

portant engagements; and that, by reason of exposure, his health was greatly impaired, to his damage a named sum. Held, that the petition was bad on demurrer, the damage being too remote, conjectural, and not in contemplation of the parties in case of a breach of the contract."

The only question remaining is whether or not the complaint states a cause of action for nominal damages, and the penalty provided in section 2209, Civ. Code Cal. This section is as follows:

"Sec. 2209. Every person whose message is refused or postponed, contrary to the provisions of this chapter, is entitled to recover from the carrier his actual damages, and fifty dollars in addition thereto."

To this section the commissioners have appended the following note:

"This new provision is needed to protect the rights of parties who are seriously annoyed by delays which, nevertheless, cannot be shown to have caused them pecuniary damage."

In the case at bar each count of the complaint alleges a valid contract between plaintiff and defendant, and its breach by the latter. These allegations, if proven, would, at least, entitle the plaintiff to nominal damages,—the amount paid for the transmission of the message,—if no more, and the statutory penalty of \$50. *Alexander v. Telegraph Co.*, 66 Miss. 161, 5 South. 397; *Telegraph Co. v. Allen* (Miss.) 6 South. 461.

The foregoing views render it unnecessary for me to pass upon the question, argued in defendant's brief, whether or not mental suffering is, in California, under any circumstances, a proper element of damages. Demurrer overruled.

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GLENN v. PORTER.

(Circuit Court of Appeals, Second Circuit. March 12, 1896.)

CORPORATIONS—UNPAID STOCK—LIABILITY OF TRANSFEREE.

One who takes an assignment of stock, accompanied by a transfer to his name on the books, and receives a certificate from the corporation, issued to him in his own name, reciting that he is entitled to so many shares, on each of which a certain sum has been paid, leaving a specified amount "to be paid when called for," is liable, as a subscriber, for the balance due on the stock.

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

This was an action at law by John Glenn, as trustee of the creditors of the National Express & Transportation Company, against Horace Porter, to recover a balance alleged to be due on stock of the corporation held by defendant. The circuit court directed a verdict for defendant, and entered judgment accordingly. Plaintiff brings error.

Burton N. Harrison (Arthur H. Masten, of counsel), for plaintiff in error.

George Zabriskie, for defendant in error.

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

WALLACE, Circuit Judge. The court below directed a verdict for the defendant upon the ground that there was no proof of the cause of action set forth in the complaint. The complaint alleges that the defendant "subscribed for fifty shares of the par value of \$100 each of the capital stock of the National Express & Transportation Company, a corporation in the state of Virginia, and thereby, for valuable consideration, agreed to be liable to said corporation, and undertook and promised to pay to said corporation, for each and every share so subscribed for by said defendant the sum of \$100, in such installments and as and when said defendant should lawfully from time to time be called upon and required to pay the same; whereby and by force of which said subscription said defendant became and was received and admitted to be a stockholder in and a member of said corporation."

It was proved upon the trial that the defendant became the holder of a certificate issued to him, and in his name, by the corporation, reciting that he was entitled to "fifty shares of the capital stock of the National Express & Transportation Company, on each share of which has been paid \$5 in cash, leaving \$95 to be paid when called for." The defendant's acceptance of this certificate, and the fact that the shares had been transferred to him upon the books of the corporation, were shown by an assignment of the shares in writing, signed by him.

The ruling at the trial is sought to be upheld upon the theory that, although the evidence was sufficient to show that the defendant became a stockholder in the corporation, the cause of action set forth in the complaint was founded, not upon that fact, but upon the fact that he was a subscriber for the stock, and the proof failed to establish the averment.

Assuming that the complaint should receive the strict construction thus placed upon it, we think the case made was sufficient to charge the defendant as a subscriber for the fifty shares. Whether he was an original subscriber for the shares, or became a subscriber by substitution, is immaterial. It suffices if he assumed towards the corporation the obligation of a subscriber. He did this by the acceptance of the certificate containing the promise to pay for the shares upon call. "When an original subscriber to the stock of an incorporated company, who is bound to pay the installments on his subscription from time to time as they are called in by the company, transfers his stock to another person, such other person is substituted, not only to the rights, but to the obligations, of the original subscriber; and he is bound to pay up the installments called for after the transfer to him. The liability to pay up installments is shifted from the outgoing to the incoming shareholder." *Ang. & A. Corp.* § 534. This statement should be understood with the qualification that the substitution, to become complete, should be recognized by the corporation, as when the transfer is acknowledged by registry upon the books. *Webster v. Upton*, 91 U.

S. 65. As was said in *Upton v. Tribilcock*, Id. 45, 48: "A promise to take shares of stock means a promise to pay for them. The same effect results from the acceptance and holding of a certificate."  
The judgment is reversed.

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SPARKS v. NATIONAL MASONIC ACC. ASS'N.

(Circuit Court, S. D. Iowa, C. D. February 6, 1896.)

1. JURISDICTION—FOREIGN INSURANCE COMPANIES—SERVICE OF PROCESS.

When, by the statute of a state, an insurance company, transacting business in such state, is required to file with a designated officer of that state a written appointment of such officer as the person upon whom process, directed against such company, may be served, such officer becomes, from the fact of its so transacting business therein, the representative of the company with regard to the service of such process, irrespective of whether such appointment has been so filed or not.

2. SAME.

A statute of Missouri (Rev. St. 1889, § 5912) provides that any insurance company, not incorporated by that state, desiring to transact business by any agent or agents in the state, shall first file with the superintendent of the insurance department a power of attorney, authorizing him to receive service of process for the company; that service of process upon such superintendent shall be valid and binding, so long as the company shall have any policies outstanding in the state; and that, if such company shall fail to make such appointment, it shall forfeit the right to do business in the state. The general agent and a soliciting agent of the M. Association, an Iowa insurance company, during the months of April and May, 1892, solicited insurance for that company in several towns in Missouri. They forwarded to the company 66 applications for policies, all dated in Missouri, stating the residences of applicants and beneficiaries as in Missouri, and all accompanied by fees, receipts for which, dated in Missouri, and containing an agreement to refund if no policies were issued, were given to the applicants. The policies were mailed by the company from Iowa to the applicants in Missouri, and, from the time of the issue of the policies until 1895, the dues thereon were collected by local collectors, in the various Missouri towns, who gave receipts for such dues, dated in Missouri, on forms furnished by the company. The M. association had never formally authorized the soliciting of insurance in Missouri, nor filed the power of attorney required by the Missouri statute; but the records of the company gave full knowledge to the board of directors, of whom the general agent who solicited the insurance was one, of the solicitation of such insurance and the issue of the policies in Missouri. Plaintiff brought an action against the M. Association, on one of the policies so issued, in a Missouri court. Process was served on the superintendent of insurance, and judgment was obtained by default, on which plaintiff afterwards brought suit in a federal court in Iowa. The defendant pleaded that the Missouri court had no jurisdiction. *Held*, that the M. Association was doing business in Missouri, within the meaning of the statute, and having thereby asserted a compliance with the laws of the state permitting it to do so, was estopped to set up that it had not authorized the superintendent of insurance to receive service of process, in order to defeat the jurisdiction of the court by which the judgment was rendered, and, accordingly, that the service on the superintendent was sufficient.

Cummins & Wright, for plaintiff.  
Clark Varnum, for defendant.

WOOLSON, District Judge. The plaintiff, a citizen of the state of Missouri, brings this action against defendant, a corporation organized under the laws of the state of Iowa, upon a judgment re-