

tiffs must go and take care of the goods, their failure to do so does not relieve the railroad company for the injury sustained by the delay. The railroad company could have opened out these goods and taken care of them, for the reason that it was the custodian of them; they were in its possession for transportation and delivery at Napoleon, and it could not compel the plaintiffs to take the goods until they were delivered at Napoleon, and if it let them get damaged by remaining longer in the water, it did it at the risk of having to pay more damages than if it had taken them out earlier after the flood. It was the duty of the railroad company, if it wanted to relieve itself from liability, to have taken these goods out as early as possible, and to save as many as it could. It was not the duty of the plaintiffs to take charge of them. They were locked up in the baggage-room, and plaintiffs had no business to take possession of them, and could not. The burden is upon the railroad company to show that it could not, under the circumstances, comply with the contract by reason of the great flood. If it has succeeded in satisfying you that it could not perform this contract, that will relieve it from liability for injuries to these goods; if it has not done so, then plaintiffs are entitled to the damages sustained to the goods. If you find that the defendant did discharge its duty, your verdict will be for the defendant. If you find otherwise, you will proceed to determine the amount of the injury which the plaintiffs have sustained by reason of the failure to perform this contract on behalf of the railroad company. The measure of recovery is the loss which the parties sustained by the breach of the contract. The rule is to restore to them whatever damages they have sustained. You are to judge of the value of the goods. A part of the goods were sold; whatever was realized from the sale of the goods is to be deducted from the general value thereof, and the measure of damages would be the balance after deducting the amount realized from the total damages sustained by reason of the goods having been wet.

Verdict for the plaintiffs, and motion for new trial overruled.

SCHEU *v.* GRAND LODGE, OHIO DIVISION, INDEPENDENT FORESTERS.

(Circuit Court, N. D. Ohio, E. D. April Term, 1883.)

BENEFICIAL SOCIETY—SUIT TO RECOVER BENEFIT—SUSPENDING MEMBER—FAILURE TO PAY DUES.

S. was a member of a subordinate lodge of defendant, and thereby, by the constitution and by-laws, became a member of the grand lodge. The death assessments were required to be collected by the subordinate lodge and forwarded to the grand lodge, the subordinate lodge being compelled to account for these assessments and pay them to the grand lodge, unless the member had

been expelled or suspended. The assessment of S. was paid by the subordinate lodge to the grand lodge, but at the time of his death had not been paid by him to the subordinate lodge. The by laws provided that "any member failing to pay his assessment within 30 days should be suspended," and that notice should be given to the grand secretary of the grand lodge. On the death of S. his widow brought suit for the amount due him from the grand lodge. *Held*, that the mere non-payment of the assessment did not of itself operate as a suspension, and that the act of the secretary in marking S.'s account as "suspended" was not sufficient, as such suspension must be made by some affirmative act of the lodge, and by payment of the assessment for him to the grand lodge it had waived his suspension, and as the grand lodge received the assessment a recovery could be had in a suit against it.

Tried to the court and finding for the plaintiff, and motion for new trial.

Mr. Wilcox, for plaintiff.

Henderson & Kline, for defendant.

WELKER, J. The plaintiff is the wife and heir at law of Albert Scheu, who died on the second day of April, 1880. The intestate, on the sixteenth day of December, 1879, became a member of Sahbeie Lodge, a subordinate lodge of the defendant, and thereby, by the constitution and by-laws, became a member of the defendant lodge. The suit is to recover the sum of \$1,000, provided by the by-laws to be paid the widow or heirs of a member on his death. The defendant claims that Scheu, at the time of his death, was not such a member of the subordinate or grand lodge as entitled his widow to recover said amount, having before that time been suspended by the subordinate lodge for non-payment of assessment. It appeared in the evidence that before the death of the intestate an assessment of one dollar had been made on all the members of the defendant lodge, for the purpose of paying the amount which any member's representatives should be entitled to receive on his death, being what is termed in the by-laws "the widows and orphan's benefit fund." This death assessment was required to be collected by the subordinate lodge, and immediately forwarded to the treasurer of the grand lodge. The subordinate lodge was required to account for these assessments and pay to the grand lodge the amount so assessed, unless members thus assessed had been expelled or suspended by the subordinate lodge, and so not members of the grand lodge. The intestate had not paid the death assessment so made upon him before his death; but the subordinate lodge had paid it to the grand lodge; and as to the defendant, the grand lodge, the assessment had been paid before his death. The evidence showed that on the books of the subordinate lodge, where accounts of dues and assessments were kept, black lines were drawn around the intestate's account, and marked "suspended" for non-payment of assessment. When that was done by the officer in charge of the books was left uncertain. There was no record of the subordinate lodge, showing any action of the lodge in reference to the suspension or expulsion of the intestate, besides what appears as before stated. No report was made or notice given to the grand lodge of

suspension of the intestate for such non-payment. In the by-laws of the lodge it is provided that "any member failing to pay such assessment within 30 days shall be suspended from his lodge." And it is also provided that notice of such suspension shall be at once given to the grand secretary of the grand lodge. It also appears that the intestate, after the time for the payment of the assessment had elapsed, had notice that he was in arrears, by objection in open lodge to his taking part in the business before it on account of the non-payment of the assessment.

If the intestate was in fact suspended by the subordinate lodge for this non-payment of the assessment at the time of his death, the plaintiff is not entitled to recover. The mere non-payment of the assessment does not of itself operate as such suspension; nor does the clerical act of the secretary in so marking the account make such suspension. The suspension must be made by some affirmative action of the lodge, and no such action appears to have been taken by the subordinate lodge. Such suspension may be waived by the lodge either expressly, or by failure to act. And it may itself advance the payment to the grand lodge, which appears to have been the fact in this case. The defendant lodge, which is alone liable to pay the plaintiff, had in fact received the amount of the assessment, and thereby had been paid the consideration for its obligation to pay said sum on the death of the intestate.

The motion is, therefore, overruled, and judgment for the plaintiff.

CALIFORNIA DRY-DOCK Co. v. ARMSTRONG and others.

(Circuit Court, D. California. February 12, 1883.)

1. GENERAL RULE OF DAMAGES.

The general rule is that no damages can be recovered until they shall have actually accrued; and that an action cannot be maintained on a mere liability to a third party to which a plaintiff has been subjected by the act of the defendant. The plaintiff, in such a case, must allege and prove that he has incurred actual damage, by showing the payment or other satisfaction of such liability.

2. LIABILITY OF STRANGER COMMITTING WASTE.

A stranger committing waste upon premises leased, or held by a particular estate, is liable to the tenant for the injury to the possession, and to the landlord, or reversioner, for the injury to the freehold or inheritance. The right of each is distinct from that of the other, and satisfaction made to the one is no bar to an action brought by the other.

3. LIABILITY OF TENANT FOR WASTE, AND HIS RIGHTS AGAINST TRESPASSER.

The tenant is answerable to the landlord, or reversioner, for waste done by a stranger. He has his remedy over against the stranger, but the tenant's recovery against the stranger for injuries to the freehold, or reversion, is dependent on his first having satisfied the landlord's claim by payment, or repair of the injured premises; and, in such case, the stranger is liable only for the payment, or expense necessarily incurred.

Wood v. Griffin, 46 N. H. 231, approved and followed.