"In actions at law it is a general rule that the losing parties or the parties against whom judgment is rendered are to pay the costs, and no apportionment of the costs is made between them. Each is liable for all, whatever may be their respective interest in the subject-matter of the suit. In equity it is different. There the court has a discretion as to the costs, and may impose them all upon one party, or may divide them in such manner as it sees fit."

The only exception to this rule not expressly made by statute is where the court is without jurisdiction of the cause. In *Railway Co.* v. *Swan*, 111 U. S. 379, 387, 4 Sup. Ct. Rep. 510, Mr. Justice MATTHEWS says:

"Ordinarily, by the long-established practice and universally recognized rule of the common law in actions at law, the prevailing party is entitled to recover a judgment for costs, the exception being that, where there is no jurisdiction in the court to determine the litigation, the cause must be dismissed for that reason, and, as the court can render no judgment for or against either party, it cannot render a judgment even for costs."

The case at bar is apparently a hard one for the defendant. At the time of suit brought he was clearly entitled to the possession of the property which he had acquired in good faith. Unfortunately for him, by his own inadvertent action in asking and obtaining credit with Carter, Hawley & Co. for the asphalt taken from him by the writ, he practically renounced the title he had received on his purchase, and accepted in its stead reclamation on Carter, Hawley & Co. The equities are with him to the recovery of his costs, but the settled rules of decision in cases at law will not permit of exception in his favor, and costs must follow the judgment.

MORTON *v.* CITY OF NEVADA.

(Circuit Court of Appeals, Eighth Circuit. October 3, 1892.)

No. 96.

LIMITATION OF ACTIONS—RUNNING OF STATUTE—MUNICIPAL BONDS.

Bonds issued by the town of Nevada, Mo., in 1870, were repudiated, and the payment of interest refused, in 1873. In 1877 action was brought to recover upon the past-due coupons, but by agreement was suspended pending a suit in the supreme court of the United States, wherein the act authorizing such issues was declared unconstitutional. It was subsequently taken up in 1881, and judgment given for defendant. Thereafter an action for money had and received was begun. *Held*, that it was barred by the Missouri statute of limitations, which began to run at least from the repudiation of the bonds, and which limits actions on implied contracts to five years. 41 Fed. Rep. 582, affirmed.

In Error to the Circuit Court of the United States for the Western District of Missouri.

Action by William H. Morton against the city of Nevada, in the state of Missouri, for money had and received. Trial by the court on an agreed statement of facts. Judgment for defendant. 41 Fed. Rep. 582. Plaintiff brings error. Affirmed.

Statement by CALDWELL, Circuit Judge:

This was an action brought by the plaintiff in error against the defendant in error for money had and received. The defense was a general denial, and a plea of the statute of limitations. The case was tried by the court below upon the following agreed statement of facts:

"It is hereby stipulated and agreed that the following facts are admitted by both plaintiff and defendant to be true, and no other proof thereof than this stipulation need be produced upon the trial of said cause, but the same may be used by either party. It is further agreed that either party shall, under this stipulation, have a right to introduce any other testimony they may deem proper; it being understood this agreement only extends to the admission of the truth of the facts herein contained. In March, 1869, the town of Nevada, Vernon county, Missouri, was incorporated under chapter 41, Gen. St. Mo. 1865. In the year 1870, in order to secure the location of the depot of the Tebo & Neosho Railroad, then building, within one half mile of the public square of said town, instead of within the distance of three quarters of a mile of said public square, as then contemplated by the board of trustees, agreed with the Tebo & Neosho Railroad Company to donate ten acres of ground for depot purposes if it would put the depot within one half mile of said public square, and by resolution entered of record on June 29, 1870, made the following proposition: 'Resolved, that whereas, the county of Vernon has subscribed to the capital stock of the Tebo & Neosho Railroad Company to aid in building the railroad of said company within the county of Vernon, and it will be advantageous to the town of Nevada to have the depot of said company established as near as practicable to the business of said town: It is therefore ordered that the town of Nevada will procure and donate to the said Tebo & Neosho Railroad Company the right of way for said company's railroad within and through the said town, and will also pay the said company such sum of money, not exceeding the sum of five thousand dollars, as shall be the actual cost to said company of establishing the depot of said company within one half mile of the public square of said town, instead of within the distance of three quarters of a mile of said public square. Ordered further, that the town will procure and donate said company suitable grounds for said depot and the other purposes in connection with the operation of said railroad, not less in quantity than ten acres.' And thereafter, to wit, on June 4, 1870, under and by virtue of the act of the general assembly of the state of Missouri entitled 'An act to authorize cities and towns to purchase land, and to donate, lease, or sell the same to railroad companies, approved March 18, 1870,' the board of trustees of said town ordered an election of the qualified voters of said town to be held on October 25, 1870, to vote upon the proposition to issue ten thousand in bonds of said town, with which to purchase ground to be donated to said Tebo & Neosho Railroad Company. That said election was held, as ordered, on October 25, 1870, and at said election a majority of the qualified voters of said town voting at said election voted in favor of issuing said bonds to purchase ground to be donated to said railroad company; and thereafter, to wit, on November 1, 1870, under and by virtue of said act of the general assembly of the state of Missouri, approved March 18, 1870, before referred to, and in pursuance of said election so held as aforesaid, and under the order of said board of trustees, there was executed, by its chairman, John T. Birdseye, signing his name thereto, and by the clerk of said board, S. A. Claycomb, attesting the same and affixing thereto the seal of said town, twenty bonds numbered from 1 to 20, both inclusive, each for the sum of $500.00, which said bonds, by their terms, were made payable at the National Bank in the city of New York, in the state of New York, ten years after the date thereof, to wit, on the 1st day of November, 1880, and were made payable to the Tebo & Neosho Railroad Company or bearer. That said bonds, by their terms,

were to bear interest at the rate of ten per cent. per annum, payable semi-annually at the National Bank on the 1st day of May and the 1st day of November of each year thereafter, on the delivery of certain interest coupons thereto attached to each of the said 20 bonds. That, after said bonds had been executed, Oscar M. Nelson, then a citizen of the town of Nevada, was appointed by said board of trustees the financial agent for said town for the purpose of selling said bonds and receiving the money therefor, for and on behalf of said town. That said bonds were placed in his hands, and he, acting for said town as its financial agent by virtue of said appointment, all of said bonds, through the firm of Jaynes & Newkirk, bankers at Sedalia, Mo., to Wm. H. Morton, the plaintiff. That in January, 1871, said firm of Jaynes & Newkirk, bankers, as aforesaid, paid to Oscar M. Nelson, the financial agent aforesaid, the following amounts: January 19, 1871, $4,000.00; January 31, 1871, $4,171.00,—total, $8,171.00; making the total sum actually received by the said board of trustees in money on account of the sale of said bonds eight thousand one hundred and seventy-one dollars, ($8,171.00.) That in pursuance of the agreement with the Tebo & Neosho Railroad Company, said board of trustees purchased from various parties ten acres of ground, to be donated to said railroad for depot purposes, paying therefor out of the $8,191.00 dollars derived from the sale of said bonds the sum of $6,785.50 dollars, and had all of said land deeded directly to the 'incorporated town of Nevada.' The balance of said money was used by said board of trustees for various purposes incident to the government of said town. The said Tebo & Neosho Railroad Company, having fully complied with the terms and conditions upon which said donation was to be made, took possession of said property. The said Tebo & Neosho Railroad Company having thereafter sold, conveyed, and merged all of its entire line of railroad in this state, and all its property, rights, and franchises, in and to the Missouri, Kansas & Texas Railroad Company, the inhabitants of the town of Nevada, by E. E. Kimball, chairman of the board of trustees, on the 19th day of May, 1875, conveyed said ten acres of ground to the Missouri, Kansas & Texas Ry. Co.; the Tebo & Neosho Railroad Company having taken possession of said ten acres, as before mentioned, some time prior to its merger into the M., K. & T. R. R. It is further agreed that on the 23d day of August, 1877, Wm. H. Morton, plaintiff herein, instituted suit against the town of Nevada in the United States circuit court for the western district of Missouri, at Jefferson City, to recover upon the past-due coupons that were attached to said issue of bonds, and thereafter, to wit, on the 20th day of November, 1877, the town of Nevada interposed a defense to said suit by filing an answer, in which it was claimed that said town was not liable in said action, for the reason that the act of March 18, 1870, under which the bonds to which said coupons had been attached, was unconstitutional. That thereafter, and on the same day, plaintiff in said action filed a demurrer to said answer, and on the 22d day of November, 1877, said demurrer was submitted. That at that time there was pending in the supreme court of the United States the case of *Jarrolt* v. *Town of Moberly*, in which the same question, to wit, the constitutionality of the act of March 18, 1870, was involved, which said cause has been certified to the supreme court of the United States by reason of a division in opinion of the two judges sitting in said cause, which fully appears by a record of said cause reported in 103 U. S. 586, and to which reference is made. The parties to said case of *Morton* v. *Town of Nevada*, by their attorneys, then agreed that no further action was to be taken in the matter, but that the same was to stand upon the pleadings as then made until the supreme court passed upon said *Jarrolt Case*, after which either party might proceed in said matter as might be deemed best by said party; and that the same stand continued. That the supreme court in said *Jarrolt Case*, in 103 U. S. 580, decided the act of March 18, 1870, unconstitutional, to which

case reference is made to show what was passed upon, and that thereafter, and, to wit, on the 25th day of November, 1881, said cause of *Morton* v. *Town of Nevada* was taken up, and, following the rulings,—said *Jarrolt Case*,—the demurrer to the answer was overruled, and judgment given for defendant, the town of Nevada, on the pleadings. It is further agreed that in the year 1884 the town of Nevada was reincorporated under the general laws of Missouri as a city of the third class, under the name of the 'City of Nevada,' and as such succeeds to all rights of said town, and assumed all of its liabilities. It is further stipulated that the interest on said bonds was paid by the town of Nevada for the year 1871 and 1872, after which the town refused to pay plaintiff any further interest, for the reason that said bonds and the coupons thereon were unconstitutional, and issued without any authority.

"J. B. HENDERSON,
"REYNOLDS & LEWIS, and
"J. B. JOHNSON,
"Attorneys for Plaintiff.
"BURTON & WIGHT,
"Attorneys for Defendant."

The lower court held the defendant was not liable for the money had and received, except possibly as to the sum of $1,385.50, and that the whole cause of action was barred by the statute of limitations. There was judgment for the defendant, and the plaintiff thereupon sued out this writ of error.

Matt. G. Reynolds and *James M. Lewis*, for plaintiff in error.

C. G. Burton and *S. A. Wight*, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

CALDWELL, Circuit Judge, (*after stating the facts.*) It is needless to discuss the question of the liability of the defendant to the plaintiff for the money received for the void bonds. Under some circumstances money thus paid may be recovered back; under other circumstances it cannot. To which class this case belongs we need not inquire, because, if any such liability ever existed, it was clearly barred before this action was brought. By section 3230 of the Revised Statutes of Missouri the limitation of actions on implied contracts is five years. The plaintiff's action is bottomed on the alleged implied obligation of the defendant to repay the money it received for the bonds. The action is barred, whether it accrued when the money was paid for the void bonds, or when the town refused to pay interest, and denied its obligation to pay the bonds, upon the ground that they were void for want of authority in the town to issue them, or when that defense was formally interposed to the suit on the bonds. All of these events happened from 8 to 15 years before the suit was brought. No fact is shown which, in law, would interrupt or suspend the running of the statute after the town refused to pay interest and repudiated the bonds, which it did in 1873.

The bonds were void, and not merely voidable. They were infected with a fatal and incurable vice. It was beyond the power of the town to impart legal validity to them. There could be no ratification, and no estoppel, which would render them valid or binding obligations on

the town. Upon the admitted facts of the case, therefore, the plaintiff could have sued for the recovery of his money the very day he received the bonds, and the general rule is that the statute begins to run from the time the party might have brought his suit. But it is not necessary to apply this rule in this case. The town paid the interest on the bonds for two years. Giving to these payments the utmost effect that can be claimed for them, and conceding that the statute did not run as long as the town treated the bonds as valid and paid the annual interest, it ceased to do this after 1872, and from and after that date denied the validity of the bonds, and paid no interest; and, undoubtedly, the statute of limitations would run against an action for the money paid for the bonds from that date. *Furlong* v. *Stone*, 12 R. I. 437; *Bishop* v. *Little*, 3 Greenl. 405; *Bank* v. *Daniel*, 12 Pet. 32, 57; *Bree* v. *Holbech*, 2 Doug. 654; *Cowper* v. *Godmond*, 9 Bing. 748, 23 E. C. L. 788; *Lunt* v. *Wrenn*, 113 Ill. 168; *Jones* v. *School Dist.*, 26 Kan. 490; *Weaver* v. *Leimann*, 52 Md. 709; *Miller* v. *Adams*, 16 Mass. 456; *Palmer* v. *Palmer*, 36 Mich. 488, 494; *Tripley* v. *McPike*, 50 Mo. 591.

The judgment of the circuit court is affirmed.

SCANLAN *et al.* v. HODGES *et al.*

(Circuit Court of Appeals, Eighth Circuit. October 3, 1892.)

No. 20.

1. CONTRACT—EVIDENCE—CONSTRUCTION—PROVINCE OF COURT AND JURY.
   The questions whether certain commercial correspondence constitutes a contract, and, if so, what its proper construction is, are ordinarily for the court, though in exceptional cases, when the alleged contract rests partly in correspondence and partly in oral communications, the question whether there is a contract is for the jury.
2. SAME—BREACH.
   The consignees of shipments of wheat were under contract to collect the bill from the purchaser, a milling company, and then to give an order on the railroad company to deliver the wheat to the milling company, and thereupon to remit the amount to the shippers. *Held* that, if the consignees expressly or impliedly consented to its delivery by the railroad company to the milling company before payment of the bill, they were liable for its price.
3. SAME—PLEADING—REDUNDANCY.
   In an action by the consignors against the consignees to recover the value of the wheat, an allegation that the wheat was delivered to them by the railroad company was redundant, and need not be proved, it appearing that the wheat was in cars on a spur track, and confessedly subject to their order as consignees.
4. SECONDARY EVIDENCE—ADMISSIBILITY.
   Parol evidence by the station master of the contents of a writing given him by the consignees, stating that the railroad was not liable for wheat consigned to them and delivered to the milling company without written orders, was admissible, it having been shown that the paper was lost, and could not be found by diligent search.

In Error to the Circuit Court of the United States for the District of Minnesota.