

ance with the instructions of the commissioner of the general land office"; the sale to continue from day to day until all the lands should be sold or offered for sale.

By section 6 it was provided:

"That the funds arising from the sale of said lands, after deducting the expenses of surveys, appraisalment, and sale, shall be deposited in the treasury of the United States to the credit of the Shoshone and Bannock tribes of Indians belonging on said reservation, and shall bear interest at the rate of five per centum per annum; and the secretary of the interior is hereby authorized and empowered to expend all or any part of the principal and accrued interest on such fund, for the benefit and support of said Indians, in such manner and at such times as he may deem expedient and proper."

Section 7 is as follows:

"That the secretary of the interior shall make all needful rules and regulations necessary to carry this act into effect; he shall determine the compensation of the surveyor for his services in laying out said lands into town lots, also the compensation of the appraisers provided for in section 4, and shall cause patents in fee simple to be issued to the purchasers of the lands sold under the provisions of this act, in the same manner as patents are issued for the public lands."

The lands thus relinquished to the United States for the purposes stated were not public lands subject to sale at the land office at which Danilson was receiver. Their relinquishment, like the cessions involved in *U. S. v. Brindle*, 110 U. S. 688, 4 Sup. Ct. 180, was made to the government in trust to survey and sell the lands, and pay the net proceeds to, or invest them for, the Indians. What was said by the supreme court in the case cited in respect to the receiver of public moneys at the Lecompton land office is equally applicable here. It was never any part of the duty of Danilson, as receiver of the public moneys at the Blackfoot land office, to sell the trust lands, or receive the payments therefor. His duties in connection with that office "were to receive and account for moneys paid for public lands; that is to say, the public moneys of the United States derived from the sales of public lands. The moneys paid for the Indian lands were trust moneys, not public moneys. They were at all times, in equity, the moneys of the Indians, subject only to the expenses incurred by the United States for surveying, managing, and selling the land." These trust moneys constituted no part of the public moneys or property for which the defendants, as sureties upon the bond of Danilson, became responsible. It results that the judgment must be, and accordingly is, affirmed.

McNEIL v. ARMSTRONG.

(Circuit Court of Appeals, Fourth Circuit. July 10, 1897.)

No. 219.

BUILDING CONTRACT—CONSTRUCTION—PERFORMANCE.

Where a contract provides that work is to be done according to certain plans and specifications, and materials furnished to be of the best, and to be to the entire satisfaction of the architect and owner, if it appears that the materials furnished were satisfactory, and the work was done according to the plans and specifications, the contractor is entitled to recover.

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

The plaintiff in error, who was the defendant below, entered into a contract December 19, 1894, with A. F. Wurach, by which the latter was to furnish and set the tiles, copper work, gutters, and conductors on the roof of the house of G. M. Hutton, at Newport, R. I., in accordance with the plans and specifications of Messrs. Peabody & Stearns, architects. McNeil Bros. were the contractors for the building of the house. Wurach, whose contract was for the roof only, began work in July, 1895, and finished in December, 1895; and the defendant in error, who was the plaintiff below, is his assignee. This suit is for the balance due on that contract, so much of which as is relevant to the controversy herein is in the words following: "It is hereby agreed that the said Adam F. Wurach will fully do, perform, and furnish all the work and materials required to be done by the said McNeil Brothers under the above-named contract, plans, specifications, and details, all to be done in good and thorough manner, and all the materials provided to be of the best quality, and are to be to the entire satisfaction of Mr. Geo. M. Hutton and Messrs. Peabody & Stearns." The suit was commenced in the superior court of Baltimore city, and removed, upon the petition of the defendant, to the circuit court of the United States for the district of Maryland. The plaintiff in error offered three prayers for instructions which were refused by the court, and the assignments of error are for the refusal to grant the first and third prayers, which are as follows: "First Prayer. The defendant prays the court to rule, as matter of law, that the plaintiff is not entitled to recover in this case unless the court, sitting as a jury, shall find that the work and materials called for by the plans, specifications, and details referred to in the contract offered in evidence, of December 19, 1894, between McNeil Bros. and Adam F. Wurach, were done and furnished by said Wurach in accordance with the said plans, specifications, and details; that the said material were of the best quality; that the said work was done in a good and thorough manner, and that the said materials and the said work were to the entire satisfaction of the firm of Peabody & Stearns, architects, and of the G. M. Hutton mentioned in said contract; and that the roofs referred to in said contract and plans, specifications, and details are thoroughly tight, in the judgment of the said Peabody & Stearns." "Third Prayer. The defendant prays the court to rule, as matter of law, that if the court, sitting as a jury, shall, under the rulings of the court, find a verdict for the plaintiff, the damages which the plaintiff is entitled to recover in this case are the sum of \$300, charged for change of gutters, the sum of \$17.50, charged for lead, and such other sums the court, sitting as a jury, may find a reasonable charge for repairing the injury to the roof caused by the blowing off of the boards, as testified to, and the difference between the contract price for said roof and the cash paid the said Wurach by the defendant, less the allowances claimed by the defendant, as set out in the account offered in evidence by him, and less such other sums as the court, sitting as a jury, shall find were expended by the defendant in looking for and repairing the leak in the kitchen chimney, as testified to, and such as are necessary to make the roof mentioned in said contract of December 19, 1894, tight, and the said roof and the art fence mentioned in the evidence conform to the plans, specifications, and details referred to in said contract, with interest on said balance and all of said items, in the discretion of the court, sitting as a jury." The case was tried by the judge, a jury being waived. The items of the account are considered in detail, and the rulings and findings of the court appear in the record. The court held "that by the contract the work was required to be done in a good and workmanlike manner; that the materials were required to be of the best quality, to the satisfaction of Mr. Hutton and the architect; that the contract requires the roof to be thoroughly tight; that the roof was constructed, both as to work and materials, in accordance with the contract, plans, drawings, and specifications and subsequent agreements, with but very trifling defects as to tightness, which have been remedied by the expenditures above allowed"; and that the plaintiff was entitled to recover the sum of \$2,815.64; and a verdict for that sum was entered.

John N. Steele, for plaintiff in error.

Charles N. Armstrong (Charles Marshall on brief), for defendant in error.

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

BRAWLEY, District Judge (after stating the facts as above). We do not find any error here. The testimony shows that the work was done under the inspection of the owner and his agents, no material defects being pointed out or objections made during its progress. Such slight defects as appeared have been corrected, or allowance has been made for them. Some of the objections were of a trivial nature, others were evidently founded upon a mistake, and the owner is in possession and occupancy. The case was heard, by consent of parties, without a jury, by an uncommonly careful and conscientious judge, who finds, as matter of fact, "that the roof was constructed, both as to work and materials, in accordance with the contract, plans, drawings, and subsequent agreements."

It is contended by the plaintiff in error, and his first prayer for instruction asks the court to rule, that by the terms of the contract both materials and work were to be to the entire satisfaction of the architects and of the owner, and that the satisfaction of such architects and owner is a condition precedent to recovery. It is not necessary to consider that class of cases which holds that a simple allegation of dissatisfaction, without some good reason assigned for it, is to be considered as a mere pretext, and not to be regarded. They fall within the rule that "that which the law will say a contracting party ought in reason to be satisfied with, that the law will say he is satisfied with." Where the object of a contract is to gratify taste and personal preferences, a different rule prevails, and parties may not unreasonably be expected to be bound by the opinion honestly entertained of the person whom he undertakes to satisfy, and performance must accord with the terms of the contract. Contracts of this nature must be explicit, for it is not to be presumed that parties will undertake a work the remuneration for which depends upon the mental condition of others, which they alone can disclose. The tiles with which this roof was to be covered were to be of a peculiar and rare shade of color. It was not unreasonable that the owner and his architects should demand that they should accord with their tastes, and, however capricious and exacting their tastes might be, it was the duty of the contractor to comply with his contract to satisfy them; and this appears to have been done, for there is no allegation or proof that the materials furnished were not to the entire satisfaction of the owner and his architects. The work to be done in putting on the tiles was defined by the plans, specifications, and details prepared by the architects. This involves no question of personal tastes or preferences. The work to be done is specifically defined, and the manner in which it is done is determined by rules which leave nothing to arbitrary caprice. It is earnestly contended that the court should construe this contract according to the presumed intention of the parties, and that the work to be done, as well as the materials furnished, should be satisfactory to the owner and architects, that the same reasons apply equally to both, and the terms, being somewhat ambiguous, should

have such reasonable construction. We have already indicated the grounds upon which there might be a distinction between the requirements as to material and work, but it is sufficient to say that the contract does not so expressly provide, and, inasmuch as it was prepared by the plaintiff in error, the well-settled rule is applicable, that in case of doubt or ambiguity the words are to be taken most strongly against the party employing them, and such construction adopted as is most favorable to the other party. The finding of the court that the work was done in accordance with the contract settles the question. The judgment of the circuit court is affirmed.

WHITCOMB et al. v. HOOPER.

(Circuit Court of Appeals, Seventh Circuit. July 17, 1897.)

No. 321.

APPEARANCE—MISNOMER—TENDERING FALSE ISSUE.

Plaintiffs were sued as receivers of the Wisconsin Central Railway Company, which had no existence; but they were receivers of the Wisconsin Central Company, and also of the Wisconsin Central Railroad Company. They appeared, and answered to the merits as receivers of the latter company, alleging the misnomer. On the trial they introduced evidence showing that as receivers of such company they had no connection with the employment of plaintiff, out of which the cause of action arose. *Held*, that they had made a full appearance, and, having pleaded to the merits, and tendered a false issue, they waived all objection to the character or service of the process and jurisdiction of the court, and that the court properly permitted an amendment to the complaint, charging them as receivers of the proper company.

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

This was an action for personal injury, brought by Hooper, the defendant in error, against Whitcomb and Morris, as receivers of the Wisconsin Central Railway Company,—the company being so named in the præcipe, the summons, the marshal's return of service of the summons, and in the complaint afterwards filed. The plaintiffs in error, after being served with a copy of the complaint, filed an answer entitled as if in an action against them as receivers of the Wisconsin Central Railroad Company. They admitted by their answer their appointment as receivers of the Wisconsin Central Railroad Company, as alleged in the complaint, though misnamed the Wisconsin Central Railway Company therein, and denied all other allegations of the complaint. Upon the issues so joined testimony on both sides was taken. It was shown by the defendants, and was not disputed, that on September 27, 1893, they were appointed receivers of the Wisconsin Central Company by the circuit courts of the United States for the Eastern and Western districts of Wisconsin, and on the same day, in a separate action for foreclosure, were appointed by the same courts receivers of the Wisconsin Central Railroad Company; that as receivers of the Wisconsin Central Company they were at the time of the injury in question the sole employers of the plaintiff, and of all those engaged with him in the operation of trains on the tracks where he was hurt, and that as receivers of the Wisconsin Central Railroad Company they had no interest in the work which was then being done, or in the parties employed in doing it. At the close of the testimony the defendant in error offered an affidavit, which the court declared unnecessary, and on motion, which the affidavit was designed to support, obtained leave to strike the word "Railway" from the title of the cause. That having been done, the defendants moved that the jury be directed to return a verdict in favor of the defendants as re-