

to all of the defendants without reference to what the proof might be upon the question of indebtedness. Test it in another way. Suppose on the trial the plaintiffs prove that they are creditors of the construction company and there stop. Would there be a judgment against that company for the amount so proved or a general decree in favor of all the defendants? It is thought that under the allegations of this complaint the latter would be the inevitable result. In *Barney v. Latham*, 103 U. S. 205, on the contrary, there were two entirely distinct controversies in each of which judgment could be entered. In the case at bar the perplexities which surround the question of jurisdiction are enhanced by reason of the anomalous character of the action, but it may be said with certainty that the goal which the plaintiffs seek is the land in the possession of the West Shore company. In order to reach it they must establish a number of facts, regarding which undoubtedly a controversy may arise between them and the construction company. For instance: they must prove that the company was insolvent, that its money paid for the land, that the transfer was collusively made, that they are creditors, etc. The construction company is interested in disproving each of these propositions: but are they not, if denied, issues to be tried rather than separate and distinct causes of action? I am constrained to hold that the motion should prevail on the ground that the action, if it can be maintained at all, must proceed upon the theory that there is no separate and distinct controversy which can be fully determined between the plaintiffs and the construction company, within the meaning of the second clause of the second section of the act of 1875.

The complaint has been considered solely with reference to the question of jurisdiction. It is not intended that anything said upon this question shall be considered as an intimation that a creditor who has not established his claim by a judgment can maintain an action of this character.

The motion to remand is granted.

NASHUA & L. R. CORP. and others v. BOSTON & L. R. CORP. and others.

(Circuit Court, D. Massachusetts. March 25, 1884.)

1. CONSOLIDATED RAILROADS—STATUS IN DIFFERENT STATES.

Two corporations, chartered under the laws of different states and afterwards consolidated under the laws of both, are separate in so far that each state is left the control over the charter it grants, and identical in so far that the corporations may represent each other in suits by or against either of them.

2. SAME—EQUITY—POOLING AGENT.

The pooling agent, under a contract between railroad companies, is a trustee, and as such is accountable in a court of equity for his acts.

3. SAME—PARTIES TO SUITS.

The plaintiff is entitled to join as defendants with the corporation all persons into whose hands they can trace the funds of the joint management.

5. SAME—CONTRACT—ESTOPPEL.

A pooling contract being once executed, one corporation is estopped from denying the validity of its own act in making it, in defense of an action for its infraction brought by the other. Still less can the agents of the parties set up such a defense.

In Equity.

F. A. Brooks, for plaintiffs.

S. A. B. Abbott, for defendants.

NELSON, J. The bill sets forth, in substance, that for the term of 20 years from and after October 1, 1858, the Nashua & Lowell Railroad and the Boston & Lowell Railroad were operated jointly under a pooling contract, by the terms of which both roads were to be placed under the control and management of a joint agent to be appointed by the directors of the two corporations, and the joint earnings and expenses were to be shared in the proportion of 31 per cent. of the whole to the plaintiff and 69 per cent. to the defendant corporation, the division to be made on the first days of April and October in each year; that the defendant Hosford was appointed and acted as the joint agent under the contract from April, 1875, until the expiration of the contract; that the defendant Bartlett, who was also the treasurer of the defendant corporation, was appointed and acted as cashier of the joint funds; that Hosford, while agent, had, in violation of the contract and without authority, paid over to the defendant corporation from the joint earnings large sums of money, amounting, as alleged, to \$208,086, being 31 per cent. of the interest, reckoned at 7 per cent. a year, from 1872 to 1878, on the entire outlay of the defendant corporation in the erection of new passenger stations in Boston and Winchester, in building the Mystic River Railroad, and in purchasing certain shares of the Salem & Lowell and Lowell & Lawrence Railroads, (after deducting dividends on the shares,) the whole of which expenditure was, by the terms of the contract, to be borne solely by the defendant corporation; that Bartlett, at the termination of the contract in 1878, had in his possession as cashier the sum of \$60,000 of the joint funds, 31 per cent. of which belonged under the contract to the plaintiff; and that, acting under the direction of the defendant corporation, he had refused to pay the plaintiff its share thereof, but had either retained such share in his own hands, or had paid it over to the defendant corporation. The prayer of the bill was for an account.

The Boston & Lowell Railroad Corporation and Bartlett have demurred to the bill, assigning various grounds of demurrer.

By the familiar rules governing courts of equity the plaintiff is clearly entitled to equitable relief upon the case stated in the bill. The joint earnings of the roads constituted a trust fund in the hands of the joint agent, to be held by him as a trustee for the benefit of the

two corporations, and to be applied by him in the manner specified in the contract. A failure on his part to perform this duty rendered him liable to account to the party aggrieved. If, through the mistaken or wrongful act of the agent, the Boston & Lowell road has received a larger share of the net earnings than belonged to it under the contract, the plaintiff is at liberty to follow the fund into the hands of the defendant corporation and compel its restitution. If, as the defendants argue, the pooling contract was not within the corporate powers of the parties to it, that can afford no defense to the Boston & Lowell road, when called upon to restore to the plaintiff the sums received in excess of its due share. As the contract has been fully executed, and the defendant road has availed itself of all the benefits to be derived from it, that corporation is now estopped to deny its validity. Still less can the agents of the parties set up a defense of this character which is not open to their principals.

Bartlett is properly joined as a defendant. The plaintiff is entitled to join as defendants with the defendant corporation all persons into whose hands it can trace any part of the funds of the joint management.

It has already been decided in this case that the plaintiff, as a corporation chartered by the laws of New Hampshire, can maintain this suit in this court against the defendants, who are citizens of Massachusetts, although the plaintiff is a part of a joint or consolidated corporation under the laws of New Hampshire and Massachusetts. 8 FED. REP. 458. Corporations thus created are separate for the purposes of jurisdiction, and to enable each state to exercise control over the charters which it grants and over the acts of the corporation within its own limits. But the corporations are so far identical that they represent each other in suits by or against either of them, and the judgments or decrees will bind the whole corporation. *Horne v. Boston & M. R. R.* 18 FED. REP. 50. The Massachusetts corporation is therefore not a necessary party to this bill.

The bill waives an answer under oath. By waiving the oath no discovery is sought, and it is not necessary to interrogate the defendants specially and particularly upon the statements of the bill. Equity rules 40, 41.

The bill prays that the defendant corporation may answer by its president, J. G. Abbott. This must be regarded as mere surplusage, and not as ground of demurrer. The plaintiff is entitled to the answer of the corporation, but has no right to require that it shall answer by its president.

Demurrers overruled.

UNITED STATES v. STOWE and others.

*(District Court, D. Minnesota. February 23, 1884.)***1. DOUBLE COMPENSATION—PROHIBITION APPLICABLE ONLY TO OFFICIAL SERVICES.**

Officers and agents of the government are not forbidden to receive extra compensation for services rendered entirely apart from their official functions, but only for services required of them within the scope of their employment.

2. PAYMENT OF FREIGHT—AGENT ENTITLED TO REIMBURSEMENT.

The statutes do not forbid the payment of freight by an Indian agent when supplies are demanded at once by a sudden emergency, and an agent paying such charges is entitled to reimbursement.

Action upon the bond of Lewis Stowe, late Indian agent at the White Earth Reservation. Defendant Stowe, as such agent, and under the direction of the commissioner of Indian affairs, hired Warren, the official interpreter at the agency, to render certain services as a day laborer in the government warehouse, and as a clerk in the agent's office. For such services he paid Warren \$336. This item was disallowed by the accounting officers of the government in the settlement of Stowe's account, under sections 1764, 1765, 2074, 2076, Rev. St. For the transportation, in 1876 and 1877, of certain government property from St. Paul to Detroit, Minnesota, for the use of the agency, defendant Stowe paid to the Lake Superior & Mississippi Railroad Company \$210.67, and to the Northern Pacific Railroad Company \$52.55, which expenditures were disallowed by the accounting officers of the government, under paragraph 2, § 1, c. 133, (18 St. at Large, 452,) also section 1, Supp. Rev. St. 171, (Richardson's.) For the deficiency caused by these disallowances this action is brought.

C. A. Congdon, Asst. U. S. Atty., for plaintiff.

Gordon E. Cole, for defendants.

NELSON, J. Stowe, the agent, was authorized by the commissioner of Indian affairs to have the services performed for which he paid Warren, the interpreter. The law required the agent to execute this order. Rev. St. § 2058, p. 362. Warren was not forbidden to receive compensation for doing the work. Sections 1764 and 1765, Rev. St., do not apply to this case, for the employment was not in the line of his official duty as interpreter, and had no connection with it. It is only when extra and additional duties are imposed upon an officer as a part of his duty, and he is bound to obey or perform them, that such officer is not entitled to and cannot receive extra pay, unless it is fixed by law, and "the appropriation therefor explicitly states that it is for such additional pay," etc.

2. In my opinion section 1, par. 2, Supp. Rev. St. p. 171, and section 5, act of 1864, granting land to the Lake Superior & Mississippi Railroad Company, and section 11, charter Northern Pacific Railroad Company, do not forbid the payment of freight by the defendant; and

it was admitted in the argument that a sudden and unforeseen emergency had arisen, requiring prompt action in the interest of humanity. If so, an equitable credit, at least to the extent of the claim made by the defendant, should be allowed, under the act of March 31, 1797. See *U. S. v. Lowe*, 1 Dill. 585.

Judgment is ordered for defendants.

A provision in an act of congress, prohibiting persons holding office under the United States from receiving compensation for discharging the duties of any other office, does not apply to services entirely unconnected with their official position. *U. S. v. Brindle*, 4 Sup. Ct. Rep. 180.—[ED.]

ROSE v. STEPHENS & CONDIT TRANSP. Co.

(Circuit Court, S. D. New York. April 8, 1882.)

NEW TRIAL—DAMAGES—PERSONAL INJURY—NEWLY-DISCOVERED EVIDENCE.

In an action to recover damages for a personal injury a motion by defendant for a new trial because of newly-discovered evidence as to the extent of plaintiff's injuries will not be granted where it does not appear that defendant, before the trial, made any investigation as to the character of the injuries received.

Motion for New Trial.

Chauncey Shaffer, for plaintiff.

Thomas E. Stillman, for defendants.

WALLACE, J. The motion for a new trial upon the ground of newly-discovered evidence should not be granted, because the defendant has failed to show that by the exercise of reasonable diligence the evidence newly discovered could not have been obtained and used upon the trial. The evidence relates to the extent of the injuries received by the plaintiff through the negligence of the defendant. The plaintiff alleged in his complaint that he had sustained severe injuries, and claimed \$5,000 damages. It does not appear that prior to the trial the defendant made any investigation to ascertain the character or extent of these injuries. Its officers seem to have contented themselves, in their preparation for a defense of the action, with accepting the plaintiff's case as it might appear upon the trial, so far as this issue is concerned. If it had been shown, upon this motion, that an effort had been unsuccessfully made upon their part, by inquiry of such persons as would be likely to have knowledge of the facts, to ascertain the character of the plaintiff's injuries, a very different case would be presented, and one which might appeal with some force to the favorable consideration of the court. To grant the motion upon such a case as is made would encourage supineness on the part of defendants. The precedent would encourage defendants