

the peculiarity of this recitation lies in the fact, not only that it fails to state either a majority or a two-thirds vote, but that the election held was "by the taxable inhabitants of Camden Point," whereas the election petitioned for and held was for a part of the municipal township of Greene, lying between given points. Camden Point, as appears from the face of the record of the county court, was a town at which the election was held. No vote of the inhabitants of Camden Point could have authorized the subscription; and no authority has been shown by the plaintiff for the issue of these bonds, other than the election held under section 7 of the charter, which is limited to the taxable inhabitants of the strip of country through which the railroad runs. When plaintiff resorts to the record of the county court to sustain his right, he must abide by what it shows.

It is hardly necessary to discuss the proposition advanced by counsel that the action of the county court has been ratified by any act done by it since the issue of the bonds. "He who may authorize in the beginning, may ratify in the end." *Bank v. Gay*, 63 Mo. 39. A ratification can only occur when the party ratifying possesses the power to perform the act done. *Marsh v. Fulton County*, 10 Wall. 677.

On the facts of this case I declare the law to be that the plaintiff cannot recover. Judgment accordingly.

KENEDY v. BENSON et al.

(Circuit Court, C. D. Iowa, N. D. March 30, 1893.)

DECEIT—RIGHT TO DAMAGES—ASSIGNMENT.

A receiver of a ranch company sold property thereof to defendants, and took in payment certain shares of stock. In his report to the court, he charged himself with the stock as cash, the report was approved, and he fully settled with the company on that basis, and kept the stock. Afterwards he individually brought suit against defendants to recover damages for fraudulent representations made at the time of the sale as to the value of the stock. *Held*, that the cause of action was in the ranch company, and did not pass to plaintiff when he acquired the stock, and he could not maintain the action without showing an assignment to himself.

At Law. Action by James Kenedy against R. S. Benson and G. C. Hayes to recover damages for false representations as to certain shares of stock. On demurrer to the petition. Sustained.

J. F. Duncombe, for plaintiff.

E. P. Andrews, for defendants.

SHIRAS, District Judge. From the allegations in the substituted petition filed in this case it appears that on the 10th day of June, 1889, the plaintiff herein, James Kenedy, was appointed a receiver of the "T. X. Ranch" in the state of Texas, in a suit pending in the United States circuit court for the eastern district of Texas, and as such receiver he took possession of several thousand head of cattle and other personal property; that on the 16th day of Decem-

ber, 1890, the plaintiff, in his capacity of receiver, sold to the defendants, who were copartners doing business under the firm name of Benson & Hayes, 9,000 head of cows and calves for the sum of \$63,000, the same being the property of the American Land & Cattle Company; that at the same time the plaintiff, in the capacity of general manager for said cattle company, sold to Benson & Hayes 3,000 head of cattle for the sum of \$25,000; that in payment of the cattle sold by plaintiff as receiver he received from the defendants \$20,000 in drafts, which were paid, \$7,000 in the capital stock of the Brule County Bank, of South Dakota, at par, \$3,000 in the capital stock of the South Park Improvement & Investment Company, of Kansas City, Mo.; and for the balance due on the sale by him made as receiver, and for the sum due for the sale made as manager of the cattle company, he took in payment a ranch upon the Brazos river, in Texas, containing 5,740 acres.

It is further averred that at the time the sale was made by plaintiff, as receiver, and in order to induce plaintiff to take the Brule County Bank stock, and the South Park Investment Company stock, as part payment for the cattle, the defendants made certain representations in regard to the same, which, it is averred, were false and fraudulent. It further appeared that the day succeeding the making of the sales of cattle, as above stated, the plaintiff filed his report as receiver in the court appointing him, in which he charged himself with the amount of the bank and investment company stocks as cash, aggregating the sum of \$10,000; that said report was approved; and that the plaintiff has fully settled with the American Land & Cattle Company for said stocks, and for the land received in payment as above stated. It is further averred that plaintiff was induced to charge himself in his account as receiver with the sum of \$10,000 as cash received, and to take and hold said stocks himself, by reason of the false and fraudulent statements made by defendants in regard to said stocks, the statements in regard to the bank stock being that the same was full paid, worth par, and that the bank in the past had paid and was continuing to pay dividends thereon, and in regard to the South Park Investment Company's stock that it was worth par, and could be sold for the face value. It is further charged that upon investigation, made after plaintiff had received these stocks, it appeared that the bank stock was not full paid, no dividends had ever been paid thereon, and the stock was valueless; and that the investment company's stock was worthless.

Based upon these facts the present action at law was brought, wherein plaintiff seeks to recover as damages the sums he charged himself in his account as receiver for the stocks by him taken as part payment for the cattle by him sold as receiver to the defendants. The defendants interpose a demurrer to the petition upon several grounds, the first being that it does not appear that plaintiff is the legal owner of the cause of action declared on. In the petition it is expressly averred that the cattle sold to the defendants were the property of the American Land & Cattle Company. The money and property transferred to the receiver in payment therefor, when so transferred, became the property of the cattle company. If the prop-

erty so transferred was not equal in value to what it was represented to be by the defendants, the loss caused by such depreciation in the value of the stocks was the loss, in the first instance, of the cattle company. Assuming that the representations charged to have been made in regard thereto by the defendants were false, and of such a character as to create a right of action against defendants, such right of action belonged to and was the property of the cattle company. This right of action rested in the cattle company as soon as the title to the stocks passed to it, which was when the cattle were delivered to the defendants. The right to an action for the recovery of damages having thus vested in that company it would not pass to any third person, to whom the company might sell or assign the stocks in question, as a mere incident thereto. The question is not other nor different from what it would be if the company had sold the stock to a third party, and it certainly cannot be true that a sale of the stocks would transfer to the purchaser the right of action which had vested in the company. The facts averred in the petition show a sale and transfer of the stocks to the cattle company, and assuming that the facts stated also show a subsequent legal transfer thereof to the plaintiff, upon which question no opinion is expressed, all that can be claimed is that the plaintiff has become the owner of the shares of stock through a purchase thereof from the cattle company; but there are no facts averred which show a transfer or assignment of the right to claim damages from the defendants by reason of the alleged false statements in regard to the value of the stock. No reason is perceived why the cattle company cannot now institute an action, if the right to maintain the same ever existed, against the defendants for damages caused by procuring a sale of the property of the cattle company, by false representations in regard to the stocks offered in payment thereof. It would not be a defense to such an action for the defendants to plead that the cattle company had sold and transferred the stock to the plaintiff or any other third party. The transfer of the stocks would not transfer the right of action for the damages caused by the false representations. At common law, such a chose in action was not assignable, so as to enable the assignee to maintain an action at law in his own name thereon. What the law of Texas is in this particular, and whether the laws of that state or of Iowa determine the right of assignment and of the assignee to maintain an action at law, it is not necessary to consider at the present time, for it does not appear from the allegations of the petition that any legal transfer or assignment of the chose in action, to wit, the claim for damages based upon the alleged false representations, has been made to the plaintiff.

The petition therefore fails to show that plaintiff is the owner of, or has the right to enforce at law, the cause of action claimed to have been created in favor of the American Land & Cattle Company by the false representations made by defendants in regard to the stocks transferred to the receiver of the cattle company. The demurrer to the petition is therefore sustained, with leave to plaintiff to amend the petition in case facts exist justifying the same.

GREENWICH INS. CO. v. WATERMAN et al.

(Circuit Court of Appeals, Sixth Circuit. March 30, 1893.)

No. 68.

1. MARINE INSURANCE—AUTHORITY OF AGENT—LOCAL USAGE.

A well-defined local usage, whereby marine insurance agents can make binding contracts to take effect on the day of application, without consulting their superiors, is presumably known to a foreign company engaged for years in insurance business at the place where the usage obtains, and is sufficient to prevail over the private instructions of such agents when the insured is in ignorance thereof, and is without notice of facts sufficient to put him upon inquiry. Hammond, J., dissenting.

2. SAME.

The fact that a local agent has no power to issue policies does not necessarily show that he is without authority to make binding preliminary contracts of insurance.

3. SAME—EVIDENCE.

Although the existence of a usage may be established by the uncontradicted testimony of one witness when he is explicit as to its duration, certainty, and notoriety, the testimony of an insurance broker as to the authority of agents in a certain locality to make binding preliminary contracts, which is based wholly on the practice of his own office, is not sufficient to go to the jury.

4. SAME.

The fact that a marine insurance agent acts for his company in the adjustment of losses, that he does bind the company as to cargoes, takes charge of wrecking expeditions, receives proofs of loss and notices of abandonment, does not warrant an inference that he has authority to bind the company as to vessels, by a person knowing that the agent has no authority to issue hull policies, and that application therefor must be forwarded by the agent to the general office for approval.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

At Law. Action on a contract of insurance in the circuit court for Wayne county, Mich., by Cameron D. Waterman and Joshua W. Waterman against the Greenwich Insurance Company. Defendant removed the cause to the circuit court of the United States, where verdict and judgment were given for plaintiffs. Defendant brings error. Reversed.

Statement by TAFT, Circuit Judge:

This was a writ of error to a judgment of the circuit court for the eastern district of Michigan in favor of Cameron D. Waterman and Joshua W. Waterman against the Greenwich Insurance Company for \$5,475. The action was on an agreement by defendant to insure plaintiffs against loss or damage by fire to an amount not exceeding \$5,000 on the steamer *Chenango*, in consideration of a premium of \$50, to be paid by plaintiffs when requested, the risk to attach from the 10th of April, 1890, at noon. On the 11th of April, 1890, the steamer *Chenango* caught fire, burned, and became a total loss, whereby, as plaintiffs claimed, the defendant became liable for the full amount of the insurance.

The defendant pleaded the general issue, and the case was heard before a jury. On the trial the plaintiffs introduced evidence to show that a verbal contract of insurance was made between their agent, Ralph, and Dickinson, the agent of the insurance company, the risk to attach from the 10th of April, the day of making the contract. The evidence of the defendant tended to show that Ralph had applied for insurance to date not from the 10th of April, but from the 20th of that month; that Dickinson had no authority to make a bind-