

tal circumstance, but the substance of a conversation. Reference is also made to later cases,—such as *Coal Co. v. Liddell*, 69 Ill. 639; *Wolcott v. Heath*, 78 Ill. 433; *Brown v. Luehrs*, 79 Ill. 575; *Clifford v. Drake*, 110 Ill. 135; *Bonnet v. Glattfeldt*, 120 Ill. 166, 11 N. E. 250; *Brown v. Pile Co.*, 132 Ill. 648, 24 N. E. 522,—but we find nothing in any of them inconsistent with the view taken of the cases quoted in our opinion. There is nothing in the opinion to the effect that the witness was not at liberty to refer to the memorandum for the purpose of refreshing his recollection, the point decided being simply that the memorandum should not have been read to the jury. That was error even by the rule contended for as laid down in *Wood*, *Prac. Ev.* § 134, “that the memorandum itself only becomes evidence when the witness, after examining it, although able to swear that he knew it to be correct when he made it, is unable to state the particulars from recollection.” The full statement on which the witness in this case was permitted to read the memorandum to the jury was the following:

“I would say this is a matter of over six years ago, and I would not be able to give the language of Mr. Overstreet. But by looking at this memoranda I could tell almost verbatim what Mr. Overstreet stated, and I would prefer to state what took place at that time from my memoranda, instead of trusting to my memory. I can't tell whether I could recollect back to January 24, 1891, and state what took place, or what I recollect from the notes taken at that time; so I would prefer to refresh my memory by reading the memoranda as it took place exactly, because I do not wish to make any statement not in exact accordance with the facts.”

He did not testify that the memoranda were accurate or true or full, or that without looking at them he had no recollection of the conversation. The memorandum itself is manifestly imperfect and fragmentary, falling far short of a verbatim report of the conversation; and, from the statement of the witness that by looking at it he could tell almost verbatim what was said, the fair inference would seem to be that, by looking at the fragmentary expressions of the memorandum, he would be able to recall and from memory give almost the exact words. There was therefore no reason for using the memorandum except for the purpose of refreshing the memory of the witness.

That the federal courts sitting in a state will follow the decisions of the highest courts of the state concerning the rules of evidence has been more than once explicitly affirmed by the supreme court. In *Ex parte Fisk*, 113 U. S. 113, 5 Sup. Ct. 724, after quoting section 914 of the Revised Statutes, that court said: “In addition to this, it has been often decided in this court that in actions at law in the courts of the United States the rules of evidence and the law of evidence generally of the states prevail in those courts.” This is quoted and reaffirmed in *Bucher v. Railroad Co.*, 125 U. S. 555, 583, 8 Sup. Ct. 974, where, after stating other respects in which the local decisions, “whether founded on statute or not,” are treated as the law of the state by the federal courts, the court says: “The principle also applies to the rules of evidence.” While it is true, as stated in the petition, that the opinion in *City of Chicago v. Baker*, 30 C. C. A. 364, 86 Fed. 753, is “destitute of any language to support the proposition” to which it was cited, the force of the decision in that direction is not less clear than if expressed. The question was whether there had been error

in the admission of evidence. By the decisions in New York there had been, but it was insisted that in Illinois a different rule prevailed, and, on the assumption that the rule in Illinois was controlling, the decisions in that state alone were examined, and the conclusion declared accordingly. Our ruling upon the point is in harmony with the decision of the court of appeals for the Fifth circuit in *Hinds v. Keith*, 13 U. S. App. 222, 6 C. C. A. 231, 57 Fed. 10; and while there is a decision to the contrary in the Eighth circuit, in *Railway Co. v. Yates*, 49 U. S. App. 241, 25 C. C. A. 103, 79 Fed. 584, the citations on which it was based seem not to be in point, because the questions decided were questions of ultimate right, and no rule of evidence by which the right might be established was considered. The cases referred to are *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10; *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914; *Ryan v. Staples*, 40 U. S. App. 427 (1), 23 C. C. A. 541, 76 Fed. 721; *Railroad Co. v. Hogan*, 27 U. S. App. 184, 11 C. C. A. 51, 63 Fed. 102. The petition is overruled.

SYNNOTT v. IRON BELT BUILDING & LOAN ASS'N.

(Circuit Court, W. D. Virginia. May 27, 1898.)

1. BUILDING AND ASSOCIATIONS—STOCKHOLDERS—WITHDRAWAL.

A stockholder who exercises the right to withdraw can only do so in accordance with the terms of the by-laws.

2. SAME—NOTICE OF WITHDRAWAL.

Where 60 days' notice of withdrawal is required by the by-laws, the stockholder remains a member of the corporation, sharing its profits or losses, until the expiration of that time, when his rights as a creditor become fixed, in so far that his demand is liquidated, and is payable in the mode and at the time prescribed in the by-laws.

3. SAME—WITHDRAWAL VALUE OF SHARES.

The by-laws of an association fixed the withdrawal value of shares at the amount paid in and the profits as shown by the last preceding apportionment of profits, which apportionments were required to be made each six months. A shareholder gave the required notice of withdrawal at a time when an apportionment of profits was due, but had not been made owing to the illness of the secretary. *Held*, that the withdrawal value of his stock was determined by such apportionment when made, and not by the one preceding, but that the amount did not become due and payable so as to draw interest until there was a sufficient amount to pay it in its proper order in the fund applicable to its payment, under the by-laws.

Scott & Staples, for plaintiff.
C. A. McHugh, for defendant.

SIMONTON, Circuit Judge. This is an action of assumpsit brought by plaintiff, shareholder in the defendant company, for the withdrawal value of his shares under by-laws of the corporation. The defense admits the right of recovery, the only question being as to the amount thereof and the period of time for which interest should run. The cause has by stipulation been submitted to the court to pass upon all issues of fact as well as law, without the intervention of a jury.