Under the constitution (section 13, art. 2) and laws of the state, the frontager may, as already said, recover whatever damages he sustains by reason of the additional public burden on the street; but he cannot control the public use of the street as a highway by preventing the construction thereon of additional facilities for the traveling public. To this effect are the decisions of the supreme court of Illinois. Patterson v. Railroad Co., 75 Ill. 588; Corcoran v. Railroad Co., 149 Ill. 295, 37 N. E. 68. Doane v. Railroad Co. (opinion filed on the 16th day of October, 1896, in the supreme court of Illinois, and not yet officially reported) 46 N. E. 520.

The ownership of real estate in Chicago by a nonresident is subject to precisely the same limitations as though vested in a person residing in that city. The local law, as declared in the Illinois constitution and statutes, and in the judicial opinions of the highest court of the state, is determinative in the one case, as in the other. No question arising out of the constitution of the United States, or any federal statute, is here involved. The subject-matter of the litigation is local, and not transitory; and it is the rule of land law in Illinois, and not elsewhere, which must measure the rights of the parties. By that rule, the dominion and proprietorship which this complainant exercises over his lot on Wabash avenue does not comprehend the right to stop the proposed improvement on the public street in front of his lot. This court cannot, therefore, disturb the ruling appealed from. The assignment of error here, namely, that the circuit court erred in not granting the preliminary or pendente lite injunction, is overruled, the order appealed from is affirmed, and the cause remanded to the circuit court for further proceedings not inconsistent with this opinion.

BRAZORIA COUNTY et al. v. YOUNGSTOWN BRIDGE CO.[1]

(Circuit Court of Appeals, Fifth Circuit. February 2, 1897.)

No. 534.

1. APPEAL—PRACTICE—WAIVER OF OBJECTION TO DEMURRER.
When a demurrer is irregularly filed, it may be wholly disregarded or taken from the files upon motion of the complainant, and, where neither of these things has been done, the complainant will not be heard to complain upon appeal that the demurrer was irregularly filed because unaccompanied by the required certificate of counsel and affidavit of defendants.

2. CONSTITUTIONAL LAW—CONTRACTS BY COUNTIES—FAILURE TO LEVY TAX.
Under Const. Tex. art. 11, § 7, which provides that "no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon, and to provide at least two per cent. as a sinking fund," a contract made by a county for the building of two bridges, to be paid for in county bonds, is void, in the absence of any provision for the levy of a tax to pay the interest and to provide a sinking fund; and the county cannot be compelled by mandamus to issue the bonds to the bridge company, although the bridges have been constructed and the county is using them.

[1] Rehearing pending.

3. SAME—POWERS OF COURTS OF EQUITY.

Where a contract is void at law, for want of power to make it, a court of equity has no jurisdiction to enforce such contract, or, in the absence of fraud, accident, or mistake, to so modify it as to make it legal, and then enforce it.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

This was a suit in equity brought by the Youngstown Bridge Company against Brazoria county, Tex., and others, to obtain a construction and reformation of a contract entered into between it and Brazoria county, and praying that an action at law upon the contract be suspended until the further order of the court. A decree having been rendered in favor of complainant, reforming the contract as prayed, defendants have appealed.

On May 25, 1892, the county of Brazoria, state of Texas, entered into a written contract with appellee, the Youngstown Bridge Company, for the construction of two iron bridges. The contract, which was duly executed by the respective parties, required the appellee to furnish all necessary material, and to construct the bridges according to the plans and specifications attached thereto. In consideration of the construction of the bridges, the county agreed to pay to the appellee the sum of $16,000, payment to be made in the bonds of the county, in denominations of $100 each, payable 20 years from the date of same, with interest at the rate of 6 per cent. per annum; the bonds, however, to be redeemable at any time after 5 years from their date. As to the time of the completion of the work, and the failure to perform the contract within the stipulated period, the following provisions occur in the contract: "Both of said bridges are to be completed in accordance with this contract within five months from this date, unless the completion of same is prevented by unavoidable accidents or the act of God; and upon a failure upon part of the party of the first part to so complete said bridges within said time, and to tender the same to the party of the second part, then the party of the first part hereby agrees to pay to the party of the second part the sum of fifty dollars ($50.00) for each day after the expiration of five months from date hereof until both of said bridges are completed according to this contract, and tendered to the party of the second part, which said amount is to be deducted from the purchase price herein agreed to be paid for such bridges. * * * The fifty dollars agreed to be paid upon a failure to complete said bridges within five months from this date is to be paid as liquidated damages for such failure." The bridges were constructed by the appellee, but not within the specified time. The county is, however, using them, but refusing to issue the bonds. To compel the county to comply with its contractual obligations, the appellee on February 8, 1893, instituted a suit at law, in the circuit court for the Eastern district of Texas, at Galveston, in which Brazoria county, the county judge, the county commissioners, the clerk of the county commissioners' court, and the county treasurer were made parties defendant. The petition in the suit at law alleged fully the facts in reference to the execution of the contract, the authority of the county to make it, the performance by the plaintiff and breach by the defendant, and prayed the issuance of a writ of mandamus to require the county authorities to issue to the plaintiff, the Youngstown Bridge Company, the bonds of the county, to the amount of $16,000, agreeably to the provisions of the contract. The concluding prayer of the petition is as follows: "That a writ of mandamus issue to the county judge and the said commissioners, ordering and compelling them, at the said next regular term of the commissioners' court of Brazoria county, Texas, to pass an order, and duly enter the same upon the minutes of said court, providing for the levy and collection of a tax sufficient to pay the interest and to create a sinking fund for the payment of said bonds, and providing by said order for the annual levy and creation of sufficient tax for said purpose; for all costs of court; and for such general and special relief as the plaintiff may show itself entitled upon the trial hereof." The petition contained no allega-

tion to the effect that Brazoria county had made any provision, by levy of a tax, for interest on the bonds and a sinking fund, as required by the constitution of the state. To the petition the defendants interposed a general demurrer and filed a special answer. The material defense of the county, as set forth in the answer, is embodied in the following averments: "That one of the conditions and provisions of said contract set out by plaintiffs in their said original petition, and sued on in this case, is that said bridges are to be completed in accordance with this contract within five months from this date, unless the completion of the same is prevented by unavoidable accidents or the act of God; and upon a failure upon the part of the party of the first part to so complete said bridges within said time, and to tender the same to the party of the second part, then the party of the first part herein agrees to pay to the party of the second part the sum of fifty dollars for each day after the expiration of five months from date hereof, until both of said bridges are completed according to this contract and tendered to the party of the second part, which said amount is to be deducted from the purchase price herein agreed to be paid for such bridges." The date of said contract is May 25, 1892. Defendants allege that, if said bridges referred to herein and in plaintiffs' original petition were ever at any time tendered to defendants herein, such tender was not made, or pretended to have been made, until June 27, 1893, or 211 days after the expiration of 5 months from date of said contract. The Youngstown Bridge Company, plaintiff in the suit at law, and appellee here, filed its bill on March 24, 1894, against the defendants in the suit at law, who are appellants on this appeal, to obtain a construction and reformation of the contract entered into between it and Brazoria county. The bill alleges the execution of the contract, the power of the county to make it, the completion of the bridges, and their acceptance and use by the county. It further alleges that appellee, without any fault of its own, failed to complete the bridges until June, 1893; that the liquidated damage clause was inserted in the contract by accident and mutual mistake of the parties; and that the clause in question was understood and intended to be a mere penalty, and not to be enforced literally as in the contract provided. The purpose of the bill was to secure relief against what appellee regards as a penalty imposed for failure to construct the bridges within the stipulated time, on the ground, as stated, that the clause was made a part of the contract by accident and mutual mistake of the parties. Relief appropriate to the allegations of the bill is prayed, and, further, that the suit at law be suspended until the further order of the court, and also that the county be enjoined from issuing other bonds until it complied with its obligation to issue bonds to the appellee in the sum of $16,000, according to the terms and stipulations of the contract. On April 7, 1894, the appellants and appellee entered into an agreement touching the matter of the issuance of an injunction, and a temporary injunction was duly issued in conformity with the stipulation. Appellants answered the bill August 6, 1894, but, in view of the conclusion reached by the court, the averments of the answer need not be stated. Replication was filed by the appellee January 5, 1895, and testimony taken on the issues joined. The appellants filed a demurrer to the bill on March 16, 1896, but the usual certificate of counsel is not thereto appended. There, however, appears an affidavit of one of the counsel for appellants that the "demurrer is not interposed for delay." On the same day, to wit, March 16, 1896, the demurrer was heard, and the following order entered: "On this day came the parties to this suit, by their attorneys, and thereupon came on to be heard the defendants' demurrer to the complainant's bill, and was argued; but, the argument not being concluded, the further consideration of the matter was postponed until to-morrow." On March 17th the hearing of the cause on demurrer, the pleadings, and proofs was concluded, and the demurrer was overruled. The court decreed the liquidated damage clause of the contract "to be a provision for a penalty for the nonperformance of said contract, and not liquidated damages, and that said amount of $50 per day does not fix the amount of damage, but is only a penalty." The decree proceeds as follows: "It is further considered, ordered, adjudged, and decreed that, in all actions sought to be maintained by said complainant upon said contract, that the said terms of said contract be so construed, and that it be used in evidence with said construction, and that the said contract be, and the same is hereby, re-

formed to the extent that the said provision of $50 per day to be paid by complainant in the case of failure to construct said bridge within the time specified is and was a provision for a penalty, and not an amount fixed as the damages which would accrue in case of nonperformance of said contract." The decree further orders the suit at law to proceed to a hearing, and perpetuates the temporary injunction theretofore issued. From this decree the defendants below appeal.

Branch T. Masterson, for appellants.
J. N. Coleman, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and MAXEY, District Judge.

MAXEY, District Judge, after stating the case, delivered the opinion of the court.

Before entering upon a discussion of the merits of the case, it becomes necessary to dispose of a preliminary question suggested by the appellee. It is objected by counsel for appellee that the demurrer interposed by appellants to the bill was irregularly filed and heard, because it was unaccompanied by the usual certificate of counsel and affidavit of the defendants, and for the additional reason that it was filed on the eve of the final hearing of the cause, and long after the filing of the answer. By equity rule 31, it is provided that:

"No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel that in his opinion it is well founded in point of law, and supported by the affidavit of defendant that it is not interposed for delay; and if a plea, that it is true in point of fact."

Construing the rule quoted, it is said by the supreme court:

"Inasmuch as the so-called demurrer was fatally defective, in lacking the affidavit of defendant and certificate of counsel required by rule 31, there was no error in disregarding it and entering a decree pro confesso." Furnace Co. v. Witherow, 149 U. S. 576, 13 Sup. Ct. 937; National Bank v. Insurance Co., 104 U. S. 76; Preston v. Finley, 72 Fed. 850; Taylor v. Brown (Fla.) 13 South. 957.

Referring to the foregoing statement of the case, it will be observed that the demurrer was accompanied by an affidavit of one of the counsel for the appellants to the effect that the demurrer was not interposed for delay. Whether such an affidavit made by counsel in the cause would be the equivalent to the usual certificate by counsel and affidavit of the defendant, need not be determined, as we are satisfied that the appellee is not in a position to avail itself of the irregularities suggested. When a demurrer is irregularly filed, it may be wholly disregarded, or taken from the files, upon motion of the plaintiff. Ewing v. Blight, 3 Wall. Jr. 134, Fed. Cas. No. 4,589; Taylor v. Brown, supra; Keen v. Jordan, 13 Fla. 327; 1 Beach, Mod. Eq. Prac. § 323. In this case the appellee neither disregarded the demurrer, nor moved to strike it from the files. On the contrary, the demurrer came on for hearing, was argued by counsel, and, as shown by the decree, overruled by the court. Objection is here made—for the first time, so far as the record discloses—to the irregularities complained of. That the appellee is too late in urging its objections seems to be well settled.

Upon this point, Mr. Chief Justice Randall, speaking for the court in Keen v. Jordan, 13 Fla. 332, 333, says:

"The appellee, however, suggests in his brief that the demurrer was properly overruled, because it was not accompanied by the certificate of counsel that in his opinion it is well founded in law, as required by the thirty-first rule of chancery practice. This objection of appellee relates to an irregularity of which he should have taken advantage by motion to strike off the demurrer. Upon an appeal, parties cannot take advantage of any irregularity which they have either consented to or waived. 1 Barb. Ch. Prac. 396. Here the parties proceeded to argument and judgment upon the demurrer, thus waiving this irregularity. The demurrer was overruled by the court,—not struck off or disregarded. Where a defendant is guilty of an irregularity in filing a demurrer, the plaintiff may, on application, obtain an order to take the demurrer off the files, but not that the demurrer be overruled. 1 Daniell, Ch. Prac. 617, 618."

See Goodyear v. Toby, 6 Blatchf. 130, Fed. Cas. No. 5,585; Clements v. Moore, 6 Wall. 310; Hayes v. Dayton, 18 Blatchf. 425, 8 Fed. 702.

The appellee having waived the right to object to the consideration of the demurrer, the contention urged by counsel in its behalf must be held to be untenable. We will therefore proceed to consider such of the questions raised by the demurrer, and insisted upon in the specifications of error, as require decision. Appellants assign, among others, the following grounds of error:

"The court erred in overruling the defendants' demurrer, and in rendering the decree in favor of complainant and against these defendants, and in not dismissing the complainant's bill, for this: (1) That the whole basis of this suit was an alleged mutual mistake, but the allegations in the bill do not show any facts constituting a mistake, nor does it allege such mistake as could be relieved against by the court, or could be made the basis of the decree rendered herein, canceling in part the contract as signed and executed by the parties to it. (2) The allegations of the bill do not show that the contract sought to be changed and corrected was a legal or binding obligation of the county of Brazoria, for this: That, under the constitution and laws of the state of Texas, the county of Brazoria could not make a legal or binding contract to issue its bonds, as provided in said contract, without, at the time when the debt was created, levying a tax to pay the interest and sinking fund on the same; and it does not appear by said bill that any tax was levied when said debt was created or contract made, or at any time, and the evidence shows that no tax was levied for that purpose."

As to the first specification, we do not deem it necessary to determine whether the bill is demurrable for the cause assigned; for, although the bill may be admitted to be sufficient, still it is apparent that the proof does not support the allegations. The gravamen of the complaint is that the liquidated damage clause of the contract was the result of accident and mutual mistake of the parties. But there is no testimony showing or tending to show the truth of such charge. On the contrary, the proof clearly shows that the clause was deliberately inserted in the contract, and that all the parties signed it with full knowledge of the existence of all its provisions. Gano v. Palo Pinto Co., 71 Tex. 102, 8 S. W. 634. It seems to have been the purpose of appellee to elicit from the county judge, and the two members of the commissioners' court whose testimony was taken, their views touching the construction of the liquidated damage clause of the contract, and the motives which

actuated the parties in making it a part of the agreement. But the question of the construction of contracts is one for the courts, and a court of law is equally competent with a court of equity to perform that duty.

The second specification of error presents the real question in the case, and upon its solution the fate of the bill depends. Under this assignment it is contended, in effect, by appellants, that the contract in question is not valid and binding upon Brazoria county, because no provision was made at the time of its execution for levying and collecting a sufficient tax to pay the interest on the debt thus created, and to provide a sinking fund, as required by the constitution of the state. The bill alleges the execution of the contract, and the fact that, under the laws of Texas, Brazoria county had authority to provide for the construction of bridges. The allegations are specific as to the performance of the contract by the appellee, and the acceptance and use of the bridges by the county. Indeed, it may be generally said that the bill, in respect of the question now being considered, is amply sufficient, save and except in one respect: There is nothing in the bill to show affirmatively, nor anything stated from which it may be inferred, that Brazoria county has made provision for the debt created by the contract, by levying a tax to pay the interest and to provide a sinking fund. The idea that such provision was made by the county is negatived by the concluding prayer of the petition in the suit at law, as recited in the bill, by which the appellee prays for a mandamus to compel the levy of a tax to pay the interest on, and provide a sinking fund for, the debt created. The prayer is in the following words:

"That a writ of mandamus issue to the county judge and the said commissioners, ordering and compelling them, at the said next regular term of the commissioners' court of Brazoria county, Texas, to pass an order, and duly enter the same on the minutes of said court, providing for the levy and collection of a tax sufficient to pay the interest and to create a sinking fund for the payment of said bonds, and providing by said order for the annual levy and creation of sufficient tax for said purpose."

It may be further observed that the contract in this case does not provide for the payment of the bridges in money, but the provision is specific that they shall be paid for in the bonds of Brazoria county, running through a series of years. Questions, therefore, of ordinary municipal indebtedness and current expenses, payable in current funds, which are considered in some of the decisions, have no pertinency to the question here discussed. Since Brazoria county has failed to make provision for the payment of the debt created by the contract, by the levy of a tax to pay the interest and to provide a sinking fund, is the contract relied upon by the appellee valid and binding upon the county, as a contract for the issuance of bonds? Section 7, art. 11, of the constitution of the state of Texas, provides:

"But no debt for any purpose shall ever be incurred in any manner by any city or county, unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon, and to provide at least two per cent. as a sinking fund."

It is said by Mr. Justice Gaines, speaking for the court, in City of Terrell v. Dessaint, 71 Tex. 773, 9 S. W. 594, that:

"The language is general and unqualified, and we find nothing in the context to indicate that the framers of the constitution did not mean precisely what is said; that is, that no city should create any debt without providing by taxation for the payment of the sinking fund and interest."

This question has been repeatedly before the courts of Texas, and the same construction has been invariably placed upon the constitutional provision. The language is so clear that it admits of but one interpretation. The provision means precisely what it says, and it cannot be evaded or set at naught to meet the supposed hardships of particular cases. Where the meaning of constitutional provisions is plain and obvious, it is the duty of courts to give effect to such meaning, without attaching to the words employed a forced construction, and one not intended by the framers of the instrument. The remarks of Mr. Justice Lamar, as the organ of the court, in Lake Co. v. Rollins, 130 U. S. 670, 9 Sup. Ct. 652, are apt and appropriate in this connection:

"We are unable," says the justice, "to adopt the constructive interpolations ingeniously offered by counsel for the defendant in error. Why not assume that the framers of the constitution, and the people who voted it into existence, meant exactly what it says? At the first glance, its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain, and in such cases there is a well-settled rule which we must observe. The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself, and, when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument."

That the contract here sought to be reformed and enforced is an invalid obligation, and therefore not enforceable against Brazoria county, is conclusively shown by the following authorities: City of Terrell v. Dessaint, supra; Citizens' Bank v. City of Terrell, 78 Tex. 450, 14 S. W. 1003; Biddle v. City of Terrell, 82 Tex. 335, 18 S. W. 691; McNeill v. City of Waco (Tex. Sup.) 33 S. W. 322; Noel v. City of San Antonio (Tex. Civ. App.) 33 S. W. 263; Kuhls v. City of Laredo (Tex. Civ. App.) 27 S. W. 791; Wade v. Travis Co., 72 Fed. 985; Berlin Iron Bridge Co. v. City of San Antonio, 62 Fed. 882. See, also, Millsaps v. City of Terrell, 8 C. C. A. 554, 60 Fed. 193, and Wiegel v. Pulaski Co. (Ark.) 32 S. W. 116.

But it is contended by counsel for the appellee, in his brief, that:

"Taking this entire transaction as one, as we must, the contract to build was only the initial step. It was a step towards the creation or incurring of a debt, but it was not incurred until the bridges were built and the bonds issued."

This position of counsel seems to be satisfactorily answered by the supreme court of Texas in the case, before cited, of McNeill v. City of Waco, 33 S. W. 322. In that case, at page 324 of 33 S. W., Mr. Justice Denman says:

"By parity of reasoning, we think it follows that a contract entered into for the construction or erection of any public improvement authorized by law, but not properly a part of the ordinary expenses of the corporation, * * * would be the creation or incurring of a debt, within the meaning of the constitution. We conclude that the word 'debt,' as used in the constitutional

provisions above quoted, means any pecuniary obligation imposed by contract, except such as were, at the date of the contract, within the lawful and reasonable contemplation of the parties, to be satisfied out of the current revenues for the year, or out of some fund then within the immediate control of the corporation."

The contract entered into between the appellee and Brazoria county being void because, in the attempt to create the debt evidenced thereby, the express provisions of section 7, art. 11, of the constitution were ignored and violated, and there being no evidence in the record of accident or mutual mistake on the part of either of the parties in the execution of the contract, it cannot be seriously claimed that a court of equity has the power to reform the instrument, and infuse into it constitutional force and vigor. In Hedges v. Dixon Co., 150 U. S. 192, 14 Sup. Ct. 74, the principle is clearly stated by Mr. Justice Jackson, as the organ of the court, in the following language:

"Where a contract is void at law for want of power to make it, a court of equity has no jurisdiction to enforce such contract, or, in the absence of fraud, accident, or mistake, to so modify it as to make it legal, and then enforce it. Courts of equity can no more disregard statutory and constitutional requirements and provisions than courts of law. They are bound by positive provisions of a statute, equally with courts of law; and, where the transaction or the contract is declared void because not in compliance with express statutory or constitutional provision, a court of equity cannot interpose to give validity to such transaction or contract, or any part thereof." Litchfield v. Ballou, 114 U. S. 192, 193, 5 Sup. Ct. 820.

It is unnecessary to consider other questions raised by the assignment of errors. The propositions already discussed establish that the bill of appellee cannot be sustained, and our conclusion is that the decree of the circuit court should be reversed and the cause remanded, with directions to set aside the order perpetuating the injunction, and dismiss the bill without prejudice; the costs of this appeal and of the circuit court to be taxed against the appellee. Ordered accordingly.

On Rehearing.

(June 10, 1897.)

PER CURIAM. On a former hearing we reversed the decree appealed from, and remanded the cause, with directions to set aside the order perpetuating the injunction, and to dismiss the bill without prejudice.

In a petition for rehearing, the opinion and decision of the court of civil appeals, Second district of Texas, in Mitchell Co. v. City Nat. Bank of Paducah, Ky., 39 S. W. 628, was called to our attention, and thereon we granted a rehearing, which has been argued at length orally and by brief; whereupon, on full consideration, we are of the opinion that our former decree was right and should be restored.

It is therefore ordered, adjudged, and decreed that the decree ap-

pealed from be, and the same is hereby, reversed, and the cause is remanded, with instructions to set aside the order perpetuating the injunction, and to dismiss the bill without prejudice.

MERCANTILE TRUST CO. v. ATLANTIC & P. R. CO. et al.

(Circuit Court, S. D. California. April 7, 1897.)

1. RAILROAD RECEIVERS—AFFIRMANCE OF SALE—RIGHTS OF BONDHOLDERS.
The S. R. Co. entered into an agreement with the A. R. Co. and two other railroad corporations by which the S. Co. agreed to sell a certain described line of railroad, without equipment, to the A. Co., for a stipulated sum, of which a large amount was to be paid in cash, and the rest either in cash or in bonds of the A. Co., the payment of the purchase price being guaranteed by the other two companies in consideration of their interest in securing a connection over the line sold. It was also agreed that, as the S. Co. could not then give a clear title, it should lease the line in question to the A. Co., until it could give clear title, for a stipulated rental, including all taxes on the property, such rental being also guaranteed by the other two companies. The A. Co. took possession of the line, and afterwards executed a mortgage covering it, with other property. In a suit for the foreclosure of this mortgage, subsequently brought, receivers of the road were appointed, who paid the rental and taxes under the agreement with the S. Co. from time to time, in part with the proceeds of receivers' certificates issued upon their representations of the necessity to the mortgaged road of the line sold by the S. Co. *Held*, that the agreement between the several companies was not a mere lease, but was a contract for a sale, the conditions of which the mortgagees who derived their rights under it could not, while asserting such rights, be permitted to disaffirm; but, if ever open to disaffirmance, the acts of the receivers had affirmed it.

2. SAME—RESISTING TAX ASSESSMENT—COSTS OF LITIGATION.
Prior to the appointment of the receiver of the A. Co., the S. Co., to which the taxes on the line in question were assessed, objected to an increase, by the California state board of equalization, of the assessment of its property, including said line, and sought, by litigation extending over several years, to reduce such assessment, and, having failed to do so, presented a claim to the receiver of the A. Co. for a proportional part of the amount paid by it, including interest, penalties, and costs. *Held*, that as the contract under which the A. Co. held the line in question provided for the payment of taxes, and as the receivers had been directed in the order appointing them to pay the taxes due and to become due, the receiver should now be directed to pay the tax, and, as the A. Co. had assented to the contest instituted by the S. Co., they should also be required to pay a proportionate share of the interest, penalties, and costs.

Alexander & Green and White & Monroe, for complainant.
C. N. Sterry, for receiver.
Henry S. Brown, J. E. Foulds, and J. H. Chapman, for Southern Pac. R. Co.
Neill B. Field and A. W. Hutton, for United States Trust Co.

ROSS, Circuit Judge. On the 20th day of August, 1884, a contract was made and entered into in writing by and between the