

pra, that the master is liable for the negligent performance of all of his personal duties, no matter by whom performed, and that he is also responsible for the negligent acts of an employé whom he has intrusted with the entire management and supervision of all of his business, or with the entire management and supervision of a distinct and separate department of a large and diversified business. The doctrine of the Baugh Case was reiterated and applied in *Railroad Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983, in which case it was held that a section boss of a railroad is a fellow servant with an engineer and conductor in the employ of the same company, and that the company is not liable for an injury to the former occasioned by the negligence of the latter, although they work in different departments of the service, and under the control of different superiors. And in the recent case of *Railroad Co. v. Keegan*, 160 U. S. 259, 264, 16 Sup. Ct. 269, it was pointed out that, while the mastery and control of a distinct department of a diversified business may entitle the person in charge to be considered a vice principal, rather than a fellow servant, yet that this must not be understood to mean or imply "that each separate piece of work was a distinct department, and made the one having control of that piece of work a vice principal or representative of the master." See, also, *O'Brien v. Dredging Co.*, 53 N. J. Law, 291, 21 Atl. 324, and *Potter v. Railroad Co.*, 136 N. Y. 77, 32 N. E. 603, which are referred to with approval in the decision last cited. This court has also decided very recently that a section foreman of a railroad is not the head or manager of a distinct department in such sense as to constitute him a vice principal, but that he is a fellow servant of those who work under him and are subject to his orders. *Railway Co. v. Waters*, 16 C. C. A. 609, 70 Fed. 28.

It is obvious, therefore, that on the state of facts disclosed by the present record Clausen cannot be regarded as a vice principal on any of the grounds heretofore indicated. He was a fellow servant of the other members of the gang of laborers who worked under him; and, inasmuch as the act of negligence complained of was not committed by him while in the discharge of a duty that was personal to the master, his employers cannot be held responsible for his neglect. The trial court was asked to so instruct the jury, and for its refusal to do so the judgment must be reversed, and the cause remanded for a new trial.

CHARNLEY v. SIBLEY et al.

(Circuit Court of Appeals, Seventh Circuit. May 4, 1896.)

No. 284.

1. SET-OFF—FOLLOWING STATE LAWS.

The right of set-off, except as it is enforced in equity, is a matter of local legislation; and the federal courts, sitting in any state, when dealing with the subject, will follow the rules established by the tribunals of the state.

2. SAME—INSOLVENT OR NONRESIDENT PLAINTIFF.

Where the state statute of set-off, as in Illinois, does not authorize a set-off, in action on contract, of unliquidated damages arising out of con-

tracts or torts, not connected with the subject-matter of the suit, there can be no set-off, in an action at law, of such damages, even as against an insolvent or nonresident plaintiff.

3. SAME—INCONSISTENT DEMANDS.

It is no objection to a set-off, claimed by a defendant, that it is inconsistent with another set-off, previously claimed by him, and rejected as improper.

4. DAMAGES—UNLIQUIDATED.

Where it is alleged that one party has agreed to ship to another, as his broker, all the goods made by him, and to pay the broker a certain rate of commission on the sale thereof, a claim by the broker of a breach of the contract, in failing to ship to him a part of such goods, is a claim for unliquidated damages.

5. SAME—ACCOUNT STATED.

The rule whereby a merchant's account, which has been presented, and not objected to, is treated as an account stated, does not apply to a distinct and independent claim for damages for breach of contract.

In Error to the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

E. A. Otis, for plaintiff in error.

Hamline, Scott & Lord and George W. Weadock, for defendants in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. The defendants in error, Hiram W. Sibley and Isaac Bearenger, co-partners under the firm name of Sibley & Bearenger, sued the plaintiff in error, James Charnley, in an action of assumpsit upon the common counts for the proceeds of a cargo of lumber consigned by the former to the latter in 1877 to be sold on commission. The defendant pleaded the general issue with notice of set-off, to the effect that the defendant, being a broker for the sale of lumber in Chicago, in April, 1888, entered into a contract with the plaintiffs, who were the owners, manufacturers, and shippers of lumber at East Saginaw, Mich., to act as their broker in the city of Chicago for the sale of all lumber manufactured by them for the season of 1888 to the amount of 40,000,000 feet, which they agreed to ship to him to be sold on their account for a commission of one and one-fourth per cent. of the gross amount for which the lumber should be sold; that he was ready and willing to perform and did perform the contract on his part, but that they, though often requested, did not, and would not during the season of 1888 consign or ship to him of the entire quantity stipulated, all of which he was prepared and ready to sell, more than 1,892,982 feet, by reason whereof, having given up other business and employment as a broker for the sale of lumber in Chicago, he sustained loss and damage to the amount of \$5,716.05, which, when set off against the demand of the plaintiffs, left a balance due him of \$1,345.76, for which he prayed judgment. This claim of set-off, it is conceded, did not grow out of or have any connection with the transaction upon which the demand of the plaintiffs was founded. Evidence offered in support thereof was excluded, and thereupon the defendant was permitted to file an additional notice of set-off, accompanied with a

bill of particulars; and the evidence offered in support of items in that bill to the amount of \$98.19 was also excluded. Error is assigned upon each of these rulings.

The right of set-off, except as it is enforced in equity, is a matter of local legislation, and the federal courts, sitting in any state, when dealing with the subject, will follow the rules established by the tribunals of the state. *Partridge v. Insurance Co.*, 15 Wall. 573; *Dushane v. Benedict*, 120 U. S. 630, 7 Sup. Ct. 696. Under the Illinois statute (Rev. St. c. 110, § 29) which authorizes a set-off, in any action upon contract, of claims or demands against the plaintiff in the action, the rule has been declared by the supreme court of the state that "unliquidated damages, arising out of covenants, contracts, or torts, not connected with the subject-matter of the suit, do not constitute the subject-matter of a set-off." *De Forrest v. Oder*, 42 Ill. 500; *Robison v. Hibbs*, 48 Ill. 408; *Clause v. Press Co.*, 118 Ill. 612, 9 N. E. 201. See, also, *Winder v. Caldwell*, 14 How. 434, 443. It is earnestly contended in behalf of the plaintiff in error that when it appears that the plaintiff in an action is insolvent or a nonresident of the state where the action is prosecuted, a set-off of damages for breach of a contract, though unliquidated, may be allowed. But the numerous authorities cited are to the effect that in such cases a set-off may be had in equity, and there ordinarily it is allowed because relief could not be had at law. *Quick v. Lemon*, 105 Ill. 578; *Lindsay v. Jackson*, 2 Paige, 581. In *Forbes v. Cooper*, 88 Ky. 285, 11 S. W. 24, a contrary ruling was made; but, however pertinent and strong the reasoning on which that decision was based, it is manifestly a departure from the commonly recognized practice, and is authoritative only as a construction of the statute of Kentucky. It cannot prevail in Illinois against the rule there established.

It is contended next that the claim set up in the original notice was not unliquidated, because "it amounts substantially to a breach of contract of employment where the damages are fixed, certain, and definite, and the contract and the law furnish the exact measure of damage." But it is evident that, in order to determine the damages in question, proof was necessary—First, to establish the contract; second, to show to what extent it had been performed; and, third, to prove the damages suffered by reason of nonperformance, including the expense of doing the business, incurred, or necessary to be incurred, and kindred matters. *U. S. v. Behan*, 110 U. S. 338, 345, 4 Sup. Ct. 81. A claim is liquidated only when the amount of it has been determined, or the data settled upon which the amount can be calculated. *U. S. v. Buchanan*, 8 How. 104; *North Chicago Rolling-Mill Co. v. St. Louis Ore & Steel Co.*, 152 U. S. 615, 14 Sup. Ct. 710; *Osborn v. Etheridge*, 13 Wend. 339; *Hall v. Glidden*, 39 Me. 445; *Bell v. Ward*, 10 R. I. 508; *Holland v. Rea*, 48 Mich. 218, 12 N. W. 167. In *Edwards v. Todd*, 1 Scam. 464, cited in *Smith v. Huie*, 14 Ala. 201, unliquidated damages were allowed as a set-off, but because connected with the subject-matter of the suit.

But it is insisted that the amount of the proposed set-off in this instance had become certain, as an account stated, because of the

fact, of which proof was offered, that the plaintiff in error had sent to the defendants in error a statement of account wherein the precise amount of damages claimed was stated, to which no response was made. Waiving all question whether, under the notice of set-off given in this case, evidence of an account stated was admissible, we know of no authority for applying to a distinct and independent claim for damages for breach of contract the rule established in respect to merchants' accounts, whereby "an account which has been presented, and no objection made thereto, after a lapse of several posts, is treated, under ordinary circumstances, as being, by acquiescence, a stated account." 1 Story, Eq. Jur. § 526; *Wiggins v. Burkham*, 10 Wall. 129; *Pynchon v. Day*, 118 Ill. 9, 7 N. E. 65; *Lockwood v. Thorne*, 18 N. Y. 285.

It remains to consider the items in the second notice of set-off, amounting to \$98.19, and alleged to have been expended at the request of the defendants in error under or in connection with the contract set up in the first notice. The record shows that the evidence to support this claim was excluded because the items were not connected with the subject of the suit, but were advanced under the contract mentioned in the first notice of set-off. That ruling, we think, was erroneous. It was equivalent to saying that there can be no set-off unless it be of a demand, whether liquidated or unliquidated, connected with the principal cause of action. It is no objection to this set-off that it is inconsistent with that set up in the first notice, which alleged a contract under which the plaintiff in error was bound to bear his own expenses. He is not entitled to claim both the stipulated commission and a reimbursement of his expenditures, but, the court having rejected evidence of the former, because, being unliquidated, it was not a proper set-off, we do not perceive that it was incompetent for him to offer proof of the latter. *U. S. v. Behan*, supra. Whether by so doing he renounced all right to the demand set up in the first notice, we need not consider. The further objection is urged that, in connection with the evidence offered to establish these items, under the second notice, the offer to prove the contract mentioned in the first notice was not renewed, and that, excepting as it might be implied from that contract, there is no evidence of a request by the defendants that the outlays charged for should be made. The offer of proof, however, included the fact of an express request. The defendants in error may remit of the judgment recovered the sum of \$98.19 as of the date of entry, and within 10 days file with the clerk of this court certified proof of the fact, and thereupon the judgment so reduced will be affirmed; otherwise the same will be reversed, and the cause remanded for a new trial; the costs of this appeal in either event to be taxed against the defendants in error.

CRANE CO. v. COLUMBUS CONST. CO.

(Circuit Court of Appeals, Seventh Circuit. May 4, 1896.)

No. 268.

1. **EVIDENCE—ADMISSIBILITY AND WEIGHT—TESTING QUALITY OF GOODS SOLD.**
Where gas piping sold was guaranteed to stand a certain pressure when tested in line, *held*, that evidence of tests made in line was admissible, even if they were made without notice to the seller, and not within a reasonable time after delivery, these facts going merely to the value, and not to the competency, of the evidence.
2. **SAME—OPINION EVIDENCE.**
Upon a controversy over the quality of gas pipe guaranteed to stand a certain pressure in line, where it is claimed by the seller that the pipe was injured in handling and laying, after delivery, witnesses who supervised or participated in the work may testify that, in their opinion, the workmen were skillful; but the general question whether the line of pipe was laid with proper skill and care is not one to be determined upon the opinions of witnesses.
3. **SAME—COMPETENCY—ESTIMATES FROM INSUFFICIENT DATA.**
In an action to recover damages for failure of gas pipe to stand the guaranteed pressure when laid in line, the purchasing company sought to recover the cost of taking up and relaying the pipe with stronger collars; but it appeared that the work was done by employes who were carrying on other work at the same time, and that no separate account was kept of the labor and expense. *Held*, that it was not competent for a manager of the company to testify to the cost per foot of the work, where his estimates were made without personal knowledge of the facts, from reports not designed for the purpose, and containing no data enabling him to reach a definite conclusion.
4. **SAME—BREACH OF WARRANTY—REPAIRS BY PURCHASER.**
A construction company, under contract with a natural gas company to furnish and lay a pipe line, made a contract with a supply company, whereby the latter was to furnish piping guaranteed to stand a working line pressure of 1,000 pounds to the square inch. Thereafter an act of legislature was passed prohibiting the transportation of natural gas under more than natural pressure, or an artificial pressure of 300 pounds. Thereupon the contract between the gas company and the construction company was modified so as to require the piping to stand a test in line of only 400 pounds. Prior to the enactment, some of the pipe furnished by the supply company had been laid, but was found incapable of standing the guaranteed pressure of 1,000 pounds. It was claimed, however, by the supply company, that it was sufficient for a working pressure of 300 pounds, and there was evidence tending to support the claim. Nevertheless, the construction company, after the enactment, took up and relaid the pipe with stronger collars, also cutting the threads anew, at great expense, and sought to recover the same from the supply company. *Held*, that the supply company was entitled to an instruction that, if the piping was otherwise in accordance with the specifications of its contract, and, as first laid, was sufficient to stand a working pressure of 300 pounds, as limited by law, and if the construction company unreasonably and unnecessarily expended money in making the change, for the alleged purpose of constructing a line to withstand a pressure of 1,000 pounds, then the supply company was not liable therefor; and that, under such circumstances, the ordinary rule should prevail, and the recovery be on the basis of the difference in value between the article delivered and that contracted for.
5. **SAME—REPUDIATION OF CONTRACT IN PART—ACTION TO ENFORCE IN PART.**
A purchaser of gas pipe to be delivered at times and places to be designated by it, after partial delivery, refused to receive more, alleging that the seller had failed to make deliveries for some time. It appeared, however, that no time or place had been designated by it for such deliveries.