

had got off the boat, he sat down with others, and played a game of cards, "for about fifteen minutes." Then he sat down, and talked to the steward for a few minutes, after which he succumbed to the rocking motion of the boat, and dozed, when he was struck and injured. On cross-examination plaintiff says that as soon as he got on the boat, and after he went upstairs, he heard some noise like blasting, and he "thought they were blasting," and that thereafter he played a game of cards. So, according to his testimony, he "understood" they were blasting at the time, and he heard some noise like blasting, and thought they were blasting, and thereafter he played cards for some 15 minutes, and followed that by talking with the steward "for a few minutes," after which he dozed in his seat for a time, the length of which he is unable to give. He was therefore fully warned of the blasting, and his instinct, if not his previous experience, should have enabled him to know there was danger. His conduct warrants the inference that he had become so accustomed to blasting, from previous journeys down the river, that it had ceased to excite any interest or concern in him. Between the time when he heard the noise of blasting and understood there was blasting, and his injury, there was ample time to have taken the utmost precautions for his own safety that any personal warning would have given him. He testifies that he had not on previous trips heard blasting, but does not testify that he was ignorant of the fact that blasting was being done regularly at that place and time; and, as already stated, there is enough to authorize the inference that he did know it, and that, with such knowledge, he was guilty of contributory negligence in going upon the boat, and, furthermore, that his subsequent conduct, after hearing the blasting, is enough to sustain a further finding of negligence on his part.

In addition to these considerations, I am of the opinion that there is nothing in the case tending to prove negligence on the part of defendants, contributing to the injury; that there is nothing to warrant the conclusion that the blasts should have been covered, or that defendants should have postponed their work of blasting until the navigation company's boat left on its trip; and that the question of a warning cry that blasts were to be fired is immaterial, since the plaintiff was otherwise warned, and had knowledge. The feeling of security which his conduct manifests was certainly not due to lack of notice, but appears to have been due to his indifference to what was taking place. The motion for a new trial is denied.

UNITED STATES v. SIMONS et a.

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

No. 441.

INDIAN AGENCIES—ACTION BY UNITED STATES—ALLOWANCE OF CREDITS.

In an action on the bond of an Indian agent, where the agent died near the close of the quarter, credit may be allowed for vouchers which have not been presented to the accounting officers of the treasury; the death of the agent bringing such vouchers within the last clause of Rev. St. U. S. § 951, relating to vouchers not presented by reason of "absence from the United States or some unavoidable accident."

In Error to the District Court of the United States for the District of Montana.

Preston H. Leslie, for the United States.

McConnell & McConnell, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. Archer O. Simons was the agent for the Indians at Ft. Belknap Agency, Mont., under a commission bearing date February 4, 1890. On April 1, 1890, he took the oath of office, and entered upon the discharge of his duties. On December 21, 1892, he died. An action was brought by the United States against his administrator and his bondsmen to recover \$858.42, with interest thereon from December 21, 1892, which sum, it was alleged in the complaint, the agent had appropriated and converted to his own use. Defendants denied their liability for any sum. They also pleaded a set-off of \$334.20 for unpaid salary due the deceased. There was a verdict for the defendants, and judgment accordingly.

It is assigned as error that the court permitted the witness Rainsford to testify orally concerning the disposition of certain articles referred to in vouchers No. 3 and No. 5, and that he was permitted to testify orally that \$30 disbursed by the agent for vaccine virus was used in vaccinating the Indian children, and that he was permitted to testify orally that certain paint brushes with which the agent was charged had been worn out under his direction in painting the rooms of the agency buildings. It is said that this oral testimony was inadmissible under section 951 of the Revised Statutes, which provides as follows:

"In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the treasury, for their examination, and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the treasury by absence from the United States or by some unavoidable accident."

The total amount involved upon the writ of error is \$243.43. Voucher No. 3 accounts for the disposition of certain flannel sheeting, linsey, etc., which, according to the voucher, were used by the pupils of the Indian school; voucher No. 5, for some lumber, amounting to \$22.44, purchased and used for the agency. There is nothing whatever in the record to inform us that proper vouchers for all of these items had not been duly forwarded to the proper accounting officers. But, assuming that they were not, we find no error in the admission of oral testimony. All the transactions concerning which such testimony was taken belong to the last quarter of the year 1892. The death of the agent occurring a few days before the end of that quarter, it was manifestly impossible for him to have submitted the vouchers. The case comes clearly within the exceptions named in the statute. If the death of the agent was not an absence from the United States, it certainly was

an unavoidable accident. It was shown that the Indian commissioner had written forbidding the administrator to sign or verify vouchers. The vouchers that were admitted in evidence were signed,—the one by the superintendent of the Indian schools, the other by the administrator of the decedent. There was competent and undisputed evidence that the vaccine virus had been used in vaccinating the Indian children, and that the paint brushes were worn out in painting the agency buildings. Upon the evidence offered on the trial, the defendants were entitled to a verdict irrespective of the set-off. We search the record in vain for a justification of the harsh charge that the agent appropriated and converted to his own use the moneys of the United States. Nor can we see that the ends of justice have been subserved by burdening his estate with the expense of this writ of error. The judgment of the circuit court will be affirmed.

CLEVELAND, C. & S. RY. CO. v. KNICKERBOCKER TRUST CO. OF
NEW YORK et al.

(Circuit Court, N. D. Ohio, E. D. April 12, 1898.)

No. 5,156.

1. RAILROADS—MECHANIC'S LIEN—OHIO RAILROAD LIEN LAW—BRIDGES.

A lien upon a railroad bridge in Ohio for work performed and material furnished cannot be obtained under the mechanic's lien law, but must be obtained under the act of April 10, 1884, known as the "Railroad Lien Law," under which the lien must be filed within 40 days after the account is closed.

2. SAME.

A railroad bridge becomes a part of the permanent structure of a railroad, and a mechanic's lien cannot be maintained for work performed and material furnished for a bridge as against liens created by prior mortgages on the railroad.

3. SAME—PRIORITY OF CLAIM FOR NECESSARY REPAIRS.

Where a railroad bridge became so defective that it was unsafe to run trains over it, and repairs were necessary to keep the railroad a going concern, those who performed the work and furnished the material necessary in repairing the bridge are entitled, on the insolvency of the company and the appointment of a receiver, to priority over the mortgage bonds, without showing any diversion of income, and such priority may be allowed, though more than six months elapsed between the time the work was done and the appointment of a receiver.

4. SAME.

Such priority is allowed as against liens created by mortgages placed on different branches of the consolidated road when they were independent corporations.

5. SAME—ORIGINAL CONSTRUCTION.

The term "original construction" (as distinguished from repairs) has a technical meaning, and is that construction of bridges, grades, culverts, rails, ties, docks, etc., that is necessary to be done before the road can be opened, not such structures as are intended to replace old and worn out counterparts.

Baldwin & Shields, for complainant.

C. E. Pennewell, Amos Denison, and F. A. Durhan, for intervener,
T. B. Townsend Brick & Contracting Co.