

will also make provisions in their policies, by virtue of which insurance on property in transit will have a limited character.

In the absence of any contract on the subject, if the insured owner accepts payment from the insurers, they "may use the name of the assured in an action to obtain redress from the carrier, whose failure of duty caused the loss." The right rests upon "the doctrine of subrogation, dependent, not all upon privity of contract, but worked out through the right of the creditor or owner." The suit cannot be in the name of the insurers. *Hall v. Railroad Cos.* 13 Wall. 367; *Hart v. Railroad Corp.* 13 Mete. 99; *Mercantile Mut. Ins. Co. v. Calebs*, 20 N. Y. 173; *Conn. Mut. Life Ins. Co. v. Railroad Co.* 25 Conn. 265. By the contract in question the owner agrees that, as between him and the carrier, the latter, when he has paid for the loss, may have the benefit of the insurance. This contract will probably interfere with the benefit which the insurer would otherwise obtain by virtue of being subrogated to the rights of the owner, or of having an equitable assignment of the owner's interest in the policy; but the mere fact, in the absence of fraud, that the insurers may not occupy the same position which they would have had if the provision had not been inserted, is not sufficient to justify an opinion that the provision is unreasonable.

The amount of the premium and the amount received by the plaintiffs from the insurance are not given in the agreed statement. I am inclined to the opinion that the owner is only bound to account to the carrier for the net avails of the insurance, and if those avails were less than the value of the goods, a balance would still be due from the defendant. But as the finding simply says that the plaintiffs received from the insurers the full value of the flour, I cannot assume that the net avails were not a full indemnity for the loss.

The defendant is liable for the amount of the loss, deducting the sum which the plaintiff has already received by way of indemnity, and as the entire amount of the loss has been paid, the plaintiff is entitled, under the contract, to receive nothing more.

Judgment is to be entered for the defendant.

SHELLEY v. ST. CHARLES COUNTY.¹

(Circuit Court, E. D. Missouri. October 5, 1883.)

1. CONSTITUTIONAL LAW—ARTICLE 14, § 11, OF THE CONSTITUTION OF MISSOURI—SWAMP-LAND ACTS OF 1869 AND 1870.

Where a statute authorized a county to improve swamp lands situated within its limits, upon being petitioned by a majority in interest of the owners of such lands to do so, and upon being shown by such owners that the improve-

¹ Reported by Benj. F. Rex, Esq., of the St. Louis bar.

ment is practicable and their declaring themselves willing to pay their just proportion of the expenses; and, provided that the benefit to the county should be estimated and be paid by the county, and that funds to pay the balance of the expenses should be raised by the county by issuing county bonds, and that funds to pay the bonds should be raised by taxes assessed exclusively on the lands benefited: *held*, that the statute was valid and did not authorize the county "to loan its credit to any company, association, or corporation" within the meaning of the provision of article 14, § 11, of the constitution of Missouri.

2. MUNICIPAL BONDS—PRESUMPTION IN FAVOR OF LEGALITY.

Semble, that where the constitutionality of a law under which county bonds have been issued is doubtful, federal courts will, in advance of any consideration of the subject by the supreme court of the United States, resolve all doubts in favor of the validity of the act.

On Demurrer to Petition.

This is a suit brought to recover judgment upon bonds issued by the defendant under the provisions of certain statutes mentioned in the opinion, authorizing the county to issue such obligations to facilitate the reclamation of swamp lands, and to be known as "land improvement bonds."

E. B. Sherzer, for plaintiff.

W. A. Alexander and Dyer, Lee & Ellis, for defendant.

McCRARY, J. The demurrer raises the question of the constitutionality of the act of the general assembly of Missouri of March 3, 1869, as amended by that of March 14, 1870, under which the bonds sued on were issued. It is said that this legislation is in violation of the provision of article 14, § 11, of the constitution of 1865, which was in force when the acts above mentioned were passed, and which is as follows:

"The general assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto."

The act of 1869 provided for the reclamation and protection of swamp and overflowed land by means of drainage, diking, or otherwise. The expense of such improvement, it was provided, should be paid by an assessment upon the county at large, to the extent of the benefits accruing to the whole county by reason of the improvement; the amount to be so assessed to be determined by the county commissioners after investigation, and the remainder by an assessment against the individuals benefited thereby, in proportion to the number of acres reclaimed or improved for them respectively. The act of 1870 provided for the issue of bonds, in lieu of immediate taxation, as the mode of raising the funds necessary for paying the expense of such improvement; and, for the raising of funds to pay such bonds, principal and interest, by taxes assessed exclusively on the lands improved, benefited, or protected by such improvements, except such portion as may be deemed by the commissioners to be justly chargeable to the county at large, according to the provisions of said act of 1869, which portion the county is to pay out of money collected for general purposes.

An examination of these statutes shows that they do not attempt to authorize a county either to become a stockholder in, or to loan its credit to, any company, association, or corporation. The owners of the swamp lands to be reclaimed, and who join in a petition to the county authorities for the purpose of invoking action to that end, and agreeing to pay their just proportion of the expense, can scarcely be regarded as an "association," within the meaning of the constitutional provision above quoted. They are clearly not a body of which the county could by possibility become a stockholder. They are not incorporated, nor in any manner organized or associated together, so as to be capable of issuing stock. But it is said they constitute an association to which the county has attempted to loan its credit. Not so. The county has made no loan of credit to any one. It has issued its own bonds, agreeing to raise money for their liquidation by a levy of taxes upon certain property. The bonds do not constitute a loan of credit to any association of swamp owners. By the statute the county contracts for the improvement, paying therefor with the bonds. The county does not engage in a purely private enterprise, nor does it undertake to aid a corporation, company, or association in carrying forward such an enterprise. It is the common case of a statute authorizing the construction of drains or of levees in order to protect or relieve swamp, marshes, and other low lands, and for the payment of the expenses thereof by special assessments.

Such statutes are very generally held valid, sometimes upon the ground that such improvements are important to the public wealth, sometimes as a proper public regulation, and sometimes upon the ground that the general public are interested in reclaiming such lands for use, and thus adding to the value of the taxable property of the county or state. It is competent for the legislature to require the owners of property to be permitted to make the improvements, and to enact that, in case of their default, the county may do so at their expense, and charge the sum to the property benefited through a special assessment of taxes thereon; and there seems to be no reason to doubt that the legislature may provide for an apportionment of the expense between the county at large and the owners of the property especially benefited. The statutes under consideration here authorize the county authorities to determine what proportion of the expense shall be borne by the county at large, and what by the property reclaimed. The general principles by which we are guided in holding this legislation to be valid and constitutional, will be found set forth in *Cooley, Tax'n, c. 20*, under the head of "Taxation by Special Assessment." We are clearly of the opinion that the legislature of Missouri, in enacting the statutes in question, was acting within the principles there enunciated, and not attempting, in violation of the constitution, to authorize a loan of county credit to a corporation, company, or association.

It is proper to add that, if the question were doubtful, this court

would feel constrained, especially when dealing with it in advance of any consideration of the subject by the supreme court of the United States, to resolve all doubts in favor of the validity of the act in question. *Gilechrist v. Little Rock*, 1 Dill. 261.

Demurrer to petition overruled.

BROWN *v.* EVANS.¹

(Circuit Court, D. Nevada. February 5, 1883.)

1. EXEMPLARY DAMAGES.

In vindictive actions, such as assault and battery, slander, libel, seduction, etc., where fraud, malice, cruelty, oppression, brutality, or wantonness is shown, on the part of the defendant, exemplary damages may be recovered.

2. WEALTH OF DEFENDANT.

In the above class of actions evidence may be given of defendant's wealth.

3. CRIMINAL LIABILITY OF DEFENDANT.

Exemplary damages may be recovered in a civil action, although the act complained of may be a crime or misdemeanor, and subject the defendant to criminal prosecution therefor.

4. GOOD CHARACTER.

In actions for damages for assault and battery, evidence of defendant's former good character is not admissible.

5. NEW TRIAL—CUMULATIVE EVIDENCE.

A new trial will not be granted on the ground of newly-discovered evidence, when such evidence is merely cumulative, or is upon unimportant matters in the case, or where, in the opinion of the court, such evidence, if produced, would not affect the action or verdict of a jury.

6. EXCESSIVE DAMAGES.

A new trial will not be granted on the ground of excessive damages, in an action of personal tort, unless it appear that the jury were influenced by passion, prejudice, corruption, or wilful disregard of law, in assessing such damages.

This is an action brought by plaintiff to recover from defendant the sum of \$20,000 damages alleged to have been sustained by plaintiff by reason of an assault and battery committed by defendant upon plaintiff on or about the thirtieth day of March, A. D. 1881, at the town of Reno, county of Washoe, state of Nevada. The cause was duly tried in this court at the November term thereof, 1882; Hon. Lorenzo SAWYER, circuit judge, and Hon. G. M. SABIN, district judge, presiding. The jury returned a verdict for plaintiff in the sum of \$8,150.87, and judgment was thereupon duly entered for said sum and costs in favor of plaintiff. Thereafter counsel for defendant duly moved the court to set aside said verdict and judgment, and to grant a new trial herein. The motion was argued orally by counsel for the respective parties before SABIN, J., presiding, and was submitted on briefs filed. The grounds of defendant's motion for a new trial are stated in the

¹From 8th Sawyer.