not built said belt line, and was in default, except as above stated. Wherefore the cross complainant insists that the holders of said bonds are not entitled to receive from the proceeds of sale under the foreclosure payments upon the principal and interest of said bonds, but only upon the proportion thereof that the value of the four miles of said belt line that has been built sustains to the value of the whole nine miles, and prays that the bonds may be scaled down accordingly.

The demurrer must be sustained. The bonds were issued before the commencement of the work, in exact accordance with the stipulations of the contract, and Andrews was then invested with the title to them, and had the right to pledge or sell them. The averments that the purchaser or pledgee had full knowledge of the terms of the contract, and of the fact that Andrews had built only four miles of the belt line, are therefore wholly immaterial. It may be properly inferred from the contract that it was the intention of the parties that Andrews should have the bonds in advance of the performance of the work which he was to do, in order to enable him by negotiating them to procure the funds which he would require. The cross bill, therefore, does not state a case entitling the cross complainant to any relief, and it will be dismissed.

MASON v. BENNETT.

(District Court, D. Alaska. July, 1892.)

1. EXECUTION—RETURN DAY—ALASKA.
   Under Code Or. § 278, in force in Alaska, the return day of an execution is ascertained by computing 60 days from the day of its receipt by the marshal, and not from the day of its issuance.
2. SAME—LEVY—SALE AFTER RETURN DAY.
   When a levy is made under an execution before the return day thereof, the marshal may make the sale after the return day without new process.
3. SAME—SALE—CONFIRMATION—INADEQUACY OF PRICE.
   Under Code Or. § 296, in force in Alaska, an execution sale cannot be set aside for mere inadequacy of price, in the absence of fraud, collusion, or substantial irregularity, to the injury of the complaining party, especially when the property consists of an undeveloped mining claim, the value of which is conjectural and speculative.

At Law. Action by George M. Mason against William M. Bennett. Motion to confirm an execution sale. Granted.

Delaney & Gamel and *J. F. Malony*, for plaintiff.

John G. Heid and *C. S. Johnson*, for defendant.

TRUITT, District Judge. The record in this case shows that the plaintiff, on the 8th day of March, 1892, in this court, recovered judgment against defendant for the sum of $2,170.48, with a decree of foreclosure of the mortgage given to secure the note sued upon herein, and for the sale of the mortgaged premises, which includes the real property, for the sale of which an order of confirmation is asked by this motion.

Within the time allowed by law, the defendant appeared and filed objections to the confirmation for the reasons—

"*First*, that the sale is void, it having been made on the 91st day after the receipt of the execution, when said execution, at the time of sale, was dead in the hands of the marshal, and should have been returned within ninety days to the clerk's office from whence it issued; and, *second*, that no bidders were present at said sale, that the bid of the plaintiff, the execution creditor, herein, was the one and only bid offered at such sale, and that the sum bid is so grossly inadequate to the value of the property sold, as to amount to an absolute and unnecessary sacrifice of the defendant's property."

Section 7 of the organic act, providing a civil government for Alaska, approved May 17, 1884, declares the general laws of the state of Oregon at that time in force to be the law in this district, so far as applicable and not in conflict with the act or the laws of the United States. By virtue of this statute, the execution in this case was issued in accordance with the provisions of title 1, c. 3, Code Or., and the proceedings conducted thereunder, and their regularity must be tested by them.

In considering this motion and the objections offered by the execution debtor to its allowance, I will take up the objections in regular order. The first is that the sale was made after return day, and is therefore void. This objection may be considered under two heads, viz., was this sale made after return day? and, if so, is it for that reason void? There seems to be some misunderstanding on the part of counsel as to how the return day is to be ascertained or fixed in this case. Section 278, Code Or., is as follows:

"The sheriff shall indorse upon a writ of execution the time when he receives the same, and such execution shall be returnable within sixty days after its receipt by the sheriff to the clerk's office from whence it issued."

Then, in section 293, in regard to the postponement of sales, it is provided that a sale may, for causes therein stated, be adjourned from time to time, not to exceed 30 days beyond the return day. The execution in this case was issued on March 14, 1892, but the marshal's return shows that it did not come into his hands until the 25th day of March, 1892. This, then, is the date from which the 60 days mentioned in said section 278 should be computed, and not the date of the execution. Excluding this day, and counting 60, the return day would be May 24, 1892. The marshal, however, set the 13th day of May, 1892, as the day of sale, but on that day the respective attorneys for plaintiff and defendant appeared, and served upon him a written stipulation, duly signed by them as such attorneys. This stipulation is made a part of the return on the execution, and it is agreed therein that—

"The sale is hereby postponed for the term of thirty days, from said 13th day of May, 1892, to the 13th day of June, 1892, and the said U. S. marshal for the district of Alaska is hereby authorized to postpone the said sale until the said 13th day of June, 1892, as above stipulated."

This stipulation was no doubt made, and the sale adjourned, for the benefit of the defendant, and it is not claimed that he was in any manner injured by the adjournment. But without the stipulation the

marshal could not have made an adjournment for a longer period than one week at a time, not exceeding 30 days altogether, beyond the day at which the writ is made returnable. The return shows that the sale was adjourned until the 13th day of June, 1892, according to said stipulation, and that the real property described herein was then sold to the plaintiff for $2,300. However, this was not more than 30 days beyond the return day, which, as already shown, was May 24, 1892. But, if my views are correct on the second question raised by this first objection, it makes no difference whether the sale was in fact made after the return day or not; it is only necessary that the levy be made before that time.

The Oregon statute says that the court shall confirm a sale of this kind unless it shall satisfactorily appear that there were substantial irregularities in the sale, to the probable loss or injury of the party objecting. Section 296, p. 363. It is not claimed that the defendant sustained loss or injury by this adjournment, but it was certainly deemed advantageous, or his attorney would not have made the stipulation which he did for it. I do not, under my views of the case, think it necessary to pass upon what effect that stipulation might have in sustaining the regularity or validity of this sale, were it irregular or void without it. Counsel for defendant refer to *Faull* v. *Cooke*, 19 Or. 455, 26 Pac. Rep. 662, to sustain their first objection, but the case is not in point. In that case the sale was made more than eight years after the date of the execution, and in the opinion STRAHAN, J., says:

"It does not appear that the officer had made a levy under the execution while it was still in force. The sole question, therefore, is whether or not a sheriff may hold an execution until long after the return day, and until his term of office has expired, and then make a levy and sale."

The court very correctly held that such a writ is *functus officio*, and confers no authority. But if the levy be made before the return day of the writ, the officer may sell afterwards on the same writ without a renewal of process. "It is immaterial to the purchaser, as to the validity of the sale, whether it be made before or after return day." Ror. Jud. Sales, p, 248, and numerous authorities there cited. This was passed upon and settled in the United States supreme court, at an early date, in *Wheaton* v. *Sexton's Lessee*, 4 Wheat. 503. In this case JOHNSON, J., delivered the opinion of the court, in which it is stated:

"At the trial two bills of exception were taken; the first of which brings up the question whether a sale by the marshal after the return day of the writ was legal. The court charged that it was, provided the levy was made before the return day, and on this point the court can only express its surprise that any doubt could be entertained. The court below was unquestionably right in this instruction."

In *Remington* v. *Linthicum*, 14 Pet. 84, the following is asserted as a settled proposition of law: "But if property, real or personal, is seized under a *fieri facias* before return day of the writ, the marshal may proceed to sell at any time afterwards without new process." Accepting the law as laid down by these authorities disposes of this objection.

I will now briefly notice the second objection to the confirmation. The property sold is an undivided two-thirds interest in a lode claim in the Harris mining district in this territory, and known as the "Aurora Lode." There are three affidavits offered in support of the objection of inadequacy of price. The execution debtor makes one, in which he says he was offered $40,000 for this lode in the summer of 1891 by a *bona fide* purchaser. In one of the affidavits the value is estimated at $50,000, while the other affiant says that, according to his best judgment, the lode is worth at least $35,000 or $40,000. It was admitted in the argument that this lode is undeveloped. It is a well-known fact that an undeveloped mining claim is property upon which it is very difficult to place even an approximate value. An undeveloped lode is hidden from the eye, buried perhaps deep in the earth, or extending into the rocky side of a mountain. Its real value is a matter of conjecture for even mining experts. One might say a claim was worth $50,000, and another of as good judgment, with equal honesty, might say it was not worth the cost of developing it. It is not claimed that there was any fraud, collusion, or irregularity in the proceedings of the sale, and the law presumes that the officer acted fairly and for the best interests of the parties concerned in conducting the same. Section 296, Code Or., *supra*, seems to give the court no discretion in cases of this kind unless there were substantial irregularities in the proceedings concerning the sale, to the probable loss or injury of the party who makes the objections to the confirmation. I have been unable to find a case where the supreme court of Oregon ever set aside a sale simply for inadequacy of price. Counsel for defendant cite *Flint* v. *Phipps*, 20 Or. 340, 25 Pac. Rep. 725, in support of their second objection, but in that case the defects in the writ, which the lower court allowed to be amended, were the primary reason for reversing the decree. The general policy of the law is to uphold and maintain execution sales. Rorer, in treating on this subject, says:

"Ordinarily, inadequacy of price is not alone sufficient cause for setting aside an execution sale which is in other respects unexceptionable." Ror. Jud. Sales, § 854.

And Herman, in his very excellent work on Executions, states the rule to be that—

"Courts will not in general set aside sales made under its process for mere inadequacy of price, in the absence of fraud and collusion. Inadequacy of price, within itself, cannot be a ground for setting aside a contract, or affording relief against it." Herm. Ex'ns, 412.

In support of this rule the author cites a list of 70 different decisions, and in the case at bar I feel bound to adhere to it. Having thus disposed of the objections, the motion for confirmation is allowed.

TRINIDAD ASPHALT PAVING CO. *v.* ROBINSON.

(*Circuit Court, E. D. Michigan.* April 11, 1892.)

COSTS—TAXATION—ACTIONS AT LAW.

In actions at law the federal courts must tax the costs against the losing party, except in cases where special provision to the contrary has been made by act of congress, (Rev. St. §§ 968, 973;) and in the absence of such provision they have no authority to modify the rule by reason of hardship or inequity resulting from special circumstances.

At Law. Action of replevin brought by the Trinidad Asphalt Paving Company against Eugene Robinson. A verdict was directed for plaintiff, and a motion for a new trial denied. The question as to whether costs should follow the judgment was reserved by the court, and is now up for determination. Judgment for plaintiff.

Statement by SWAN, District Judge:

This is an action of replevin for 766 barrels of asphalt that were formerly the property of Carter, Hawley & Co., of New York, both parties tracing title to them. The evidence is uncontradicted that plaintiff, wishing to obtain asphalt of Carter, Hawley & Co., whom plaintiff knew would not sell to it, employed one Coburn to make the purchase for it, —the Trinidad Asphalt Company,—instructing Coburn not to reveal the name of his principal, but to make the purchase as for himself. The asphalt was bought for the benefit of plaintiff, who had the right to it as against its agent, Coburn, or any one to whom the latter might deliver it, except a purchaser in good faith and for value. Coburn, it seems from the facts found by Mr. Justice BROWN, who tried the case, went to Carter, Hawley & Co. for the plaintiff, but exceeded his authority in effecting the purchase. Instead of representing himself simply as the principal in the transaction, or withholding the name of his employer, he untruly stated that he had no connection with the plaintiff whatever,—a statement which he had no authority from plaintiff to make. Carter, Hawley & Co. delivered to Coburn the asphalt, which he turned over to plaintiff. A month or two afterwards, Coburn made a contract with a lighterman to go to South Amboy, where the asphalt lay, load it on board his lighter, and take it up the North river. The asphalt was accordingly laden on the lighter, and was insured for transportation to the docks of the plaintiff at Jersey City. Instead of thus forwarding it, Coburn diverted it from its original and proper destination, and sent it to Weehawken, when it was delivered to the West Shore Railroad for transportation and delivery to defendant, and in due course of time came into the possession of defendant, who in good faith had dealt for and purchased it through Coburn from Carter, Hawley & Co., whom he supposed to be the owners of it, and whom he paid for it. The asphalt was taken from defendant's possession under the process in this cause. After the commencement of this suit defendant wrote Carter, Hawley & Co., who had received their pay for the property from plaintiff, through Coburn, asking them to credit him with the amount