suit is not for specific performance, or for damages for nonperformance, but only for compensation so far as the contract has in fact been executed, none of the objections taken by the defendant require that they be further investigated on this demurrer, whatever difficulties, if any, may be developed at a trial of the issue of fact. The demurrer to the first and second counts is overruled, and the counts are adjudged sufficient.

NORTHERN PAC. R. CO. et al. v. HEFLIN.

(Circuit Court of Appeals, Ninth Circuit. October 4, 1897.)

No. 347.

1. RECEIVERS OF CORPORATIONS—LIABILITY FOR TORTS.
   A receiver of a corporation, appointed in an action to foreclose a mortgage, is not liable for a tort committed by the corporation prior to the receivership.
2. SAME—PARTIES.
   In an action to recover damages for a tort committed by a corporation prior to the appointment of a receiver, the latter is not a proper party.

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

Crowley & Grosscup, for plaintiffs in error.

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

ROSS, Circuit Judge. For the alleged negligence on the part of the Northern Pacific Railroad Company in causing, or permitting to remain, an opening in one of its wharfs, through which, it is alleged, the defendant in error, who was plaintiff in the court below, fell, and was thereby seriously injured, he commenced this action in the court below against Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers of the railroad company mentioned. The complaint itself showed that the injury complained of occurred prior to the appointment of the receivers, and at the trial upon the original complaint and the answer thereto the defendants, at the conclusion of the plaintiff's evidence, moved the court to direct the jury to return a verdict for the defendants. The court denied the motion, and entered an order "that the case be withdrawn from the consideration of this jury, for the reason that there is a defect of parties defendant, to which ruling of the court the plaintiff, by his attorneys, excepts, and his exception is allowed." To the action of the court below, in each respect stated, the defendants at the time excepted. Subsequently the plaintiff filed an amended complaint, in which the Northern Pacific Railroad Company was joined as defendant with the three receivers named, upon which amended complaint a summons was issued, and served upon one A. Tingling, as agent of the company. A motion was made on behalf of the company, appearing specially and only for that purpose, to quash the service of summons so made on the ground that Tingling was not, at the time of

such service, an agent of the company, and had not been at any time since the beginning of the receivership; which motion the court denied, as it also did a motion made on behalf of the receivers to strike the amended complaint from the files. The case subsequently came to issue, and to trial before another jury, resulting in a verdict for the plaintiff for $5,000. After the verdict, Andrew F. Burleigh, who had succeeded to the receivership, was substituted for and in the place of the former receivers, and thereupon judgment in favor of the plaintiff was rendered and entered upon the verdict against the Northern Pacific Railroad Company and Andrew F. Burleigh, as receiver, for $5,000, with interest and costs, and with the direction that "said judgment as against said receiver to be paid by him only upon the further order of this court." The judgment expressly recites, what appeared from the complaint as well as the evidence in the case, that the cause of action sued on "arose prior to the appointment of receivers for the Northern Pacific Railroad Company." Those receivers were appointed, as this court judicially knows from its own records, in an action brought for the foreclosure of a mortgage executed by the railroad company, the purpose of such appointment being the conservation of the mortgaged property pending the foreclosure proceedings. The change in the personnel of the receivership was of no consequence. McNulta v. Lochridge, 141 U. S. 327, 12 Sup. Ct. 11. Neither of the receivers was answerable for any injury resulting from any negligent act of omission or commission on the part of the railroad company, arising prior to the commencement of the receivership. Even in respect to contracts entered into by the corporation prior to the receivership, the rule seems to be settled that receivers are not liable thereon unless they adopt or ratify such contract. Express Co. v. Railroad Co., 99 U. S. 191; Railroad Co. v. Humphreys, 145 U. S. 82, 12 Sup. Ct. 787; United States Trust Co. v. Wabash Ry. Co., 150 U. S. 287, 14 Sup. Ct. 86; Electric Co. v. Whitney, 20 C. C. A. 674, 74 Fed. 664. A fortiori, a receiver is not liable for a tort committed by the corporation prior to his appointment; and, not being liable therefor, it necessarily results that the receivers in the present case were not proper parties to the action brought by the defendant in error as plaintiff in the court below to recover damages for injuries alleged to have been sustained by him through the negligence of the Northern Pacific Railroad Company. Decker v. Gardner, 124 N. Y. 334, 26 N. E. 814; Finance Co. v. Charleston, C. & C. R. Co., 46 Fed. 508. The original receivers were, therefore, entitled to a verdict upon the original trial, and the judgment against Receiver Burleigh for damages growing out of negligence of the railroad company arising prior to the beginning of the receivership is, for the same reason, erroneous. Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion.

BURKE et al. v. PIERCE et al.

(Circuit Court of Appeals, Third Circuit. October 29, 1897.)

No. 33.

1. LANDLORD AND TENANT—COVENANT TO REPAIR—MEASURE OF DAMAGES.
A lease contained a covenant by the lessee that upon the termination thereof he would deliver up certain parts of the property "in as good repair as the same now are, or to pay to" the lessor "a sum sufficient to put said parts in such repair." In an action for damages for a breach, *held*, that the landlord was entitled to a sum sufficient to make the repairs stipulated for, and that, if this could only be done by the use of new materials, no deduction should be allowed the tenant on that account, and that in such case the landlord would not be restricted to the difference between the value of the property when received by the tenant and its value when surrendered.

2. SAME—AGREEMENT TO ARBITRATE.
A lease contained a provision that if the parties could not, at the termination of the lease, agree upon the condition of the property, or the sum to be paid by the lessee under his covenant to surrender the premises in good repair, or to pay a sufficient sum to make repairs, they should submit the dispute to arbitrators, and be bound by their finding. In an action by the lessor for damages for a breach, *held*, that this clause afforded no defense, it never having been acted on by the parties.

3. EVIDENCE—VALUE—ORIGINAL COST.
Evidence of the original cost of an article is relevant upon the question of its value at a subsequent period.

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

This was an action at law by Walter, Frank, and James B. Pierce against Stevenson Burke, James Corrigan, and Price McKinney, trading as Corrigan, McKinney & Company, to recover damages for breach of a covenant to repair, contained in a lease. In the circuit court a judgment was given for plaintiffs, and the defendants sued out this writ of error.

Samuel S. Mehard, for plaintiffs in error.

A. M. Imbrie and Q. A. Gordon, for defendants in error.

Before DALLAS, Circuit Judge, and BUTLER and KIRKPATRICK, District Judges.

BUTLER, District Judge. The suit is for damages for breach of covenant to repair, in a lease, which reads as follows:

"The said parties of the second part covenant and agree to keep the furnace, tools, machinery and other property hereby demised and let, in good order and repair during the continuance of this lease, and at its termination, whether by limitation of time or otherwise, to deliver the same to said parties of the first part in as good order and repair as the same now are, ordinary wear and tear and accidents by fire, wind or lightning excepted. The provisions of this clause as to ordinary wear and tear shall not apply to the hearth, bosh, bottom lining or hot blasts of the furnace, but the said parties of the second part agree to keep these parts of the furnace in good working repair, and return the same to the parties of the first part at the termination of the lease, whether by limitation of time or otherwise, in as good repair as the same now are, or to pay to said parties of the first part a sum sufficient to put said parts in such repair."

The court charged substantially "that the measure of damages was the amount required to put the hearth, bosh, bottom lining and hot