

front as is included within the side boundary lines of his tract running to the river; and, if the river gradually washes away its bank, each tract or lot will be diminished by the amount washed away from between its boundary lines, and the owner thereof must stand such loss, and he cannot, on any legal or equitable principle, require the adjacent owner to share such loss, even if it be true that their loss has been less than his, or because their lots have gained by accretion what he has lost; and, on the other hand, as each tract is liable to be thus diminished in extent, and its boundary lines to be shortened, it is also liable to be increased in area, and its side boundary lines to be lengthened by the accretions formed upon its front. It must certainly be the law that, if a person owns a 40-acre tract bounded on the north and south by the governmental survey lines and on the east by the river, and there is formed an accretion in front of the tract, but wholly between the north and south boundary lines thereof, such accretion forms part of that 40-acre tract, and the adjacent owners on the north or south cannot assert any title or right, legal or equitable, to the accretion thus lying wholly between the north and south boundary lines extended of the adjacent owner. If, in the progress of time, the accretion grows, and by so doing passes by the extended north and south lines of the tract in front of which it began to form, then the portions outside of these lines, and which in fact are between the side boundary lines of the adjacent tracts, will become accretions to the adjacent tracts. It seems clear that this rule is simple in its application, and will meet the ordinary cases arising out of accretions formed in front of the lands surveyed by the government abutting upon the Missouri and other rivers of the Western country. It may be true, as is urged by counsel for the defendants, that occasionally, owing to the crooked course of many of the Western rivers, fractional lots may be formed, the river front of which may look to the north or south, and that the extension of the side boundary lines of such a lot might intersect with the extended north and south boundary lines of some adjacent tract. Should this occur, then the situation would call for the application of a proper equitable rule to determine how that portion of the accretion lying between the extended lines of each tract should be divided, but the possibility of such an occurrence is no argument against the adoption of the general rule followed by the court, when the only substitute proposed by counsel for defendants is that in every instance of an accretion formed in front of several abutting government tracts an equitable apportionment must be had. The motion for a new trial is overruled.

ROSE v. NORTHWEST FIRE & MARINE INS. CO.

(Circuit Court, D. Oregon. January 7, 1896.)

No. 2157.

PRACTICE—COUNTERCLAIM—ACTION ON CONTRACT—OREGON CODE.

An action upon a judgment of another state is an action arising on contract, within the meaning of the provision of the Code of Oregon that, in

such an action, any other cause of action, arising also on contract, and existing at the commencement of the action, may be pleaded as a counterclaim.

This was an action by Charles E. Rose, receiver of the Consolidated Mutual Fire Insurance Company of Chicago, Ill., against the Northwest Fire & Marine Insurance Company of Portland, Or., upon a judgment recovered in Illinois. A motion to strike out parts of the answer was denied. 67 Fed. 439. Plaintiff demurred to the answer and to a counterclaim therein set up.

Rufus Mallory, for plaintiff.
Zera Snow, for defendant.

BELLINGER, District Judge. In this case there is a demurrer to three several parts of the answer, by which are again raised the same questions heretofore decided on the motion to strike out all the separate defenses set up in the answer. Upon that hearing it was decided that, in an action on a judgment of another state, the defendant may show, notwithstanding the record to the contrary, that he was not served with process, and that the court did not acquire jurisdiction of his person; that such judgment is conclusive as to all matters going to the merits of the controversy, but not as to the facts conferring jurisdiction; and that the defendant is entitled to plead the counterclaim set up in its answer. 67 Fed. 439. The last of these questions is the only one that I shall now consider. The Code provides that, in an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action, may be pleaded as a counterclaim. It is contended for the demurrer that an action upon a judgment is not upon contract, within this provision; and this view is directly held in *Rae v. Hulbert*, 17 Ill. 572, under a statute like that of this state. The court says:

"We cannot agree with counsel that a judgment is a contract, within the meaning of this statute. It is the conclusion of the law upon the rights of the parties, and it is not very common that it is entered up by the agreement of the unsuccessful party, but the reverse is generally the case. In this statute the words 'action,' 'contract,' and 'agreement' are used in their ordinary sense, and not with the intention of embracing every imaginable litigation upon every cause of action. A judgment is no more a contract than is a tort."

The case of *Crawford v. Executors of Simonton*, 7 Port. (Ala.) 110, is also cited in support of the demurrer; but in that case the conclusiveness of the judgment sued on is placed upon the ground that the matter pleaded in defense was available in the action where the judgment was rendered, and it is held that it is not allowable to interpose any plea that might have been pleaded in the first action. It is claimed that the Illinois case should be conclusive here, because the judgment sued on in this action is a judgment of that state. The question must, however, be decided upon the weight of authority, and whether judgments of other states are "contracts," within the Oregon statute, must be left to the interpretation of that statute; otherwise, it will result that a judgment of New York

must be held to be a "contract," and a judgment of Illinois not to be one, within the meaning of the same statute, since the highest courts of these states hold opposite views on this subject. The weight of authority is against the view taken by the supreme court of Illinois. It is held in Kentucky, Pennsylvania, Iowa, and New York that a judgment is a contract, within the meaning of statutes in effect like that of this state. Rankin v. Barnes, 5 Bush, 20; Taylor v. Root,* 43 N. Y. 335; Johnson v. Butler, 2 Iowa, 535; Hogg v. Charlton, 25 Pa. St. 200. In the New York case cited, the judgment sued on was recovered in an action founded on tort. The court say that the nature of the action wherein the judgment was recovered, and the cause thereof, were wholly immaterial, and in no manner affected the right of counterclaim. I shall follow the rule which seems to me to be thus supported by the weight of authority.

It was urged on the argument that the defendant is a stockholder in the plaintiff company, and that the judgment in this action was recovered for assessments levied upon the stock so held by defendant. It does not appear, however, that the judgment in question was recovered upon defendant's liability as a stockholder in the plaintiff company, or that defendant was such stockholder. The rule seems well settled that a stockholder cannot, in a proceeding against him by or on behalf of a creditor or creditors, set off a debt due to him by the corporation. As the case now stands, this question does not arise. The demurrer to the defense upon the merits of the judgment upon which the action is brought is sustained. As to the other defenses, the demurrers are overruled.

WHITTEMORE v. WESTERN UNION TEL. CO.

(Circuit Court, D. Kansas, First Division. December 21, 1895.)

No. 7,236.

1. TELEGRAPH COMPANY—DELIVERY OF MESSAGE—LIABILITY FOR DELAY.

When the agent of the company at the terminal office, instead of complying with a rule of the company by demanding payment or guaranty from the sender of charges for delivery beyond the established free-delivery limits, decides to have the message delivered, and trusts to voluntary compensation by the addressee, he is bound to act without unnecessary delay, and deliver it with reasonable promptness.

2. SAME—PAYMENT IN ADVANCE.

If the sender knew that the addressee lived beyond the free-delivery limits, and he made no deposit to pay for the delivery of the message, and did not guaranty its payment, or provide for such extra service, the failure of the company to deliver the message beyond such limits does not render it liable, unless the operator at the terminal office waived the requirements of prepayment or guaranty, and undertook to deliver the message and trust to the addressee for payment.

Action by Charles E. Whittemore against the Western Union Telegraph Company.