

"The denial of explaining a contract by verbal testimony does not prevent parties to a written contract from proving that either contemporaneously or as a preliminary measure they had entered into a distinct oral agreement on some collateral matter. Still less does it exclude evidence of an oral agreement which constitutes a condition on which the performance of the written agreement is to depend."

Or, as another writer expresses it:

"The first question to determine in construing a document is whether there is a document to construe. Hence it is always admissible to show by parol that a document was conditioned on an event that never occurred."

Thus, in the case before you, if you shall find from the testimony that Olmstead signed the contract sued upon with the full, definite understanding by both Michels and himself that he, Olmstead, was not to be liable personally in the event no corporation was formed, he is not bound by the contract, and you will so find by your verdict. With the \$46,000 contract which was to be carried out by Olmstead himself in case of the failure of the 2,000-bushel house of which mention was made, you have nothing to do, the plaintiff not having sued thereon.

In case you find the issues for plaintiff, you will state the amount allowed him. If you find the issues for the defendant, you will so state in your verdict.

BEAULIEU & ALLEN *v.* CITY OF PLEASANT HILL.

(Circuit Court, W. D. Missouri. October Term, 1882.)

1. MANDAMUS TO COMPEL PAYMENT OF DEBT OF MUNICIPAL CORPORATION—RETURN.

The return to an alternative writ of *mandamus*, issued against a city to enforce the payment of a judgment, must show that the city has exhausted its power in the levy and collection of taxes under power conferred upon it by its charter and its amendments, and that the revenues so collected have been properly applied.

2. MUNICIPAL CORPORATION—CREDITOR TAKING BOND—REMEDY.

A creditor taking a bond of a municipal corporation whose taxing power at the time of the issuing of the bond was and still is limited, and providing that the bond and interest shall be paid out of the yearly revenue of the city, cannot insist on remedies beyond the limitation, but may insist on the full and proper exercise of such power within the limitation.

Mr. Cockrell, for relators.

Whitsett & Comingo, for respondent.

KREKEL, D. J. Relators, Beaulieu & Allen, recovered judgment in this court against respondent, the city of Pleasant Hill, in 1881, for the sum of \$4,620. Failing to obtain satisfaction, they sued out an alternative writ of *mandamus*. The bonds, upon the coupons whereof the judgment was obtained, were issued by the city of Pleasant Hill to consolidate the floating debt of the city, under authority of an act of the legislature of Missouri amending its charter, passed in 1871. The bonds on their face recite that they were issued pursuant to section 12 of the amending act, and an ordinance of the city of Pleasant Hill providing for the payment of the floating debt of the city. The twelfth section of the amendment, providing for the consolidation of the floating debt and authorizing the issuing of bonds, in reference to them says they "shall bear interest at the rate of 10 per cent. per annum, payable semi-annually at the office of the city treasurer of the said city, which said interest shall be provided for and paid out of the yearly revenue of said city, and the principal of said bond may be paid out of the yearly revenue of said city."

The original charter of the city of Pleasant Hill, passed in 1859, provided in section 8 for the levy of taxes on real and personal property not to exceed one-fourth of 1 per cent. This section was amended in 1868, providing that the members of the council "shall have power by ordinance to levy and collect a tax not exceeding one dollar in any one year on all male inhabitants of the city of Pleasant Hill of the age of 21 years, and not over 50 years; also to levy and collect taxes on all real estate and personal property in said city subject to taxation by law not exceeding 1 per cent. on the assessed value thereof." This power, with its limitation regarding the levy and collection of taxes, was in force when the charter amendment of 1871 was passed. It did not in any way interfere with the limitation, but extended the power of taxation to the licensing and taxing of merchants, retailers, taverns, billiard tables, pigeon-hole tables, bagatelle tables, ten-pin alleys, and other gambling devices, hackney carriages, wagons, carts, drays, pawnbrokers, hawkers, peddlers, restaurants, eating-houses, livery stables, theatrical performances, circuses, and shows of whatever kind, singing concerts, and other amusements in said city; to levy and collect tax on dogs in said city; to tax, license, and regulate dram-shops and tippling-houses and saloons; to tax auctioneers; to impose fines, forfeitures, and penalties for breaches of city ordinances.

When the court issued its mandate directing the city council of Pleasant Hill to levy a tax to pay relators' judgment, or show cause

why it refused so to do, any showing of cause for refusal, if based upon the want of taxing power, should show that all taxes authorized by law had been levied, collected, and properly applied. Instead of such showing, the amended return made is that 1 per cent. has been assessed and collected on all real and personal property of the city, and that the amount thereof, \$3,500, has been expended in city expenses, except about \$1,500, which have been used in buying up judgments against the city; that the assessed value of the real and personal estate and merchandise for 1882 is \$409,000. The remaining part of the return consists of statements of the large indebtedness of the city, and its inability to pay dollar for dollar; that the city has sought to compromise its indebtedness, and offered to do so with relator without success.

The city of Pleasant Hill, aside from the right to tax all property made taxable by law, has power to levy taxes on persons and various occupations, collect fines and impose penalties, as pointed out in the quotations from its charter, which power to tax, taking the return to be true, it has not exercised. It is not the proper answer to the mandate of a court to show that a partial tax has been levied and the proceeds thereof expended in city expenses and the purchasing of judgments. The court is entitled to know what are the full resources of the city, and whether they have been called into requisition, and how the revenues are expended. In the language of the twelfth section of the amended charter of 1871 the interest on the bonds issued under it "shall be provided for and paid out of the yearly revenue of said city," so that none of the revenue of the city can be used and employed for other than ordinary purposes, so long as creditors have a claim thereon. The purposes for which the ordinary revenues may be applied are pointed out in the law, and they must be applied accordingly.

On the other hand, it would seem that a creditor taking a bond of a municipal corporation whose taxing power at the time of the issuing of the bond was and still is limited, cannot insist on remedies beyond the limitation, but, as stated, may insist on the full and proper exercise of such powers within the limitation. This construction does not conflict with the provision of the execution law of Missouri, giving authority to courts to compel municipal corporations by *mandamus* to levy a tax to pay unsatisfied judgments. There is application for this provision in cases where no limitations as to taxation exist, as well as within the limitations, as in this case. The power of taxation is a legislative power, and cannot be inferred. Except in cases where

a denial would work injustice, as authorizing the creation of liabilities, implied power may be inferred to raise the means for their satisfaction. In the case under consideration the city of Pleasant Hill had a floating debt, for the consolidation and settlement of which by way of bonds the legislature sought to provide. The creditor had choice between the evidence of debt possessed of and the new instruments provided. In the instance before us the creditors preferred the bonds, and took them under the limitations the law provides. It is no hardship to hold them to their choice, which may be presumed to have been wisely made. These views find support in the *Macon Co. Case*, 99 U. S. 589.

The case under consideration differs from *Britton v. Platte City*, 2 Dill. in this: that there is a provision in the Pleasant Hill act which requires the interest on the bonds to be paid out of the yearly revenues of the city. It is this provision which takes it out of the statutes of Missouri providing for payment of municipal debts and punishing neglects, and out of the rulings in the *Louisiana Case*, 103 U. S. 289, and the *Butz Case*, 8 Wall. 575.

The conclusions arrived at are that the return to the alternative writ of *mandamus* is insufficient, in its failing to show that the city council of Pleasant Hill has exhausted its power in the levy and collection of taxes under power conferred upon it by the charter of the city and its amendments, and by its failing to show the proper application of the revenues collected. Unless the return is amended in conformity to the views expressed, a peremptory writ of *mandamns* will issue directing such an amount of the revenue of the city to be levied, collected, and paid to relator as the court shall deem not oppressive.

McCrary, C. J., concurs.

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MOORES v. LOUISVILLE UNDERWRITERS.

(Circuit Court, W. D. Tennessee. November 23, 1882.)

1. MARINE INSURANCE—SEAWORTHINESS.

If the evidence in the case establish the fact of seaworthiness, there is, where a disaster occurs without any discernible cause, a presumption of fact that the loss was occasioned by some of the perils insured against.

2. SAME—EVIDENCE—BURDEN OF PROOF—JURY.

When a disaster happens in fair weather and without apparent peril of navigation to cause it, there is, in the absence of other proof sufficient to countervail it, a presumption of the fact that the vessel was unseaworthy at the beginning of the voyage, but the assured may show by proof that the vessel was in fact seaworthy, and there then arises a presumption of loss by some peril of navigation covered by the policy, unless the insurer can show that it was otherwise caused by some danger not within the policy. The technical difficulties of the burden of proof are diminished in such cases by observing the distinction between that burden as a matter of pleading and the sometimes shifting exigencies of the testimony requiring further proof from the one side or the other. But in all these cases there is no fixed presumption of law or fact, but only a matter of inference by a jury from the particular facts of the case, and they are always to determine the issue according to the peculiar circumstances of each case.

3. SAME—POLICY—ADVENTURES—PERILS OF THE RIVER—SELF-DISTRIBUTING POLICY.

Where the form of the policy is one for general use in the insurer's business, the word "adventures," associated with the words "perils of the lakes, seas, rivers, canals, *railroads*, fires, and jettisons," cannot be permitted to enlarge the phrase "perils of the river." It is a self-distributing policy, to be construed in each case with sole reference to the subject-matter of the risk in that case, whether of lake, sea, river, canal, or railroad.

4. SAME—PERILS OF SEA OR RIVER.

While it is settled that the phrase "perils of the sea" does not cover all losses that happen on the sea, there is a principle of construction which gives it as extended a meaning as can be reasonably done. All navigation is perilous, and the rule that the insurer is liable only for losses occurring from extraordinary causes, means nothing more than that a seaworthy vessel will endure all ordinary perils; it does not mean that a loss for which the insurer is liable may not happen to a seaworthy vessel from the ordinary action of the sea, for it may, and the term is only used to describe those abnormal circumstances of dangerous navigation under which the loss occurs, be they what they may. Because the "peril" cannot be located, it does not follow there was none.

5. SAME—SEAWORTHINESS.

The best and most skillful form of construction is not required to meet the warranty of seaworthiness, but only a sufficient construction for vessels of the kind insured and the service in which they are engaged.

6. SAME—RAFT.

A raft is not, in the ordinary contemplation of the maritime law, a *vessel*; but where it is insured by a "cargo policy," and is in charge of a tow-boat, the principles of law governing a contract of insurance are applicable to it.