"In testimony whereof the city of Huron, Beadle county, South Dakota, has caused this bond to be signed by the mayor thereof, and countersigned by the city clerk of said city, and the seal of said city is affixed, this 26th day of September, A. D. 1890. H. J. Rice, Mayor of the City of Huron.
"B. M. Rowley, City Clerk of the City of Huron."

A jury having been waived in writing, this action was on the 27th day of April, 1897, tried to the court.

The defendant seeks to defeat a recovery by the plaintiff in this action upon certain grounds, which may be specified as follows: First, that at the time the bonds were issued the defendant had no power to fund its floating indebtedness; second, that at the time the bonds were issued the defendant had exceeded the amount of indebtedness which it lawfully could contract under the limitation contained in the constitution of this state; third, at or before the time said bonds were issued the defendant made no provision for the collection of an annual tax sufficient to pay the interest and principal of said bonds when due; fourth, that the proceeds of said bonds were used by the officers and agents of defendant for the purpose of paying the expenses incurred in carrying on a campaign to secure the location of the state capital at Huron, S. D., and that said proceeds never were paid into the treasury of defendant. The undisputed testimony shows that the bonds were issued for the purpose of raising money to carry on a capital campaign, and that the proceeds arising from the sale thereof were so used; that the equalized assessed value of the property subject to taxation in the city of Huron for the year 1890 was $3,014,764; that neither before or at the time of the issue of said bonds was there any provision made by defendant for the collection of an annual tax sufficient to pay the interest and principal of said bonds when due; that the indebtedness of the defendant, exclusive of the money in its treasury, at the times these bonds were issued, was $197,949.79. The plaintiff alleges in its complaint that it is the holder in good faith for value, before maturity, of the bonds and coupons involved in this action. This allegation is denied by the defendant in its answer. The plaintiff, in making out its prima facie case, relied upon the presumption that the holder of negotiable paper payable to bearer, subsequent to its date, holds it clothed with the presumption that it was negotiated to him at the time of its execution in the usual course of business, and for value, and without notice of any equities between the prior parties to the instrument. Goodman v. Harvey, 4 Adol. & El. 870; Goodman v. Simonds, 20 How. 365; Noxon v. De Wolf, 10 Gray, 346; Ranger v. Cary, 1 Metc. (Mass.) 373. Title and possession are one and inseparable to clothe the instrument with the prima facie presumption that it was indorsed or delivered at the date of its execution, and that the holder paid value for it, and received it in good faith in the usual course of business, without notice of any prior equities. It was not necessary for the plaintiff to show that it paid value for the coupons or bonds, in making out its prima facie case upon which it rested; but the defendant, in support of the denial in the answer, after the plaintiff had rested, had the undoubted right to show that the consideration of the bonds and coupons was illegal; that the instruments sued on were fraudulent in their inception, or that they had been lost or

stolen before they were negotiated to the plaintiff. And, if the defendant has proved any of these defenses, then it must prevail, unless the plaintiff again takes up the burden of proof which has been shifted back upon it, and proves that it gave value for the instrument in the usual course of business, in which event, as a general rule, it would still be entitled to recover. Fitch v. Jones, 5 El. & Bl. 238; Smith v. Braine, 16 Q. B. 244; Hall v. Featherstone, 3 Hurl. & N. 287; 2 Pars. Bills & N. 438. In Commissioners of Marion Co. v. Clark, 94 U. S. 285, Justice Clifford, in delivering the opinion of the court, said:

"Where the theory that the plaintiff paid value for the instrument depends solely upon the prima facie presumption arising from the possession of the instrument, the defendant may, if the pleadings admit of such a defense, prove that the instrument originated in illegality and fraud; and the rule is, if he establish such a defense, that a presumption arises that the subsequent holder gave no value for it. And it is also true that such a presumption will support a plea that the holder is a holder without consideration, unless the presumption is rebutted by proof that the plaintiff paid value for the instrument, in which event the plaintiff is still entitled to recover."

In the case of Stewart v. Lansing, 104 U. S. 505, it was distinctly held that in an action on coupons detached from certain bonds issued by the town of Lansing to aid a certain railroad, which bonds had been declared illegal by the courts, the holder of the coupons could not rely upon the presumption arising from the possession thereof, but, after the bonds were shown to be illegal, it was necessary for the holder to show that he paid value for the same; and, on failing to do so, a verdict was directed for the town. As the plaintiff introduced no testimony to show that it paid value for the coupons, it is necessary to inquire as to whether the testimony introduced by the defendant proved that the bonds in question originated in illegality or fraud. Section 4, art. 13, Const. S. D., provides:

"The debt of any county, city, town, school-district, or other sub-divisions, shall never exceed five per centum upon the assessed value of the taxable property therein."

Section 5, art. 13, provides:

"Any city, county, town, school-district, or any other sub-division, incurring indebtedness, shall at or before the time of so doing, provide for the collection of an annual tax sufficient to pay the interest and also the principal thereof, when due."

The only provision contained in the charter of the defendant under which it is claimed these funding bonds were issued is found in the enumeration of the powers of the city council of defendant, and is worded as follows:

"To borrow money and for that purpose to issue the bonds of the city in such denominations for such length of time, not to exceed twenty years, and bearing such rate of interest, not to exceed 7% per annum, as the city council may deem best."

In the view I take of this case, I do not find it necessary to decide whether the provision quoted from the charter of defendant empowers the defendant to issue bonds to fund its floating indebtedness. I am of the opinion, however, that the language quoted from the constitution of this state, when applied to the facts stated herein,

rendered the bonds, and necessarily the coupons involved in this action, illegal in their inception, and that the acts of the agents and officers of the defendant in issuing these bonds under false pretenses, and converting the proceeds thereof to the use of influencing the people of the state to vote for the defendant as the proper site for the location of the state capital, was not only illegal, but actually fraudulent. It follows that the bonds and coupons involved in this action are shown by the evidence to have originated in illegality and fraud, and, there being no evidence that the plaintiff is a bona fide holder for value of the same, it can take nothing by this action. Judgment should be entered for the defendant.

PORTER et al. v. PRICE et al.

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

No. 819.

1. ACCOUNT STATED—ACQUIESCENCE IN ACCOUNTS RENDERED.
   When an itemized account showing a balance is duly rendered, the party receiving it is bound, within a reasonable time, to examine it, and object if he disputes its correctness. If he makes no objection in a reasonable time, he will be deemed to have acquiesced, and, in the absence of fraud or mistake, will be bound by the account as an account stated.
2. CONFLICT OF LAWS.
   A contract intended to be performed, and actually performed, partly in one state and partly in another, may be treated by the parties as a contract of either state, and interest will then be due at the rate prevailing in that state.
3. ACCOUNT STATED—OPENING OF ACCOUNT—RATE OF INTEREST.
   Where the rate of interest charged in an account stated is readily ascertainable by calculation, the account cannot be opened on the ground that the rate was not stated, or that the party receiving the account did not know what rate was charged, or that the rate was greater than could have been recovered by suit in the absence of a written agreement, such rate being lawful if agreed on in writing.
4. SAME—COMPOUND INTEREST.
   A compounding of interest on the face of an account stated is no ground for opening the account, since an agreement to pay interest on an amount of interest already due is valid.

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

In the year 1880 the defendant N. B. Price, a farmer and merchant residing and doing business at Mt. Adams, in the state of Arkansas, began doing business with the firm of Porter, Taylor & Co., cotton brokers, commission merchants, and grocers, at Memphis, in the state of Tennessee, which firm consisted of the plaintiffs and one Taylor, who withdrew from the business the next year, and thereafter the plaintiffs alone, under the firm name of Porter & Macrae, continued the same business, and the dealing with said N. B. Price, until some time in the spring of 1894. During all that time the said N. B. Price obtained from plaintiffs continual advances of money, merchandise, and supplies, and shipped to them cotton, to be sold by them at Memphis, upon commission, and the proceeds credited to him on account of such advances. The plaintiffs, in the course of such business, obtained insurance for the benefit of said N. B. Price upon all cotton so shipped to them against the perils of transportation, and also against loss by fire, and charged said Price with the cost of such in-

surance, and with commissions for selling the cotton, and credited him with the proceeds of such sales. The plaintiffs at short intervals during all that time sent to said N. B. Price statements of the accounts between the parties, charging said N. B. Price with all advances of moneys, merchandise, and supplies, and cost of insurance and other disbursements, and with commissions on sales of cotton, and interest at the rate of 8 per cent. per annum on all such advances, and crediting him with the proceeds of such sales and interest thereon at the same rate. Each new statement commenced with the balance shown by the last previous statement, and the amounts charged for insurance and for interest in each instance appeared on such statements, which were carefully itemized; but the rate of interest was not stated on the face of the statements. Each of such statements was duly received and examined by said N. B. Price, or by the defendant Byron Price, his clerk and bookkeeper; and none of such statements were ever objected to. On August 4, 1894, the plaintiffs and said N. B. Price made a final settlement of their accounts, agreeing upon the balance as shown by the last of said statements as correct, and thereupon, at Mt. Adams aforesaid, where such settlement was made, the defendants executed and delivered to the plaintiffs the three promissory notes in suit in satisfaction of the balance of said accounts. After the maturity of all of said notes, the same being unpaid, and protested for nonpayment, this action was begun, and thereupon the defendants, in their answer, questioned the correctness of said accounts, alleging that excessive or usurious interest had been charged and compounded by the plaintiffs in said accounts; that the same contained also excessive charges for insurance, and that in many cases the plaintiffs had failed to credit therein sales of cotton as soon as they should have been credited, and that defendants had no knowledge of any of these matters when they settled said accounts and made said notes; that by reason of said facts said accounts were incorrect to the extent that nothing was really owing to the plaintiffs when said notes were given; that the notes were without consideration; and that plaintiffs had been overpaid a large sum, which was sought to be recovered as a counterclaim.

Upon the trial, the court, against the objections and exceptions of plaintiffs, allowed each of the defendants to testify that he never had examined nor computed the interest charged by plaintiffs, and appearing on said statements of accounts so furnished from time to time by plaintiffs, and did not know nor understand at or prior to the giving of said notes that such interest was charged at a higher rate than 6 per cent., and also that they did not, prior to the giving of said notes, know that said plaintiffs had charged for such insurance higher rates than had been paid by the plaintiffs therefor, or had failed to credit on such accounts the proceeds of sales of cotton as soon as such proceeds had been received by plaintiffs. Also, under like objections and exceptions, the court allowed the defendants to introduce evidence in respect to the current rates of river and fire insurance at Memphis, during the times of said transactions, and also some evidence as to sales by plaintiffs of such cotton at dates prior to the dates when the proceeds of such sales were credited.

After the evidence was closed, the plaintiffs' counsel requested the court to charge the jury as follows: "No. 6. Under the course of dealing between the plaintiffs and the defendant N. B. Price they could agree upon the highest rate of interest allowed by the state of Arkansas or Tennessee. If there was no express agreement as to the rate of interest, but the plaintiffs in fact charged the defendant interest at the rate of eight per cent. per annum, and rendered thereon accounts showing the amount of interest charged, from which they could have ascertained the rate by a computation; and if the settlement was made between the parties on the basis of eight per cent. interest on the account, and the notes sued on were executed for the balance so found to be due the plaintiffs,—the defendants cannot defend on the ground that there was no agreement in writing as to the rate of interest." The court refused so to charge, and to such refusal the plaintiffs excepted. The court did, in effect, charge the jury that the highest rate of interest the plaintiffs could charge in said accounts was 6 per cent., and that, if the testimony and circumstances showed that at the time of the execution of the notes the defendants did not know that the rate of interest charged in the account current was 8 per cent., the jury should deduct the overcharge from the amounts for which the notes were given; to which exception

was taken, and all the matters excepted to as above stated are assigned as errors.

William M. Randolph (George Randolph and Edward Randolph with him on the brief), for plaintiffs in error.

W. E. Hemingway (U. M. Rose, George B. Rose, M. A. Austin, S. M. Taylor, and Manning & Lea with him on the brief), for defendants in error.

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

LOCHREN, District Judge, after stating the case as above, delivered the opinion of the court.

Where an itemized account showing a balance is duly rendered, the party receiving it is bound within a reasonable time to examine the same, or procure some one to examine it, and object if he disputes its correctness. If he omit to do so, he will be deemed, from his silence, to have acquiesced, and will be bound by it as an account stated in the absence of fraud or mistake. Lockwood v. Thorne, 11 N. Y. 170; Davenport v. Wheeler, 7 Cow. 231; Wiggins v. Burkham, 10 Wall. 129; Philips v. Belden, 2 Edw. Ch. 1; Langdon v. Roane, 6 Ala. 518; Oil Co. v. Van Etten, 107 U. S. 325, 1 Sup. Ct. 178; Bank v. Morgan, 117 U. S. 96, 6 Sup. Ct. 657. This is especially true in respect to accounts rendered between merchants, and between merchants and their factors. Manufacturing Co. v. Starks, 4 Mason, 297, Fed. Cas. No. 11,802; 1 Am. & Eng. Enc. Law, 121. The contract shown by the course of dealing in this case was intended to be performed, and was performed, partly in the state of Tennessee and partly in the state of Arkansas. It might, therefore, be treated by the parties as an Arkansas contract, and as subject to such rates of interest as were allowed by the statutes of that state. Cockle v. Flack, 93 U. S. 344, 347; Cromwell v. Sac Co., 96 U. S. 51, 62. The Arkansas statutes allowed interest at 6 per cent., and by agreement in writing at any rate not exceeding 10 per cent. The rate of 8 per cent. therefore was not usurious or illegal. That rate could not be enforced by suit upon verbal contracts, but, if paid voluntarily, could not be collected back, and, if allowed on settlement, and included in a note, the note would be a written promise to pay it.

The accounts rendered in this case, never objected to, became accounts stated; not subject to be opened except for fraud or mistake. There was no fraud as to the items of interest charged, as they were plainly set out in each account. The duty was cast on N. B. Price of examining these items of interest in each instance, or of having some competent person examine them, and of notifying the plaintiffs of his objection to them, if he did not assent to them. He cannot allege any mistake that any court can admit, as a simple arithmetical calculation of the stated items would disclose the rate. Such an excuse, if valid, would always excuse a man from looking at any account rendered. But a man cannot be allowed to lay a rendered account aside, and afterwards, merely upon saying that he did so trusting to the honesty and accuracy of the other party, be allowed to attack it in respect to matters apparent upon a reasonable examination of

the items as stated on the face of the account. Had objection been made at the beginning, or at a later time, to the interest charged, the plaintiffs might have declined further business. In the absence of objection they had the right to assume that the rate was assented to. It is incredible that a business man should receive such accounts for 14 years, and never know the rate of interest invariably charged in each account, and believe all the time that the interest was at another specific rate, never charged in any of the accounts, and never mentioned between the parties; and that he should at the end of the business, by reason of implicit confidence in the honesty and integrity of the other parties, settle the accounts without scrutiny, giving promissory notes for the footed balance, and yet, when these notes become due and unpaid, for the first time bethink himself to look over the accounts, finding readily therein the rate of interest charged. The inference is obvious. The rate of interest charged—8 per cent.—was legal under the Arkansas statutes. While its collection could not be enforced by suit in the absence of a written agreement to pay that rate, the party charged could pay or settle it at that rate. The promise implied upon a stated account is a promise to pay the stated balance, in the absence of fraud or mistake, and not a promise to pay any of the specific items. Marye v. Strouse, 5 Fed. 483, 496. In the course of the business all these items of interest were actually paid by Price by the application of credits to such payment, with his consent. Without specific directions from him the plaintiffs could apply the credits, or the law would apply them, to the older items of debit. But each account rendered showed the application of the credits by the plaintiffs to the entire previous account, including the interest items, and by not objecting Price consented to such application. Price must be held to have been cognizant of such application of payments, as well as of the rate of interest charged, and of everything else which a reasonable examination of the accounts as rendered would have shown. To hold differently would overthrow the wholesome rules of law in respect to accounts stated, and offer advantages to the dishonest and careless for throwing aside accounts rendered without examining them.

The case may be different in respect to the charges for insurance, contained in these accounts. A factor or commission merchant ordinarily would have no right to charge his principal any sum for insurance, or like disbursements, in excess of the amount actually paid. In view of the confidential relation, which, in respect to disbursements, is that of principal and agent, the law will not permit any overcharge. No custom allowing such overcharge can be sustained unless known and assented to by the principal. Marye v. Strouse, supra. The accounts rendered by plaintiffs afforded Price no means of ascertaining whether the amounts therein charged for insurance were the amounts actually so paid by the plaintiffs therefor. These items constituted representations by plaintiffs that they had paid the sums charged for such insurance. Price was obliged to rely and act on these representations, and, if deceived, he would not be estopped by the stated accounts, nor by having given the notes, from showing such deceit, and the actual facts relative to the amounts