

putes, as to its management, between Irsch and Wallerstein. It is of no importance who was right and who was wrong in this controversy. It is conceded that the merits of that dispute are not involved in this action. It is a fact that the organization of the company was not perfected, that no property was ever vested in the company, and that its organization is now impossible. It being admitted by all that this company is defunct it leaves the rights of all parties as they were before the organization was attempted.

If the foregoing propositions are correctly stated, there can be little room for discussion as to the conclusion to be derived therefrom. Assuming that Irsch was wholly to blame for the failure to organize the corporation, it cannot be said that his conduct in this respect worked a forfeiture of the October agreement. He does not lose his interest in the patents because of the failure of a scheme to exploit the patents any more than Salzer would lose his interest if the failure to organize the company were wholly attributable to him. It seems clear, therefore, that the only relief to which the complainant is now entitled relates to the assignment of November 30, 1890. This was a conveyance by the complainant to the proposed corporation of his interest in the patents. It was intrusted to the defendant merely that he might attach his own signature and hand it to the corporation. He declined to do either. The corporation is no longer a possibility. The defendant has no shadow of right to this instrument. It belongs to the complainant and should be returned to him. Should the defendant fail to carry out the terms of the October agreement in the future, relief may be granted, but until this occurs that agreement cannot be disregarded. The defendant has vested rights which a court of equity must respect so long as the defendant himself respects them.

There must be a decree for the complainant directing the defendant to deliver up the November assignment, but without costs.

REED v. PENNSYLVANIA R. CO.

(Circuit Court, E. D. New York. May 10, 1893.)

1. CARRIERS—INJURIES TO PASSENGERS—CONTRIBUTORY NEGLIGENCE.

In an action against a railroad company for injuries to a passenger it appeared that plaintiff boarded the train while it was in motion, and that when she had gotten safely on the step the brakeman pushed her so violently as to throw her down on the platform, and seriously injure her. *Held* that, however negligent plaintiff may have been in undertaking to board a moving train, such negligence in no wise contributed to the injury, which was due to the brakeman's violence, and does not affect her right to recover.

2. SAME—DAMAGES—CONTINUING INJURY.

In such action the opinion of medical experts as to the permanence and probable future effect of the injuries is competent, and damages may be allowed for such effect. *Cunningham v. Railroad Co.*, 49 Fed. Rep. 439, followed.

At Law. Action by Martha A. Reed against the Pennsylvania Railroad Company for personal injuries. The jury found a verdict for plaintiff, which the defendant moves to set aside. Motion overruled, and judgment on verdict.

Wilmot M. Smith, (George H. Pettit, of counsel,) for plaintiff.

Robinson, Bright, Biddle & Ward, (H. G. Ward, of counsel,) for defendant.

WHEELER, District Judge. The plaintiff boarded the defendant's train while it was in motion, starting from a station in Pennsylvania. Her evidence tended to show that the conductor was calling "All aboard;" that the brakeman helped two others on, and, after she had got safely onto the steps, pushed her so violently as to throw her down upon and nearly over the platform, whereby she was seriously injured; and that she had not fully recovered from the injuries at the time of trial. Testimony of her attending physician that there was a doubt in his mind about her absolute recovery, and he could not say whether she would recover or not, was allowed to stand. The defendant claimed a verdict because the plaintiff undertook to get on the train while it was moving. This claim was denied, and the jury was charged that, if the brakeman pushed the plaintiff violently, beyond what was proper assistance, she was entitled to recover for what she had suffered in consequence of the injury done to her by this violence, and what she was likely to suffer from it thereafter. Two points are made upon this motion to set aside the verdict: One that the verdict should have been directed for the defendant because of contributory negligence in getting onto the train in motion; the other for allowing recovery for what the plaintiff was likely to suffer from the injury.

Counsel for the defendant insists that, as this case was tried in New York, the law of that state governs, and relies upon *Solomon v. Railroad Co.*, 103 N. Y. 437, 9 N. E. Rep. 430, to show that boarding a train in motion is such contributory negligence as precludes recovery for any injury received at the time. If this is a question of local law, that of Pennsylvania would seem to control as to what would constitute an actionable injury. But, however that may be, the case was tried upon the theory that the plaintiff took all the risks of the moving of the train, and she did not recover for their consequences, but for those of the violence. She did not contribute to that. If she put herself in danger she was entitled to freedom from assault or violence either during the danger or after it had passed. Negligence defeats recovery only for injuries it contributes to. *Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. Rep. 653; *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. Rep. 679.

The other question was considered in *Cunningham v. Railroad Co.*, 49 Fed. Rep. 439. The rulings in this case followed the decision in that, which was acquiesced in, and is deemed to have been correct. Motion overruled, and judgment on the verdict.

DAVENPORT et al. v. PRINCE.

(Circuit Court, E. D. New York. May 12, 1893.)

1. LIMITATION OF ACTIONS—ACCRUAL OF RIGHT—DEMAND.

Defendant's father was executor of a will which bequeathed a certain sum to plaintiffs, and he and defendant were coexecutors of another will. The father mingled the funds coming into his hands under the two wills, and invested them in land. At his death the defendant, as surviving executor under the latter will, sold the land, and took two mortgages on it,—one to himself, as executor, and the other (for the amount of the fund due plaintiffs) to himself, as trustee,—and he recorded the latter mortgage after the other. He afterwards foreclosed the first mortgage, and had the land bid in for his benefit. *Held*, that a right of action against defendant for the fund did not accrue to plaintiffs, nor did the statute begin to run, until they made a demand upon him for it.

2. SAME—INQUIRY—DEMAND AND REFUSAL.

An inquiry by plaintiffs as to the status of the fund, and a denial by defendant that he ever had it, on the ground that the foreclosure of the first mortgage wiped out the fund, and ended his liability, did not constitute such a demand and refusal as will set the statute running.

At Law. Action by Abraham C. Davenport and Antoinette P. Davenport against David Prince. There was a verdict for plaintiffs, and defendant moves for a new trial. Motion overruled, and judgment on verdict.

Benjamin Estes, for plaintiffs.

Dillaway, Davenport & Leeds, (John S. Davenport, of counsel,) for defendant.

WHEELER, District Judge. Abraham Cargill bequeathed the use of a fund, which became \$5,328, to the plaintiffs' mother, during life, and the principal to her children, at her decease, by will, of which the defendant's father was executor. The mother of the defendant left a will, of which he and his father were executors. This fund was invested by the defendant's father, with the estate of the defendant's mother, in real estate in Pennsylvania, upon which he attempted to take security for it; and the interest was paid to the plaintiffs' mother during her life, and a while after her death, by consent of her children, to their father. The defendant, after death of his father, sold the property, as surviving executor of his mother, for \$12,500, and took a mortgage for \$7,172 to himself, as executor, and another for \$5,328, representing this fund, to become due in 10 years, to himself, as trustee, which was recorded after the other. After some payments on the principal of the first mortgage, and of interest on the second, the defendant, in 1877, caused the property to be sold for \$450, on foreclosure of the first; and it was afterwards conveyed by the purchaser to the Prince Manufacturing Company, in which the defendant was largely interested, and from which he received money. On inquiry in behalf of the plaintiffs, in 1878, the defendant denied that he had ever had the fund, and claimed that the foreclosure of the first mortgage "wiped out" the one given for