the statute. To so hold is not only to overturn a well-settled rule of statutory construction, but also do violence to the language of the statute itself. In Murray v. Gibson, 15 How. 421, the court say:

"As a general rule for the interpretation of statutes, it may be laid down that they should never be allowed a retroactive operation where this is not required by express command, or by necessary and unavoidable implication. Without such command or implication they speak and operate on the future only."

In U. S. v. Heth, 3 Cranch, 398, the following was stated:

"Words in a statute ought not to have a retrospective operation unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied."

To the same effect are McEwen v. Den, 24 How. 242–244; Harvey v. Tyler, 2 Wall. 328, 347; Sohn v. Waterson, 17 Wall. 596; Chew Heong v. U. S., 112 U. S. 536, 5 Sup. Ct. 255; Fuller v. U. S., 48 Fed 654.

In the case of People v. Green, 58 N. Y. 295, it was held that an amendment to the charter of a municipal corporation, which provided that an officer of the city who accepted a seat in the general assembly of the state should be deemed to have vacated his office, was to be construed as prospective, and not to apply to officers who had already become members of the legislature. The decision in this case was based, not on the ground that the legislature did not have the power to thus regulate and change the tenure of officers already elected, but for the reason that the intention to so regulate was not clearly expressed in the act.

The language of the statute in question by its terms is clearly prospective. It says:

"No person related to any justice or judge of any court of the United States * * * shall hereafter be appointed by such court or judge to * * * any office or duty in any court of which such justice or judge may be a member."

The statute does not prohibit one already appointed from continuing to act and perform the duties of his office.

It is further urged that the appointment as master was void because no special reasons therefor were assigned in the order of appointment. It will be noticed that authority to appoint the clerk as master exists when there are special reasons therefor. It is fairly inferable, from the order of appointment, that it was made because asked for by petitioners. Whether that was a sufficient special reason, within the purview of the statute, it is unnecessary at this time to inquire. In Fischer v. Hayes, 22 Fed. 92, Justice Blatchford, speaking with reference to the appointment of a deputy clerk as master, when it was shown that the solicitors of the parties had assented to the appointment in open court, although such was not shown in the order, said:

"Under such circumstances, consent being an adequate special reason in a case of the kind, it must be presumed that, as the judge appointed Mr. Shields, he determined that the consent was an adequate special reason. Nothing, therefore, remains but the irregularity of omitting to state the special reason in the decree. * * * The irregularity, if it was one, in a case of consent, of not specifying the consent in the decree as the special reason for the appointment, is a mere defect or want of form, which may be disregarded."

However irregular we might regard the appointment of Mr. Dundy as a master in chancery of this court, the judges were not without

jurisdiction, and such appointment clothed him with the insignia of the office, and, in exercising the powers and functions thereof, his acts were at least those of a de facto officer, and are valid so far as they concern the public and third persons, and cannot be questioned in a collateral proceeding. Cocke v. Halsey, 16 Pet. 71; Hussey v. Smith, 99 U. S. 20; Ralls Co. v. Douglass, 105 U. S. 728.

As a further reason why the sale should not be confirmed, it is urged that the appraisement is too low,—much below the actual value of the premises,—and affidavits are filed in support of this view. The right to have the premises appraised, and sold at a price not less than two-thirds of such appraised valuation, does not arise from any provision of the chancery practice, but is a right founded upon the provisions of the state statute providing therefor. Such being the case, the decisions of the highest state tribunal relative to the matter of vacating an appraisement should be followed, when not in conflict with any equity rule. It is the settled law in Nebraska that the appraisers, in making their valuation, act judicially, and their finding cannot be set aside except for fraud, which must be alleged and proven. True, actual fraud need not be proven. Constructive fraud may be shown, but fraud must be charged. Vought v. Foxworthy, 38 Neb. 790, 57 N. W. 538; Smith v. Foxworthy, 39 Neb. 214, 57 N. W. 994; Ecklund v. Willis, 44 Neb. 129, 62 N. W. 493. In Vought v. Foxworthy, the court say:

"Appraisers of property about to be sold under execution act judicially, and the value fixed by them on property appraised can only be assailed for fraud. Inadequacy of the appraised value, alone, is not sufficient cause for setting aside a sale, in the absence of fraud. To justify the vacation of a sale on the ground that the appraisement was too low, the actual value of the property must so greatly exceed its appraised value as to raise a presumption of fraud. All the affidavits filed in this case on the question of the value of the property were immaterial. There was no averment, in the motion to set the sale aside, of any fraudulent conduct on the part of the appraisers in making this appraisement, nor averment of any fraud or unfair means resorted to by the appraisers at the sale, or other party to the suit, conducing to the making of this appraisement. No facts were stated in the affidavits showing any fraudulent conduct on the part of any one in the making of the appraisement, nor can any such inference be drawn from the facts stated. The appraisement is assailed for error of judgment upon the part of the appraisers, and this furnishes no ground for setting the sale aside."

In this case no charge of fraudulent conduct is made against the appraisers. It is only shown that, in the judgment of those whose affidavits of value have been given, the value of the premises is greater than is shown by the appraisement to have been the judgment of the appraisers. Such showing is not sufficient. For the reasons given, the exceptions to the master's report are overruled, and the sale confirmed.

CHICAGO, ST. P., M. & O. RY. CO. v. MYERS.

(Circuit Court of Appeals, Eighth Circuit. April 12, 1897.)

No. 848.

1. CARRIERS OF PASSENGERS — VIOLATION OF REGULATIONS — PERSONAL INJURIES.
A carrier of passengers is entitled to insist that passengers shall remain in such places as are provided for them, and comply with reasonable regulations for their safety and comfort, and if a passenger of mature age leaves the place provided for him, and, without occasion for so doing, or to gratify his curiosity, goes to a place of greater danger, he assumes any increased risk of injury incurred by so doing.

2. SAME—CONTRIBUTORY NEGLIGENCE.
A passenger who, of his own volition, incurs an unnecessary risk by leaving a place provided for him, and going to one where he has no right to go, cannot excuse his conduct, and hold a carrier liable, as such, for injuries received while he is in such exposed position, on the plea that he or others believed the place to be safe; and it is error, in an action by a passenger against a carrier for injuries incurred under such circumstances, to refuse to charge the jury that such conduct on the plaintiff's part would prevent a recovery.

3. EVIDENCE—STENOGRAPHIC NOTES OF FORMER TRIAL.
The stenographic report of the testimony given on a former trial by a witness whose attendance cannot be procured may be admitted if the witness was fully examined and cross-examined, and the report is correct and complete; but, if incomplete, as by the absence of photographs used by the witness in illustrating his testimony, it cannot be admitted.

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

Thomas Wilson (L. K. Luse with him on the brief), for plaintiff in error.

Edwin A. Jaggard (O. A. Turner with him on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge. This is a suit for personal injuries. Levi W. Myers, the defendant in error, who was the plaintiff below, purchased a ticket from St. Paul to Chicago over the railroad of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, the plaintiff in error, and was received as a passenger by said company on one of its trains which left St. Paul at 8 o'clock on the morning of September 10, 1894. When the train reached a point a few miles east of Hudson, Wis., it found the track obstructed by a freight train that had been derailed about 4 o'clock a. m. of that day, which train was made up in part of three tank cars, two of which contained naphtha, and one refined coal oil. Several hours before the arrival of the passenger train from St. Paul, the tank containing oil had taken fire, and it was burning fiercely, and making considerable noise, when the passenger train from the west arrived. One of the naphtha tanks had exploded when the wreck occurred, and the other naphtha tank and its contents had been destroyed in the wreck. On the arrival of the passenger train from St. Paul, two openings were made in the fence on the south side of the railroad right of way, one of said openings

being 258 feet west, and the other 256 feet east, of the burning oil car, for the purpose of permitting passengers to pass through the fields around the burning car, at a safe distance therefrom, to a point on the track east of the wreck, where another train was expected to start shortly for the east, carrying the passengers who had arrived from St. Paul. The train from St. Paul stopped abreast of the west opening, and the plaintiff, with other passengers, left the train where it had halted. They passed through the west gap in the fence, as they were directed to do, walked around the burning car over the route that was indicated to them, and reached the east opening in the fence, through which they passed back onto the right of way. While they were standing somewhere in the vicinity of the east opening, awaiting the departure of the train for the east, the burning oil tank exploded, and the plaintiff was very seriously burned and disfigured. The evidence at the trial appears to have been conflicting as to where the plaintiff was standing when the explosion occurred, but the bill of exceptions recites that the defendant company offered testimony tending to show "that no passenger or person at said west gap, or west thereof, or on said route between the said west gap and said east gap, or at, near to, or east of said east gap, was seriously injured by said explosion; that plaintiff, after he had passed around to the said east gap, and to said place designated as a temporary station, as aforesaid, without the knowledge or consent of any officer or agent of the defendant, and of his own volition, left the place so designated, as aforesaid, as a temporary station, at which the passengers should wait, and went west on the defendant's right of way, west of said east gap, toward the said burning tank, more than one-half of the distance between said east gap and the said burning tank, and that while he was there standing within about ——— feet of said burning tank, it exploded, and he was injured, which is the injury complained of, and that he would not have been injured materially or at all had he remained at the said east gap, or at the place designated as a temporary station as aforesaid; that no officer or agent of defendant had actual knowledge that plaintiff was at or near the place at which he was injured as aforesaid, or that he had left the place designated as aforesaid as a temporary station at which the passengers should remain until after the explosion; that the train from St. Paul on which plaintiff was arrived at the point at which it stopped at the west gap at about 10 o'clock in the forenoon, and that the explosion occurred at or about 10:45 o'clock in the forenoon of said day."

The principal question presented by the record is whether the trial court erred in refusing certain instructions which were asked by the defendant company. These instructions were as follows:

"(5) If the jury find that the plaintiff left the point designated as the place for passengers to wait for the train for Chicago, and went to a point nearer to the burning tank, for his own pleasure, or to gratify his curiosity, or to see the burning tank, and was there injured, and that he would not have been injured had he remained at the point designated, then he is not entitled to recover, and the jury should find for the defendant."

"(7) If you find that the plaintiff passed around the burning tank to a point at or near the east gap, and that he understood, or by ordinary observation or the exercise of ordinary care would have understood, that that was the point where he was to take the train for the east, it was his duty, so far as his rela-

tions to the defendant are concerned, to remain there until the train should arrive."

"(9) If it would have appeared to a man of ordinary intelligence and prudence that the point at which the passengers were to remain was at or east of the east gap, then, if the plaintiff left that point, and went to a more dangerous place, at which he was injured, he cannot recover."

These instructions were refused, and in lieu thereof the court charged the jury, in substance, that it was for them to determine where the plaintiff was standing with respect to the east opening in the fence when the explosion occurred, whether he knew that the place where he was standing was dangerous, and whether he was guilty of contributory negligence in going where he did, or in being where he was when the oil tank exploded. The only modification of this instruction was an instruction to the effect that, if the plaintiff knew that the place where he went and where he was west of the east gap was dangerous, and that he went there voluntarily, and that no prudent man would have done as he did, then he could not recover. But the charge, considered as a whole, was so framed as to permit the jury to decide that the plaintiff was not guilty of any contributory fault, although the fact was that he voluntarily walked up the right of way to the west more than one-half the distance from the east opening in the fence to the burning tank, and was standing there when it exploded, and was injured solely in consequence of his being in such exposed situation.

We feel constrained to hold that the three refused instructions above quoted were applicable to the testimony which was produced at the trial, and that some of them, particularly the one numbered 5, should have been given, inasmuch as the court in its charge gave no equivalent direction. The plaintiff was a man 65 years old, and of more than ordinary intelligence. The evidence shows that for many years he had been a proprietor and editor of a newspaper, and that at the time of the accident, and for four years preceding, he had held the office of American consul at Victoria, in British Columbia. When the train on which he was riding reached the scene of the accident, the ignited oil car was burning fiercely, and making much noise. It was in plain view during all the time that he was standing at the gaps in the fence, or passing through the field outside of the right of way from the west side of the wreck to the east side, and the contents of the tank appear to have been well known to him. Moreover, the fact that openings had been made in the fence on the west and east sides of the burning tank, and at a considerable distance therefrom, and that passengers were directed to go through the field to the point where they were to board the east-bound train, was in itself notice to the plaintiff and other passengers that the space inside the right of way between the two gaps in the fence was either considered dangerous, or that for some reason the defendant company desired the passengers to keep outside of that space. In view of these considerations, we do not see that any greater knowledge could be fairly imputed to the employés of the defendant company than to the plaintiff of the risks incident to approaching too near to the burning tank. But, even if the defendant company could be held chargeable with greater knowledge of the risks in question,

we do not see that such fact should excuse the plaintiff for voluntarily leaving the place which the defendants had appointed for taking up passengers, and going to another place, where the dangers were greater, without invitation of any sort, and merely to gratify his own curiosity. Nor are we able to say that the fact that certain railroad employés were at work on the railroad track between the gaps in the fence excused the plaintiff for approaching nearer to the burning tank than the openings which had been made in the fence for the use of passengers. These employés had duties to perform in clearing the track, which rendered it necessary for them to assume greater risks than passengers were at liberty to assume while the relation of carrier and passenger existed, inasmuch as the defendant company had clearly indicated to passengers, by making openings in the fence, what route they would be expected to take in passing by the burning tank, what part of the right of way they should avoid, and where they should remain until they were taken up by the train. The high degree of care which the law exacts of a carrier of passengers entitles the carrier to insist that passengers shall remain in such places as it has provided for them, and that they shall also comply with such reasonable regulations for their safety and comfort as the carrier may prescribe. If a passenger of mature age leaves the place which he knows has been provided for him, and without any occasion for so doing, or to gratify his curiosity, goes to another, where the dangers are greater, or places himself in a dangerous attitude, which he was not intended to assume, or if he disobeys any reasonable regulation made by the carrier, it should be held that he assumes whatever increased risk of injury is incurred by so doing. This doctrine has been enforced in a variety of cases, and in view of the evidence it was applicable to the case at bar. Hickey v. Railroad Co., 14 Allen, 429; Railroad Co. v. Jones, 95 U. S. 439; Todd v. Railroad Co., 3 Allen, 18, 21; Coleman v. Railroad Co., 114 N. Y. 609, 612, 21 N. E. 1064; Railroad Co. v. Rutherford, 29 Ind. 82, 85; Railroad Co. v. McClurg, 56 Pa. St. 294, 298; Railroad Co. v. Zebe, 33 Pa. St. 318; Bricker v. Railroad Co., 132 Pa. St. 1, 18 Atl. 983; State v. Grand Trunk Ry., 58 Me. 176; De Kay v. Railway Co., 41 Minn. 178, 184, 43 N. W. 182; Railroad Co. v. Ricketts (Ky.) 27 S. W. 860; Turnpike Road v. Cason, 72 Md. 377, 20 Atl. 113; Paterson v. Railroad Co., 85 Ga. 653, 11 S. E. 872; Bon v. Assurance Co., 56 Iowa, 664, 667, 10 N. W. 225; Dun v. Railway Co., 78 Va. 645. We are of opinion, therefore, that, inasmuch as the evidence tended to show that when the plaintiff reached the east opening in the fence he turned west, and went of his own volition for a considerable distance along the right of way towards the burning tank, and by so doing sustained injuries which he otherwise would have avoided, the court should have charged the jury that such conduct on the plaintiff's part prevented him from recovering. If the plaintiff was guilty of the act last described,—if out of curiosity he went to a place other than that designated by the carrier,—he assumed the extra risk thereby incurred, and it should not have been left to the jury to determine whether he thought that the place where he thus went was safe, or whether other prudent persons thought so. A passenger who, of his own volition, has incurred an unnecessary