notice to appoint another attorney; that the order of March 1, 1881, was entered without the knowledge, consent, or authority of the plaintiffs, and after the death of Mr. Smith was known to the defendant's attorney, and that the plaintiffs were not informed until after January 1, 1884, that the suit had been attempted to be discontinued, or that any attorney had assumed to represent them since Mr. Smith's death.

The executors of Schell now move to quash said writ in *Strang* v. *Schell*, and the plaintiffs in *Dale* v. *Redfield* and in *Strang* v. *Schell* move to set aside the several orders substituting Mr. Cromwell and Mr. Jordan as plaintiffs' attorneys, and the order of March 1, 1881, and that the suits be reinstated, and Mr. Sanders be substituted as plaintiffs' attorney in place of Mr. Smith. The plaintiffs' motion in *Dale* v. *Redfield* is made on an affidavit of one of the plaintiffs therein, which sets forth that the suit was brought to recover illegal fees exacted from them by Mr. Redfield for oaths to entries, stamps, and orders; that, besides the claim for fees, they had a claim for duties on charges and commissions, exacted by Mr. Redfield, but it was paid in 1865, independently of this suit and of the Douglases, and there is no claim for duties on charges and commissions herein; that until the latter part of 1883 neither of the plaintiffs was informed of the death of Alfred Douglas, Jr., or of Mr. Smith, or of the substitution of Mr. Cromwell or Mr. Jordan as plaintiffs' attorney, or of the judgment of March 1, 1881; that they immediately took steps to set aside the orders of substitution and the judgments; that they never authorized the representatives of Alfred Douglas, Jr., to appoint an attorney for them; that, after the trial of *Hutton* v. *Schell*, in April, 1881, Mr. Jordan took no steps to have the judgment in *Dale* v. *Redfield* set aside; that the plaintiffs in that suit never had notice of an order to furnish a bill of particulars; that the claim to recover fees therein was never abandoned, and the plaintiffs never authorized it to be abandoned; and that they could have furnished a bill of particulars of their claim for fees at any time, if it had been demanded of them. The plaintiffs' motion in *Strang* v. *Schell* is made on an affidavit of one of the plaintiffs therein, to the same effect as the affidavit last recited in *Dale* v. *Redfield*, and further stating, that their contract with the Douglases was not in writing; and that, for want of protests, they never had any cause of action for the recovery of duties on charges and commissions, but they had and have a cause of action to recover fees. It otherwise appears that protests were made against the exaction of the fees from the plaintiffs in these two suits; that, from and after the death of Alfred Douglas, Jr., the plaintiffs never made, until recently, as before stated, any inquiry of his estate or of any of his attorneys as to the claims, or manifested any interest in them, or asserted any right to appoint attorneys on their own nomination. The Douglas estate claims the right to conduct these suits if the judgments are opened. It asserts that the contract survived Douglas,

and that, in any event, it must be compensated before there can be any substitution of an attorney in place of Mr. Jordan.

The propositions contended for on behalf of the plaintiffs are, that the executors of Alfred Douglas, Jr., had no right to substitute Mr. Cromwell as attorney in place of Mr. Smith, or Mr. Jordan in place of Mr. Cromwell, after the death of Mr. Smith, he having been appointed by Mr. Douglas; that the plaintiffs are not concluded by the decision of November 20, 1878, made on a motion of which only Mr. Jordan, and not the plaintiffs, had notice; and that the judgment of March 1, 1881, does not bind the plaintiffs. To support these contentions, it is urged by the plaintiffs (1) that the death of the two Douglases terminated the agency; (2) that the power given to them was not a power coupled with an interest; (3) that the power was a personal trust or a personal contract; (4) that Mr. Jordan's appearances were a nullity, and the judgments of March 1, 1881, were, therefore, void.

1. It is apparent from the contract between the plaintiffs and the Douglases, that the plaintiffs employed the Douglases to endeavor to establish, by legal decisions or otherwise, that the exactions were illegal, and to recover back the excess paid. The obtaining of legal decisions involved the bringing of suits in the names of the plaintiffs. The contract implied that attorneys at law were to be employed by the Douglases, and paid by them, with the chance on their part of reimbursement, if at all, only out of their half of the recovery. Such an arrangement could be carried out only by allowing the Douglases to have the control of the appointment and change of attorneys at law, the plaintiffs giving the use of their names, as having the title to the causes of action, but the Douglases agreeing to pay all costs and expenses in any event. Such was the practical construction of the contract by the parties to it. The plaintiffs for nearly 20 years allowed the Douglases, and the survivor of them, and his executors, to employ and change attorneys. The Douglases first employed Kaufmann, Frank & Wilcoxson. In 1866, Alfred Douglas, Jr., employed Smith. He continued to act after 1876, when Alfred Douglas, Jr., died, until 1878, when he died himself. Then the executors of Alfred Douglas, Jr., employed Mr. Cromwell, and afterwards Mr. Jordan. It matters not that the plaintiffs did not hear for seven years of the death of Alfred Douglas, Jr., or for five years of the death of Mr. Smith. The acquiescence was the same as if they had heard of such deaths when they occurred, so far as the executors and the defendants were concerned. The plaintiffs knew they had put the matter into the hands of the Douglases, and it sufficiently appears that they knew of Mr. Smith's employment. Inquiry was easy, especially as the statute has, since 1863, required that the attorney for the United States shall be the attorney for the defendant. Under such circumstances, negligence was acquiescence and consent. The very negligence serves to show that the plaintiffs regarded the whole matter as

out of their own hands, until there should be a recovery, or, at least, until they should, for good cause, interpose. By the contract, the Douglases acquired a substantial and valuable interest, as between themselves and the plaintiffs, in one-half of the claims, subject to the payment by themselves of all costs and expenses incurred about recovering them, even though nothing should be recovered. They had, with the authority given them by their contract relation, an interest, by virtue of which they and the survivor of them, and the executors of the survivor, were entitled to manage and control the claims and the suits, and appoint attorneys at law in them, at least until the plaintiffs should interpose, and then it would be for the court to determine on what terms there should be a change of relationship, as was done in *Dodge* v. *Schell*, 20 Blatchf. 517, S. C. 12 FED. REP. 515, in regard to one of the suits brought under the contract with the Douglases. The relation of the plaintiffs to the suits, when they do interpose, raises questions which are not necessarily the same as those raised, prior to such interposition, between the defendant and the executors of Alfred Douglas, Jr., and an attorney appointed by them. For this reason there may be, in each case, special circumstances as to the services rendered by the Douglases, or by the attorneys employed by them, or the survivor of them, or his executors, and as to the position of the claim and the suit at the time of such interposition, which may require consideration.

The cases cited and relied on by the plaintiffs have no relevancy. In *Shelton* v. *Tiffin*, 6 How. 163, the person whom it was sought to bind by the judgment, through an appearance for him by an attorney, had not been served with process in the suit or had any notice of it, and had not authorized any appearance for him. But here the plaintiffs set the suits in motion by their contracts with the Douglases, and do not attempt to question anything done prior to Mr. Smith's death. The provision cited from the New York statute in regard to notice to a party, on the death of his attorney, to appoint a new one, has no application to a case where, as here, a new attorney is otherwise duly appointed.

2. It is apparent that the sole object now of reinstating these two suits is to obtain in them a recovery for the fees referred to. The judgments of March 1, 1881, were entered for want of prosecution of the suits, because of the failure to serve bills of particulars, and on the view, entertained in good faith at the time by all parties, that there was no cause of action, there being no claim in them for duties paid on charges and commissions, and it not being supposed that moneys paid for fees were recoverable. Everything goes to show that until April, 1881, though the suits had been pending 15 and 18 years, respectively, no one had supposed there could be a recovery in them for fees. Under such circumstances, the estates of the collectors, both of whom are dead, and the United States, who respond to the claims, have rights which are entitled to consideration. The at-

torney for the defendants, by due proceedings, obtained the judgments. Having put an end to the suits after so long a lapse of time, and so much more time having elapsed thereafter before the plaintiffs attempted to interpose, the defendants and the government have a right to hold the plaintiffs to their responsibility for the laches, there being no actual fraud or bad faith shown. In *Bronson* v. *Schulten*, 104 U. S. 410, the negligence or inattention of the plaintiffs or their attorney was held to be a bar to the correction of an erroneous judgment after the term at which it was rendered. The first recovery for fees, in April, 1881, was, as the statute shows, at a term subsequent to that at which these judgments were rendered.

The motion to quash the writ in *Strang* v. *Schell* is granted, and the motions of the plaintiffs in that suit, and in *Dale* v. *Redfield*, are denied.

SPERRY and others *v.* INSURANCE CO. OF NORTH AMERICA.

(*Circuit Court, D. Colorado.* December 11, 1884.)

FIRE INSURANCE—KEEPING DANGEROUS SUBSTANCES ON PREMISES.

The prohibitory clause in a fire insurance policy against the keeping of dangerous substances cannot be extended so as to include a building other than the one covered by the policy.

At Law.

E. T. Wells, for plaintiffs.

V. D. Markham, for defendant.

HALLETT, J. Action on a policy of insurance for $1,000, issued by defendant to plaintiffs, of date October 24, 1883, covering a stock of goods "on the grade floor of the two-story frame shingle-roofed building situate on the north side of Main street, east of Center avenue, in Garfield, Chaffee county, Colorado." The goods were destroyed by fire, October 30, 1883. Several defenses are set up in the answer:

First. That the loss was caused, not by fire, but by an explosion of some kind, for which the defendant is not liable by the terms of the policy.

This defense is not supported by the evidence.

Second. That a clause of the policy prohibited the keeping of gunpowder, giant powder, or nitro-glycerine in the premises where the goods were kept; "and defendant alleges that the plaintiffs, at the time of the alleged damage and for a long time prior, had deposited and stored on said premises, and in said building where the stock of goods insured was, large quantities of gunpowder, giant powder, and nitro-glycerine, that is to say, 1,000 pounds of each, without any consent of the defendant so to do expressed in the body of the policy, and without the knowledge and against the consent of the defendant."

On this point the evidence shows that a one-story building on an