

with by the defendant. *Gratiot v. U. S.*, 15 Pet. 338; *U. S. v. Wilkins*, 6 Wheat. 135; *U. S. v. Eckford*, 6 Wall. 484; *U. S. v. Ringgold*, 8 Pet. 150. That section, which originated in the act of March 3, 1797, has received a very liberal construction by the supreme court, "extending it to matters even distinct from the cause of action if only such as the defendant is entitled to a credit on, whether equitable or legal." *U. S. v. Buchanan*, 8 How. 105. By that section, however, no claim for a credit shall be admitted, in suits brought by the United States against individuals, except such as appear to have been presented to and disallowed, in whole or in part, by the accounting officers of the treasury, unless it is proved that the defendant is in possession of vouchers not before in his power to procure, and was prevented from exhibiting his claim for such credit at the treasury by absence from the United States or by some unavoidable accident. It has not been shown that the claim has been presented to the accounting officers of the treasury, nor that the defendant has been prevented by any cause from making presentation. Consequently, the defendant must seek its remedy by a suit against the government, brought conformably to the provisions of the act of March 3, 1887. 1 Supp. Rev. St. p. 559.

It follows that the plaintiff is entitled to judgment in the sum of \$94,687.50.

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UNITED STATES v. McCLANE et al.

(Circuit Court, D. Oregon. April 28, 1896.)

1. OFFICIAL BONDS—INDIAN AGENT—PAYMENT UNDER MISTAKE.

The bondsmen of an Indian agent cannot be held liable for a mistake of fact or law, or error of judgment, or misconstruction of authority, by such agent, in disbursing money in good faith for the benefit of the government, though the payment has been disallowed in his accounts.

2. SAME—FAILURE TO FILE RECEIPT.

The mere failure of an Indian agent to file a receipt, with his accounts, for money actually disbursed for the benefit of the government, is not enough to charge his bondsmen for such money.

3. SAME—DISPOSITION OF PROPERTY.

Nor is the mere failure of such agent's property return to show the disposition of a large quantity of clothing and provisions sufficient, without other evidence to authorize an inference, in an action against his bondsmen, that such property has been misapplied.

4. SAME—ALLEGATIONS AND PROOF.

There can be no recovery, in an action against the bondsmen, of an Indian agent, for specific articles or goods not accounted for, upon allegations that such agent has failed to account for moneys received by him.

Daniel R. Murphy, U. S. Atty., and Charles J. Schaubel, Asst. U. S. Atty.

W. H. Holmes, for defendants.

BELLINGER, District Judge. This is an action by the United States to recover the sum of \$150.85 upon the official bond of J. B. McClane as Indian agent at the Grand Ronde agency, Or. It is alleged that, of the money of the United States received by said

agent, there remains in his hands, unaccounted for, said sum of \$150.85. There is no proof that McClane retained possession of the amount claimed, or that he appropriated any part of it to his own use. The proof is entirely consistent with the use of this money for government purposes. Of the amount claimed against the bondsmen, \$99.75 were paid out by the agent, for clerk hire, to La Fayette Williams, contrary to instructions from the office of Indian affairs, and this amount was disallowed in the agent's accounts. There is nothing to impeach the good faith of the agent in making this payment, and it appears that the services for which the money was paid were rendered. The services are not disputed, and the only complaint is that they were not authorized. If McClane disbursed this money in good faith for the benefit of the government, his bondsmen are not liable for any mistake of fact, or mistake of law, or error of judgment, or misconstruction of authority, by him. This doctrine is firmly established by the authorities collected in *State v. Chadwick*, 10 Or. 465, and by the decision in that case.

Two other items are of express charges, amounting to \$1.65. These items were disallowed because the receipts of the express company were not furnished. The account shows what the charges were for, and leaves no doubt but that the payments were in fact made, and that the government has had the benefit of them.

The agent's property return fails to account for 15 jackets and pants, at \$1.75 each, amounting to \$26.40; for 2 dictionaries, at \$14.56 per dozen, making \$2.43; and for 316 pounds of beef, at 6 cents per pound, making \$18.96. It appears, also, that the agent gives himself, in his account, an excess of credit for lamp wicks amounting in the aggregate to 22 cents, and he has credited himself with \$11.50 for a stove and six joints of pipe, whereas the receipt accompanying the voucher is for only \$11.25,—an excess of credit amounting to 25 cents. These several items make up the amount for which this action is brought. There is no claim that the government has not had the use and benefit of this property, except as to the lamp wicks, and overcharge on the stove and pipe, but only that it has not been accounted for. The mere failure thus to account is not, in my judgment, under the circumstances of the case, enough to authorize an inference that this property has been misapplied. A misapplication of jackets and pants, and of a large quantity of fresh beef, ought to be susceptible of other proof than that of the negative testimony of an agent's property return. There is much stronger inference that the failure of the agent's abstracts to show what became of this property is due to negligent bookkeeping, than that the agent consumed this beef, or sold it, or the unaccounted for jackets and pants, on his private account. It is manifest that the express charges in this account were paid. The account shows what they were paid for, and the failure to file a receipt is not enough to charge the bondsmen on this account; and what is true as to these items is probably true as to the other property not accounted for on the property return. The charges as to lamp wicks and stove pipe are probably overcharges in the agent's account. They aggregate 45 cents. The allegations of the complaint are that the agent has

failed to account for moneys received by him, belonging to the United States, and that he retains such money in his possession. Upon such allegations there can be no recovery for specific articles or goods not accounted for.

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## MOTÉY v. PICKLE MARBLE &amp; GRANITE CO.

(Circuit Court of Appeals, Eighth Circuit. April 13, 1896.)

No. 703.

## 1. TRIAL—INSTRUCTIONS—DIRECTING VERDICT.

It is the duty of the court at the close of the evidence to direct a verdict for the party who is clearly entitled to recover when it would be its duty to set aside a verdict in favor of his opponent if one were rendered.

## 2. NEGLIGENCE—PERSONAL INJURIES—PROXIMATE CAUSE.

An injury that is the natural and probable consequence of acts of negligence is actionable, but an injury that could not have been foreseen or reasonably anticipated as the probable result of the negligence is not actionable.

## 3. MASTER AND SERVANT—ASSUMPTION OF RISKS.

A servant assumes the ordinary risks and dangers of the employment upon which he enters, so far as they are known to him, and so far as they would have been known to one of his age, experience, and capacity by the use of ordinary care.

## 4. SAME—NEGLIGENCE OF BOTH PARTIES.

If the negligence of a servant is one of the proximate causes of his injury, he cannot recover of his master, even though the negligence of the master also contributed to it.

## 5. SAME—CONTRIBUTORY NEGLIGENCE.

A servant is bound to exercise a degree of care commensurate with the character of his occupation and the occasion, and which a reasonably prudent person would employ under like circumstances to protect himself from injury; and if he fail to exercise that care he cannot recover for an injury to which his own negligence contributed.

## 6. SAME.

Plaintiff was employed by the superintendent of a marble company to assist him in hauling slabs of marble on a spring wagon. They loaded 14 slabs, each about  $3\frac{1}{4}$  feet wide, 9 feet long, and  $\frac{3}{8}$  of an inch thick, placing 7 on each side of the wagon on their edges, and leaning slightly outward against the stakes on either side of the wagon. This left a vacant space in the middle, in which plaintiff and the superintendent stood, each holding a stick crosswise between the almost vertical slabs to prevent them from tipping down while the wagon was in motion. After proceeding some distance it was found that the slabs on one side of the wagon were rubbing and chipping, and the wagon was stopped, and the superintendent took his brace from between the slabs. He then directed plaintiff to remove his brace, and to pull one of the slabs apart from the others, so that he could place paper between them. Plaintiff removed his brace, and took hold of the slab to pull it towards him, when the slabs on the other side fell upon both men, and broke plaintiff's leg. *Held*, that plaintiff could not recover from the marble company, for the danger and risk were plain and open, so that if the superintendent was negligent, plaintiff was also negligent, and the action of both contributed to the injury.

## 7. SAME—EXPERT EVIDENCE.

It was proper in such case to exclude the testimony of a person having much experience in hauling marble slabs, on the question whether he would consider it safe to draw slabs in this manner with a man standing between them and no frame to keep them from falling in upon him, or whether an ordinarily prudent man would draw slabs with only two sticks to keep them from falling; for defendants were not drawing slabs at the time of the accident, but were reloading them with the wagon at a stand-