

the receivers' reports, for which the clerk charged 10 cents a voucher, amounting to \$1,562.10. It may be that these vouchers unnecessarily incumber the records of the court, and unduly swell the cost of the proceedings. We express no opinion as to whether these vouchers should have been kept in a safe place among the records of the railroad offices, or filed with the special master, or brought into court and filed with the clerk. As the statutes and rules of court now stand, it was in the discretion of the judge to decide this question, and we do not feel authorized to review his decree in this matter, or in the matter of making a part of the amount of the costs a charge on the property of the railway and railroad companies respectively. We are clear that so much of the proper cost as accrued during the first receiver's operation of the railroads, and grew out of that operation, was and is a proper charge on the property of those corporations, and that, under the conditions in which the costs accrued, the apportioning of them against the respective properties must rest in the sound discretion of the judge of the circuit court. The decrees appealed from are affirmed.

TABOR v. INDIANAPOLIS JOURNAL NEWSPAPER CO.

(Circuit Court, D. Indiana. March 14, 1895.)

No. 9,184.

1. PLEADING—SURPLUSAGE—COMPLAINT FOR LIBEL.

Allegations in a complaint for libel that plaintiff addressed several letters (setting them out in full) to defendant, asking a retraction of the alleged libelous statements, and that no answers thereto were received, constitute a violation of the rule requiring a statement of facts constituting the cause of action, and not the evidence to sustain it; and all matter relating to such letters must be stricken out on motion.

2. PRACTICE—FILING INTERROGATORIES IN ACTIONS AT LAW.

The rule of practice in the federal courts does not permit the plaintiff in an action at law to file, with his complaint, interrogatories to be answered by defendant. *Ex parte Fisk*, 5 Sup. Ct. 724, 113 U. S. 713, followed.

This was an action for libel brought by Julia Marlowe Tabor against the Indianapolis Journal Newspaper Company. Defendant moves to strike out certain matter from the complaint.

Lucius B. Swift, for plaintiff.
Hawkins & Smith, for defendant.

BAKER, District Judge. The plaintiff, in her complaint, alleges that the defendant did maliciously, with intent to injure her good name and reputation, and to defame and injure her in respect of her profession as an actress, print and publish in the regular Sunday issue of the Indianapolis Journal, of and concerning the plaintiff, a certain false and malicious libel, which is set out in the complaint. The complaint then further alleges that on the 16th day of January, 1895, the plaintiff caused to be addressed to the defendant's editor a letter, which is set out, asking for a retraction of the

alleged libelous matter. It further alleges that, no answer having been received to that communication, on the 21st of January, 1895, the plaintiff caused another letter to be addressed to the defendant, asking for a retraction of the alleged libel; and it alleges that no answer was received to that letter. The complaint further alleges that on the 5th day of February, 1895, the plaintiff addressed to the defendant another letter, in like manner asking for a retraction of the alleged libelous matter; and that no response to either of said letters has been made, and the alleged libelous matter has never in any manner been retracted by said defendant. The complaint alleges that plaintiff has been damaged by said libelous publication, in her person and in her profession, in the sum of \$25,000, for which she demands judgment. The complaint is also accompanied by five interrogatories, and the court is asked to require that the same be answered by the defendant under oath, positively and without evasion, within such time as may be limited by the court therefor. These interrogatories, if proper to be filed and answered, call for facts which would be pertinent to the matters alleged in the complaint.

The defendant has moved the court to strike out all that part of the complaint relating to and containing the several letters above mentioned. This motion must be sustained. While it is true that a refusal to retract a libel may be given in evidence on the trial of the cause in support of the charge that the alleged libelous publication was maliciously made, it is improper to set out such evidence at large in the complaint. All that part of the complaint which contains the letters relates to matter constituting no part of the cause of action, and which occurred after the alleged cause of action accrued, and can only be competent as evidence to reflect light on the prior intention of the publisher of the libel at the time the publication was made. It is fundamental in the law of pleading that the facts constituting the cause of action, and not the evidence to support it, shall be set out in the complaint. The plaintiff is given an exception to this ruling, and has leave within 20 days to file her bill of exceptions.

Although no motion has been made by the defendant to strike out the interrogatories filed with the complaint, the court feels constrained *sua sponte* to strike them out. It is settled by the rule of practice in this court that the plaintiff will not be permitted to file interrogatories to be answered by the defendant, with his complaint, in a common-law action. This principle is established by the decision of the supreme court of the United States in *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. 724, and later cases in the federal courts follow the doctrine of this case.

An order, therefore, will be entered, striking from the files all the interrogatories annexed to the complaint in this cause, to which ruling the plaintiff excepts, and has 20 days in which to file her bill of exceptions.

HAMMOND v. CRAWFORD.

(Circuit Court of Appeals, Second Circuit. March 5, 1895.)

1. BROKERS—COMMISSION FOR EFFECTING SALE—WHEN EARNED.

Defendant made a contract in writing with plaintiff, agreeing, "in case he effected a sale or deal of" certain mines, through the introduction by plaintiff of one S., to pay plaintiff certain sums in money and stock. Plaintiff introduced S. to defendant, and an agreement was made between them that defendant should organize a corporation, and convey the mines to it, and issue certain stock to S., who should then make certain payments in cash to defendant and to the corporation, it being provided that the charter and by-laws of the corporation must be mutually satisfactory to the parties. Subsequently, defendant, having organized the corporation, offered to S. its charter and by-laws and a deed of the mines. S. refused to consummate the contract on the grounds that defendant's title was not good, and that the charter and by-laws of the corporation were not satisfactory to him. The transaction then came to an end, and no sale or deal with S. was effected. *Held* that, as plaintiff's intervention had not effected either a completed sale or an enforceable agreement for sale, he was not entitled to the commission stipulated in his contract with defendant.

2. PRACTICE—REQUEST FOR SUBMISSION OF A QUESTION TO JURY.

When a party does not ask to go to the jury on a question arising in the case, he cannot contend, in an appellate court, that such question should have been left to the jury.

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

This was an action by William J. Hammond, Jr., against George Crawford, on a written contract. The circuit court directed a verdict for defendant, and entered judgment thereon. Plaintiff brings error.

Charles H. Brush, for plaintiff in error.

Hugh L. Cole, for defendant in error.

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

LACOMBE, Circuit Judge. This is an action upon a written contract in the words and figures following:

"N. Y., July 15, 1891.

"The understanding I have with W. J. Hammond, Jr., is as follows: That in case I effect a sale or deal of the Confidence group of mines situated in Socorro county, New Mexico, through the introduction, by said Hammond, of A. F. Sortwell or his associates, I am to pay said Hammond from the sale of stock of the Confidence Mining Company, which I am to sell at par, \$25,000 in cash, and am also to assign to W. J. Hammond, Sr., \$25,000 of the aforesaid mining stock, and, in addition to the above, I am to pay over to said Hammond, Jr., \$25,000 in cash, and am to assign to said Hammond, Jr., or whom he may direct, \$25,500 of the aforesaid mentioned mining stock.

"George Crawford."

The plaintiff contended that he performed the services required of him, and, alleging that the stock of the said company was worth \$25 per share (the par value being \$5), demanded judgment for \$302,500. He sought to prove performance by showing that through his procurement Sortwell entered into an agreement with defendant containing the following provisions, viz.: That Crawford was to cause