

cognizance of cases that those courts would not. The declining of jurisdiction by those courts cannot, however, take from this court that which properly belongs to it; and the decision of what belongs to this, at least, must ultimately be determined by the supreme court of the United States. The decisions of that court must be followed here, as understood; and so, by them, this motion must be overruled. Motion denied, and judgment on verdict ordered.

GAILLARD et al. v. CANTINI.

(Circuit Court of Appeals, Fourth Circuit. November 10, 1896.)

No. 153.

1. PARTIES—CONSPIRACY—TRESPASS.

In an action for conspiracy to injure and oppress the plaintiff, carried out in a trespass upon his place of business, the fact that his business was carried on in company with another is not sufficient to require or justify the joinder of such other as plaintiff.

2. PLEADING—DEMURRER—IMPROPER JOINDER OF ACTIONS.

Where a demurrer on the ground that several causes of action have been improperly joined does not specify any particular cause of action as improperly joined, and fails to specify any particular part of the complaint, it must be regarded as a demurrer to the whole complaint; and, if such complaint states one good cause of action, the demurrer will not lie.

3. SAME—NO LEGAL CAPACITY TO SUE.

A demurrer on the ground "that the plaintiff has not legal capacity to sue for damage for the alleged personal injury and suffering of his wife, nor for the alleged outrage and wounding of his feelings by reason thereof," is not properly an objection to plaintiff's capacity to sue, but relates rather to the absence of facts sufficient to constitute a cause of action.

4. SAME.

In an action against several persons for damages, one of the counts averred that defendants, combining and confederating to injure and oppress plaintiff, with threats of violence caused him to open the door of his residence, and forcibly and maliciously entered therein, assaulted and overawed plaintiff, disturbed the peace of his family, and seized and carried away his property; and that by reason of said unlawful conduct plaintiff's wife became terrified, her health was injured, plaintiff's feelings were outraged, and he was damaged in reputation and character. *Held*, that the count was for a conspiracy to injure and oppress plaintiff, not an action for personal injuries and sufferings of his wife and outrage to his own feelings, and that these matters were merely set forth as part of the *res gestæ*, or as matters of aggravation and characterization of defendants' tortious acts.

5. JUDICIAL ORDERS—SEARCH AND SEIZURE—THIRD PARTIES.

A judgment order or warrant authorizing search and seizure of property can have no force or effect as to the persons or property of one who was not a party or privy to the suit in which it was made, and between whom and the parties in the case no connection appears.

6. CHIEF CONSTABLE OF SOUTH CAROLINA—POWERS.

The chief state constable of South Carolina, not being a judicial officer subject to the order of a judge, has no authority to execute the process of the courts.

7. SOUTH CAROLINA DISPENSARY ACT—ENTRY OF RESIDENCE—SEIZURE.

Certain state constables of South Carolina, under the direction of the chief state constable, entered plaintiff's residence, and took therefrom several packages of wine. There was no evidence that such residence was a place where intoxicating liquors were sold, bargained, or given away in

violation of sections 22 and 23 of the dispensary act. *Held*, that the entry and seizure were unlawful, and that plaintiff was entitled to recover damages therefor.

In Error to the Circuit Court of the United States for the District of South Carolina.

William A. Barber, Atty. Gen. S. C., for plaintiffs in error.
Theodore G. Barker, for defendant in error.

Before GOFF, Circuit Judge, and HUGHES, District Judge.

GOFF, Circuit Judge. This action was instituted in the circuit court of the United States for the district of South Carolina by Anania Cantini, the defendant in error, against Theodore Gaillard, Charles V. Swan, R. Hayne Pepper, and Charles B. McDonald, plaintiffs in error, for the recovery of damages. The plaintiff, in his complaint, set forth three causes of action against the defendants: First. That on the 3d day of October, 1893, the defendants, combining, confederating, and agreeing to injure and oppress the plaintiff, with a number of other persons unknown to said plaintiff, forcibly and maliciously entered and searched the place of business of the plaintiff and his brother in the city of Charleston and state of South Carolina, in violation of the plaintiff's rights, and to the injury of his character and reputation. Second. That on the 3d day of October, 1893, the defendants, accompanied by a number of persons unknown to the plaintiff, led by said defendants, combining, confederating, and agreeing together to injure and oppress the said plaintiff, forcibly and maliciously entered and searched the place of business of the plaintiff in said city and state, and afterwards, on same day, with an armed body of men, the defendants Charles V. Swan, R. Hayne Pepper, and Charles B. McDonald, under the order and instruction of said Theodore S. Gaillard, caused the plaintiff to open the door of his residence in said city and state, and forcibly and maliciously entered therein, assaulted and terrified the plaintiff, and disturbed the peace of his family, and searched the rooms of his private dwelling, and took from the possession of the plaintiff certain personal property, to wit, sixty-odd packages consisting of Italian domestic wine, the property of the plaintiff, to the value of \$141.75. Third. That on the 3d day of October, 1893, the defendants Swan, Pepper, and McDonald, under the direction and instigation of the defendant Gaillard, and accompanied by a number of armed men led by said defendants, combining together to injure and oppress the plaintiff, unlawfully and maliciously entered the place of business of the plaintiff in said city and state, and afterwards, on the same day, said defendants, with a number of armed men, and with threats of violence, caused the plaintiff to open the door of his residence, and forcibly and maliciously entered therein, and assaulted, terrified, and overawed the plaintiff, and disturbed the peace of his family, and despoiled plaintiff of his property, which they forcibly seized and carried away; and by reason of said unlawful conduct and by said force and violence the wife of the plaintiff became terrified, and became

therefrom ill, and greatly suffered from the effects thereof, and has been seriously injured in her health; and that the plaintiff's feelings were outraged and wounded, and that he was damaged in his reputation and character, and in other respects greatly injured. To this complaint the defendants filed a demurrer, the grounds of which will sufficiently appear as we proceed with the consideration of the case. The demurrer was overruled by the court below, and the defendants filed an answer, in which they denied all the allegations contained in the said three causes of action, except that the plaintiff was doing business in said city of Charleston and state of South Carolina; and they set forth in said answer that they were state constables under the dispensary law of that state, and that they acted in an official capacity in executing an order issued by a state circuit judge in a legal proceeding duly instituted, and that all they did was to execute said process in a lawful manner, and that, as such state constables, they were exempt from being sued for their official actions; and they further claimed in said answer that this suit was, in effect, a suit against the state of South Carolina. Defendants also moved the court to strike out of the complaint, as being irrelevant and redundant, all the allegations thereof and demands therein for damages claimed for injury to plaintiff's character and in regard to the personal injury to plaintiff's wife, and the outrage and wounding of his feelings caused thereby; which motion the court below refused. An oral demurrer to the third cause of action as set forth in the complaint was interposed by the defendants and overruled by the court below.

The case came on to be tried to a jury, and a verdict for \$3,000 was rendered for the plaintiff below. During the trial the defendants excepted to certain portions of the judge's charge to the jury, and bills of exceptions relative thereto were duly signed, as were also bills of exceptions to the action of the court in refusing to give certain instructions asked for by the defendants. The subject-matter of said several bills of exceptions and their relevancy to the pleadings and issues joined in this case will be considered hereafter. The court below (Hon. William H. Brawley, district judge, then holding the circuit court), in disposing of the demurrer and motion to strike out, filed a written opinion, which so clearly states the questions raised by the demurrer and motion that this court, in disposing of the assignments of error referring to such action of the court below, deems a further discussion of the same uncalled for, and quotes with approval the opinion of Judge Brawley relating thereto, which is as follows:

"This case came on to be heard upon a demurrer filed by defendants on the 5th day of February, 1894, and also on a notice served upon plaintiff to strike out certain allegations of the complaint. The demurrer and notice were argued together. The demurrer is upon four grounds:

"1. That there is a defect of parties plaintiff, in that Geremia Cantini should have been joined as plaintiff, because he was, at the commencement of the action, as appears upon the face of the complaint, a co-partner and "doing business in company" with the plaintiff at the place of business where the alleged forcible and malicious entry and search was made by the defend-

ants, and suffered jointly with the plaintiff the wrongs and injuries alleged.' It does not appear that there is any express allegation of partnership in the complaint, and none, except such as may be inferred from the words 'doing business in company' with, which are quoted above. These words may be considered as merely descriptive of the place of business of plaintiff Anania Cantini, and, were the partnership the gist of the action, would be scarcely sufficient as an allegation of the existence of the partnership. Moreover, the complainant does not set forth the injury complained of as done to the partnership, or as affecting in any way the partnership relation. The rule, as laid down by Mr. Pomeroy, is that: 'Where a personal tort has been done to a number of individuals, but no joint injury has been suffered, and no joint damages sustained, in consequence thereof, the interest and right are necessarily several, and each of the injured parties must maintain a separate action for his own personal redress. * * * In order that a joint action may be possible, there must be some prior bond of legal union between the persons injured, such as a partnership relation, of such a nature that the tort interferes with it, and by virtue of this very interference produces a wrong and consequent damages to all. * * * It is not every prior existing legal relation between the parties that will impress a joint character upon the injury and the damage.' Pom. Rem. § 231. The gravamen of the complaint here is a conspiracy to injure and oppress the plaintiff, Anania Cantini, carried out in a trespass upon his place of business and afterwards upon his residence. The fact that the business was carried on in company with his brother, Geremia Cantini, is not enough to require or justify the joinder of Geremia Cantini as plaintiff, and this ground of demurrer cannot be sustained. Wait's Code, p. 237, § 144.

"2. The second ground of demurrer is that 'it appears on the face of the complaint that several causes of action therein have been improperly joined.' Examination of the complaint shows that the several causes of action as set forth in the complaint (if they are considered as several distinct causes of action) all 'arise out of the same transaction or transactions connected with the same subject of action.' 'In general, under the liberal provisions of our statute, different causes of action may be united where they belong to the same class or species of injuries or wrongs, or when they arise out of the same transaction.' Estee, Pl. & Prac. p. 420, § 3068; Id. p. 153, § 314, and cases cited. Again: 'A demurrer lies only when an entire pleading that is the entire cause of action is insufficient, as a part of a cause of action cannot be demurred to. So, if any part of a bill demurred to is good, demurrer to the whole cannot be sustained. If the complaint contains one good cause of action, a demurrer to the whole complaint will not lie.' Id. p. 423, § 3071. The demurrer in this cause does not specify any particular cause of action as improperly joined, and fails to specify any particular part of the complaint. It must, therefore, be regarded as a demurrer to this whole complaint. 'When a demurrer does not go to the whole complaint it must distinctly point out the part it is intended to cover.' Wait's Code, p. 235, § 144. 'A demurrer must reach the whole cause of action.' Id. p. 235. 'If the complaint states one good cause of action, a demurrer to the whole complaint will not lie.' Estee, Pl. & Prac. p. 423, § 3071; Sewing-Mach. Co. v. Wray, 28 S. C. 86, 5 S. E. 603. It is not, however, clear that the complaint in this case does set forth several distinct and separate causes of action. 'It is not necessarily stating several causes of action to set up several grounds of complaint.' Durant v. Gardner, 10 Abb. Prac. 445; Id., 19 How. Prac. 94; Wait's Code, p. 227, § 142. 'Where the complaint contains, in substance, but one cause of action, stated in different counts, it is not a ground of demurrer.' Hillman v. Hillman, 14 How. Prac. 456. It may be here, as was held in Brewer v. Temple, 15 How. Prac. 286; Wait's Code, p. 198, § 142,—that 'the complaint in fact contained but one cause of action, that each allegation constituted a part of the *res gestæ*, that what was alleged to have been said and done constituted but a single transaction.' It is claimed on behalf of plaintiff here that the subject of this cause of action is the unlawful confederacy or conspiracy on the part of the defendants (admitted by the demurrer) to injure the plaintiff, and the doing of the acts in pursuance of that conspiracy (also admitted by the demurrer). And that the rule in an action for

conspiracy is that 'a conspiracy to do an unlawful act, and the doing of the act in pursuance of the conspiracy, to the damage of plaintiff, creates a good cause of action against all the parties to the conspiracy.' 2 *Add. Torts*, p. 61, § 850, note 1. The general rule, as stated in *Wait's Code*, p. 237, is this: 'If, in fact, the complaint contains but a single cause of action, whatever else it may contain, a demurrer on the ground that several causes of action are improperly united is bad.' *Hillman v. Hillman*, 14 *How. Prac.* 456. 'In an action for conspiracy the rule is to allow a great latitude in setting out in the complaint the particular acts from which the conspiracy is to be inferred; even so far as to allow the individual acts of the conspirators to be averred.' 1 *Estee, Pl. & Prac.* p. 645, § 1767. In either aspect of the complaint, it appears to the court that the second ground of the demurrer is bad.

"3. The third ground of demurrer is 'that the plaintiff has not legal capacity to sue for damage for the alleged personal injury and suffering of his wife, nor for the alleged outrage and wounding of his feelings by reason thereof.' This cannot be considered properly as an objection that 'plaintiff has not legal capacity to sue.' Mr. Pomeroy says: 'A want of legal capacity to sue—a demurrer or defense for this cause—must relate exclusively to some legal disability of the plaintiff, such as infancy, coverture, idiocy, and the like, and not to the absence of facts sufficient to constitute cause of action.' *Pom. Rem.* p. 247. If this ground of demurrer is considered as in the nature of an objection that the complaint does not state facts sufficient to constitute a cause of action in the plaintiff, as the husband, viz. 'the personal injury and suffering of his wife, and the alleged outrage and wounding of his feelings by reason thereof,' the answer of plaintiff's counsel to the objection seems to be conclusive, viz.: That the action is not brought 'for the damages for the personal injury and suffering of plaintiff's wife, nor for the alleged outrage and wounding of his feelings by reason thereof'; that the action, as already stated, is for a conspiracy on the part of the defendants to injure and oppress the plaintiff, and for doing certain acts in pursuance of the conspiracy, and that the injury and suffering of the plaintiff's wife, and the alleged outrage and wounding of his feelings by reason thereof is, in so far as they are mentioned in the complaint, are set forth, either as part of the *res gestæ*, or as matters of aggravation of, and as characterizing the tortious proceedings of, defendants. In any view, the fourth ground of demurrer is bad. For the like reasons the motion to strike out 'the allegations of the complaint and demands for damages in regard to injury to plaintiff's character and reputation, and in regard to personal injury to plaintiff's wife, and the outrage and wounding of his feelings thereby,' is refused. The judgment of the court is that the demurrer be, and the same is hereby, overruled, and that the motion to strike out is refused, both with costs to plaintiff."

We have also carefully considered the argument of counsel for plaintiffs in error relating to the assignments of error concerning the charge of the court below to the jury, and his refusal to instruct the jury as prayed for by the defendants. The action of the court under consideration was evidently based upon the force and effect of the testimony that had been submitted to, and was to be considered by, the jury. Such testimony—at least the parts thereof pertinent to the matters set forth in the bills of exceptions—should have been included therein if it was intended to ask this court to review said action of the court below. Considering the charge itself, and the statement of the testimony as therein set forth, we are compelled to fully concur with the trial judge (Hon. C. H. Simonton then presiding) in his instructions as given to the jury. Having approved of the action of the court below in overruling the demurrer, it follows that the refusal of the court to give the instructions to the jury asked for by the defendants below must also have our indorsement, for the reason that the in-

structions so refused were, in substance, the same propositions that had been presented by the demurrer, and properly rejected. We deem it proper, under the circumstances attending this case, and in the absence of the certified evidence alluded to, to make the charge of the judge below to the jury, which was excepted to, a part of this opinion. It reads as follows:

"Plaintiff charges that the defendants, conspiring together, entered upon his premises unlawfully, thereby committing a trespass upon his rights and property, taking and carrying off a part of it. The evidence tends to show that the defendants, with others, under the direction of T. S. Gaillard, who had been appointed chief constable, entered plaintiff's premises in Tradd street, and his residence in King street, and searched both places, taking sundry packages of wine from the last-named place, in which plaintiff had a half interest. The previous concert and the subsequent entry are both admitted. They are justified by the averment that defendants were acting under the orders of the chief constable, Gaillard, who had what is called a 'warrant' from Judge Izlar. I will not go into or comment on this act of Judge Izlar, or dispute his authority, or discuss the validity or invalidity of his order in the case in which it was made. Were I to be of the opinion that it is wholly erroneous, abnormal, and invalid, I would not presume to sit in judgment on it, as this court cannot revise or review that opinion. But I charge you that, having been passed in a cause in which Cantini was not a party, and to which he was not a privy, and no connection appearing in any way between Cantini and the parties in that case, the order had no force or effect whatever as to Cantini and his property. Besides this, the order professes to have been issued in an action, a judicial proceeding, brought before a judge, a judicial officer, and could only be executed by a judicial officer subject to his orders; that is to say, the sheriff of the county in which the parties defendant or their property was, or any lawful deputy of his. Gaillard, as chief constable, was not such an officer, nor was he a constable under the dispensary act; and neither he nor any one under his appointment could execute this process, and so protect themselves with it. Neither he nor his appointees were the officers to whom it was directed. Whatever may be the conflict in decisions of other courts, there is no conflict of decision in this court upon the question of liability for the invasion of the rights of person or property, however confident parties may be that they have authority to do so, whatever may be their good faith. When persons act under these circumstances, they take this risk. The dearest rights of a freeman are protection of his home, his property, and his life. They must not be invaded, except under extreme circumstances, and on the most ample authority; and whoever invades them must be prepared to show, and he takes the responsibility of showing, that he had ample authority. Put the question to yourselves, and you can answer it. Were any one of you to be arrested as you leave this courthouse, and lodged in jail, and there kept until it was discovered that the officer had mistaken you for some other man, or believed that the paper he had was a good warrant of arrest, would the mistake of the officer, however honest it might have been, satisfy you? If these facts be established to your satisfaction, then plaintiff is entitled to some compensation. You fix this. What is it worth to a man to have his home invaded under the circumstances you have heard, and his property taken off? For, in the absence of any evidence that the residence of Cantini was a place where intoxicating liquors were sold, bargained, or given away in violation of sections 22 and 23 of the dispensary act, which I now read to you, the state officers had no right to enter and seize. Now, these damages must be compensatory only, unless you see anything in the evidence showing wanton or malicious, gross or outrageous action on the part of the defendants. If you can see these, or any of them, you can find exemplary damages, punish the defendants. I must say to you that I do not see it."

The mere statement of the ground on which the oral demurrer was founded, that the complaint hereinbefore set forth in substance

did not state facts sufficient to constitute a cause of action, is sufficient to show that the court did not err in overruling it; and a further discussion of the assignment of error referring to the same is, we think, entirely unnecessary.

If this case were heard only on the questions raised by the assignments of error referring to what transpired during the trial before the jury, we would find it to be our duty to impose the damages provided for by clause 2, rule 30, of this court (11 C. C. A. cxii., 47 Fed. xiii.), as a punishment for suing out a writ of error merely for delay, and it is only by giving the plaintiffs in error the benefit of a doubt that may be said to have existed as to one of the grounds of demurrer that we are not impelled to take that course. The judgment complained of will be affirmed.

STANDARD LIFE & ACCIDENT INS. CO. v. FRASER.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1896.)

No. 295.

1. ACCIDENT INSURANCE—APPLICATION—ADVICE OF AGENT.

A provision in the application and policy that no agent can waive any provisions of the policy does not protect the company, where the applicant truly states the facts, and then answers in accordance with the agent's advice, as to the effect of such facts.

2. SAME—OCCUPATION OF INSURED—QUESTION FOR JURY.

An applicant stated that his occupation was "proprietor of a bar and billiard room, not tending bar." The evidence was that he tended bar to the extent of relieving his bartenders occasionally at lunch or meal hours. *Held*, that the question whether the occupation of the insured was as stated in his application was a question for the jury.

3. SAME—VIOLATIONS OF LAW.

An accident policy provided that the insurance should not cover violations of law. The insured, shortly after committing the misdemeanor of shaking dice with another, was shot and killed by the latter. There was no evidence that any quarrel arose over the game, or that any provocation was given up to the moment of the shooting. *Held*, that it was a question for the jury whether the death resulted from the violation of law.

In Error to the Circuit Court of the United States for the Northern Division of the District of Washington.

This was an action by Eliza M. Fraser against the Standard Life & Accident Insurance Company to recover \$4,000, which she alleged was due her under a policy of accident insurance issued by the company upon the life of Harry L. Fraser. From a judgment in favor of plaintiff, defendant brings error.

James Kiefer, for plaintiff in error.

Lindsay, King & Turner, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. Eliza M. Fraser, the widow and beneficiary of Harry L. Fraser, deceased, commenced an action in the court below to recover from the plaintiff in error \$4,000, which she alleged

was due her under a policy of accident insurance issued by said insurance company upon the life of said Harry L. Fraser. The insurance company set up several defenses, the first of which was that the policy was issued in consideration of warranties contained in the application, in which the applicant, at the time of applying for the insurance, had warranted that he had no other accident insurance in the said company, or any other company, and that he had made no application for accident insurance upon which he had not been notified of the company's action thereon, which warranties were false and untrue, in this: that on the 26th day of January, 1894, more than a year before Fraser's application, there had been issued to him, by the Fidelity & Casualty Company of New York, a policy insuring him against accident in the sum of \$2,000 for 12 months, and that at the expiration of that policy, and on or about January 26, 1895, the same company, at the request of the insured, had renewed the same for 12 months thereafter. A second defense was that, subsequent to the issuance of the policy sued upon, the insured had violated the terms of the insurance contract by doing an unlawful act in that he had voluntarily engaged in and played a game of dice for money, and during the game he had become involved in a dispute over the result of the same and the ownership of the money bet thereon, and during the progress of said dispute, and as a result of said game, the insured was shot, and thereby met his death. A further defense was that the insured had warranted in his application that his occupation was "proprietor of Hotel Northern sample and billiard rooms, not tending bar," and that said statement was false and untrue, in this: that said insured did tend the bar of said hotel, and did frequently tend and wait upon the drinking bar therein, and that by reason of said false description of his occupation he obtained classification of his occupation as "preferred," and thereby secured a policy in \$4,000, whereas, if he had stated his occupation correctly, as that of saloon keeper tending bar, the highest amount of insurance which the company would have granted would have been \$2,000. The jury returned a verdict for the sum of \$4,000, and returned negative answers to four special interrogatories submitted to them by the court, thereby finding that the insured did not receive his injuries as the result of being engaged in a violation of the law, and that he did not lead the agent of the insurance company to believe that the prior policy he had obtained from the Fidelity & Casualty Company was to be superseded by the policy which he obtained from the defendant in error, and also that the assault made upon the insured, whereby he lost his life, was unprovoked.

It is assigned as error that the court permitted the defendant in error to prove that one Brydges, who was the solicitor of the insurance company, was, at the time the insurance was applied for, fully advised of a state of facts directly the opposite to that represented by the answers of the insured to the question propounded to him in the application blank, viz. whether or not he had, or had applied for, other insurance. The testimony so admitted was that of the agent himself, who said that when he wrote up Fraser's application Fraser stated to him that he had a policy in the Fidelity & Casualty Company, which had expired on January 26, 1895, and

had been renewed, but that the renewal had not been paid for, and that thereupon he, the agent, advised Fraser that the policy was not in force, and that Fraser could truthfully answer that he had no other accident insurance. It appeared that the agent was merely a solicitor of insurance, and had no power to issue policies, and that he turned in the application to the local office, which was authorized to write policies, without saying anything about the insurance in the Fidelity & Casualty Company. He also testified that from his conversation with Fraser he understood that the Fidelity policy was not to be renewed, and that the policy in suit was to supersede it. It appeared from the evidence that subsequently the premium was paid upon the prior policy, and that the policy remained in force during the year succeeding January 26, 1895.

It is contended by the plaintiff in error that the decision of the supreme court in the case of Insurance Co. v. Fletcher, 117 U. S. 519, 6 Sup. Ct. 837, is decisive of the question here involved, and establishes the doctrine that, where notice is given in the application itself that the powers of the soliciting agent are limited, the company is not bound by any statement or conversation between the agent and the insured which is not embodied in the application, or brought to their notice. In that case the agent of the insurance company had questioned the insured on subjects material to the risk, and the latter had made answers which, if correctly written down and transmitted to the company, would probably have caused it to decline the risk. The agent, with the knowledge of the applicant, wrote down false answers, concealing the truth, and transmitted the application to the company, whereupon the policy was issued. It was expressly conditioned in the policy that the answers in the application were part of the policy, and that no statement to the agent, not embodied in the application, should be binding on the company, and a copy of the answers, with these conditions conspicuously printed upon it, accompanied the policy. The court held the policy void. In the present case there is no stipulation, either in the policy or in the application, to the effect that no statement to the agent not transmitted to his principal shall be binding upon the latter. The only limitation of the powers of the agent is that contained in the policy, which provides that the terms of the policy "cannot be waived or altered by any agent," and the stipulation in the application, whereby the applicant agrees that the application and warranty "shall be the basis of the contract between the company and me, and I accept the policy which said company shall issue upon this application subject to all conditions, provisions, and classifications contained in such policy or referred to therein, which I understand cannot be altered, changed, or waived by any agent of said company, either before or after the issuing thereof." It will be seen, therefore, that the case of Fraser is very different from that of Fletcher in the decision above referred to. Fraser truly stated all the facts concerning his prior insurance. He perpetrated no fraud upon the company or its agent. He stated the facts, and the agent placed an interpretation upon them. The agent said that under those facts the applicant could truly answer that he had no other insurance. There is nothing in the policy or the application to inform

an applicant that the agent of the insurance company may not advise him concerning the facts essential to be considered in making the contract, or that the company may not be bound thereby. In *Insurance Co. v. Chamberlain*, 132 U. S. 304, 10 Sup. Ct. 87, an applicant for insurance, in answer to the question whether he had other insurance, had informed the agent that he had certain certificates of membership with certain co-operative societies, and that he did not know whether they would be considered insurance or not. The agent thereupon informed him that they were not insurance, and wrote the answer "No" to the question. The court held that the acts of the agent in these respects were the acts of the insurance company, and in so holding gave effect to a statute of the state of Iowa, where the insurance contract was made, which provided that "any person who shall hereafter solicit insurance or procure applications therefor, shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application, or on a renewal thereof, anything in the application or policy to the contrary notwithstanding." It is true that in the state of Washington, where the contract now before the court was made, there is no statutory provision similar to that of Iowa just quoted, but, even in the absence of a statute, the principles which govern the decision of the *Chamberlain* Case must control the case under consideration. There was no stipulation in the application or the policy in the present case that the soliciting agent who procured the insurance was not to be deemed the agent of the insurance company, and it is not disputed that he was such agent. The company relies, not upon the contention that he was not their agent, but upon the limitations they had placed to his powers. Those limitations are confined to withholding the power to alter the terms of the policy of insurance. There is not withheld from the agent the power to act for the company in other respects, or to bind the company in deciding for it whether or not the facts detailed truthfully and in good faith by the insured did or did not amount to evidence of a prior insurance. *Insurance Co. v. Baker*, 94 U. S. 610; *Insurance Co. v. Mahone*, 21 Wall. 152; *Insurance Co. v. Wilkinson*, 13 Wall. 222.

It is contended also that there was a breach of warranty upon the part of the insured with respect to his occupation. In his application he is described as a "proprietor of a bar and billiard room, not tending bar." The evidence was that he tended bar to the extent that he relieved his bartenders occasionally at lunch or meal hours, and waited upon customers at such times. It may well be doubted whether, in view of the stipulations in the policy and the application which provide that, if any injury is received by the insured in any occupation classed by the company as more hazardous than the one stated, he should be entitled to recover only such amount as the premium paid would purchase at the rates fixed by the company for such increased hazard, there could be any breach of the warranty of his occupation, so long as his real occupation was one of those which the company held itself out as ready to insure. The amount for which the company undertook to insure a barkeeper for a given premium was one-half the amount for which it insured the applicant, and it would seem that its remedy in such a case would be

to have its liability in case of death reduced according to the real occupation of the insured, and that the description of the occupation of the applicant as stated in the application would be a representation only, and not a warranty. But that question is not necessarily involved in the decision of this case. The trial court instructed the jury that it was for them to say what was the occupation of the insured. The court said: "The phrase in the policy was intended to describe the occupation—the regular business—of the applicant, and, if you find from the evidence that the said Fraser was not engaged in the business or occupation of tending bar as a business or occupation, you should disregard this defense." We find no error in this instruction. The question whether the occupation of the insured was as stated in his application was a question for the jury, and was determined by the jury in favor of the defendant in error.

Error is assigned to the refusal of the court to direct the jury to return a verdict for the plaintiff in error on the ground that it appeared conclusively from the evidence that the insured lost his life while engaged in the commission of an unlawful act. It had been provided in the policy that the insurance should not cover "violation of law, resisting arrest, or fleeing from justice." It is contended on the part of the defendant in error that the violation of law which is here referred to is confined to the specific instances which are described in the two following sentences, "resisting arrest or fleeing from justice." Whether or not this contention is correct, it is unnecessary here to determine. The evidence in the case does not, to our minds, conclusively establish the fact that the deceased met his death as the direct result of violation of law. The statute of Washington prohibited the act of gambling in dice, in which he had been engaged just prior to his death, and declared the same to be a misdemeanor; but the evidence concerning the connection of the unlawful act with the death of the insured was properly submitted to the jury under instructions from the court. The jury found that the shaking of the dice was not wholly or partly, directly or indirectly, the cause of the shooting. According to all the testimony, there was no provocation for the shooting, there had been no dispute over the game, and there had been no trouble between the parties engaged in it up to the very time of the shooting. There was some conversation between the insured and his assailant about changing money, and, in the course of the conversation, the latter drew his weapon and shot. There was nothing to show that any ill feeling between the parties was engendered by the game. The cause for the shooting was wholly unexplained. We cannot see that the evidence conclusively establishes the fact that gambling with dice for money, in violation of the statute of Washington, caused the death of the insured. It would have been error, therefore, to instruct the jury to that effect.

We find no error for which the judgment should be reversed, and it is accordingly affirmed, with costs to the defendant in error.

PRICHARD v. BUDD et al.

(Circuit Court of Appeals, Fourth Circuit. November 10, 1896.)

No. 167.

1. CONTRACTS—ASSIGNMENT—AGENCY—UNDISCLOSED PRINCIPAL.

Where one party to a contract stipulates therein that he will not assign the same without the consent of the other, this does not prevent an undisclosed third party, for whom he acted as agent in making the contract and in carrying on the work provided for therein, from maintaining an action upon it.

2. BREACH OF CONTRACT—ASSUMPSIT.

Where, under a contract with the owner of certain land to convert trees thereon into railroad ties, and sell them, and to pay for them after sale, the ties were manufactured and removed from the land, and, before the time in which they were to be sold had expired, the owner of the land seized and sold them, and appropriated the money to his own use, *held*, that assumpsit would lie to compel him to account therefor.

3. APPEAL—ASSIGNMENT OF ERROR.

The circuit court of appeals will not consider assignments of error relating to the giving or refusing of instructions unless they set out fully the parts of the charge referred to, according to rule 11 (11 C. C. A. cil., 47 Fed. vi.).

4. SAME—REVIEW OF ACTION OF TRIAL COURT.

In the United States courts the refusal of the trial judge to set aside a verdict or grant a new trial is not subject to review.

5. SAME—BILL OF EXCEPTIONS—EVIDENCE.

It is not error for a federal court to certify in a bill of exceptions merely what the evidence tended to prove, instead of setting it out in full. *Railway Co. v. Ives*, 12 Sup. Ct. 679, 144 U. S. 408, and *Lees v. U. S.*, 14 Sup. Ct. 163, 150 U. S. 476, followed.

6. SAME.

The practice and rules in the circuit courts embracing the preparation, settling, and signing of bills of exception are not within the "practice and forms and modes of proceeding" required by Rev. St. § 914, to conform as near as may be to those existing in like causes in the courts of record of the state.

In Error to the Circuit Court of the United States for the District of West Virginia.

E. W. Wilson, for plaintiff in error.

George D. Price (Campbell & Holt, on the brief), for defendants in error.

Before GOFF and SIMONTON, Circuit Judges, and HUGHES, District Judge.

GOFF, Circuit Judge. R. P. Budd and Mathias J. Forbus, citizens of the state of Ohio, doing business under the firm name of Budd & Forbus, on the 21st day of August, 1894, brought this action of trespass on the case in assumpsit, in the circuit court of the United States for the district of West Virginia, at Charleston, against B. J. Prichard, a citizen of that district. The declaration contains the common counts for goods, merchandise, and railroad ties sold and delivered, for work and labor performed, for money lent, for money paid by plaintiff for use of defendant, for money had and received by defendant for use of the plaintiff, and for