

signed to the plaintiff; and it is contended the defendant cannot, by alleging that the contract was made with the plaintiff, make a counter-claim arising out of the same transaction set forth in the petition.

I take it that, under the rules of pleading obtaining in this state, he is right in that respect; that we are to take the pleadings as they read, and not as affected by mere exhibits; and that if the contract, filed as an exhibit, and not made a part of the pleadings, when offered in evidence, turns out not to be a contract on the part of the electric light company, the plaintiff will go out of court because of a failure to prove his allegations. But it is also true that under your statute a counter-claim is not limited to a matter arising out of the subject of the plaintiff's cause of action. Any cause of action arising on a contract may be set up as a counter-claim.

The defendant alleges he made a contract with the plaintiff. True, he says it is the contract attached to the plaintiff's petition as an exhibit, but that is unimportant. He alleges he made a contract with the plaintiff, and that the plaintiff has broken that contract, and he has suffered damages thereby. If, on the trial, when the contract is produced it should turn out to be such as he alleges, the plaintiff must go out of court and the defendant's counter-claim will stand; for, if there was a contract made between the defendant and the plaintiff directly, broken by the plaintiff, there is a counter-claim which may be sued on, independent of the plaintiff's ability to maintain his cause of action. So I think there is an independent cause of action set forth in this counter-claim. The demurrer, therefore, will be overruled, and the plaintiff will have leave to reply.

GRAHAM and Wife *v.* HANNIBAL & St. J. R. Co.¹

(Circuit Court, E. D. Missouri. October 1, 1886.)

ESTOPPEL—DAMAGES FOR DEATH OF MINOR—EARNINGS DURING MINORITY—REV. ST. MO. 2123.

A satisfied judgment for damages for the death of a minor, recovered under section 2123, Rev. St. Mo., by his parents, is a bar to a subsequent common-law action by such parents to recover the loss of their child's earnings during minority.

At Law.

Fagg & Hatch, for plaintiffs.

Strong & Mosman and *George S. Grover*, for defendant.

BREWER, J., (*orally.*) You have two statutes providing for damages in the case of death through negligence; one giving a penalty of

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\$5,000 even money, the other allowing damages not exceeding \$5,000. These plaintiffs, whose son, a brakeman in the employ of the defendant, was killed through the negligence of the company, brought their action, setting forth the relationship, the death, the negligence, and asking \$5,000. When that case came on for trial, the plaintiffs insisted that they could proceed under the first section, and obtain the penalty, the fixed sum of \$5,000. Constrained to follow the ruling of the supreme court of this state, whose later decisions, reversing prior rulings of that court, hold that an employe is not within the scope of that first section, I ruled that they could not recover the penalty, but must proceed, under the second section, to recover damages. Proceeding under that section, they offered testimony showing the value of the earnings of the decedent during his minority, and I instructed the jury that they were entitled to recover the value of those earnings, as well as compensation for the loss through life of the attentions and services which a child, through natural affection, owes or renders to its parents. The jury returned a verdict for \$3,500. I sustained that verdict on a motion for a new trial. Judgment was rendered and satisfied.

This case was commenced by the plaintiffs, not under the statute, but as a common-law action, independent of the statute, to recover for the loss of the earnings of the child during his minority. To this the railroad company pleads, among other defenses, former recovery; that the plaintiffs have once obtained judgment for the full earnings of the minor during his minority.

The statute prescribing the measure of damages says that the jury may give such damages, not exceeding \$5,000, as they may deem fair and just with reference to the necessary injury resulting from such death to the surviving parties who may be entitled to sue. In 71 Mo. your supreme court, properly I think, held that among the matters to be considered as forming part of these damages—part of the necessary injury—was the loss of the earnings of the minor child during his minority, and, as a matter of fact in this case, they were proven, and the jury instructed to include them in the verdict. So there has been a former recovery for these very earnings, and the plea in bar is sustained, and judgment will be entered for the defendant.

ALDERSON, Guardian, etc., v. CROCKER and others.

(Circuit Court, N. D. Ohio, E. D. April Term, 1886.)

MINES AND MINING CLAIMS—AUTHORITY OF AGENT.

A banker who brought suit for advances made a mining company through its superintendent, acting as agent, was allowed to recover the amount, with interest; the superintendent having implied authority, unless limited by notices given him from the company, to give orders for such advances to persons who have debts against the company for labor and materials to run the mine.