apparent that its execution must be regarded as part and parcel of the execution of the trust expressed therein.

We are, therefore, of the opinion that the railroad company was authorized to retain out of the proceeds of the sale of the lands embraced in the mortgage its reasonable expenditures incurred in making such sales. The bill does not aver that the expenditures of the railroad company were unnecessary or unreasonable, and it must, therefore, be considered as only raising the question whether the railroad company was entitled to make any charge for selling the land, and to deduct the same from the proceeds of the sales.

The bill further alleges that a large sum has been paid by the company, out of the proceeds of sales of land, for taxes upon the same. As legal taxes were liens upon the land prior and paramount to any claim under the mortgage, it is difficult to see upon what ground their payment can be regarded as an expenditure outside of the trust.

The railroad company, by the terms of the mortgage, was to be suffered and permitted to possess, manage, use, and enjoy the lands in the same manner and with the same effect as if the deed of trust and mortgage had not been made, except as in the instrument otherwise provided; and it was, as we have already seen, to be allowed to manage the matter of selling the lands. The control, management, and sale of the lands by the railroad company was, therefore, provided for as part of the contract and of the trust. The payment of the taxes accruing from year to year was plainly a part of the proper management of the estate. If it had been neglected, the whole property would have been lost, and the bondholders would have been the chief sufferers.

If the land had been sold subject to the taxes, the price received for it would have been correspondingly less, and therefore no damage has resulted to any of the parties interested by reason of their payment. We are, therefore, clearly of the opinion that the payment of the taxes was properly within the duties devolved upon the company in the management and sale of the lands.

If we were in doubt as to either of the questions raised by the demurrer, the fact that the parties themselves who made the contract at once adopted the construction above suggested, and have for many years acquiesced in and acted upon it, would lead us, without hesitation, to resolve our doubts against the claims of the complainants.

The trustees, acting upon the theory that the company was entitled to retain the expenses in question, including sums paid for taxes, have from time to time received the net proceeds of sales ascertained upon that basis, and have voluntarily executed releases in accordance with the terms of the mortgage. It is not necessary to determine whether such action, continued for so long a period, is an absolute estoppel, which deprives them of the privilege of now being heard to assert that this construction was erroneous. It is enough to say

that the construction which the parties themselves placed upon their own contract, and upon which they have so long acted, is the one which the court ought to adopt.

The demurrer to the bill is sustained.

FOSTER, J., concurs.

LUNT and others *v.* BOSTON MARINE INS. CO.

(*Circuit Court, S. D. New York.* June 20, 1883.)

MARINE INSURANCE—REPRESENTATIONS—REPAIRS TO VESSEL—SEAWORTHINESS—BURDEN OF PROOF.

Where a vessel had put into Shelburne, Nova Scotia, leaking and in distress, and repairs were recommended after a survey, and the vessel sailed for Yarmouth for repairs, and a memorandum of insurance was effected upon the cargo before her arrival at Yarmouth, the application for the insurance containing a statement that the vessel was to be repaired at Yarmouth, *held*, in an action on the contract of insurance, that the requirement was only that such repairs as were necessary should be made, and if none were necessary none need be made; and that, although in ordinary cases the burden of proof in cases of defense of unseaworthiness of the vessel rests upon the defendant, in this case, with the statement that the vessel was to be repaired at Yarmouth, in the application, the burden rested upon the plaintiff.

Lunt v. *Boston Marine Ins. Co.* 6 FED. REP. 562, followed.

Motion for New Trial.

Welcome R. Beebe, for plaintiffs.

Robert D. Benedict and *Enos N. Taft*, for defendant.

WHEELER, J. This suit is brought upon a contract of marine insurance on a cargo of potatoes on board the schooner Lacon from Yarmouth, Nova Scotia, to New York. It was tried, and there was a verdict for the plaintiffs, which was set aside on motion of the defendant. 6 FED. REP. 562. It has now been again tried with a like result, and been heard upon a similar motion. The vessel had put into Shelburne, Nova Scotia, leaking and in distress. The master had made a protest against her to the consular agent, stating her condition and asking for a survey, which was had, recommending repairs. She sailed to Yarmouth for repairs. The insurance was effected before her arrival there, on an application by the owners, signed by and on behalf of them, in due form. A short memorandum of the insurance was made and delivered to the insured, and no policy was written out. The application was produced on the trial, and contained the statement that the vessel was to be repaired at Yarmouth. The plaintiffs' evidence tended to show that this statement was not in the application when made, but was inserted afterwards, without their knowledge or consent; and that the vessel was examined at Yarmouth and was not leaking, and did not need any