forded no cause for complaint. Such being the case, we are satisfied that no other errors were committed which would justify a retrial, and the judgment below is accordingly affirmed.

UNITED STATES ex rel. COQUARD v. INDIAN GRAVE DRAINAGE DIST. et al.

(Circuit Court of Appeals, Seventh Circuit. March 23, 1898.)

No. 444.

1. FEDERAL COURTS—FOLLOWING STATE STATUTES—TRIALS AT LAW WITHOUT JURY.
   The Illinois statute, providing that, in an action at law tried without a jury, propositions of law may be submitted to the court, and a ruling required, in order to lay a foundation for a writ of error, is not made applicable to trials in the federal courts by Rev. St. § 914, since the practice in such cases is prescribed by sections 649, 700.
2. APPEAL AND ERROR—ASSIGNMENTS OF ERROR.
   Under rule 11 of the circuit court of appeals, assignments of error upon admission and rejection of evidence must set forth the full substance of the evidence admitted and of documentary evidence rejected. Where a witness is not permitted to answer a question, the full substance of the expected answer should be set out. This may be done before the conclusion of the trial, if not required at the time the question was overruled.
3. SAME.
   Every separate exception intended to be urged as error should be made the subject of a distinct specification in the assignment of errors, and no specification should embrace more than one exception.
4. MANDAMUS—PAYMENT OF MONEY BY PUBLIC OFFICER.
   To entitle a judgment creditor to mandamus against the treasurer of a drainage district for the payment to him of a sum of money, there must be in the hands of the treasurer an amount legally due, and there must have been a specific demand therefor by the creditor, and a refusal to pay it.
5. SAME—EQUITABLE RIGHT.
   A holder of a judgment recovered on bonds and coupons against a drainage district of Illinois claimed that money in the hands of the district treasurer was applicable to his judgment, because, in previous years, the treasurer had received coupons from other bondholders in payment of assessments, whereby plaintiff alleged that he became entitled to the whole of the assessments of subsequent years until he had received payment proportional to those of the other bondholders. *Held*, that this claim was founded on an equitable, rather than a legal, right, and therefore could not be enforced by mandamus.

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

This proceeding was commenced by petition for a writ of mandamus, filed on April 16, 1896, after the decision of this court in the case of Coquard v. Drainage Dist., 34 U. S. App. 169, 16 C. C. A. 530, and 69 Fed. 867. The facts there stated are substantially the same as those disclosed in this record.

The original petition in this case alleged the recovery by the relator, on April 24, 1892, of a judgment against the Indian Grave Drainage District for the sum of $10,709.73, based upon bonds and coupons from bonds issued by the commissioners of the district, the failure and neglect of the district to provide from time to time by taxation for the payment of interest as it became due on the bonds, the possession by the treasurer of the district of a sum of money exceeding $1,500, which had been in his hands for the past two years, and which ought

by right to be turned over and applied to the payment of the relator's judgment. The prayer of the petition was that process be issued to the Indian Grave Drainage District, to Gerhard G. Arends, treasurer, and to L. H. A. Nickerson, H. H. Cober, and Henry Misser, commissioners thereof, returnable, etc.; that they be required to answer, and that upon final hearing a writ of peremptory mandamus be ordered, requiring the district, through its corporate authorities, to pay the said judgment with interest and costs, and, in case of insufficiency of funds in the treasury for the purpose, to cause a special tax to be levied, etc.; and that other proper relief be awarded.

A demurrer to this petition having been sustained, an amendment was added, which, after a general averment of the corporate character of the principal respondent, alleges, in substance, that there is now in the treasury of the district $2,770 collected from the first and second assessments, of which $1,683 had been collected from the second assessment, and remained subject to the relator's rights in this proceeding; that the entire bonded indebtedness of the district, except that belonging to the relator, was represented by George Edmunds, as trustee, who had intervened in the cause; that the holders of such indebtedness, except the relator, had joined in a settlement and compromise, and had accepted new and other bonds in lieu of the first bonds issued to them,—the new bonds being "subservient to the judgment and bond holdings of relator"; and that, notwithstanding the written demand therefor made, as alleged in the original petition, the treasurer and commissioners had refused to pay the judgment of the relator, and no part of the same had been paid.

A second demurrer having been sustained, a second amendment was added, which is long and so involved in expression as to be difficult of comprehension; but, after first stating that the relator claims a share of all the moneys now in the treasury of the district, proportionate to the amount of his share of the bonded indebtedness, it alleges that since July 1, 1886, continually from year to year, the commissioners and treasurer of the district had collected a large portion of the assessments, the amounts collected being unknown to the relator, but believed to be many thousand dollars, and to exceed the sum due him, but, disregarding their duty to pay his demand, and contriving to hinder and defraud him of his proper share of the amounts collected, "did pay unto the bond holdings of other bondholders a large proportion of the receipts collected by said district in coupons due by said district on the bonded indebtedness, in this wise, to wit." Here follow three successive statements, the first two of which seem to be summarized in the third, which is "that the said district, through its officers, did accept interest coupons of all the outstanding indebtedness against said district (with the exception of your relator's coupons and holdings) in payment of taxes due from the land subject to taxation within said district, by reason of the bonded indebtedness created by said district, and whereby the said district, through its officers, agents, and servants, accepted such coupons from the bondholding and compromised indebtedness due from said district, in exclusion to the rights of your relator, and whereby the said other bondholders paid themselves an amount of money largely in excess of the amounts of their distributive share, and by means whereof the relator now complains that the commissioners and treasurer of said district have deprived said relator from participating or recovering the amount now in the treasury of his demand as hereinbefore set forth, when such taxes should have been paid in money of the United States." It is further averred "that by reason of the premises all of the moneys now in the hands of the treasurer of said district belong to, and should of right be ordered to be paid unto, your relator," and "that there are no other bondholders entitled to the proceeds now in the hands of the treasurer of said district, for the reason that, with the exception of the relator, all other bondholders have by compromise and adjustment received all of the moneys lawfully due them, and that the moneys now in the hands of the treasurer of said district belong to, and of right should and ought to be paid to, the relator."

George Edmunds, having been permitted to appear, answered, setting up facts on which, as trustee for all the bonds secured upon the first assessment, and for all secured by the second assessment, except those held by the relator, amounting to $20,500, and one for $500, held by a resident of Quincy, Ill., he claimed that the relator had received his pro rata share of the moneys collected, and that the sums in the hands of the treasurer should be paid over to him.

The drainage district and its officers answered, denying the sufficiency of the petition, and alleging, among other things, that the coupons entering into the judgment of the relator were from bonds charged against the second assessment, "and were and became due for the years 1886, 1887, 1888, and 1889, and were and are a lien upon the installments of said second assessment, and the actual interest upon said second assessment, for those several years, respectively, as the bonds and coupons entering into that judgment, respectively, came due during those several years"; that of all moneys received from any source on account of the second assessment, up to the commencement of this proceeding, the relator had received his due proportion; that the only moneys remaining in the treasury of the district at the commencement of the action, being the moneys mentioned in the petition and amendments thereto, were collected on account of interest for the year 1892 and subsequent years, and are the pro rata part of such interest on the second assessment as belongs to other coupons of bonds represented by the intervener, George Edmunds; and that during no one of those years—1892 and later—has any coupon or coupons of bonds of the district been paid or received upon any assessment, and all payments thereon have been in lawful money.

Trial by jury was waived by written agreement, and the court, having made only a general finding, entered an order that the petition of the relator be dismissed, that the sums in the district treasurer's hands be paid to Edmunds as trustee, and that Coguard pay the costs.

The assignment of errors contains the following specifications: (1) The circuit court admitted upon the trial improper evidence on the part of the defendant and intervening petitioner; that is to say, permitted defendant and intervening petitioner to prove that they had expended and paid out funds of said district to various parties without any authority of law. (2) The circuit court improperly refused to admit proper evidence, offered by petitioner, wherein petitioner attempted to prove that the defendants received large sums of money, and now in the hands of the treasurer of said district, which should be distributed and paid over to petitioner. (3) The circuit court erred in refusing to petitioner to prove that the defendants received and accepted from intervening petitioner coupons in discharge of and in payment of petitioner's indebtedness, to the exclusion of the rights of petitioner, as set up in said petition. (4) The circuit court improperly decided the issue in the case on the law and the evidence, and the petition herein should have been sustained, and the rights claimed by intervener in his petition should have been denied. (5) The decision of the circuit court herein made is contrary to the law and the evidence in the case. (6) The circuit court erred in dismissing the petitioner's petition. (7) The circuit court erred in decreeing in favor of intervening petition.

It is objected that the first, second, and third specifications are not entitled to consideration, because the evidence referred to in each is not set out, as required by rule 11 (21 C. C. A. cxii., 78 Fed. cxii.) of this court, and because the bill of exceptions in the record does not purport to contain all the evidence, and that the other specifications are not such as can be considered.

George Edmunds, intervening petitioner, pro se.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The statute of Illinois which provides that, in an action at law tried without a jury, propositions of law may be submitted to the court, and a ruling required, in order to lay a foundation for a writ of error, is not made applicable to trials in the federal courts by section 914 of the Revised Statutes of the United States, because the practice in those courts in such cases is prescribed by sections 649 and 700 of the Revised Statutes. Ex parte Fisk, 113 U. S. 713, 5 Sup. Ct. 724; Distilling & Cattle Feeding Co. v. Gottschalk Co., 24 U. S. App. 638, 13 C. C. A. 618, and 66 Fed. 609. It is not material therefore, in this case, that

propositions of law were not submitted, or that exception was not taken to the judgment rendered, if otherwise any question is properly preserved for consideration. There being only a general finding, it is well settled, under section 700, that only such questions can be made the subject of review as arose upon "the rulings of the court in the progress of the trial of the cause." Crawford v. Foster (decided Jan. 3, 1898) 84 Fed. 939; Fourth Nat. Bank v. City of Belleville, 27 C. C. A. 674, 83 Fed. 675, and cases cited. It follows that the fourth, fifth, sixth, and seventh specifications of error must be disregarded, and, if there is any question properly presented for consideration, it is whether evidence was improperly admitted or rejected, as alleged in either the first, second, or third specification.

The requirement of rule 11 (21 C. C. A. cxii., 78 Fed. cxii.) of this court is that, when the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote "the full substance of the evidence admitted or rejected." There need be no difficulty in applying this rule literally to evidence admitted, whether documentary or oral. It is simply necessary to state its full substance in the specification of error. The same is true when the evidence rejected is documentary; but, when a witness is not permitted to answer a question, the quotation can be only of the full substance of the evidence which it was proposed to elicit, and the better practice is that the bill of exceptions should be made to show just what facts it was proposed to prove in answer to the question. This could be done even where it is not the practice to require a statement, at the time when a question is overruled, of the facts expected to be elicited. A statement, preferably in writing, made to the court before the conclusion of the trial, would be sufficient. There is some uncertainty, if not conflict, in the opinions of the supreme court in respect to the proper practice. In Railroad Co. v. Smith, 21 Wall. 255, 261, it is said:

"Whatever may be the rule elsewhere, to render an exception available in this court it must affirmatively appear that the ruling excepted to affected, or might have affected, the decision of the case. If the exception is to the refusal of an interrogatory not objectionable in form, the record must show that the answer related to a material matter involved; or, if no answer was given, the record must show the offer of the party to prove by the witness particular facts, to which the interrogatory related, and that such facts were material."

This is applicable, in terms and in principle, alike to unanswered interrogatories in a deposition and to unanswered questions to a witness on the stand; and in harmony with it are the decisions of the United States circuit court of appeals in the Fifth and Eighth circuits, in Turner v. U. S., 30 U. S. App. 104, 13 C. C. A. 445, and 66 Fed. 289, and American Nat. Bank v. National Wall-Paper Co., 40 U. S. App. 646, 23 C. C. A. 33, and 77 Fed. 85. But in Buckstaff v. Russell, 151 U. S. 626, 636, 14 Sup. Ct. 448, 452, after referring to Railroad Co. v. Smith, and other cases, which arose upon exceptions to parts of depositions, it was said:

"But this rule does not apply where the witness testifies in person, and where the question propounded to him is not only proper in form, but is so framed as to clearly admit of an answer favorable to the claim or defense of the party producing it. It might be very inconvenient in practice if a party, in order to take advantage of the rulings of the trial court in not allowing questions proper

in form and manifestly relevant to the issues, were required to accompany each question with a statement of the facts expected to be established by the answer to the particular question propounded. Besides,—and this is a consideration of some weight,—such a statement, in open court, and in the presence of the witness, would often be the means of leading or instructing him as to the answer desired by the party calling him. If the question is in proper form, and clearly admits of an answer relevant to the issues and favorable to the party on whose side the witness is called, it will be error to exclude it. Of course, the court, in its discretion, or on motion, may require the party in whose behalf the question is put to state the facts proposed to be proved by the answer. But, if that be not done, the rejection of the answer will be deemed error, or not, according as the question, upon its face, if proper in form, may or may not clearly admit of an answer favorable to the party in whose behalf it is propounded."

But, whatever the objections to requiring a statement in open court of the expected answer to an interrogatory, there is no reason why the statement should not be prepared and presented to the court during the progress of the trial, and shown in the bill of exceptions. The wholesome effect would be, first, to afford the court below an opportunity, either to justify its ruling by a fuller statement of facts in the bill, or to recognize and cure an error committed by granting a new trial; and, second, to restrict the plaintiff in error in the upper court to the exact position asserted in the court below. A practice which, while conforming to the letter and spirit of the rule, will promote the ends of justice, should be deemed to be established by the force of the rule itself without the aid of other authority.

The rule also requires "an assignment of errors which shall set out separately and particularly each error asserted and intended to be urged," and, if it be accepted as the plain meaning of this provision that there shall be in the assignment of errors a separate specification of each error intended to be urged, it will follow that every separate exception intended to be urged should be made the subject of a distinct specification in the assignment of errors. No specification, therefore, ought to embrace more than one exception. That is what was meant when, in Railroad Co. v. Mulligan, 34 U. S. App. 1, 14 C. C. A. 547, and 67 Fed. 569, it was said that "the same rule governs the saving of exceptions and the assigning of errors." The court, in its discretion, may waive a strict compliance, but the rule is an easy one, promotive of fairness to the trial courts, and of convenience as well as of just results in the final disposition of cases in the courts of appeals. A proper specification of error for the rejection of testimony would be:

"The court erred in overruling the following question, propounded to the witness A. B. [here a statement of the question], to which the witness was expected to answer as follows [here a quotation of the full substance of the answer]."

The first of the specifications now under consideration has reference to evidence admitted, and there can be no question of its failure to comply with the rule. The second specification, in effect, is that the court erred in refusing to admit proper evidence to show that the money in the hands of the treasurer of the drainage district should be paid over to the relator. Whether the relator was entitled to that money was substantially the issue in the case, and the assignment is little more specific than if it alleged broadly the refusal of the court to admit evidence offered by the relator. The third specification embraces but one phase of the issue, but, like the other, fails to show what the evidence was

which was rejected, and whether it was oral or documentary, or both; and, without looking to the brief, it is impossible to know what the ruling was which it is sought to bring under review. See Grape Creek Coal Co. v. Farmers' Loan & Trust Co., 24 U. S. App. 38, 12 C. C. A. 350, and 63 Fed. 891. The brief, too, in so far as it refers to the exclusion of evidence, is confined to the inquiry:

"Was it proper for the court below to deny relator the right to prove that the defendants received and accepted from the intervening petitioner, George Edmunds, coupons or bonds in discharge of and in payment of intervener's bond and coupon indebtedness, to the exclusion of the rights of the petitioner as set up in said petition and attempted to be proved by oral and documentary evidence adduced and offered?"

Aside from any question of the sufficiency of the specifications of error, we are of opinion that the judgment below ought not to be disturbed. Mandamus is a remedy, not for the adjustment of equities, but for the enforcement of a definite and certain legal right, and will not be used when the right to be vindicated is doubtful. It will be used against public officers to compel performance of an administrative duty, and in this case would have been a proper remedy if there had been in the hands of the treasurer of the drainage district a sum of money legally due the relator, which, on proper demand, the treasurer had refused to pay over to him. There must have been a specific demand. "It must be shown that there has been a distinct demand of that which the person moving for the writ desires to enforce." Wood, Mand. 93. The demand of the relator in this case was for the payment of his entire judgment, when, as the evidence shows without dispute, he not only knew that there was and had been no such amount of money in the treasury, but that of the sums actually collected upon the second assessment, in which alone he had an interest, he had, as late as November, 1895, received and, without protest or reservation, receipted for a share proportionate to the number and amount of his bonds compared with the whole number and amount of bonds secured by that assessment. Yet, by the second amendment to his petition, after first asserting a claim only for a proportionate share, he concludes with the inconsistent claim that, by reason of coupons from other bonds having been received in payment of taxes levied under the second assessment, he is entitled to the remaining sums in the hands of the treasurer, notwithstanding he had accepted a prorated share thereof.

Aside from this uncertainty of the petition, if the proof offered had been admitted, it would have shown that coupons had been received in payment of interest upon the second assessment only in the years prior to 1892, and that the money remaining in the treasury (after the receipt by the relator of the proportion thereof corresponding to the number of his bonds) was collected on account of interest on the assessment for the year 1892 and later years; and the question would have been whether, by reason of the receipt by the treasurer of the coupons from other bonds in payment of the taxes extended for prior years, the relator, whose coupons had not been so received, became entitled to take the whole of the collections on the levies of later years until the amounts so received by him should be equal proportionately to the payments realized by the holders of the coupons so received by the

treasurer. On that basis the right asserted is equitable, rather than legal, and the suggestion in the brief for the plaintiff in error that this proceeding to establish and enforce it by mandamus is "upon the basis and theory" of the opinion of this court (34 U. S. App. 175, 16 C. C. A. 530, and 69 Fed. 867) is unwarranted. The proposition there advanced was that mandamus would be the appropriate remedy against "the further acceptance of coupons in discharge of taxes levied for the payment of interest on the second assessment." This petition shows no necessity for the writ in that direction, and can be regarded as brought only for the purpose of asserting a right to, and obtaining possession of, the money in the hands of the treasurer of the district when the proceeding was commenced.

The judgment below is affirmed.

COLUMBIA NAT. BANK OF TACOMA et al. v. MATHEWS.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1898.)

No. 380.

1. NATIONAL BANKS—INCREASE OF STOCK—CONCLUSIVENESS OF COMPTROLLER'S CERTIFICATE.

   The certificate of the comptroller of the currency that the capital stock of a bank has been increased to a certain amount is conclusive of the sufficiency of the facts and the regularity of the proceedings requisite to an increase, and cannot be questioned in any collateral proceeding.

2. SAME—SUBSCRIPTIONS—ESTOPPEL.

   One who subscribes to a proposed increase of stock with knowledge that the stockholders had by a resolution authorized the officers, with the approval of the comptroller, to increase the capital stock in any multiple of $50,000 up to $300,000, as the subscriptions shall be paid in, is estopped from questioning the regularity of the proceedings after the certificate of the comptroller to such an increase is obtained.

3. SAME—VOTING BY PROXY—POWER OF ATTORNEY—WAIVER OF IRREGULARITIES.

   A stockholder who, by power of attorney, has authorized another to vote his stock at any and all stockholders' meetings "in the same manner as I should do were I there personally present," is estopped, by the vote of his proxy, as respects any irregularities in the proceedings or calls of the meeting, which he could have waived if personally present.

   79 Fed. 558, reversed.

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

This case was tried upon an agreed statement of facts. It appears from this statement: That the Columbia National Bank of Tacoma, plaintiff in error, was duly organized September 2, 1891. That the articles of the association provide that the capital stock shall be $200,000, divided into shares of $100 each, and that the capital stock may be increased at any time by shareholders owning two-thirds of the stock, according to the provisions of the act of congress of May 1, 1886; and in case of the increase of the capital of the association each shareholder shall have the privilege to subscribe for such number of shares of the proposed increase of the capital stock as he may be entitled to according to the number of shares owned by him before the stock was increased. That immediately after its organization it engaged in a general banking business at the city of

Tacoma, and continued until October 24, 1895, when Charles Clary, a bank examiner, by direction of the comptroller of the currency of the United States, took possession of the books, records, and assets of said bank, and closed its doors, and thereafter, on October 30, 1895, Charles Clary was appointed by said comptroller temporary receiver of said bank, and acted as such receiver until May 15, 1896, when the defendant Philip Tillinghast was duly appointed by said comptroller receiver of said association, and thereupon duly qualified as such, and ever since has been, and is now, the duly appointed, acting, and qualified receiver of said bank. That at a regular meeting of the shareholders of said association held January 12, 1892, said shareholders passed, by a vote of shareholders owning two-thirds of its capital stock, the following resolution: "Resolved, that under the provision of the act of May 1, 1886, the capital stock of this association be increased in the sum of $300,000, making the total capital $500,000. Further resolved, that, as the money paid in amounts to $50,000 or more, the president or cashier be authorized to certify the same to the comptroller of the currency, and shall so continue to certify until the said $300,000 is paid in." That on July 13, 1892, L. P. Mathews, the defendant in error, purchased 12 shares of the original capital stock of the association, and paid therefor, and received a certificate therefor issued in due form. That on October 28, 1892, L. P. Mathews subscribed for 23 shares of the increased capital stock of the association, voted at the meeting of the shareholders on January 12, 1892, and paid to said association $2,300 therefor; whereupon the name of L. P. Mathews was entered upon the books of the bank as the holder of 23 shares of the increased capital stock of the bank, and a certificate was issued and delivered to him therefor. That on November 29, 1892, Mathews, at the request of the bank, forwarded to its officers a blank power of attorney to vote on his stock, as follows: "Know all men by these presents, that L. P. Mathews, of Crete, state of Nebraska, do hereby constitute and appoint ——, of Tacoma, state of Washington, my attorney, for me, and in my name, place, and stead, to vote at any and all stockholders' meetings of the Columbia National Bank of Tacoma, Washington, until this power is revoked, on all shares of stock of said National Bank of Tacoma, Washington, on which I shall have the right to vote, and in the same manner as I should do were I then personally present, with power to substitute an attorney under him for like purposes." The blank was afterwards filled in by the officers of the bank having authority so to do by inserting the name of T. W. Bean. This proxy was never formally revoked. Mathews had no knowledge of the name that had been inserted in said instrument. That on December 28, 1893, at a meeting of the board of directors of the association duly called, on motion, a 4 per cent. dividend was declared payable on and after January 2, 1894. That on January 2, 1894, the officers of the bank inclosed in an envelope addressed to Mathews, without any letter or word of explanation, two instruments: (1) An ordinary dividend check, drawn upon the Columbia National Bank of Tacoma, showing upon its face that it was a 4 per cent. dividend declared upon the capital stock of the bank, for $48; and (2) an ordinary draft for $92, drawn upon the Continental National Bank of Chicago, there being nothing upon its face to indicate for what it was paid. Both of these instruments were received by Mathews in due course of mail, and he collected the money upon the same. That on July 25, 1895, at a meeting of the board of directors of the association, the following resolution was adopted: "Whereas, on the 12th day of January, 1892, this association resolved to increase its capital stock in the sum of $300,000, making a total capital, as increased, of $500,000; and also resolved, that, as payments aggregating $50,000 or more were made, the same should be certified to the comptroller of the currency; and whereas $150,000 of such increase of capital has been paid in, and certificates issued therefor, the remaining $150,000 of such proposed increased capital stock not having been paid in, resolved, that the unpaid portion of such proposed increase of said capital stock be canceled and rescinded, and that the paid-up capital stock of said association be, and the same is hereby, fixed at $350,000, and that the comptroller of the currency be notified of the increase of $150,000 in said capital stock,—making a total capital of $350,000,—and that the same has been paid in, and that he be requested to approve and issue a certificate of such increase according to law." A copy of this resolution was duly transmitted to the comptroller of the currency, together with a certificate of said bank in words

and figures following, to wit: "Columbia National Bank of Tacoma, July 25, 1895. To the Comptroller of the Currency, Washington, D. C.: It is hereby certified that the capital stock of the Columbia National Bank of Tacoma, Washington, has been increased, pursuant to the act of congress approved May 1, 1886, in the sum of $150,000, all of which has been paid in cash, and that the paid-up capital stock of said bank now amounts to $350,000,"—to which certificate was annexed the affidavit of the cashier that the certificate subscribed by him is true. That Mathews was not a director of the association. No notice of the above-mentioned meeting of the board of directors, or of its action at said meeting, or of the forwarding of said certificate to the comptroller of the currency, was given to him, and he had no actual knowledge thereof until long after the bank closed. That on August 9, 1895, the comptroller of the currency sent a letter, directed to the cashier of the Columbia National Bank, to the effect that he had determined to approve an increase in the sum of $150,000 upon the following conditions: "A meeting of the shareholders must be called for the purpose of considering the question of increasing the capital stock, and the notice of said meeting must be given to the shareholders, by mail or publication, thirty days prior to the date of holding the same, and must specifically state that the matter of increasing the capital stock in the sum of $150,000, making the capital after increase $350,000, will be considered at such meeting, and such other business as may properly come before it. If at such meeting a two-thirds stock vote is obtained in favor of said increase, and the legal requirements are fully met, the increase will receive my approval." That subdivision 8 of the articles of the association provides as follows: "These articles of association may be changed or amended at any time by shareholders owning a majority of the stock of the association, in any manner not inconsistent with the law; and the board of directors or any three shareholders may call a meeting of shareholders for this or any other purpose not inconsistent with law, by publishing notice thereof for thirty days in a newspaper published in the town, city, or county where the bank is located, or by mailing to each shareholder notice in writing thirty days before the time fixed for the meeting." That on August 9, 1895, and continuously thereafter until September 9, 1895, the following notice was inserted in a daily newspaper published at Tacoma, to wit: "Stockholders' Meeting. A special meeting of the stockholders of the Columbia National Bank of Tacoma, Washington, is hereby called for Monday, the 9th day of September, 1895, at 10 o'clock a. m., at the office of said bank, to take action in regard to the increase of the capital stock in the sum of $150,000, making the capital, after increase, $350,000, will be considered at such meeting, and to attend to any other business that may properly come before the meeting,"—signed by the proper officers. No notice of this proposed meeting was mailed to Mathews, and he had no actual knowledge of the meeting, or that it had been held, until after October 24, 1895. That on September 9, 1895, a meeting of the stockholders of the bank was held at the office of the bank, at which 9 shareholders were present in person, and said T. W. Bean, acting under similar powers of attorney, was present claiming to represent 58 other stockholders. The total number of shares so represented at said meeting was 1,578, and of the votes of said stockholders the full amount of shares so represented was cast in favor of the following resolution: "Resolved, that under the provisions of the act of May 1, 1886, the capital stock of this association be increased in the sum of $150,000, making a total capital, after increase, of $350,000; and it is further resolved, that the cashier be authorized to certify the same to the comptroller of the currency of the United States, according to law." T. W. Bean was present at this meeting, and voted 1,472 shares of stock in the name of various stockholders, including 12 shares belonging to Mathews. That on September 9, 1895, a certificate was forwarded by the officers of the bank to the comptroller of the currency of the holding of said meeting, and of the vote by which said resolution was passed. On the same day a further certificate was forwarded to the comptroller of the currency by the officers of the bank, to the effect that the capital stock of the bank had been increased, pursuant to the act of congress, in the sum of $150,000, all of which has been paid in cash, and that the paid-up capital stock of said bank now amounts to $350,000. That on September 9, 1895, the board of directors and officers of the bank requested one Charles P. Corbit, a stockholder and member of its board of directors, to go to Washing-

ton, D. C., personally, and present the application of the bank for the purpose of obtaining the certificate of the comptroller of the currency approving the increase of its capital. Corbit arrived at Washington September 14, 1895, and, after several personal interviews between Corbit and the comptroller, the comptroller of the currency, on October 23, 1895, signed a certificate as follows: "Whereas satisfactory notice has been transmitted to the comptroller of the currency that the capital stock of the Columbia National Bank of Tacoma, Washington, has been increased in the sum of $150,000, in accordance with the provision of the act of congress approved May 1, 1886, and that the whole amount of such increase has been paid in, and that the paid-up capital stock of said bank now amounts to the sum of $350,000: Now, it is hereby certified that the capital stock of the Columbia National Bank * * * has been increased as aforesaid in the sum of $150,000, that said increase of capital has been paid into said bank as a part of the capital stock thereof, and that said increase of capital is approved by the comptroller of the currency." This certificate was not delivered to Corbit, but, after it was executed, was duly mailed by the comptroller to the Columbia National Bank of Tacoma, Wash.; but when it reached Tacoma the said bank was in the hands of a bank examiner, and as a matter of fact it never came into the possession of any of the officers of the bank. That at all times subsequent to January 12, 1892, until the bank closed, the proposed increase of capital of the bank was mentioned and described in all of its published statements and reports, and in its reports to the comptroller of the currency, as capital stock paid in uncertified, and was so entered and carried upon the books of the bank. That subsequent to September 9, 1895, the bank continued in business until it closed, and incurred debts during this time in a large amount. That on June 22, 1896, the comptroller of the currency of the United States, having ascertained and determined that the assets and property and credits of the said association were insufficient to pay its debts and liabilities, made an assessment and requisition upon the shareholders of the said Columbia National Bank of Tacoma of $61 upon each and every share of the capital stock held and owned by them respectively at the time of its default, and selected the defendant Philip Tillinghast as receiver thereof, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the individual liability of said shareholders. On June 28, 1896, Philip Tillinghast, as receiver, duly demanded of Mathews the aforesaid assessment and requisition upon 35 shares of stock, whereupon Mathews paid to Philip Tillinghast, as such receiver, the sum of $732, and no more, and refused, and still refuses, to pay the balance of $1,403, or any part thereof.

Section 5142 of the Revised Statutes provides that: "Any association formed under this title may, by its articles of association provide for an increase of its capital from time to time, as may be deemed expedient, subject to the limitations of this title. But the maximum of such increase to be provided in the articles of association shall be determined by the comptroller of the currency; and no increase of capital shall be valid until the whole amount of such increase is paid in, and notice thereof has been transmitted to the comptroller of the currency, and his certificate obtained specifying the amount of such increase of capital stock, with his approval thereof, and that it has been duly paid in as part of the capital of such association." On May 1, 1886, congress passed an act to enable national banking associations to increase their capital stock, which reads as follows: "That any national banking association may, with the approval of the comptroller of the currency, by the vote of shareholders owning two-thirds of the stock of such association, increase its capital stock in accordance with existing laws, to any sum approved by the said comptroller notwithstanding the limit fixed in its original articles of association and determined by said comptroller; and no increase of the capital stock of any national banking association either within or beyond the limit fixed in its original articles of association shall be made except in the manner herein provided." 24 Stat. 18.

Tillinghast & Pritchard, for plaintiffs in error.

T. H. Hammond, for defendant in error.

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

HAWLEY, District Judge (after stating the facts). This action was brought by L. P. Mathews, the defendant in error, against the National Bank of Tacoma and Philip Tillinghast, its receiver, the plaintiffs in error, to establish his claim against them for the sum of $2,525, being the amount paid by him on his subscription for the increased shares of stock, with interest. A demurrer to the complaint was overruled (77 Fed. 372), and upon issue joined the cause was tried before the court without a jury, and judgment rendered in favor of the defendant in error (79 Fed. 558). The right of Mathews to recover herein was sustained by the circuit court upon the ground that the vote of the stockholders of the bank to increase its capital stock to the amount of $500,000 never became effective because the full amount thereof was not subscribed or paid for; that the board of directors was not authorized to cancel that portion of the increased stock which was in excess of the amount which was subscribed and paid for; that the board had no authority to give the assent of the corporation to any increase, because that power belonged exclusively to the shareholders; and that a subscriber for the increased stock had, therefore, the right to recover back from the bank the amount paid upon his subscription. Is this conclusion correct? This question is important. It has been answered by opposing opinions in different circuits, and for that reason, as well as others, has received careful thought and study. That the association had the power, after authorizing an increase of the capital stock of $300,000 so as to make a capital in the full sum of $500,000, as voted at the meeting held on January 12, 1892, to thereafter assent to a reduction of the increase of $150,000, making the capital of the bank $350,000, which amount had been paid in, is undoubted. This question is, we think, settled by the decision of the court in Delano v. Butler, 118 U. S. 634, 649, 7 Sup. Ct. 39. It is true that in that case reference was made only to the provisions of section 5142 of the Revised Statutes, and all the requirements of that statute were fully complied with, and all steps were taken in accordance with the articles of the association, while in this case it is earnestly contended that some of the proceedings were irregular. But that difference in the facts does not affect the question as to the power of making the change in the increase of the capital stock by reducing the amount so as to conform to the amount actually paid in. In that case the court said:

"The circumstance that the original proposal was for an increase of $500,000, subsequently reduced to the amount actually paid in, does not seem to affect the question, for the amount of the increase within the maximum was always subject to the discretionary power of the association itself, exerted in accordance with its articles of association, and to the approval and confirmation of the comptroller of the currency."

In Aspinwall v. Butler, 133 U. S. 595, 609, 10 Sup. Ct. 422, the court, after quoting from the Delano Case, said:

"In these remarks we entirely concur, and do not see why they do not furnish a complete answer to the objection arising from the change of amount. There was no agreement or condition that the amount should not be changed. The making of the change, therefore, could not have the effect of enabling the defendant to repudiate his subscription and his acceptance of the stock, unless he could show that the change was fraudulently made, or was made to such an inequitable extent as to defeat the purpose and object of the increase. If these views

are correct, it makes no manner of difference what the defendant afterwards did in the way of objection or protest, either at the stockholders' meeting or elsewhere."

See, also, Bank v. Eaton, 141 U. S. 227, 11 Sup. Ct. 984.

We do not deem it necessary to discuss seriatim the objections urged by the defendant in error to the various alleged irregularities in the proceedings of the association or of the action of the comptroller of the currency. There are two controlling principles relied upon by the plaintiffs in error, which, if sustained, are absolutely conclusive upon all the various questions that have been elaborately argued by the respective counsel in favor of or against the conclusions reached by the circuit court. The first proposition raises the question whether or not the certificate of the comptroller of the currency, on October 23, 1895, that the capital stock of the bank had been increased by $150,000, and that this amount had been paid in cash, is a conclusive determination of the regularity of all the acts of the officers, its stockholders, and of the corporation itself, and cannot be attacked in this action. Under the provisions of the statute it is made the duty of the comptroller of the currency to specify in his certificate the amount of the increase of the capital stock, with his approval thereof, and that the amount has been paid in cash. The statute virtually imposes upon him the judicial power of determining upon the regularity of all the preliminary proceedings leading up to the increase of the capital stock of the banking corporation. It has frequently been held that the determination of the comptroller of the currency as to the existence of the facts and conditions necessary to authorize the original formation of a banking association becomes conclusive by the issuance of his certificate approving the formation of the bank and authorizing it to proceed to business; that the action of the comptroller in deciding that the facts presented to him authorized the appointment of a receiver for a national banking association is conclusive in all proceedings which may thereafter be instituted; and that the action of the comptroller in declaring to what extent the individual liability of the stockholders shall be enforced in all cases where a national banking association is insolvent is conclusive. Kennedy v. Gibson, 8 Wall. 498, 505; Casey v. Galli, 94 U. S. 673, 679; Bank v. Case, 99 U. S. 628; U. S. v. Knox, 102 U. S. 422, 425; Bushnell v. Leland, 164 U. S. 684, 17 Sup. Ct. 209; McCormick v. Bank, 165 U. S. 538, 548, 17 Sup. Ct. 433.

In Kennedy v. Gibson, the court, in discussing the appointment of a receiver and of the institution of the proceedings against the stockholders to enforce their individual liability, said:

"The receiver is the instrument of the comptroller. He is appointed by the comptroller, and the power of appointment carries with it the power of removal. It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and, if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him."

In Casey v. Galli the questions arose upon demurrer. The court said:

"The plea proposes to go behind the certificate, and contradict it. This cannot be done. The comptroller was clothed with jurisdiction to decide as to the completeness of the organization, and his certificate is conclusive upon the subject for all the purposes of this litigation."

In Bushnell v. Leland, the court, speaking of the various assignments of error there made, said:

"All these alleged errors may be reduced to the single contention that under the national banking law the comptroller of the currency is without power to appoint a receiver to a defaulting or insolvent national bank, or to call for a ratable assessment upon the stockholders of such bank, without a previous judicial ascertainment of the necessity for the appointment of the receiver and of the existence of the liabilities of the bank; and that the lodgment of authority in the comptroller, empowering him either to appoint a receiver or to make a ratable call upon the stockholders, is tantamount to vesting that officer with judicial power in violation of the constitution. All of these contentions have been long since settled, and are not open to further discussion."

We are unable to perceive any distinction between those cases and the one under consideration. The statutes conferring the power upon and prescribing the duties of the comptroller in each case are substantially the same. There is no valid reason that can be urged against the conclusiveness of the comptroller's certificate in this case that could not be urged with equal force and strength in the other cases. By the several provisions of the statute, in the various steps to be taken by the bank, the comptroller is called upon to act, and is invested with clearly-defined powers and authority, judicial in their character, to decide as to when and how he shall act, and to determine the facts upon which the lawful exercise of his authority depends; and his decision upon those facts ought not, and cannot, in the very nature of the power and authority confided to him by the statute, be questioned in any collateral proceedings in the courts. His judgment as to the sufficiency of the facts and regularity of the proceedings, like that of other special tribunals, upon matters coming within his exclusive jurisdiction, is unassailable except by a direct proceeding for correction or amendment. The identical question under discussion was presented in Latimer v. Bard, 76 Fed. 536, 540, which was an action brought by the receiver against a stockholder to recover the amount of an assessment made by the comptroller of the currency. The answer to the complaint set up the defense that the assessment was levied upon a pretended increase of stock, and that such increase was invalid and unlawful for the reason that the whole amount of such increase was not paid in, and the particular acts of irregularity and of alleged false and fictitious entries of the books of the bank were set out in detail. To this complaint the receiver interposed a demurrer. The comptroller in that case, as in this, had certified that the amount of subscription for the increase of stock had been paid in. Judge Adams, in the course of his opinion, said:

"It seems to me clear that the action of the comptroller of the currency in certifying that the whole amount of the increase of stock had been paid in, with his approval of the increase, so partakes of the judicial character that it cannot be assailed in this proceeding. In reaching this conclusion it must be borne in mind that the particular matter which, by the answer, is relied upon as a defense is by the act of congress pointedly referred to the comptroller for his finding and certification. If, therefore, the finding of any executive officer of the

government in any case is to be treated as conclusive (except as against direct attack), it seems to me his finding and certificate of this fact ought to be. The important and divers business interests of a bank, and the welfare of its stockholders and creditors, demand, in my opinion, that a matter of fact so affecting each and all of these features as the stockholders' relations to the bank and their liability to its creditors should be fixed clearly and definitely by some decisive authority; and this is what I think congress undertook to do in requiring the comptroller of the currency to find and certify to the fact in question, and, as a result thereof, to give his approval to the increase."

In Tillinghast v. Bailey, in the Southern district of Ohio, 86 Fed. 46, Judge Clark, in a case similar to this, arrived at the same conclusion.

The other principle relates to the question of estoppel. When a man subscribes to a proposed increased of stock in a national bank with knowledge that the stockholders had, by a resolution duly passed, authorized the officers of the association, with the approval of the comptroller of the currency, to increase the capital stock in any multiple of $50,000, up to $300,000, as the subscriptions shall be paid in, he is bound by his act of subscription in any amount of the increased stock which may at any time thereafter be voted and authorized, not exceeding the amount of $300,000, and not exceeding the amount of money actually paid in; and is estopped from questioning the regularity of the proceedings of the bank, its directors, officers, or shareholders, provided the certificate and consent of the comptroller of the currency to such increase has been obtained. Mathews having regularly subscribed for a certain number of the shares of increased stock in pursuance of the vote of the shareholders of the banking association at a regular meeting of said shareholders held on January 12, 1892, and having voted at said meeting as a shareholder, and paid to said association the sum of $2,300 for the shares by him subscribed for, and his name having been duly entered upon the books of the association as the holder of such shares of the increased stock, and having thereafter, in the due course of business, received the dividends duly declared thereon, it does not lie in his mouth to say, as against the creditors of the bank, that the meeting on July 25, 1895, when the increased stock of $150,000 was voted for, was not regularly called. He is estopped from saying that he had no notice of the meeting held in 1895, or of the action then taken, or of the certificate thereafter issued by the comptroller. He is, moreover, estopped from denying or repudiating the authority given by his general power of attorney to T. W. Bean to act and vote in his place and stead at all the stockholders' meetings of the association. He is estopped from saying that he did not authorize the name of T. W. Bean to be inserted in the blank left by him to be filled in by the bank with the name of any person its officers might select. It was his duty to ascertain that fact. It is enough to say that the power of attorney or proxy so given by him was never revoked. The power given was general in its character; not limited as to time or to any specific acts. His proxy was authorized "to vote at any and all stockholders' meetings * * * until this power is revoked, on all shares of stock * * * on which I shall have the right to vote, and in the same manner as I should do were I there personally present." Any vote which Bean thereafter cast was, to all

intents and purposes, the vote of Mathews. Any irregularity in the proceedings, or calls of the meeting, if there were any, which could have been waived by Mathews if personally present, could be waived by his proxy, and such waiver was binding upon him. Again, it is apparent from the facts of this case that, until the association failed, Mathews considered himself a subscriber to the increased shares of stock, as well as of the original shares, subscribed for by him. He accepted and pocketed the dividends without objection, and without any murmur or complaint. Had it continued prosperous, it is safe to say that none of the objections which he now seeks to urge against the regularity or validity of the increase would have ever come from him. He allowed the association, in its regular notices published, as required by law, to represent to its depositors, customers, and patrons that the stock had been increased. He is therefore estopped, after its failure, from denying that he was a subscriber. This principle cannot, upon any sound reason, be denied. When the law requires a public declaration or notice of the amount of the capital of a national or any other bank to be given to the world, or to the community where the bank operates, it contemplates a truthful and honest statement; one upon which the general public dealing with the bank may rely. The notice is not required for the sole purpose of imparting knowledge to the stockholders. It is made, and required to be made, for the benefit of the public, and especially for the information of all parties having dealings and transactions with the bank. If a contrary rule should prevail, it is plain to be seen that one of the securities which the creditors of a bank have would be taken away, and they would be left to the mercy of the shareholders, whose diligence and energy could always be relied upon, in case of danger to themselves, to find a variety of reasons tending to show that some of their actions or the decisions of the comptroller were not in all respects regular. It is true that there may be cases of individual hardship upon the stockholders of the bank, but when a man subscribes to the stock he has the power, and it is his right and duty, to keep himself advised of the transactions of the bank; and he can at any time, in the event of any departure from the established rules, take such steps as may be necessary to compel the directors and the stockholders to proceed in all their transactions in strict conformity with the law. If he fails to do so, it is but fair and just that he should be held liable.

The question as to the shortness of the time elapsing in this case between the date when the comptroller of the currency approved the increase of the capital stock and the date when he took possession of the books and assets of the bank is immaterial. It is the principle involved that controls the decision, not the length of time intervening between the acts. The door of construction cannot be opened in the courts as to what particular period of time must transpire before the principle should be applied. Mathews, having been a subscriber and stockholder, accepting its profits and sharing in its benefits, must be held legally bound to all the consequences of his relations to the bank. He must perform the obligation which he voluntarily assumed. Having received the advantages of a stockholder in the days of the bank's prosperity, he cannot be permitted to avoid its responsibility

to its creditors in the day of its adversity. The principles announced, and the reasons given therefor, in the following cases, more or less analogous to the case at bar, fully support the conclusions we have reached upon this point: Sawyer v. Hoag, 17 Wall. 610, 623; Upton v. Tribilcock, 91 U. S. 45; Sanger v. Upton, Id. 56, 64; Webster v. Upton, Id. 65, 69; Chubb v. Upton, 95 U. S. 665, 667; Pullman v. Upton, 96 U. S. 328; County of Morgan v. Allen, 103 U. S. 498, 508; Hawkins v. Glenn, 131 U. S. 319, 329, 335, 9 Sup. Ct. 739; Veeder v. Mudgett, 95 N. Y. 295, 310. The judgment of the circuit court is reversed.

DAVIDOW v. PENNSYLVANIA R. CO.

(Circuit Court, S. D. New York. March 21, 1898.)

1. PLEADING—DEMURRER—ADMISSION OF ALLEGATIONS OF COMPLAINT.
In an action by an administrator to recover for death of his intestate, the complaint alleged that, "under the laws of the state of New York, plaintiff, as such administrator, has a right to commence this action for the benefit of said next of kin." *Held* that, since the laws of different states are not required to be pleaded and proved in the federal courts, such an averment was not an allegation of fact admitted by the demurrer. Hanley v. Donoghue, 6 Sup. Ct. 242, 116 U. S. 1, distinguished. Lamar v. Micou, 5 Sup. Ct. 857, 114 U. S. 223, followed.

2. DEATH FROM WRONGFUL ACT—ACTION—LAWS OF FOREIGN STATE.
Intestate was killed in one state, and his administrator, to recover for his death, brought an action in another. *Held*, that whatever cause of action resulted to his survivors, whether widow, next of kin, or personal representative, was governed by the law of the state where the injury occurred.

3. SAME—COMPLAINT—SUFFICIENCY.
Laws Pa. 1851, p. 674, § 19, provide that the widow or personal representative of the deceased may bring an action to recover for his death resulting from wrongful act. Laws 1855, p. 309, § 1, provide that the persons entitled to recover are the husband, widow, children, or parents of the deceased, and no other relative, and that the declaration shall state who are the parties entitled to recover. *Held*, that a complaint which states that the action is brought for the benefit of the next of kin, but which does not state that deceased left a widow, children, or parents, does not state a cause of action.

The complaint avers that plaintiff is a citizen of New York, and defendant a Pennsylvania corporation; also that deceased in his lifetime was a citizen of New York; that by the negligence of defendant deceased was struck by one of its engines and killed at Sunbury, in the state of Pennsylvania; that the deceased was a brother of plaintiff, and left, him surviving, five other persons named in the complaint as "next of kin"; and that the surrogate of New York duly appointed plaintiff administrator of the goods, chattels, and credits of the deceased, for the purpose of instituting this action. It finally avers that, "under and pursuant to the laws of the state of New York, plaintiff, as such administrator, has a right to commence this action for the benefit of said next of kin, and that, by reason of the wrongful acts aforesaid of defendant, the said next of kin have sustained damages in the sum of $25,000. The defendant demurred to the complaint as not setting forth a cause of action.