creditors of defendant Cohn, in enforcing their garnishment, are pressing a "suit which is in effect a suit by the defendant [Cohn], in plaintiff's name, against the garnishee," so far as existing relations and substantial rights of parties are concerned (Daniels v. Clark, supra), the state court could not have reached a different conclusion upon plaintiffs' attack from what it must have reached upon an attack by the main defendant himself; and especially if the proceedings attacked be viewed in the light of section 2528 of Code of Iowa, which provides:

"The rule of the common law that statutes in derogation thereof are to be strictly construed, has no application to this Code. Its provisions, and all proceedings under it shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice."

The action which the state court would be required to take must be taken by this court in case at bar. Liability against a garnishee is never presumed, but must be affirmatively shown. Letts, Fletcher & Co. v. McMaster, 83 Iowa, 449, 49 N. W. 1035. The garnishee is not to be placed in a worse position than he would have been in had the claim for which he is garnished been enforced against him directly. Henry v. Wilson, 85 Iowa, 60, 51 N. W. 1157.

The views above expressed necessarily lead to the discharge of the garnishee, the Farmers' State Bank of Charter Oak, Iowa. Let judgment be entered accordingly. To which plaintiffs at the time duly excepted.

SMITH v. NEW ENGLAND MUT. LIFE INS. CO.

(Circuit Court of Appeals, Third Circuit. October 18, 1894.)

No. 26.

1. LIFE INSURANCE—NONPAYMENT OF PREMIUM.
   The giving of a note for a premium to an agent, who had no power to postpone payment of the premium or to substitute anything for it, which was never accepted by the company or brought to its knowledge, will not keep alive a policy which provides that the company assumes no risk except for that portion of the year for which the premium shall have been actually paid in cash in advance.
2. SAME—PAYMENT OF PREMIUM.
   The acceptance of payment of a quarterly premium and of premium notes 73 days, 50 days, 120 days, and 30 days, respectively, after they were due, in one year, does not show such a course of dealing as justifies the assured in believing that punctuality in paying premiums is not required, so as to excuse delay in paying premiums the following year.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

This action was brought by Aline M. Smith against the New England Mutual Life Insurance Company on a policy of insurance for $10,000 issued on the life of Zant McD. Smith. Another action was brought at the same time on another policy, like, in all respects, to the one in this action, and the two cases were tried together. The policies contained the following conditions:

"General agents appointed directly by the company are alone authorized to receive premiums at the day when payable, and not afterwards, but can-

not give credit, or make, alter, or discharge contracts, or waive forfeiture; and no alteration or waiver of the conditions of this policy shall be valid unless made in writing at the office in Boston, and signed by the president or secretary." "All premiums due on this policy shall be paid in advance, but any annual premium may, at the election of the assured, be paid in cash, either in one sum, or in semiannual or quarterly installments, to be secured by the notes of the assured; it being understood that the company assumes no risk for the period covered by such deferred payments, but only for that portion of the year for which the premium shall have been actually paid in cash, in advance, and that in case of loss all such deferred payments are to be deducted from the amount payable."

The premiums due May 24, 1891, were not paid until August 5th of the same year, or 73 days after they were due, and the three installment premium notes were not paid for 50 days, 120 days, and 30 days, respectively, after they were due. When the premiums fell due May 24, 1892, the assured delivered to the local agent at Pittsburgh premium vouchers for $46.90 on each policy, and premium notes for three quarterly installments, and an ordinary promissory note, payable in 30 days to the order of defendant, for $86.61, with interest, for the balance of the first quarterly installments on both policies. This note and the regular premium notes were never paid. The assured died November 22, 1893, and, the company having refused to pay the amount of the policies, two suits were brought, and by agreement of counsel were tried together, and a verdict rendered in each case, under instructions of the court, for the amount of paid-up insurance due on the policies, under the Massachusetts statute, as lapsed policies. A writ of error was taken by plaintiff in only one case, counsel having agreed that the decision in this case should be treated as applicable to the other.

W. K. Jennings, for plaintiff in error.
Shiras & Dickey, for defendant in error.

Before ACHESON, Circuit Judge, and BUTLER and WALES, District Judges.

BUTLER, District Judge. The suit is on a policy of insurance for $10,000, issued on the life of Zant McD. Smith, dated May 24, 1890, which recites as a condition, the payment of a premium by the assured of $352, at its date, and the payment of like premiums on or before the 24th of May in every year thereafter until 34 such premiums have been paid, or during the term of Mr. Smith's life if he shall die within 34 years of its date. The defendant is a corporation of the state of Massachusetts, and the policy recited that it is issued "subject to the provisions of the insurance act" of that state; the 76th section of which was indorsed and provides that "no policy of life insurance thereafter issued by any domestic corporation shall become forfeited or void for nonpayment of premiums after two full annual premiums have been made, but in case of default of payment thereafter then without any further stipulation or act, such policy shall be binding on the company for the amount of paid-up insurance," to be computed and valued according to a prescribed rule. Mr. Smith paid two full annual premiums. Whether he paid or tendered another, which fell due May 24, 1892,

or was excused from doing so, is the question raised. The company, treating him as in default for failure to pay, refused payment subsequently, because, as it asserted, the policy had lapsed.

Under direction of the court, a verdict was rendered for the plaintiff in the amount of paid-up insurance under the statute, only. The plaintiff appealed and assigned the following errors:

"First: The court erred in refusing to affirm the plaintiff's first point, which was as follows:

" 'If the jury believe from the evidence that Z. McD. Smith, the insured, on the 24th day of May, 1892, signed and delivered to the defendant company a dividend receipt or voucher for $46.90 in each policy, authorizing the company to apply the same on the premiums then due; that he gave his three premium notes upon the forms provided by the company, payable in three, six and nine months, in accordance with the company's custom, and also gave an ordinary promissory note for $82.61, payable in thirty days, being for the balance of the cash payment of premium in each policy, to wit, $1.10, with interest on the note, and that the same were accepted by the company in payment of the annual premiums due that day upon policies Nos. 88,946 and 88,947; that said policies were thereby continued in force for another year, and said company having afterwards refused payment of said ordinary note and attempted to cancel said policy, and the said Smith having subsequently died, plaintiffs are entitled to recover in each case, and the verdict should be for the full amount of the policies, with interest from the insured's death.'

"Second: The court erred in refusing to affirm the plaintiff's second point, which was as follows:

" 'If the jury believe, from the evidence, that the previous course of dealings between the insured and the company in regard to receiving payment of overdue premiums at any time within ninety days from the date that they fell due had been such as to lead him to believe that the same course will be pursued in regard to the small portion of the annual premium due May 24, 1892, covered by the promissory note for $82.61, mentioned in the first point, and that he tendered payment thereof within ninety days of its date in good faith, the defendant company should have accepted payment and had no right to forfeit the policy, and for that reason, in addition to the one set out in the first point, the verdict should be for the plaintiffs in each case for the full amount of the policy, with interest from the date of the decedent's death.'

"Third: The court erred in affirming the first point of the defendant, which was as follows:

" 'That under all the evidence the verdict must be for the defendant except as to the paid up value of the policy as set forth in the defendant's third point.'

"Fourth: The court erred in the general charge in stating that

" 'Mr. Dermitt had no authority to accept the insured's note at thirty days instead of cash; besides the evidence does not justify the finding that he did so accept the note for $82.61. The company itself did not accept that note or authorize the acceptance thereof, and knew nothing of the transaction.'

"Fifth: The court erred in the general charge in stating that

" 'The indulgence which Mr. Smith received in the year 1891 did not excuse his default in 1892. The evidence in the opinion of the court does not justify the finding that Mr. Smith was misled.' "

The only questions raised are those presented by the first and second assignments. Were the answers to the points therein recited erroneous?

To the first of these points the court said:

"This point is refused, because, in the opinion of the court, it is not warranted by the evidence in the case. Mr. Dermitt had no authority to accept the assured's note at 30 days instead of cash; besides, the evidence does not

justify the finding that he did so accept the note for $82.61. The company itself did not accept that note or authorize the acceptance thereof, and knew nothing of the transaction."

This answer seems fully justified by the evidence. A careful examination has not discovered anything to warrant a belief that Mr. Dermitt undertook to accept the note mentioned, in payment of the premium; and besides it is clear that if he had so undertaken his act would have been unauthorized, and therefore ineffectual. He had no power to postpone payment of the premium, or to substitute anything for it. The defendant, personally neither accepted the note nor knew of its existence.

To the second point the court replied:

"Under the uncontradicted evidence this point is refused. The evidence does not warrant its affirmance. The indulgence which Mr. Smith received in the year 1891 did not excuse his default in 1892. The evidence in the opinion of the court does not justify a belief that Mr. Smith was misled."

We do not see how the point could have been answered differently. We find no evidence to warrant its submission. The dealing referred to was slight, and standing alone would not justify a belief that Mr. Smith thought himself excused from the obligation to make prompt payment. But it is clear that he did not so think—that he was not betrayed or misled into delay; for it distinctly appears that he was repeatedly warned, in ample time, of the necessity of prompt payment, and the danger of delay.

There is no room for question about the rules of law applicable. A course of dealing which justifies the assured in believing that punctuality in paying premiums is not required, or will be excused, will relieve him from the consequences of delay, as was held in Insurance Co. v. Unsell, 144 U. S. 439, [12 Sup. Ct. 671.] But it must be dealing which actually creates such belief, and justifies a jury in finding its existence. The assured seeking relief from the terms of his contract must prove they were waived or that he was misled. Punctuality in paying premiums is of the essence of such contracts, and the consequences of delay can only be avoided by waiver, or other sufficient excuse; Thompson v. Insurance Co., 104 U. S. 252; Statham v. Insurance Co., 93 U. S. 24; Klein v. Insurance Co., 104 U. S. 88; Miles v. Insurance Co., 147 U. S. 177, [13 Sup. Ct. 275.]

A discussion of the evidence involved would extend the opinion without serving any useful purpose. The case was well tried, and the conclusion reached the only one admissible. The assured acquiesced in the company's position—that his policy had lapsed—and accordingly neither paid nor tendered subsequent premiums, but treated the policy as a security simply for the interest acquired under the statute. Had his life been continued the claim now made would never have been urged or thought of; his early death alone suggested it. Had he lived ten years longer without payment or tender, this claim would then have been as reasonable as it is now.

The judgment is affirmed.

YARDLEY v. TRENHOLM.

(Circuit Court of Appeals, Second Circuit. October 15, 1894.)

No. 146.

BANKS—ACTION FOR OVERDRAFTS PAID—EVIDENCE.

In an action by the receiver of a bank against a customer to recover $6,784.94, paid on alleged overdrafts, the bookkeeper of the bank testified that the ledger showed $2,995.78 overdrafts at the close of 1888, and that the leaves in the ledger of 1889 containing defendant's account had been destroyed, before the bank suspended, by some unknown person, but that the witness' recollection was that the ledger showed overdrafts by defendant of about $6,000. The cashier testified that checks amounting to $3,619.16 of defendant were paid in 1889. There was no evidence of the amount of deposits in 1889 made with the receiving teller, or that none had been made. No deposit slips were produced, nor was it shown that there were no such slips. The accuracy of the ledger accounts was not proved. *Held*, that the court properly directed a verdict for defendant.

In Error to the Circuit Court of the United States for the Southern District of New York.

This was an action by Robert M. Yardley, receiver of the Keystone National Bank, against William Trenholm, to recover alleged overdrafts paid. The court directed a verdict for defendant, and plaintiff sued out a writ of error.

Silas W. Pettit and William F. Randel, for plaintiff in error.

John J. Crawford, for defendant in error.

Before BROWN, Circuit Justice, and WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. Robert M. Yardley, the plaintiff, was duly appointed on May 9, 1891, receiver of the Keystone National Bank of Philadelphia, which ceased to do business on March 20, 1891, and, as receiver, brought an action at law against the defendant to recover the sum of $6,784.94. The complaint alleged that between October 1, 1888, and September 7, 1889, the defendant's deposits in said bank amounted to $6,058.65; and that his drafts upon the bank amounted to the sum of $12,843.59; and that the difference had been overpaid him, and was on May 9, 1891, due to the bank and to the plaintiff. The defendant's answer was a general denial. Upon trial of the case to the jury, the plaintiff proved by one Ege, who was a bookkeeper in the bank, and kept the ledgers for 1888 and 1889, which contained the defendant's account, that his account was balanced on October 1, 1888, and showed an overdraft on that day of $1,608.53; that the ledger showed an overdraft at the close of 1888 of $2,995.78; that the leaves in the ledger of 1889 containing Trenholm's account were cut out, before the bank suspended, by some unknown person; and that the witness' recollection was that the ledger showed an overdraft by Trenholm of about $6,000. It was proved by the cashier that 30 checks of Trenholm's, amounting to $3,619.16, were paid in 1889, and that the deposits were made with the receiving teller, and not with the bookkeeper. There was no evidence of the amount of deposits in 1889, or that none had been made. The deposit slips were not produced,

or the fact that there were no such slips was not proved. Neither the accuracy with which the missing leaves in the 1889 ledger were kept, nor the accuracy of the ledger of 1888, was proved. At the close of the plaintiff's testimony, upon motion, the court directed a verdict for the defendant, upon the ground that there was not sufficient testimony to entitle the plaintiff to recover. The assignment of errors presents in various forms the correctness of the ruling of the court.

The question which was before the circuit court for decision was whether the plaintiff had made a prima facie case, which required a defense. Assuming, what was shown only by way of inference, that Trenholm's bank book was written up on October 1, 1888, and that he must be considered as having assented to the correctness of the ledger account, the sole knowledge which the jury could have of the state of the account on September 7, 1889, was the recollection of the bookkeeper that the ledger showed an overdraft of about $6,000. This recollection amounted to nothing, in the absence of evidence that the book was accurately kept. If the ledger had been in court, it would not have proved itself. Its probable accuracy must be presented to the jury by the testimony of those who had original means of information, and whose business it was to furnish such information to the bookkeeper. Proof in regard to Trenholm's deposits was necessary, because, although payment of his checks was proved, there was no presumption that they were not drawn upon and paid from funds to his credit in the possession of the bank. White v. Ambler, 8 N. Y. 170. The original entries of deposits, if any there were, were not produced, and it was not shown that there were no such entries. The bookkeeper did not testify from what source he was in the habit of obtaining notice of deposits, or that he entered all of which he received notice. When the person who makes the entries has no knowledge of the correctness of the charge, but receives his information entirely from another, who was a party to the transaction, it is necessary to show by some testimony the probable accuracy of the system or course of business which was employed to make original memoranda, and to transmit information of them to the person whose sole business it is to make the entries. For example, testimony from the teller that he correctly made true reports of all deposits to the bookkeeper, or made correct memoranda in the discharge of his duty, and in the usual course of business, which were duly handed to the bookkeeper, and his testimony that he correctly entered all the reports, would, if written vouchers had been destroyed, make prima facie proof of the accuracy of the final entries. Kent v. Garvin, 1 Gray, 148; Harwood v. Mulry, 8 Gray, 250; Mayor, etc., of New York v. Second Ave. R. Co., 102 N. Y. 572, 7 N. E. 905. In this case the counsel for the plaintiff probably presented all the evidence which was accessible. There is enough in the record to suggest that those officers who, at the time of the bad management of the bank, were privy to it, desired concealment of their conduct.

We find no error in the action of the circuit court, and the judgment is affirmed, with costs.

LITTLE ROCK & M. R. CO. v. ST. LOUIS S. W. RY. CO. (two cases. Nos. 394, 399). SAME v. ST. LOUIS, I. M. & S. RY. CO. (two cases. Nos. 395, 398). SAME v. LITTLE ROCK & FT. S. RY. CO. (two cases. Nos. 396, 397).

(Circuit Court of Appeals, Eighth Circuit. September 24, 1894.)

1. CARRIERS—INTERSTATE ACT—CONNECTING LINES—DISCRIMINATION—PREPAYMENT OF CHARGES.
   An interstate carrier does not subject another carrier to an "undue or unreasonable disadvantage" (Interstate Commerce Act, § 3, cl. 2) by exacting the prepayment of freight on all property received from it at a given station, although it does not require charges to be paid in advance on freight received from other individuals and competing carriers at such station. 59 Fed. 400, affirmed.

2. SAME—THROUGH BILLING, RATING, AND LOADING.
   An interstate carrier which enters into an arrangement with a connecting carrier for through billing, rating, and loading, and for the use of its tracks and terminals, is not obliged to make the same arrangement with other connecting carriers, though the physical facilities for an interchange of traffic are the same. 59 Fed. 400, affirmed.

Appeals from and Writs of Error to the Circuit Court of the United States for the Eastern District of Arkansas.

These were six suits which were brought by the Little Rock & Memphis Railroad Company against the St. Louis Southwestern Railway Company, the St. Louis, Iron Mountain & Southern Railway Company, and the Little Rock & Ft. Smith Railway Company, for alleged violations of the third section of the interstate commerce law (24 Stat. 379, 380). A suit at law and a bill in equity were filed against each of the defendant companies above named, in which the Little Rock & Memphis Railroad Company counted upon the same violation of the law; asking in the one case for an injunction, and in the other for damages. The six suits against the three companies involved similar questions. They have been argued as one case, and it is found most convenient to dispose of them in a single opinion. Subjoined diagrams will serve to illustrate the relations which the several railroads concerned occupy to each other. It will be seen by a glance at diagram No. 1 that the Little Rock & Memphis Railroad runs east and west from Little Rock, Ark., to Memphis, Tenn. Its total length is about 135 miles. Coming down from the north, the St. Louis Southwestern Railway crosses the Little Rock & Memphis Railroad at Brinkley, a point intermediate between Little Rock and Memphis. It also crosses a branch of the St. Louis, Iron Mountain & Southern Railway, leading from the main line of that road into Memphis, at Fair Oaks, which is a point about 20 miles north of Brinkley. Diagram No. 2 illustrates the situation further west, in and about Little Rock. It will be seen that the main line of the St. Louis, Iron Mountain & Southern Railway Company enters Little Rock from the north, and thence runs southwest through Arkansas into Texas, with a branch leading from Little Rock to the southeast. The Little Rock & Ft. Smith Railway runs west from Little Rock to Ft. Smith on the western border of the state of Arkansas, and to Ft. Gibson in the Indian Territory. Its length is said to be about 165 miles. Diagram No. 2 does not show the main line of the St. Louis Southwestern Railway, which is disclosed by the first diagram; but it is sufficient to say that, after passing through Brinkley, it runs in a southwesterly direction through Arkansas, and far into Texas. As against the St. Louis Southwestern Railway Company, complaint was made that it refused to receive freight or passengers coming over the Little Rock & Memphis Railroad except at local rates, and that it refused to honor through tickets or through bills of lading issued by the latter road, and that it required all freight to be rebilled and reloaded, and all passengers to purchase new tick-