

department in fixing the compensation, and neither the consul or his sureties would be bound to look back of that department for such action. *Wolsey v. Chapman*, 101 U. S. 755; *U. S. v. Badeau*, 31 Fed. Rep. 697. The statutes provide that the only allowance to a consular agency for expenses "shall be an amount sufficient to pay for stationery and postage on official letters." The stationery in question was printed blanks, which would seem to have been proper and necessary. The money paid over for fees supposed to belong to the government was none the less paid over; it was not applied where it should have been. The correction could well be made at any time before the accounts should be settled, at least, and they have not been finally settled before now. Thus the principal in the bond appears to have fully accounted for all the moneys covered by it, and more. A verdict was directed for the defendant on these facts appearing, and a motion for a new trial entered, which is now, for these reasons, overruled. Judgment on verdict.

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McELWEE v. NEW YORK LIFE INS. CO.

(Circuit Court, E. D. Missouri, E. D. October 28, 1891.)

LIFE INSURANCE—POLICY PAYABLE TO CHILDREN—RIGHTS OF ADMINISTRATOR.

Where a policy of insurance on the life of a wife is made payable to her children, and she dies before any children are born, her executor cannot maintain an action at law for the amount of the insurance.

At Law.

This was a suit on a policy of life insurance. The case was submitted on an agreed statement, the material parts of which are as follows: On or about the 10th day of July, 1889, Mary Frances Vail intermarried with one Charles F. Vail, and thereafter and until her death on the 11th day of February, 1890, continued to be the wife of said Charles F. Vail. On the 24th day of July, 1889, said Mary Frances Vail, through her husband, Charles F. Vail, tendered a written application to the defendant company for insurance upon her life, duly signed by her, in the sum of \$5,000, payable to her estate. The local manager of defendant company, to whom said application was submitted at the company's St. Louis office, declined to receive the same, and called the attention of said Charles F. Vail to the rule of defendant company regarding insurance upon the lives of married women, contained in a book of written instructions to agents, as follows:

"A woman may effect insurance on her life for the benefit of her husband if he have a pecuniary interest in her life, but not otherwise. She may, however, insure for the benefit of her children, or for the benefit of any one who may have a pecuniary interest in her life, or who may be dependent on her; but evidence of such interest or dependence must accompany the application."

Said Charles F. Vail thereupon withdrew said application, and upon the same day submitted for his wife an application, duly signed by her, for such insurance, made payable to the children of said Mary Frances Vail. The application was accepted by the company at its home office, and on the 5th day of August, 1889, the defendant company, for the consideration in said policy expressed, executed the policy sued upon. Mary Frances Vail complied with all the conditions required by the policy of her, as the life insured under the same. She departed this life on the 11th day of February, 1890, and at the time of the issuing of said policy and of her death she was a resident of the city of St. Louis, state of Missouri. At the time of making said application to said company on which said policy was issued, said Mary Frances Vail had never had a child, and this fact was made known to the defendant company by the report of its medical examiner. No child was born of her body thereafter, nor had she any child living at the time of her death, but she was then pregnant with child, and she leaves surviving her a mother, brothers, and sisters.

*C. P. & J. D. Johnson*, for plaintiff.

*F. N. Judson*, for defendant.

THAYER, J. After an attentive consideration of this case I have concluded that plaintiff is not entitled to recover. By the terms of the policy the company agreed "to pay the sum of the insurance \* \* \* to the children of the insured, [that is, to the children of Mrs. Vail,] share and share alike, or their executors, administrators, or assigns," and there was no change made or attempted in the phraseology of the promise during the life-time of the insured. The policy was obviously intended as a provision for such children as might be born of the marriage between Mr. and Mrs. Vail, and for no one else. The promise was to pay to the children; they were the beneficiaries. If Mrs. Vail had contemplated the possibility of death before she had given birth to any children, some provision would probably have been inserted in the policy touching the disposition of the insurance money in that event. What such provision would have been it is impossible to say, and it is useless to indulge in speculation on that subject, as the court is powerless to make a contract for the parties covering that contingency. It can only enforce such a contract as the parties have themselves made. Some stress is laid on the fact that, according to the rule which prevails in some states, Mrs. Vail retained the power, so long as she held the policy, to change the beneficiaries with the consent of the insurer. *Kerman v. Howard*, 23 Wis. 108; *Gamb's v. Insurance Co.*, 50 Mo. 47. It is claimed that because she retained such power, her administrator may recover on the policy. I am unable to assent to that proposition. Even if she had a right to change the beneficiary, it was a mere power, to be exercised with the company's consent, and, as the agreed case shows, she never exercised it, or attempted to do so. The existence of such power, even if its existence be conceded, is not sufficient to make the policy a part of her estate, or authorize her administrator to sue thereon. Furthermore,

it is said that by taking out the policy for the benefit of her children Mrs. Vail constituted the defendant company a trustee for her children, and, the trust having failed because she died childless, that the fund in the trustee's hands inures to the benefit of her estate, in the same manner that a fund left in trust for a given purpose will inure to the benefit of the donor or his heirs, if for any reason the trust cannot be executed. It is sufficient to say of this contention that, if the principle invoked has any application to the case at bar, it is only applicable to the premiums actually paid up to the time of Mrs. Vail's death, and the interest accumulated thereon; and the remedy is in equity. Mrs. Vail did not place \$5,000 in the hands of the defendant company to be held for the benefit of or in trust for her children. She contracted to pay \$39.60 quarterly, and up to the time of her death had paid only two quarterly installments. The contract was entered into with the expectation that Mrs. Vail would live many years, and that the premiums paid in the mean time, with accumulated interest, would equal the face of the policy at the end of her expectancy. Under the circumstances, it cannot be maintained, even on the trust theory above outlined, that the defendant is liable to the plaintiff in the sum of \$5,000, or in any other sum, in a strictly legal proceeding. I feel satisfied that judgment should be entered for the defendant, and it is so ordered.

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SELBY *v.* UNITED STATES.

(District Court, E. D. Missouri, E. D. October 28, 1891.)

1. CIRCUIT COURT CLERKS—EXPENDITURES FOR CLERK HIRE.

Where no limitation has been placed upon the expenditures of the clerks of the United States circuit courts for clerk hire, they are not liable to account for necessary sums paid for that purpose out of the emoluments of their office, and which payments have been approved by the attorney general.

2. SAME—VOLUNTARY PAYMENT.

But where, notwithstanding this absence of limitation, the first comptroller of the treasury demands from the clerk the payment of a specified sum, claiming that he had expended more for clerk hire than was allowed by law, which sum the clerk pays over with full knowledge of all the facts and without duress of any sort, this is a voluntary payment, and the money cannot be recovered.

At Law.

Petition of Arthur P. Selby, clerk of the United States circuit court, brought under the act of March 3, 1887, which permits suits to be brought against the United States to recover moneys paid to the first comptroller of the treasury.

*Thomas M. Knapp*, for plaintiff.

*George D. Reynolds*, U. S. Atty.

THAYER, J. The facts established on the trial of this case are stated with substantial accuracy in the following extracts from the plaintiff's petition:

"As clerk of the United States circuit court for the eastern district of Missouri, from the 1st day of March, A. D. 1883, up to and until the 1st day of July, A. D. 1885, plaintiff was not limited by any action of the department of justice to any specific amount to be paid by plaintiff for clerk hire in said office of the United States circuit court for the eastern district of Missouri. As such clerk, he paid for clerk hire out of the emoluments of his office, for and during the first half of the calendar year 1885, to-wit, from the 1st day of January, A. D. 1885, to the 30th day of June, A. D. 1885, the sum of two thousand nine hundred and forty-six dollars; that said amount so paid was approved by the attorney general of the United States, and plaintiff was allowed said amount by said attorney general in the emolument return made by plaintiff for said first half of the calendar year A. D. 1885. Thereafter, to-wit, on the 15th day of July, A. D. 1885, the said attorney general, by his letter of said last-named date to plaintiff, limited the amount plaintiff would be allowed to pay for clerk hire from and after the 1st day of July, A. D. 1885, to the sum of three thousand dollars per annum; and thereafter, to-wit, on the 4th day of August, A. D. 1885, the said attorney general, by his letter of said last-named date to plaintiff, increased the said limit of the amount to be expended by plaintiff for clerk hire in said office to the sum of four thousand dollars per annum from and after the 1st day of July, A. D. 1885."

To the foregoing the court adds the following finding:

On June 25, 1886, the first comptroller of the treasury requested and demanded of the plaintiff that he should pay over to the United States the sum of \$946, this demand being based on the ground that he had not been authorized to expend for clerk hire in his office a sum exceeding \$2,000 for the half-year ending July 1, 1885. In accordance with such demand, plaintiff paid to the United States said sum of \$946, which it received and still retains. To recover the sum so paid plaintiff now sues.

#### CONCLUSIONS OF LAW.

The court holds as a matter of law that the plaintiff was under no legal obligation to refund to the United States said sum of \$946, inasmuch as that portion of the emoluments of his office had been actually expended for necessary clerk hire before any limitation had been placed on the amount of such expenditures. But, inasmuch as plaintiff made the payment in question upon request of the first comptroller, with full knowledge of all the facts upon which his right to retain the money depended, and without being under duress of any sort, the court further concludes that it was a voluntary payment, and that plaintiff cannot recover the money in a suit at law. It rests with congress, and not with the courts, to do justice and afford redress in such cases.

UNITED STATES *ex rel.* McSWEENEY *v.* FULLHART.

(Circuit Court, W. D. Pennsylvania. September 19, 1891.)

## 1. UNITED STATES MARSHALS—MAKING ARRESTS—RIGHT TO USE FORCE TO PREVENT RECAPTURE.

United States deputy-marshals have full power to use all force necessary in executing process of the federal courts; and when, after having legally arrested a man, and while conveying him to prison, they are met by a company of his friends who, they have reason to believe, intend to effect a rescue, and one of whom seizes their horses' heads, they are justified in immediately pointing their revolvers at him, thus causing him to desist.

## 2. SAME—HABEAS CORPUS.

When United States marshals or their deputies are arrested by state authority for using force or threats in executing process of the federal courts, the writ of *habeas corpus* will issue to effect their release.

*Habeas corpus* to release a United States deputy-marshal from imprisonment by virtue of state authority for using force and threats in preventing the recapture of a prisoner.

Walter Lyon, U. S. Dist. Atty., for relator.

REED, J. One Chauncy Marble was under indictment in the district court, charged with counterfeiting. He was called for trial at the session of the court held at Erie in July, 1891, and an application for continuance made in his behalf on the ground of the sickness of a material witness. After investigation the continuance was refused. On the next day, Marble, who was under bail, was not present, and his counsel stated that they had received word that he was sick at home, some 50 miles away. Two physicians made their appearance, and testified that his condition was serious, and that it would be dangerous to his health to bring him to Erie for trial. On the application of the district attorney, his bail was forfeited, and an order made that process, directed to the marshal, be issued for his arrest, which was accordingly done. At the same time another order was made, directing a physician to be taken by the marshal, to examine into the condition of the defendant, to ascertain whether he could be removed from his home at that time. The marshal placed the process in the hands of H. Baring, a regular deputy United States marshal, to execute the orders of the court, and, at the same time, deputed Daniel McSweeney, the relator, as a deputy-marshal, to assist Mr. Baring. Taking a physician from Erie, and accompanied by William McManus, an operator of the United States secret service, the two deputies went to the defendant's house. It was necessary, in order to reach it, to drive from Corry, a distance of 9 or 10 miles, passing through a small town called Columbus. The defendant was found to be in a condition which admitted of his arrest and removal, and he was brought to Erie, and the next day pleaded guilty, and was sentenced.

As the party returned to Corry, they drove across a short bridge, near the town of Columbus. At the end of the bridge quite a crowd had col-