

not ready. They desired testimony. But it is not the condition of the proof in a cause that determines the right of removal, but the condition of the pleadings; when the cause is at issue it can be tried.

The absence in an equity suit of an outstanding commission does not settle the question whether or not the cause can be tried, any more than the absence of a witness in a suit at law would determine whether it was triable or not. To discover that an equity cause is ready for trial it is not necessary to find that it was ever set for hearing. The cause must be triable before it can be set for hearing. How long before it was heard it might have been heard depends upon the diligence of counsel.

The words of the statute, "at the term at which said cause could be first tried," it might be contended, should be construed to mean either the term at which the issues were made up; or the term at which the judge was present and had an opportunity to hear the case; or the term at which the engagements of counsel allowed them to attend; or the term at which all the requisite witnesses could be procured or their depositions taken; but it has been found that the only reasonable construction to be put upon these words of the statute is the first term at which the pleadings were in condition for trial; that is to say, when the issues were made up.

We think this cause could have been tried at the term when the replication was filed, February 24, 1876, and must adhere to the ruling in the case of *Gurnee v. The County of Brunswick*, 1 Hughes, 270, and will direct the case to be remanded.

GAUSE v. CITY OF CLARKSVILLE.

*(Circuit Court, E. D. Missouri. March 9, 1880.,***MUNICIPAL CORPORATION—VOID BONDS—APPLICATION OF MONEY.—**

Where a city without power to make negotiable obligations sells its void bonds, and, receiving the money therefor, applies it to its legitimate corporate uses, an action will lie to recover the money so received and applied.

SAME—ASSIGNMENT OF BONDS—ACTION BY ASSIGNEE.—The right to recover money so received is transferred by the transfer of the bonds, and can be enforced by the last holder of such bonds as the assignee thereof.

Wood v. Louisiana, (MS.) U. S. Circuit Court, E. D. Missouri, September term, 1878, affirmed.

SAME—VOID BONDS—ACTION BY HOLDER.—Where a bond is made by a city for two considerations, as to one of which it has power to make a bond, but as to the other has none, such bond is wholly void. The holder cannot recover on the bond as such. His remedy is an action for money had and received.

VALID BOND SURRENDERED FOR VOID BOND—ACTION ON SURRENDERED BOND.—Where the holder of a valid bond presents it when due to the maker, and receives in payment a renewal bond, which for any reason is void, then the old bond, though surrendered for cancellation, is not extinguished, but recovery may be had on it the same as if the new bond had not been given.

CITY ORDINANCE—ISSUE OF BONDS—RECITAL—ESTOPPEL.—A city ordinance, authorizing a subscription to stock of a road company and issue of bonds to pay same, recited that the authority prescribed by the law as a prerequisite of such subscription had been given by an election held for the purpose. In a suit upon such bonds, *held*, that the city was estopped by such recital to show that the voters at such election were not duly sworn, and the election therefore void. Principle of estoppel by recitals in bonds applies to recitals in an ordinance authorizing the issue of bonds.

PLEA IN ABATEMENT—JURISDICTION—CAPACITY TO SUE.—All matters which go to challenge the jurisdiction of the court, or the capacity of the plaintiff to sue, should be presented by plea in abatement, in advance of hearing on the merits, unless the want of jurisdiction is put in issue by some pleading. Evidence tending to show cause is irrelevant and will not be heard.

Action upon 27 negotiable bonds of defendant, payable to bearer, of divers dates and amounts, and acquired by plaintiff after due. The amended petition contained 27 special counts based on said several bonds, respectively, together with two

common counts for money had and received, etc. The bonds described in counts 1 to 11, inclusive, were therein alleged, and by the evidence were shown, to have been given for money borrowed by defendant from the original payees, for the purpose either of building or improving its wharves or streets, or of paying for a city cemetery, and to have been actually used for those purposes.

Upon demurrer to like counts in the original petition all these bonds were held to be void, for want of an express grant of power in the charter of defendant to make bonds or borrow money.

The bonds described in counts 12 to 17, inclusive, were therein alleged to have been made either in direct payment of subscriptions made by defendant to stock of certain road companies, organized under the laws of Missouri to build gravel roads leading from the defendant city to other places in Missouri, by virtue of an act approved in 1857, (Sess. Acts Mo. 1857, p. 302,) or in renewal of other bonds originally so given in payment of such subscriptions. The evidence showed that the allegations as to all of these bonds were true, with the exception of those described in counts 12 and 13. As to these it appeared that while eight-tenths of their consideration was the payment or renewal of bonds so given in payment of road subscriptions, the remaining two-tenths was money borrowed from the holders of said bonds, and applied to the general uses of defendant.

As to the bond described in the fourteenth count, it also appeared that when due it was surrendered to defendant by its then holder in exchange for a new bond of like amount, and bearing a like rate of interest, but which was made on April 20, 1872, and had not been registered according to the law of Missouri passed March 30, 1872, which required all bonds issued after its passage to be registered. Sess. Acts 1872, p. 56, § 4. It also appeared that after the old bond had been surrendered it came again into possession of its holder at maturity, who transferred it to the plaintiff, who, at the trial, produced it, together with the void renewal bond, and offered to surrender the latter to defendant. The bonds de-