said Jones & his administrators

Testimony of
Shields

Plaintiff then produced as a witness John Shields
who testified that on the 19th day of March 1855
he went with plaintiff to defendant's office, that at
that time the plaintiff had with the policy of Ins-
urance of defendant above mentioned and also a
written instrument of guaranty which Policy and
guaranty Plaintiff offered to deliver up to the Pre-
sident of the Globe Mutual Insurance Company
for cancellation & acceptance, and that plaintiff
at same time demanded payment of the sum of
\$2000, That said President refused to accept said
Policy & instrument of guaranty and also refused
to pay the money demanded. Witness was then
shown a paper signed "Cartridge Co" which he
identified as the one spoken of by him as being
offered by plaintiff to defendant with the Policy of
Insurance.

Plaintiff then read in evidence the said Instru-
ments of guaranty of Cartridge Co which paper is as
follows,

Guaranty of
Cartridge Co

Whereas protest has been entered this 28th day
of October 1854 before W^o H Pritchard Notary
Public of the City of St. Louis declaring that the
Steamboat "Wenona" of W Barclay Master was
sunk near Augusta on the Missouri River on
Friday 27th October 1854 and Whereas the Globe
Mutual Insurance Company the Citizens Insurance
Company and the Lumbermen & Mechanics Insurance

(9)

Company of the City of St. Louis have issued Policies each in the sum of four thousand six hundred and sixty six dollars covering together two thirds of the Steamboat "Neusua" against loss to Jones W. Church Co of Linn Bess, W. & R. W. Barclay as owners of said vessel. In view of the truth of the declaration of said protest and in order to a settlement it is agreed that on full cancellation of said policies with George Partridge Co of St. Louis as guarantor for full cancellation thereof the said Insurance Companies agree to pay each the sum of two thousand dollars to the said insured parties or to said R. W. Barclay as the assignee for them October 28th 1854

W. H. Greene President Globe Mutual Ins. Co
J. M. D. Hood, Secy Citizens Ins. Co of Mo.
Jno. H. Pritchard, Secy L & W Ins Co

In Consideration of the agreement of which the above and foregoing is a copy and of the payment to us of One dollar and ^{for} other ~~and~~ valuable considerations, the undersigned George Partridge Co of St. Louis agree with the said ~~Insurance Company~~ ^{Globe Mutual} ~~Insurance~~ Insurance Company and hereby guarantee the said last named insurance Company that any cancellation of the Policy or Policies issued by said Insurance Company on the Steamboat "Neusua" or on any part or interest therein before the 28th October 1854 made by the said Jones W. Church Co or R. W. Barclay or the surrender to the said Company of any such policy or policies by said Jones W. Church Co or R. W. Barclay shall be full and complete cancellations thereof and on the payment by said last named Insurance Company of the said sum of

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two thousand dollars as mentioned and provided in said agreement. we do hereby agree with said Insurance Company and do hereby guarantee and undertake to indemnify and save harmless the said insurance Company from all or any further liability of every nature whatsoever growing out of said agreement or any policy or policies issued by said Company on the said Steamboat or any part thereof before the said 28th October 1854

St. Louis this 17th day of March 1855

"Partridge & Co"

Testimony
of
Prockway

Plaintiff's case being submitted upon the foregoing testimony; the defendant produced William Prockway as a witness who testified, that he had been for some three years & more secretary of the Globe Mutual Insurance Company, that plaintiff had never to his knowledge tendered the Policy of insurance on the *Neuma* for cancellation or offered to deliver the quantity of Partridge & Co at any time to any officer of said Company.

The defendant then offered as a witness W. H. Greene, the President of the Globe Mutual Insurance Company who being examined on his voir dire by plaintiff's counsel stated that he was a stockholder in said Company, whereupon plaintiff objected to his being sworn in chief and the Court sustaining the objection, defendant at the time duly excepted.

Defendant then offered to prove the following facts

Statement of The Cause being on trial this 29th May 1857
Def't's offers of Proof. the defendant at the close of plaintiff's case offered the protest of the Steamboat *Neuma* in evidence and

(11)

further offered to prove the following facts,

That the Steamboat "Neuona" did not sink in less than five minutes after the concussion mentioned in her Protest., that she did not sink in about eight feet water, and that proper persons were not left on board of her after the accident to protect the interests of all concerned,

But defendant offered to prove further,

That at and before the making and delivery of the agreement sued upon, the plaintiff represented and stated to defendant, that the "Neuona" was so badly broken & injured in her Hull and timbers in three different places that it was impossible to raise her by any means on board of said boat, and that the expense of raising her would be very nearly six thousand dollars; that every exertion had been theretofore made by plaintiff & his officers & crew to save said boat & raise her, and that such exertions had been found unavailing, that the amount of damage was considerably greater than ten per cent upon the insured value,

In connection with which proof of representations defendant offered to further show by competent evidence that the injury really sustained by said boat was less than the sum of ten per cent on the insured value & that she was easily repaired; that the plaintiff, being master of the boat and on board of her at the time of the accident with several of his officers and crew left the boat very soon after the accident and before any sufficient or reasonable exertion had been made to raise her, That it was impossible for the portion of the crew & men left on board of the boat to raise her in a short time

(120)

with the means at hand on the boat, and that plaintiff knew at the time of making said representations that they were false. And defendant further offered to show by proper evidence that the plaintiff at the time of applying for & procuring the Policy of Insurance represented to defendant that he and the firm of Jones, W. Cary & Co. were the owners of the "Neuona", and at the time of the procuring of the agreement sued on he also represented that he & the representatives or surviving partners of said firm were the only owners of said boat. And in connection with said proof of ownership ship defendant further offered to prove that at the time of procuring said policy & making & delivery of said agreement sued on they were not the only owners of said boat and that one Lewis Hake was at both periods & all the time an owner of one quarter of said boat. And defendant further offered to prove that defendant had no other knowledge of the condition of said "Neuona" at the time of her accident than that derived from the representations of plaintiff, that full confidence was placed in such representations and that the agreement sued on was made and delivered solely from its confidence in the plaintiff and the belief of the truth of all ~~the~~ his statements aforesaid made to defendant.

To the producing of which matters & all of them plaintiff objected. The Court sustained plaintiff's objection and defendant at that time duly excepted. And thereafter and on the same day aforesaid the Court filed with the Clerk its decision in writing which is as follows;

Now at this day this cause

187
Finding
of the
facts

coming on for trial and neither party requiring a jury by consent of parties the same was submitted to the Court. The Court finds the facts to be as follows;
1st That the defendant executed and delivered to the plaintiff the instrument of writing mentioned in the petition which is in the following words and figures to wit; (Inserted herein on Page 6.)

2^d That the parties to the agreement aforesaid meant and intended by George Partridge & Co a firm in St. Louis under the name and style of Partridge & Co of which firm George Partridge was a member.

3^d That on the 14th February 1855 Jones W. & George apique to the plaintiff all their interest in said agreement and to the sum of money named therein and all cause of action which they had against the defendants.

4th That it is true as recited in said agreement that the said Steamboat "Huron" was sunk near Augusta on the Missouri River on Friday 27th October 1854.

5th That on the 19th March 1855 the plaintiff tendered to the defendant the policy of insurance issued by the defendant on said boat and the same mentioned in said agreement to be cancelled, and at the same time tendered to the defendant the following instrument of writing ~~which was cancelled~~ executed by said firm of Partridge & Co the same was signed in the name of the firm by said George Partridge which act was approved to by all the members of the firm. The said writing is in the following words and figures, (Inserted herein on page 8)

6th That at the time of the tender of said Policy and guaranty the plaintiff demanded of the deft the payment of the sum of \$ 2000, but the defendant refused to pay said sum or to cancel said Policy or to accept said guaranty.

7. The said agreement on which the suit was brought was not procured to be executed by means of the fraud and misrepresentations of plaintiff to Deft, nor was the said agreement obtained and delivered to plaintiff through the said misrepresentations and fraud of plaintiff, and the said agreement is not void,

Conclusion.

1. On the above facts the plaintiff is entitled to recover against the defendant the sum of \$2,000 with interest at ~~two~~ 6 per cent per annum from the 19th March 1855 amounting to \$2,213.39 Saml. Peber, Judge of the Court and on the 20th day of June 1857 leave having been granted by the Court until said day for that purpose, the defendant filed in Court its application & motion for a review of the questions of law & of fact arising on the trial of said cause which motion is as follows:

Motion for Review.

And now upon the foregoing case made defendant applies to the Court and moves for a review of the following questions of fact & of law arising upon said trial to wit;

1st The finding that the agreement sued on was not procured to be executed by means of the fraud and misrepresentations of plaintiff to defendant, and that said agreement was not obtained & delivered to plaintiff through the misrepresentations & fraud of plaintiff and that said agreement was not void.

2^d The sustaining of plaintiff's objection to the competency of W. H. Green as a witness for defendant.

3^d The rejection of the proofs offered to be made by defendant. Andrew & Thomas & Ciddell come

(15)

attys for Defendant,
and on the 26th day of June 1857 the Court
overruled the said motion for review to which de-
fendant excepted. And defendant prays the Court
to sign & seal this Bill of Exceptions and it is done

Sam^l Peber Judge ^{seals}
And afterwards the following further proceedings were
had in this cause to wit;

Thursday July 2^d 1857

Appeal
granted.

On application of the defendant filed hereunder the
Court allows said defendant an appeal to the Supreme
Court from the judgment herein, and thereupon said
defendant files an appeal bond with William Brock-
way Jr as principal and Edward Mead and Dunc-
an S. Carter as sureties which bond is acknowledged
by the obligors and approved by the Court;

The application for appeal is in the words and figures
following to wit;

Applications

" The defendant in the above cause
appears in Court and prays an appeal from the
judgment heretofore rendered therein,

" Hudson & Thomas v. Piddleson for defendant.
The appeal bond is the words and figures following
to wit;

Appeal
Bond.

Know all Men by these Presents that we
William Brockway Jr, as principal and Edward
Mead and Duncan S. Carter as sureties are
held and firmly bound unto Robert W Farley in
the sum of four thousand dollars for the payment
of which well and truly to be made we bind our-
selves, our heirs executors and administrators jointly
and severally firmly by these presents sealed with
our seals and dated at St Louis this 2^d day of

(16)

July 2^d 1887

The condition of the above obligation is such that whereas the Globe Mutual Insurance Company has appealed from the judgment rendered against it and in favor of the said Robert W. Barclay in the St. Louis Court of Common Pleas for the sum of twenty two hundred and sixty three dollars and thirty cents together with costs.

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

Acknowledged & approved
July 2^d 1887; attest:
C. H. Fitch,
clerk.

Now Brockway Jr.

Edward Mead,

Duncan J. Carter,

Seal
Seal
Seal

(17)

State of Missouri
 County of St. Louis

I, Charles W. 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 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 Seventeenth
 day of July 1857
 C. W. Hicks Clerk.

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| | |
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Robert M Barlay
respondent, against
The Globe Mutual Ins-
urance company appellant

In the Supreme
Court October Term
1857.

And now comes said appellant and says
there is manifest error in the judgment, record
and proceedings of the court below, in this,
First The court below erred in admitting imp-
roper and illegal evidence on the part of the
respondent.

Secunda. The court erred in ~~excluding~~ refusing
to permit the appellant to introduce the
testimony offered by it

Third The court erred in their finding of the
facts, and judgment of the law

Fourth. The court erred in overruling the
appellant's motion for review.

Fifth The court erred in rendering judgment
for respondent.

For the reasons aforesaid the appellant prays
that said judgment may be reversed.

Redolence and
Hudson & Thomas for resp^t

There is no error in the record

J. T. & Glover
for Barlay

Robert M. Barclay
Respondent

vs

The Globe Mutual Insurance
Company Appellant

In Supreme Court

And now comes the appellant & suggests a diminution of the Record in this cause.

Said Record is defective in this -

1. It does not contain the original answer of the defendant
2. It does not contain the motion of the Respondent to strike out parts of said original answer, nor the action of the Court upon such motion

When you appellant moves the Court to order that said Record be forth with perfected

Hudson & Thomas &
Biddlecome
for Appellant

No 89

Barclay
Respondent

vs

Globe M. Ins. Co.
Appellant

Suggestion of Dismissal
of Record & Motion for

Filed 2 April 1868.
Wm S. Garrison Ch.

Robert M Barclay

The Globe Mutual
Insur. Co -

In Suit
against
Court
March 1
1858

By mutual consent the record
in this cause is amended
so as to show the original
answer of the Company
the pliffs motion to strike
out - parts thereof, and
the opinion of the Court
sustaining said motion
also by consent the word
"ten" on the 14th page has
been changed to "6"

and their alterations
make the record complete
April 3/58

J. T. A. D. Glover
for Barclay

Hudson & Thomas

for appellants

R M Barclay

N

Globe Mt
Inds Company

agreement -
amending
record -

Filed 3 April 1858
Wm A. Garrison
clerk

R M Barclay
Respondent

vs
The Globe Mutual
Insurance Comp
any Appellants

In Supreme
Court of Mis
souri
March 7
1858

Statement of the case by S T & A D
Glover for respondents

on the 7th March 1855 Barclay
sued the Globe Mutual Insur-
ance Company in the Court of
Common Pleas.

His petition stated in effect
that said company with other
insurance companies made
& delivered to him an instru-
ment of writing in the words
& figures following

"Whereas protest has been en-
tered ^{before} this 28th day of October
1854 ~~by~~ W^m H Pritchard No-
tary public of the City of St
Louis declaring that the Steam
boat Menona R M Barclay
master was sunk ^{near} Augusta in
the Missouri river on Friday
27th October 1854 and whereas

the Globe Mutual Insurance Compy
 the Citizens Insurance Compsany
 & the Lumbermans & mechanics In-
 surance Compy of the City of St Louis
 have issued policies each in the sum
 of four thousand Six hundred and
 sixty six dollars covering together
 two thirds of the Steamboat Me-
 nona against loss to Jones M^c.
 Clurg & Co of Siver Creek Mo & R
 M Barclay as owners of said
 vessel, in view of the truth of
the declaration of said protest
 and in order to a settlement it is
 agreed that on full cancellation
 of said policies with George Part-
 ridge & Co of St Louis as guarantee
 for full cancellation thereof the said In-
 surance Companies agree to pay each
 the sum of two thousand dollars to
 the said insured parties or to said R
 M Barclay as the assignee for them
 St Louis October 28. 1854

W. W. Green President Globe
 Mutual Insurance Co = W. M. D. Wood
 Secty Citizens Insurance Co Mo =
 Jno N Pritchard Sectry L & M Ins
 Co

That on the 14th February 1853 - the
 sole surviving partner of M^c Clurg
 & Co and the adm^r of Jones the de-

ceased partner assigned said agreement to plaintiff. The plaintiff then averred that it was true that the said Steam Boat "Wenona" was sunk near Augusta on the Missouri river on Friday 27th October 1854" also that March 19. 1855 he tendered to the debt said policy with the written guaranty of George Partridge & Co of St Louis executed by Partridge & Co who were meant and intended by the parties by the description George Partridge & Co -

That In & by said guaranty the said Partridge & Co agreed with debt that any cancellation or delivery of said policy by Jones M^cClurg & Co or plaintiff should be full cancellation and indemnified debt on payment of said sum of two thousand dollars against any further liability on said policy & said agreement & demanded payment of said two thousand dollars & interest. ^{that the plaintiff had} The ^{petition} prayed judgement for debt \$2000 & interest.

On 29th May 1857,

The cause was heard on the above petition and an amended answer to following effect. It is not true plaintiff tendered debt on 19th March 1855 or any other time the policy of insurance issued by debt on said Steam Boat for cancellation & at the same time or any other time tendered

to deft the written guaranty of George Partridge & Co according to the requirements of said agreement guarantying deft for the cancellation of said policy & indemnifying deft against further liabilities on said policy and agreement.

And deft stated that the writing sued on by plff was procured to be executed by means of the fraud and misrepresentations of plff to deft

and also said writing was obtained by and delivered to the plff through the misrepresentations & frauds of said plff for which causes same was void

The plff had judgement for \$2263³⁰/₁₀₀

The following shows the evidence and rulings of the Court on the trial.

- 1) The plff read in evidence a policy of insurance executed to plff & Jones Mc Clung & Co July 11. 1854 insuring the Menona & Co in the sum of \$4666 for one year.
- 2 The agreement already set forth in the petition with the argument thereon.
- 3 The guaranty of Partridge & Co as set forth

in the petition

4 The p[er]son called George Shuelds who testified that on 19th March 1855 he went with p[er]son to de[ep]t's office and p[er]son there offered to deliver up to to President of Globe Mutual Insur Co for cancellation & acceptance said policy and guaranty & demanded the payment of said \$ 2000 all which was refused by said President. The paper read in evidence by p[er]son as the guaranty of Partridge Ho was shown to this witness & identified as the same offered to said President

Deft called W^m Brockway who testified ~~field~~^{he} had been three years or more Secretary of the Globe Mutual Insur Compy and knew nothing as to any tender of said policy or guaranty to any officer of the Company

Deft then called W. W. Green as a witness he being President of the Globe Mutual Insur. Compy This witness being examined on his voir dire

6

stated he was a stockholder in
said Company whereupon the
pff objected to his testifying
in the cause and the ^{court} sustained
(1) the objection & dept excepted

The depts then offered to read in
evidence the protest of the Steam
Boat-Wenona, also to prove that
said boat did not sink in less than
five minutes after the concussion
mentioned in her protest, that she
did not sink in about eight feet
water and proper persons were not
left on board of her after the accid-
ent to protect the interest of
all concerned, that prior to mak-
ing the agreement sued on pff
stated to depts the boat was so badly
broken in her hull & timbers in three
different places it was impossible to
raise her by any means on board &
the expense of raising her would
be very near 6000 dollars, and every
exertion had been made by pff his
officers & crew to save & raise said
boat in vain, and the amount
of damage was considerably great-
er than ten per cent on the ins-
ured value,

~~whereas~~ the depts-

Then offered to show that in fact - the injury really sustained by the boat was less than 10 per cent on insured value, she was easily repaired, that plaintiff being master of the boat and on board at the accident - with several of his officers & crew left the boat very soon before any reasonable & efficient means had been made to raise her that it was impossible for the portion of the men & crew left behind to raise her in a short time with any means at hand - and that plaintiff knew at the time he made said representations they were false

Deft also offered to prove that plaintiff at the time of procuring the policy of insurance represented to deft that he and the firm of Jones McClellan & Co were the owners of the Wenona and at the time of procuring the agreement sued on he also represented that he & the representatives of said firm were the owners of the Wenona when they were not the owners either at the date of said policy or agreement, but that Louis Hake was all the time the owner ^{of 1/4} of the said boat, and that deft had no other knowledge of the condi

tion of the Menona at the time of the accident - than that derived from the representations of the plff. Full confidence was placed in said representations & the agreement sued on was made & delivered solely from its confidence in plff and belief in the truth of all his statements — to producing of which matters & all of them plaintiff objected and the court sustained the objection & ~~plff~~ deft- & accepted

The court found the facts of the case to be as stated in the petition - See page 13 record, and negatived the allegation in the answer that the agreement sued on was procured by fraud

The defts motion to review was on three grounds of alleged error

- (1) The finding that the agreement sued on was not procured by fraud & misrepresentations of plff.
- (2) The sustaining of plff's objection to competency of W. W. Green

as a witness for deft

(3) The rejection of the proofs offered by deft

The court overruled the motion and the deft, excepted and appealed from the judgement rendered

Points & authorities for the respondents by S, T, & A D Glover attorneys ~~for~~
~~of~~,

- 1 The contract sued on recited that protest had been entered declaring the steamboat Wenona was sunk near Augusta in Missouri river on Friday 27th October 1854 and then stated as follows, "in view of the truth of the declaration of said protest & in order to a settlement it is agreed," &c This declaration therefore was the one and only one deemed material and the truth of which was the inducement to the contract. any other matter not be

ing considered material in contemplation of the contracting parties at the period of contracting could not be set up afterwards merely to avoid their bargain. If the appellant did not require the truth of any other statement, did not rely upon any other as a motive to enter into the bargain then they were not misled nor deceived and the attempt to show ~~mis~~ representations of a different nature and as to other subjects is a mere shift to rid themselves of a just liability.

2 There was no allegation in the answer that the policy of insurance had been procured by fraud, no evidence could be lawfully received therefore to that point

3 W. H. Green being a stockholder in the corporation sued was not a competent witness. The suit was defended ~~for~~^{to} his use; because the money wrong^{ly} taken out of his pocket as a member of the corporation, if recovered. Mr. Green was President of the company - signed the contract - and ~~was~~^{was} of course a stockholder at ~~the~~^{the} date ~~September~~^{Sept 1853} p 312. If no corporate property [belonging to the stockholders] could be found then Mr. Green's private property was liable to the execution Revised Code 1845 p 233 §13 -

§ 8.

Now the statute renders incompetent ^{to testify} any one ~~person~~ for whose immediate benefit the action is prosecuted or defended.

What is an immediate benefit in contemplation of the act? That is the question. In New-York a number of ~~cases~~

decisions have been made, on the idea that if a corporation is really a person, and a stock holder is also a person in law then a suit in the name of the corporation is not prosecuted or defended for the benefit of the stockholder in contemplation of the statute. There is really nothing else in the cases in 2 Sandf Sup C R 686 & 732.

Now we respectfully suggest that this is a petitio principis. The statute certainly means that there are two distinct "persons" one suing or defending on the record and another on the witness stand & yet the court in 2 Sandf 686 admits the witness to testify because the Supreme Court of the United States, on a question of jurisdiction held a corporation, ^{to be} a person. The argument is then simply this the ~~def~~ being a corporation is a person the suit is therefore defended for the immediate benefit of a person therefore it is not defended for the benefit of the stockholder!

■ We can not perceive the force

of such reasoning, or this.
In the Bank of Athaca v
Bean & al 2 Code Reporter 133
a rational construction is placed
on the statute and reasons are
given which have never been
answered since.

When the judgement in a cause finds
the party so that an execution
may issue against him without
further judicial action it would
seem to fix an immediate benefit
or interest in him to defeat
the suit. If not it would be
difficult to conceive in what manner
~~the~~ such benefit could arise

By our laws a Steamboat is a person
and may be sued as such; but no
owner has been allowed even since
the new code of Practice to testify
on behalf of the boat 19 Mo R
73

Barclay

v

Globe Mutual In
sur. Co

Appellants

Points & authorities
for respondent
by S J & A D Glover
attornies

Filed 3^d April 1858,
W. A. Lawrence
Clerk

Robert M Barclay, respd. } In the Supreme
against } Court, March Term 1858
The Globe Mutual Insurance }
Company, appellant } 3

Statement of the case by appellant

The respondent brought suit against the appellant returnable to the October Term 1855 of the St Louis Court of Common Pleas.

The petition alleges that the defendant together with the Citizens and the Lumbermen and Mechanics Insurance companies executed and delivered to the plaintiff the instrument of writing to the petition annexed, & which is copied in the petition.

The substance of the instrument is, that whereas on the 28th day of October 1854, protest was entered before a notary public declaring that the Steam boat Menona, R M Barclay Master, was sunk near Augusta on the Missouri river on Friday the 27th October 1854, and that whereas the ~~plaintiff~~ the Globe Mutual Insurance Company ~~and~~ the Lumbermen and Mechanics Insurance Company and the Citizens Insurance Company have issued policies each in the sum of four thousand six hundred and sixty six dollars, covering together two thirds of the Steam boat Menona against loss to Louis Mc Cleary & Co of Linn Creek Mo, and R. M. Barclay as owner of said vessel

In view of the truth of the declaration of said protest and in order to a settlement, it is agreed that on full cancellation of said policies, with George Partridge & Co of St Louis as guaranter for full cancellation the said Insurance Companies agreed to

pay each the sum of two thousand dollars to the insured parties or to said Barclay as assignee for them, signed by the companies October 28th 1884. The plaintiff avers that the said parties meant by George Partridge & Co, a firm under the name of Partridge & Co of which George Partridge was a member, that McChery & Murphy surviving partners of Louis McChery & Co assigned their interest in said agreement to the plaintiff on the 14th day of February 1885;

That it is true that said boat sunk as stated in said agreement, that on the 19th day of March 1885: plaintiff tendered to said Globe Insurance company the policy issued by it, to be cancelled, and at the same time tendered to defendant the written guarantee of said George Partridge & Co, executed in the name of Partridge & Co, whereby they indemnified defendant as agreed upon in said written agreement, plaintiff also then demanded of defendant the payment of said \$2000. but defendant refused to pay the same, or to accept said guarantee or to cancel said policy.

The defendant filed an answer setting up fraud, among other things, & specially stating the facts, which on motion was stricken out. The defendant ^{then} filed an amended answer denying that plaintiff tendered to defendant its said policy to be cancelled, or that he tendered to defendant the written guarantee of said George Partridge & Co according to said agreement.

Defendant further states that the instrument of writing spoken of in the petition was procured to be executed by means of the fraud and misrepresentation of plaintiff to defendant, and also that said instrument executed in writing was obtained by and delivered to

plaintiff through the misrepresentations and frauds of said plaintiff, for which causes said agreement is void.

The cause was tried by the court. On the trial the plaintiff read in evidence a Policy of Insurance executed by defendant February 11th 1854 by which defendant caused Jones McClurg & Co & plaintiff to be insured in the sum of \$4,666 on the Steamboat Menona of which plaintiff was master, for one year.

Plaintiff then read the agreement mentioned in the petition, and the assignment thereon, being the same as set out in the petition.

Plaintiff then produced as a witness John Shields whose testimony tended to prove that on the 19th day of March 1855 he went with plaintiff to defendant's office that at that time the plaintiff had with him the policy of Insurance of defendant above-mentioned and also a written instrument of guaranty, which policy and guaranty plaintiff offered to deliver up to the president of the defendant, for cancellation and acceptance, and that plaintiff at the same time demanded payment of the sum of \$2000. That said president refused to accept said policy and guaranty and refused to pay the money. The guaranty was shown to witness and identified as being the same tendered to said president, and is in substance as follows, the guaranty recites the agreement aforesaid, and then follows the indemnification against the consequences of cancellation of the policy and the payment of the money, dated 17th March 1855 & signed Partridge Med.

The plaintiff here rested his case.

The defendant introduced William Brookway, who stated that he had been for some three years and more secretary of the Globe Mutual Insurance Company, that plaintiff had never to his knowledge, tendered the policy of insurance on the *Nevena* for cancellation or offered to deliver the guaranty of Partridge & Co.

The defendant then offered as a witness W. W. Greene the President of the Globe Mutual Insurance Company, who being examined on his voir dire by plaintiff's counsel stated that he was a stock holder in said company, whereupon plaintiff objected to his being sworn in chief and the court sustained the objection, to which ruling of the court the defendant at the time only excepted.

The defendant then offered to prove the following facts, first having offered the protest of the steamer *Nevena* in evidence, that the said boat did not sink in less than five minutes after the concussion mentioned in her protest, that she did not sink in about eight feet water, and that proper persons were not left on board of her after the accident to protect the interests of all concerned,

And further that at and before the making & delivery of the agreement sued upon, the plaintiff represented and stated to defendant that the *Nevena* was so badly broken and injured in her hull and timbers in three different places that it was impossible to raise her by any means on board of said boat, and that the expense of raising her would be very nearly six thousand dollars, that every exertion had been theretofore made by plaintiff and his officers & crew to save said boat, and raise her, and that such exertions

had been found unavailing, that the amount of damage was considerably greater than ten per cent on the insured value.

In connection with which proof of representations defendant offered to prove further by competent evidence that the injury really sustained by said boat was less than the sum of ten per cent on the insured value and that she was easily repaired that the plaintiff being master of the boat and on board of her at the time of the accident with several of his officers and crew left the boat very soon after the accident, and before any sufficient or reasonable exertion had been made to raise her.

That it was impossible for the portion of the crew and men left on board of the boat to raise her in a short time with the means at hand on the boat, and that plaintiff knew at the time of making said representations that they were false. And defendant further offered to show by proper evidence that the plaintiff at the time of applying for and procuring the policy of insurance represented to defendant that he and the firm of Louis McChurg & Co were the owners of the "Memora" and at the time of procuring the agreement ~~the~~ same on he also represented that he and the representatives ~~and~~ or surviving partners of said firm were the only owners of said boat, and in connection with said proof of ownership defendant further offered to prove that at the time of procuring said policy and of making and delivering of said agreement sued on they were not the only owners of said boat, and that one Lewis Hake was at both periods & all the time an owner of one quarter of said boat; And defend-

but further offered to prove, that defendant had no other knowledge of the condition of said "Memona" at the time of her accident, than that derived from the representations of plaintiff, that full confidence was placed in such representations & that the agreement sued on was made and delivered solely from its confidence in the plaintiff and the belief of the truth of all his statements aforesaid made to defendant,

To the proving of all which matters plaintiff objected, the objection was sustained and exceptions duly taken at the time,

The court found as follows,

- 1st The making and delivery of the instrument sued on.
2. That the firm of Partridge & Co. was meant by George Partridge & Co.
- 3 That the assignment of Jones, Pi O'Leary & Co to plaintiff was made as alleged in the petition.
- 4 That the steamer "Memona" was sunk as recited in said agreement.
- 5 That the plaintiff tendered to defendant the policy for cancellation, and also the guaranty of Partridge & Co, which was signed in the name of the firm by George Partridge, which act was assented to by all the members of the firm.
6. That at the time the policy & guaranty were tendered to defendant, the money was demanded & payment refused.

7. That the agreement was not obtained by fraud or misrepresentation & is not void,

In due time the defendant filed its motion for review of fact & of law,

1. The finding that the agreement was not obtained by fraud or misrepresentation

2. The sustaining of the objection of plaintiff to the competency of W. V. Green as a witness

3. The rejection of the proofs offered by defendant,

which motion was overruled & exceptions taken and the case appealed to this court,

Hudson & Thomas & Biddleman
for appellant.

No 89 - M. J. 58

Robert M Bardang
respondent
vs

The Globe Mutual
Insurance Co, app'tt.

Appellant's statement
of the case

Audron & Thomas &
Beadle come
per appellant,

Filed 7 April 1858,
Wm J Garville Clk

The said companies agreed to pay each the sum of two thousand dollars to the insured parties or to said Bonday as assignee for them. Which agreement was signed on the 28th October 1854.

The respondent in his petition then avers that the parties meant, by "George Partridge & Co" a firm under the name of Partridge & Co of which firm George Partridge was a member, and that Mc'Clurg & Murphy surviving partners of Louis Mc'Clurg & Co, assigned their interest in said agreement to the respondent, on the 14th of February 1855 - That said boat did sink as stated in said agreement, and that on the 9th of March 1855, respondent tendered to appellant its policy and also the guaranty of said George Partridge & Co executed in the name of Partridge & Co, and at the same time demanded the 2000 dollars which appellant refused to pay.

The appellant filed an answer denying all the material allegations in the petition except the issuing of the policy, and the execution of the agreement, and stating as a further defence ~~that~~ among other things, that said agreement was obtained by the fraud and misrepresentations of the respondent, and specifically setting forth the facts constituting such fraud and

Misrepresentations, which on motion of respondent were stricken out by the court,

The appellant then filed an amended answer denying that the policy was tendered to be cancelled, or that the guaranty of George Partridge & Co was tendered to appellant, and avers that said agreement was obtained by fraud and misrepresentation.

On the trial of the cause, by the court, the respondent, offered evidence tending to prove the allegations in the petition.

The appellant offered evidence tending to show, among other things, that said agreement was obtained by fraud and misrepresentation which the court refused to hear.

Appellant also offered W. W. Green as a witness whose testimony the court refused to admit in evidence, because said Green was a stockholder in said Globe insurance Co, to which rulings of the court exceptions were taken.

Upon the foregoing statement of the case the

Appellant presents the following points, on which it relies for a reversal of the judgment below.

First. The court erred in sustaining the motion to strike out parts of appellants answer

Second. The court erred in excluding the testimony offered by the appellants, tending to show fraudulent misrepresentations by respondent as to the sinking of said boat and its construction,

Third. The court erred in rejecting the witness W. W. Green, upon the ground of his being a stockholder in the appellant,

1. The consideration of the first point involves the same question, in principle, presented by the second proposition, and will be ~~examined~~ considered in our examination of that proposition.

II, The defence of fraud and misrepresentation was sufficiently pleaded in the amended answer, to admit of the introduction of the evidence offered by the appellant.

It is not necessary in a pleading to state the facts and circumstances by which the ultimate fact relied on is to be proved.

See *v* Co. 16, Mo. R., 166

Montgomery v Lipton 1 Mo. 317

Casey v Lusk 4 Mo. R. 78

Pemberton v Staples 6 *id.* 59

That a judgment was obtained by fraud and by perjury committed on the trial of the issues in the cause, is sufficient,

Edgel v Sigerson 20 Mo. R., 494.

If fraud ^{was} sufficiently pleaded, then the court erred in rejecting the evidence offered by the appellant. Whether the evidence offered would have established fraud to the satisfaction of the court or jury was not the question, but whether evidence to that point was admissible at all.

If the appellant was induced to execute the agreement, by the representations of the respondent, in connection with the facts stated in

the protest, and those representations were false, the appellant ought to have been permitted to show that fact.

The agreement says in consideration of the truth of the facts stated in the protest &c. they agree to pay, but if there were other considerations, such as the representations of respondent and the title, the appellant have a right to show what they were,

III. A witness is not incompetent, under our state on the ground of interest alone, but is only incompetent by reason of his being a party to the action or one for whose immediate benefit it is prosecuted or defended, Rev. Code 1576-7.

In the case of Penobscot & Kennebec Railroad Co v. Dunn, 39 Maine (4 Heath) R 587-602 the court held that a stockholder in the company was a competent witness for the decter, under a statute containing provisions similar to ours. In the decision the statute is quoted as follows, see page 602, "Laws of 1855, § 1, that no person

officer as a witness, shall be excluded by reason of his interest in the result of the action but his interest may be proved to affect his credibility.

"Section 2, The above section shall not apply to a party to the action, nor to any person for whose immediate benefit it is prosecuted or defended," See also York & Cumberland

R. R. Co v Pratt 110 Maine R. at page 453. - 1 Greenb. Ev. § 416.
Little Miami R. R. Co v Martin 10 Western Law Journal 54
Washington Bank v. Palmer 2 Sandford S. C. 686
New York & Erie R. R. v Cook same vol 732
Montgomery Co Bank v Marsh 3 Selden 481.

It may be argued that because the 25 section of the ~~1st~~ Article of an act concerning corporations, Rev. Code 375, expressly permits members of certain corporations to be witnesses, that therefore the statute intended to exclude all others, such could not have been the intention of the legislature. The section above referred to is an exact copy of section 25 of the ^{corporation act article 1,} Rev. Code of 1846 at the time of the passage of which, witnesses were incompetent by reason of interest alone. The same section was copied into the present Code, without regard (it may fairly be presumed) to the competency or incompetency of witnesses under the general statute, concerning witnesses.

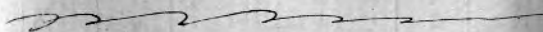
Hudson & Thomas
attys for appell.

No 89 - Mar. 5. 1858

Robert, M. Barclay
Respondent

vs

The Globe Mutual Ins Co
Appellant.



Appellants Brief

Hudson & Thomas
with Piddicombe
for appth

Filed 7 April 1858,
Wm J Glanville
Clk.

of said George Partridge & Co according to the requirements of said agreement guarantying defendant for the cancellation of said Policy & indemnifying defendant against further liabilities on its said Policy and agreement.

Defendant alleges that before and at the time of making said agreement plaintiff made the following statements and representations to defendant - to wit - that said steamboat was very badly broken & injured in the hull and timbers in three different places so much so that it was impossible to raise her by the aid of any means on board of said steamboat and without the use of extraordinary means & great expense amounting to very nearly as much as the sum agreed to be paid by the several underwriters named in said agreement - that all due exertions had been ~~made~~ theretofore made use of by plaintiff and his officers & crew to save said boat and raise her and that all their efforts and all the means at their command on said steamboat had been exerted without being able to save said boat or to raise her; that the amount of damage was so great as to considerably exceed the sum of ten per cent upon the value of said boat as fixed in defendant's policy. And defendant states that it was not true that said steamboat was very badly broken in three differ-

ent places, nor that any extraordinary means or great expense was necessary to save said boat and raise her. And it was not true that it was impossible to raise said boat by the use of the means & men on board of her and at hand at the time of her concussion. And it was not true that plaintiff exerted all or any of the means usual in such cases to save said steamboat nor that said officers and men made proper endeavors to raise said boat before leaving her. But on the contrary defendant states that plaintiff and nearly all of his officers & men left said boat and abandoned her immediately after her meeting the accident alleged and without using any suitable efforts or the means at hand to save her from sinking as he was in duty bound to do - that the damage sustained was but slight & easily repairable and was not sufficient to authorize plaintiff to recover any thing from defendant on account thereof under the provisions of defendant's Policy of Insurance.

And defendant states that at the time of said alleged damage the plaintiff was the master of said steamboat and a part owner thereof that the agreement sued upon was executed on defendant's part in consequence of the said representations & statements of plaintiff and

under the belief that they were true - that defendant was induced to make said agreement solely from its confidence in the said master and the belief in the truth of his representations of the condition of said boat - that each & all of said representations and statements of plaintiff were false as herein alleged and known to plaintiff to be false at the time of making the same. And the defendant had no knowledge of the truth or falsehood of said statements except as derived from plaintiff and was thereby induced to sign said agreement and was grossly deceived misled and wronged and so said agreement was fraudulently and wrongfully obtained by plaintiff from defendant and defendant submits that said agreement is void.

And ~~at~~ defendant states that at the time of issuing its Policy of Insurance on said Steamboat the plaintiff stated and represented to defendant that said steamboat was owned by himself and Messrs Jones McClurg & Co solely; and also that he represented at the time of procuring said agreement that said Steamboat was owned by him and the surviving partners of said firm - and defendant states that said representations of ownership were false - that said plaintiff & said Jones McClurg & Co or their survivors were not the sole owners of said Boat at

any or either of the times aforesaid; but on the contrary as defendant is informed and believes to be true one fourth ~~part~~ of said boat at the times of procuring said Insurance and of said damage and of giving said agreement belonged to one Lewis Stake and was so known to be owned by plaintiff at the times of his making such representations of ownership. And defendant submits that on account of said fraudulent & false representations of plaintiff the said agreement and the original Policy of Insurance granted by defendant are void.

Defendant is not indebted to plaintiff in the sum of two thousand dollars nor in any sum of money whatever and prays judgment &

Hudson & Thomas and Riddlecome

Attorneys for deft.

William W Greene being sworn says on oath that he is the President of defendant and he believes the above answered the matters & things therein as stated are true.

Subscribed & sworn to before
me this 6th day of October
1855

(Seal) C D Appleton

Notary Public.

W W Greene

In the St Louis Court of Common Pleas
Ochs Term 1856

Robert M. Barclay plaintiff

vs
The Globe Mutual Insurance
Company Deft.

Now at this day
the plaintiff
comes and moves
the Court to strike

out the following parts of the defendants answer
commencing at the fourth line of said answer
in these words.

"That it is confessed in the agreement and
upon by the plaintiff that said agreement was
made in view of the truth of the declaration contained
in a certain protest spoken of therein and de-
fendant files herewith a true copy of said
protest and states that the matters and things
in said protest alleged were not true in the
following respects to wit; it was not true that
said Steamboat Neroya sunk in less than
five minutes after the concussion spoken of
and it was not true that said Steamboat sunk
in about eight feet water, nor was it true
that proper persons were left in charge of the al-
leged wreck of said Steamboat for the
purpose of protecting the interests of all par-
ties concerned, as was alleged in said protest"

Also the following part of said answer on the
2^d page of the answer in these words,

"Defendant alleges that before and at the time of making said agreement plaintiff made the following statements and representations to defendant to wit; that said Steamboat was very badly broken & injured in her hull and timbers in three different places so much so that it was impossible to raise her by the aid of any means on board of said Steamboat and without the use of extraordinary means and great expense amounting to very nearly as much as the sum agreed to be paid by the several underwriters named in said agreement, that all due exertions had been theretofore made use of by plaintiff and his officers & crew to save said boat & raise her and that all their efforts and all the means at their command on said Steamboat had been exerted without being able to save said boat or to raise her, that the amount of damage was so great as to considerably exceed the sum of ten per cent upon the value of said boat as fixed in defendant's policy; and defendant states that it was not true that said Steamboat was badly broken in three different places, nor that any extraordinary means or great expense was necessary to save said boat and raise her, and it was not true that it was impossible to raise said boat by the use of the means and men on board

of her and at hand at the time of her concussion
and it was not true that plaintiff exerted all
or any of the means usual in such cases to
save said Steamboat nor that said Officers
and men made proper endeavors to raise said
boat before leaving her, But on the contrary
defendant states that plaintiff and nearly
all of his officers & men left said boat & aban-
-ed her immediately after her meeting the ac-
-cident alleged, and without using any
suitable efforts or the means at hand to
save her from sinking as he was in duty
bound to do, that the damage sustained was
but slight and easily repairable and was not
sufficient to authorize plaintiff to recover any
thing from defendant on account thereof under
the provisions of defendant's policy of Insurance
Has the following part of said answer on the
fourth page thereof, to wit;

"And the defendant states that at the time of
said alleged damage the plaintiff was the master
of said Steamboat and a part owner thereof that
the agreement sued upon was executed on the
defendants part in consequence of the said
representations & statements of plaintiff and
under the belief that they were true that
defendant was induced to make said agree-
-ment solely from its confidence in said master

and the belief in the truth of his representations of the condition of said boat, that each and all of said representations & statements of plaintiff were false as herein alleged and known to plaintiff to be false, at the time of making the same, and the defendant had no knowledge of the truth or falsehood of said statements except as derived from plaintiff, and was thereby induced to sign said agreement and was grossly deceived, misled and wronged and so said agreement was fraudulently & wrongfully obtained by plaintiff from defendant and defendant submits that said agreement is void."

Also the following part of said answer immediately following the foregoing portion in these words "and defendant states that at the time of issuing its policy of Insurance on said Steamboat the plaintiff stated and represented to defendant that said Steamboat was owned by himself and Messrs Jones, McChurg & Co solely and also that he represented at the time of procuring said agreement, that said Steamboat was owned by him & the surviving partners of said firm and defendant states that said representations of ownership were false, that said ^{plaintiff & said} ~~plaintiff~~ ^{Jones} McChurg & Co or their survivors were not

the sole owners of said boat at any or either
of the times aforesaid, but on the contrary as
defendant is informed and believ'g to be true
One fourth of said boat at the times of
procuring said insurance and of said damage
and giving said agreement belonged to ^{one} Ferris
Hobbs and was so known to be owned by
plaintiff at the time of his making such
representations of ownership, and defendant
submits that on account of said fraudulent
& false representations of plaintiff the said
agreement and the original policy of insurance
granted by deft are void.

Because,

- 1st The said statements are irrelevant
- 2nd The said allegations are inconsistent with
the said agreements declared on.
- 3rd The said accounts are contradictory to said
agreements
- 4th The contract sued on states the inducements
of the parties in making it and the
parties by it are estopped from setting out
any other inducements.

Glover & Richardson
for Plff.

March Term 1837

Tuesday April 14th 1837

The plaintiffs motion to strike out parts

of the defendants answer herein being heard
and fully understood it is ordered by
the Court that said motion be sustained.

State of Missouri
County of St. Louis
J. Charles, W
Clerk of the
St. Louis Court of Common Pleas within and
for the County aforesaid certify the above
and foregoing to be a true copy of the origi-
nal answer, motion to strike out parts of
same, and order sustaining said motion in
the cause of Robert M. Barclay Plaintiff
against The Globe Mutual Insurance
Company Defendant as fully as the same
remain in my Office.

In Testimony Whereof I hereto
set my hand and affix and
the Seal of said Court at
Office in the City of St. Louis
this 3^d day of April
A. D. 1838

C. H. Nicks.
Clerk



No 89

Robert M Barclay

No 3 Copy

Globe Mutual Ins
Company.

Copy of Original And
With strike out parts of same
& Order sustaining W

Filed 7 April 1858,

Wm J Glanville Ch

3.00 paid by J. D.
Thomas.

Robt. M. Barclay Repd^t.

vs

The Globe Mutual Ins. Company

Appeal from
the St. Louis
Court of Common Pleas

This judgment will be reversed for the reason that the evidence of the president of the company who was a stockholder was excluded. A stockholder of a corporation which is a defendant in an action, is not a person for whose immediate use such action is defended. Although the property of the witness was liable to an execution in the event of a want of corporate means to satisfy the judgment that might be recovered, yet as the want of those means was not shown the relation of the stockholder to the corporation was not variant, from that of a stockholder in any corporation which was not subject to an execution so far as this question is concerned. We express no opinion on the question of the competency of the witness had the insolvency of the company been proved. Under our statute it has been held, that a partner not a party to an action was a competent witness for the partner who was sued. *Weston vs Hunt* 19 Mo: 505. So also, that a ~~director~~ distributee was a competent witness for the adm^r in prosecuting or defending a suit for or against an estate. *Stein vs Weidman's adm^r* 20 Mo: 17. Is the stockholder of a corporation

more interested than a partner in trade or a distributor? The precise point involved in this suit has been determined by the Court of Appeals in N. York, it was then held, that a stock holder of a corporation is not a person for whose immediate benefit the suit is prosecuted in an action in which such corporation is plaintiff in which such stock holder is not individually named as a party. *Montgomery Co. Bank vs Marsh* 3 Sel. 485. This case cited and approved several preceding decisions of the question in the same way. These were all under a statute from which ours was copied.

We suppose, that the defendant could not prove any fraud in the transaction unless it was set up as a defense to the action. But as the case ~~may~~ will be remanded it may be as well to submit our present views in regard to that matter. If there was any written protest other than that recited in the agreement, it does not appear in the record. If there was none other, then the enquiry would be limited to the truth of the fact recited because it would sufficiently appear that the parties compromised & settled upon the truth of that fact alone disregarding all others as immaterial. Under the circumstances, such a conclusion would not be unreasonable. But

if there was a full protest made out, stating
all the circumstances ^{of the loss}, we are not now prepar-
ed to say that the word "declaration" in the
agreement would not refer to all the ma-
terial facts set forth in the protest. The
language of the agreement is not the said
declaration in the protest, but the decla-
ration in the said protest. In such case
the portion of the declaration set ^{out}, might have
only been intended for ^{the} identification of the
instrument. But as the paper is not before
us if there is any such, we can give no authori-
tative interpretation of it.

Judge Napton concurring there is over-
sight & the cause remanded Wm Scott

J. Richardson not sitting

Barclay

¹⁰¹
Globe Mutual Ins Co,

Opinion

Rev. A. Hernandez

Filed 24 June 1858,
Wm S. Glanville C.

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