

in its terms, and doubted whether the receiver could afford to pay the prices then demanded; but at the same time admitting that the Peoria & Pekin Company was the owner of the property, and that it had the right to prescribe on what terms the receiver should do his railroad business between Pekin and Peoria, and in the latter city, stated that if the receiver would not accept the terms he could not be permitted to have the use of the property of the Peoria & Pekin Union Company, and accordingly the receiver ceased to do business between Pekin and Peoria, and in the latter city, and the only question now before the court is whether during this *interim*, and from the time this claim was made on the receiver up to the time when he quit doing business with Peoria, he should pay the price demanded, according to the terms arranged by the Peoria & Pekin Union Company and the other railroads; and I do not think that, under the circumstances, is a true test, and I feel inclined to let the matter stand upon the basis which had existed before this claim was made upon the receiver, and to consider that, having paid in conformity with the previous arrangement which had been made all that was due, this claim should not be paid to the Peoria & Pekin Union Railway Company.

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SEAMAN, as Survivor, etc., v. SLATER and others.

(Circuit Court, S. D. New York. November 16, 1883.)

1. PARTIES—MISJOINDER—DEATH OF PARTY UNDER LIABILITY WITH OTHERS.

Where several persons have incurred a liability arising from the same transaction, the representatives of one of them who has died cannot, in an action at law, be joined with the survivors. If the liability is merely joint, the survivors only remain liable at law; if several, as well as joint, the action, if prosecuted against both the representatives of the deceased person and the survivor, must proceed against them separately.

2. SAME—ORDER FOR SEVERANCE.

The court may grant an order for the severance of an action which should have been brought separately against defendants who have been improperly joined.

At Law.

*Man & Parsons*, for complainant.

*Franklin Bartlett*, for defendant Slater.

*Marsh, Wilson & Wallis*, for defendant Fisher.

WALLACE, J. Whether the deceased defendant was a partner or a tenant in common with the surviving defendant the action cannot be revived against the representatives of the decedent so as to proceed against them and the survivor jointly, because there cannot be a judgment against one *de bonis testatoris* and against the other *de bonis propriis*. If, as would seem to be the case, the liability of the original defendants upon the cause of action alleged in the complaint is a

joint and not a joint and several liability, the remedy of plaintiff, as against the representatives of the decedent, is in equity, after his remedy shall have been exhausted at law against the survivor. If the liability is several as well as joint, inasmuch as the cause of action survives, a severance of the action may be allowed, so that it can proceed separately against the survivor and the representatives of the decedent. The question whether plaintiff can proceed separately against both the survivor and the representatives of the decedent is one of too much importance to be decided upon a motion which relates to the procedure merely, when there can be no review. The representatives of the deceased defendant can avail themselves, by way of defense of the suit against them, of any objection to the right of the plaintiff to maintain such suit, and the questions presented can be more appropriately decided then.

An order for a severance, and for bringing in the representatives of the deceased defendant accordingly, may be entered if plaintiff elects to adopt that course.

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### LYNCH and others *v.* MERCANTILE TRUST Co.

(*Circuit Court, D. Minnesota.* November 22, 1883.)

#### 1. FRAUDULENT MISREPRESENTATIONS—RECKLESS STATEMENTS.

A person is not at liberty to make positive assertions about facts material to a transaction unless he knows them to be true; and if a statement so made is in fact false, the assertor cannot relieve himself from the imputation of fraud by pleading ignorance, but must respond in damages to any one who has sustained loss by acting in reasonable reliance upon such assertion.

#### 2. SAME—WHAT INQUIRIES MUST BE MADE.

The purchaser of land is entitled to rely upon the vendor's assertions about the boundaries, and is not obliged to consult the recorded plat.

#### 3. SAME—PRINCIPAL AND AGENT—IMPUTED FRAUD.

A principal is liable for the reckless or otherwise fraudulent misrepresentations of his agent.

#### 4. SAME—VENDOR CANNOT REPUDIATE CONTRACT.

A purchaser is entitled to the benefit of his contract, and the vendor cannot purge himself of fraud in the transaction by offering to rescind, but is liable for the difference between the value of the property actually sold and the value of the property as represented.

A stipulation waiving a jury is filed, and the case is tried by the court. This suit is brought to recover damages for fraudulent representations, alleged to be made by the defendant's agent to one of the plaintiffs, upon the sale of a certain tract of land called "E. Murphy's reserved block," in the city of Minneapolis, owned by defendant, and sold for \$15,000. The plaintiffs, being desirous of purchasing a house and lot for a hospital, applied, through Alicia Lynch, to Brown & Hamlin, real estate brokers and agents in Minneapolis. They had for sale, belonging to the defendant, "E. Murphy's reserved block," so