ter; and in cases in which there are conflicting claims between an estate and some other person to specific property, such claims must be settled in some other than the probate court.

Any claim which the appellant has, under his contract with O'Malley, is not of such character as to authorize the probate court to enforce it under art. 2096. Peters *v.* Phillips, 19 Tex., 73; Norris *v.* Duncan, 21 Tex., 596; Booth *v.* Todd, 8 Tex., 138. And if the estate of O'Malley be in any manner responsible to him, that fact cannot be determined by a suit in the probate court, but should have been ascertained in the court of a justice of the peace.

The record as presented is not such as to enable us to determine whether the former suit between the parties, instituted in the justice's court and appealed to the county court, and there determined in favor of the appellee, is a bar to the claim sought to be established in this.

The probate court correctly decided the case on demurrer against the appellant, for it is evident that it had no jurisdiction of the case, and it is unimportant upon what ground the district court on appeal decided the case in favor of the appellee; for, wanting jurisdiction in the probate court, the district court could acquire none by an appeal from its decision.

The district court having no jurisdiction of the case, none of the reasons given for its judgment will interpose any obstacle to the prosecution of any suit which the party may be entitled to maintain, and that judgment must be considered simply as a dismissal of the appeal from the probate court, and so considered it is affirmed.

AFFIRMED.

[Opinion delivered January 18, 1884.]

C. M. MACDONELL v. THE I. & G. N. R'Y CO.

(Case No. 1669.)

1. PLEADING — EXHIBIT. — A copy of a paper which evidences the contract which constitutes the plaintiff's cause of action, in whole or in part, may be attached to the petition as an exhibit in aid and explanation of material averments in the petition, though it may be necessary and proper to use the paper in evidence. Rule 19 has no application. The petition, however, should contain, independent of the exhibit, all averments necessary in the cause, and should refer to the exhibit only to aid and explain the pleading.
2. FERRIES — MUNICIPAL CORPORATION. — The power conferred on a municipal corporation to establish ferries carries with it authority to do such acts as

Statement of the case.

may be necessary to construct permanent ferries, and to operate them, either through the agents of the corporation, or any other agencies the corporation may provide.

3. SAME.— The power conferred on such a corporation to fix the rates, fees and rents of a ferry is broad enough to authorize the city to rent the ferry to another, to be operated by him.
4. SAME.— The power conferred to fix the rents is inconsistent with the idea that the city alone can operate the ferry.
5. SAME — STATUTE CONSTRUED.— The definition of the word *rent*, as used in the charter of the city of Laredo, has a broader meaning than that which the word usually imports, and which restricts it to land and tenements corporeal. As there used, it means that the city shall have the power to fix the sum which shall be paid, not only for the use of the land on or contiguous to which a ferry is established, but also the sum which shall be paid for the appurtenances to the ferry and the franchise of operating it.
6. SAME.— The power to fix rents necessarily carries with it the power in a municipal corporation, holding in trust for the public, the power to make such a contract as will entitle the one operating the ferry to collect rents.
7. MUNICIPAL CORPORATION — FERRIES.— A city owning a ferry landing, with boats and appurtenances to operate a ferry, and having a charter power to operate the ferry, and to fix the rates, fees and rents thereof, may do with such property whatever a private person could do if he were the owner, except that, holding it as an agent for the state for a public purpose, it could not surrender its control and supervision to the unrestricted management and control of another person. It may lease to another, retaining by ordinance supervisory control.
8. MONOPOLY — CONSTITUTION CONSTRUED.— See statement of case for a contract made between a city and a private party, held not to be within the prohibition contained in section 26 of the Bill of Rights.

APPEAL from Webb. Tried below before the Hon. J. C. Russell.

The contract referred to the petition as contained in Exhibit A was as follows:

"EXHIBIT A.

"LAREDO, TEXAS, January 6, 1881.

"At a called meeting held this 6th day of January, A. D. 1881, there was present his honor the mayor, and aldermen . . . Garcia, Ryan and Gonzales.

"Absent, aldermen De Leon and Shea.

"The case of the ferry privileges by the city to C. M. Macdonell having been read and considered, it was ordered that the same be accepted and approved, signed by the mayor for and in behalf of the city, and by lessee C. M. Macdonell, and that it be recorded in the minutes of the mayor's office, to wit:

"STATE OF TEXAS — *County of Webb.*

"Know all men by these presents, that the corporation of the city of Laredo, for and in consideration of the matters hereinafter

Argument for the appellant.

expressed, has granted, bargained, sold and conveyed, and does hereby grant, bargain, convey and sell unto C. M. Macdonell, of the county of Webb, and state of Texas, all the right, title and interest of said city of Laredo, in and to the ferry privileges and ferries across the Rio Grande river, to have and to hold the same unto the said C. M. Macdonell, his heirs or assigns, for the term of five years, beginning on the 7th day of January, A. D. 1881, and ending on the 7th day of January, 1886.

"Conditioned, however, that the said C. M. Macdonell, his heirs or assigns, shall well and truly pay unto the city of Laredo the sum of twenty-five thousand two hundred and fifty dollars ($25,250), payable in instalments of five thousand and fifty dollars each ($5,050), beginning on the 7th day of January, 1881, and annually thereafter until the full sum of $25,250 is paid up and discharged. Conditioned, further, that said sums may be paid in Mexican coin, current in Laredo; provided said C. M. Macdonell shall receive the same coin in payment of all ferry dues.

"Conditioned, also, that said C. M. Macdonell, his heirs or assigns, shall be subject to and governed by the ordinances of the city of Laredo regulating ferries.

"It is further provided that said C. M. Macdonell, his heirs or assigns, within twelve months from the date hereof, shall establish and maintain a steam ferry boat for the ferriage of passengers and goods.

"LAREDO, January 6, 1881.

(Signed) "C. M. MACDONELL.

"PORFERIO BENAVIDES,

"Attest: Mayor of Laredo.

"R. VEDAURRI, City Sect'y. [L. S.]

"I hereby certify this to be a true copy of the original as appears in the Minutes, vol. 2d, pages 53 and 54.

"A. E. VEDAURRI,

"City Sec., *pro tem.*"

McLane & Atlee, for appellant, cited: City of Laredo *v.* Martin, 52 Tex., 548; Enfield T. B. Co. *v.* Hartford R. R. Co., 42 Am. Dec., 716; Cooley's Const. Lim., 281; Dillon on Mun. Corp., sec. 80; art. 642, R. S.; act of Legislature, approved January 28, 1848; Ogden *v.* Lund, 11 Tex., 688; Dunlap *v.* Yoakum, 18 Tex., 583; Butt *v.* Colbert, 24 Tex., 355; McGowen *v.* Stark, 9 Am. Dec., 715; Newberg Turnpike *v.* Miller, id., 274; Patrick *v.* Ruffners, 40 id., 740; Smith *v.* Harkins, 44 id., 83; 2 Wait's Actions & Defenses, p. 108, sec. 9; 3 id., p. 345, sec. 2; id., p. 347, sec. 4; id., p. 354, sec. 12.

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Showalter & Nicholson, for appellee, cited: 47 Tex., 620, Rule 19; Williams *v.* Davidson, 43 Tex., 36, 37; Charles River Bridge *v.* Warren Bridge, 11 Pet., 547, 548; Gale *v.* Kalamazoo, 9 Am. Rep., 85, 86, 87; Logan *v.* Pyne, 22 Am. Rep., 262, 263; Tuckahoe C. Co. *v.* Tuckahoe R. R. Co., 36 Am. Dec., pp. 378, 379; Cooley's Const. Lim. (5th ed.), pp. 251, 252, 253; Dillon's Mun. Corp. (3d ed.), vol. 1, secs. 89, 97, and note 2; sec. 362 and note 2; id., vol., 2, secs. 691, 692, 693.

STAYTON, ASSOCIATE JUSTICE.—The petition, in effect, alleges that about January 6, 1881, the city of Laredo was possessed of certain ferry franchises, ferries and lands upon which, under the terms of its charter, it was "authorized and empowered to establish ferries across the Rio Grande, and to fix the rates, fees and rents therefor," and that at said date it leased the same to the appellant for the period of five years, for which the appellant agreed to pay to the city as rent the sum of $25,250, payable in annual instalments.

It further alleges that, after said renting, the appellant entered upon the land and ferries which he had rented, and operated the same until about the 2d of February, 1882, at which time, it is alleged, the appellee entered upon the lands and ferries and ousted the appellant, and that from that time until the institution of the suit the appellee had continued to use the lands rented by the appellant from the city of Laredo, and also the ferry rights and privileges which he had acquired by his contract, whereby he was injured and damaged not only by the deprivation of the use of the lands and other rights which he claimed to have acquired by his contract with the city, but also by the diminution of the value of the franchise by the establishment and operation of ferries by the appellee.

There were several special demurrers filed to the petition, all of which went to the question of power in the city of Laredo to make the contract and confer the rights and franchise claimed by the appellant.

The third was: "Because the alleged contract made by the city of Laredo is an attempt upon the part of said city and plaintiff to create a monopoly in favor of plaintiff, and therefore void."

The court sustained this demurrer, and, the appellant failing to amend, the cause was dismissed.

There was a copy of the contract between the city of Laredo and the appellant attached to the petition, and therein referred to as an exhibit. This set forth more fully than did the petition the terms and conditions of the lease.

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On motion of appellee, the exhibit was detached from the petition upon the ground that it could not properly be made an exhibit under rule 19.

This and the action of the court in sustaining the demurrer and dismissing the case are the matters assigned as error.

It seems to have been considered that a paper which was evidence of a party's right could not properly be made an exhibit. This view we think erroneous.

If the paper made an exhibit evidences a contract which constitutes the plaintiff's cause of action in whole or in part, then it was proper to make it an exhibit, notwithstanding it may be necessary and proper to use it in evidence in the case. In such case, however, a petition should contain such averments as may be necessary in the cause, the object and purpose of the exhibit being to aid and explain the pleading.

The appellant's cause of action consisted of his right to the possession and use of the lands, ferries and franchise, which he claimed to have acquired by his contract with the city of Laredo, and the deprivation of that right by the appellee.

The first element in the cause of action, if acquired at all, was acquired through the contract which was made an exhibit.

The petition, in so far as it gave the terms of the contract between the city of Laredo and the appellant, gave them with substantial accuracy, but the averments were not so full as they ought to have been in regard to the conditions under which, by the terms of the contract, the appellant was to hold and operate the ferry or ferries. There was, however, no demurrer to the petition pointing out this defect. That the averments in this respect were not so full as they should have been was not a sufficient ground for excluding the exhibit, nor was that the ground upon which it was excluded. The exhibit was in aid, and explanatory, of material averments in the petition, and should not have been detached.

If it be true that the city of Laredo owned the lands, ferries and ferry franchise which the appellant claims to have acquired through his contract with the city, and that by its charter it was authorized and empowered to establish ferries across the Rio Grande and to fix the rates, fees and rents thereof, and this the petition alleges to be true, then it follows that there is but one question remaining, which is: Did these facts empower the city to make the contract with the appellant which is alleged to have been made? Is it a legal contract?

The power to establish ferries carries with it the power to do all such acts as may be necessary to construct permanent ferries; and

as their construction would be a useless thing unless they were operated, it also carries the power to operate them, either through the municipal corporation itself or through such other agencies as it may lawfully provide. The word "establish" means to make, erect or found permanently.

The power to fix the rates, fees and rents would seem to be broad enough to authorize the city to rent the ferry or ferries, which it has the power to establish, to some other person.

The power to fix the rate and fees is consistent with the power of the city to operate the ferries itself, or with power in the city to cause the ferries to be operated by some other person, they to collect for ferriage such rates or fees as the municipal government may prescribe; but the power to fix the *rents* is inconsistent with the idea that the city alone can operate the ferries.

"Rent" is defined to be "a certain profit in money, provisions, chattels or labor issuing out of lands and tenements in retribution for the use." Bouvier's Dictionary.

In its strict sense the word "rent" can only be applied to lands and tenements corporeal, and it would not apply to a franchise; but it is evident that the word as used in the petition, and in the charter of the city, which is set out in the brief of appellee correctly, is not used in such a restricted sense; but that as thus used it means that the city shall have the power to fix the sum which shall be paid not only for the use of the land on or contiguous to which ferries are established, but also the sum which shall be paid for the appurtenances to the ferry and the franchise of operating one or more.

The power to fix the *rents* would be an inoperative power if there is no power in the city to make a contract by which some person other than the city may operate the ferry or ferries, and thereby the occasion for fixing the *rents* arise.

No right to rents can exist unless the owner has placed the property from which the profit arises in the possession and use of another, who, as compensation for such use, agrees to pay rent.

The power to fix rents necessarily carries with it, when conferred upon an owner of property, even though the owner be a municipal corporation holding in trust for a public purpose, the power to make such a contract as will entitle to rents.

If the city of Laredo owned the land on which the ferry or ferries were established, and the boats and appurtenances to the same, as well as the franchise to operate the ferries, then it was clothed with the attributes of ownership and might do with such property what a private person might do, restricted only by the fact that as

a municipal corporation, in so far as it held the property as an agency of the state for a public purpose, it could not surrender its control and supervision of such property into the unrestricted management and control of some other person.

If, however, it reserved and exercises a control and supervision over the ferries through its own ordinances, as it would have done and was required and authorized to do for the public good, had it operated the ferries through its own servants, then it is not perceived that a contract made by the city by which some other person was authorized to operate the ferries, paying a sum to the city for the right to do so, would be illegal.

The contract between the city and the appellant expressly reserved such power to the city. The manner of operating, and rates and fees to be charged, can still be fixed by the city.

The petition does not state a case in which the city has attempted to grant to the appellant an exclusive right to operate ferries at any and every place within the water front alleged to be owned by the city, but it does state a case in which ferries in existence have been leased by the city to the appellant, which the city had the right to operate, or rent to another to be operated under its control, upon which the appellee is alleged to have trespassed.

No exclusive right to so operate ferries, even by the city itself, is alleged in the petition, but some of the matters set up as basis for damage would lead to the belief that in the opinion of the pleader such was the character of the right conferred upon the appellant by his contract with the city.

If the petition sought to assert an exclusive right to a ferry franchise within the limits of the water front of the grant which was made to the city, its averments are insufficient for that purpose. Whether the city would have the power to confer upon any person such exclusive franchise, to be exercised even under its own control and supervision for a limited period, would depend entirely upon the grant of power to the city, and no such exclusive right could be given by implication, unless necessary to the exercise of the power expressly granted. There is nothing in the petition to indicate the existence of such a power. Dillon on Mun. Corp., 114, 116, and authorities cited in notes.

A very essential element to constitute a monopoly is an exclusive right or privilege conferred on one person or association of persons by which they have the sole authority to pursue a given business.

The averments of the petition not showing that the contract in question conferred any such exclusive right, it is not necessary

further to inquire how far and what kind of exclusive privileges may be conferred without coming within the prohibition contained in sec. 26 of the Bill of Rights.

For the error of the court in sustaining the demurrer to the petition the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

[Opinion delivered January 18, 1884.]

JOHN A. GREATHOUSE v. EARLY GREATHOUSE.

(Case No. 4664.)

1. SET-OFF — PLEADING.— The separate, independent claim of a defendant against the plaintiff for a balance claimed to be due on partnership transactions between them alone may be set off against a suit by plaintiff for purchase money and to enforce a vendor's lien. Construing art. 645, Revised Statutes.
2. CASE DISTINGUISHED.— This case distinguished from Allbright *v.* Aldrich, 2 Tex., 166; Hamilton *v.* Van Hook, 26 Tex., 302, and other cases which seemingly announce a different rule; the difference being that in those cases one or more additional obligors were bound with the plaintiff in the counterclaim attempted to be set up by defendant.

APPEAL from Bell. Tried below before the Hon. B. W. Rimes.

Suit by appellee Early Greathouse against John A. Greathouse, on a purchase money note for $275, given for a tract of land, and to enforce the vendor's lien thereon. The defendant set up as an answer a counterclaim consisting of a balance largely in excess of the plaintiff's claim, growing out of a partnership alleged by defendant to have existed between himself and the plaintiff from 1876 to 1879 in the business of ginning cotton for the public. The answer set forth the items of account between them in the conduct of the business, from which the balance charged against the plaintiff was derived, and that the partnership was dissolved in 1879. The note sued on was dated and due June 10, 1873.

The plaintiff excepted to the answer and moved to strike it out; the exceptions were made on the grounds following:

1st. Because defendant attempted to set up a counterclaim to plaintiff's cause of action, a matter of unliquidated damages, against a certain and liquidated demand.

2d. Because he attempted to set up a joint debt as a counterclaim against the demand of plaintiff, which was a separate debt.