

moved. We feel constrained to hold that this instruction was erroneous. If the defendants received and disposed of living and uninjured timber which was wrongfully cut, they are liable to the government for its full value. We are unable to perceive any legal ground upon which payments that they may have made into the Indian poor fund for the support of indigent Indians can be accepted or regarded as payments made to the United States for its benefit. Such payments stand on the same footing as a payment made to a third party, inasmuch as the government received the money simply as a trustee for the benefit of poor Indians, and has doubtless expended it for their benefit.

Another question was raised at the trial, and an exception was duly saved, which will be noticed briefly, because it has been discussed in the briefs, although it is not distinctly raised by the assignment of errors. The question is whether the trial court, at the conclusion of the government's testimony, properly required it to elect whether it would take the value of the logs in controversy at the place where they were originally seized,—that is, in northern Minnesota,—or, in lieu thereof, would take the value of the lumber which was made therefrom at the city of Minneapolis, at which place, as it was claimed, the lumber was wrongfully sold. The trial court ruled, in substance, that, after the government had closed its case, it was no more than reasonable to require it to state at what place and time it would elect to have its damages assessed, because it could not recover the value of the logs and also the value of the lumber made therefrom, and because it would be unnecessary to enter upon a long inquiry as to the cost of rafting the logs to Minneapolis, and sawing them, provided it determined to take the value of the logs in northern Minnesota, and to have its damages assessed at that time and place. We fully concur in the views of the trial judge on this point, and are unable to see that the ruling in question placed the government at any disadvantage, or prejudiced its rights to any material extent.

The government further insists that the trial-court erroneously refused to permit one of its witnesses to detail a conversation which he had with a person by the name of Galbreath, who was a foreman of one of the logging camps where a portion of the logs in controversy were cut, which conversation occurred at the camp during the winter of 1891 and 1892, and related to the character of the timber, whether living or dead, which was being cut. It also complains because one of its witnesses was not allowed to answer the question whether he regarded trees which had been burned from six inches to six feet from the butt upwards as dead timber; also because another witness was not allowed to describe the effect which a fire running through his land had had upon the timber growing thereon. We think it is manifest that the last two complaints are not well founded, because the proposed testimony was irrelevant and immaterial. Concerning the statements made by the foreman, Galbreath, there is more room for controversy; but, upon the whole, we have concluded that it was not shown that the statements in question were so coincident with an act which was being done at the time by Galbreath as to constitute them a part of the *res gestæ*, and it is clear that they

were not admissible on any other ground. It is most probable, we think, that the statements related to what had been done previously, and would have proven to be merely narrative of a past transaction, and inadmissible for that reason.

It results from what has been said that the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

UNITED STATES, to Use of HEISE, BRUNS & CO., v. AMERICAN BONDING & TRUST CO. OF BALTIMORE CITY.

(Circuit Court, D. Maryland. February 2, 1898.)

1. BOND OF CONTRACTOR—PROCUREMENT BY MISREPRESENTATION—RIGHTS OF MATERIAL MAN.

A company proposing to act as surety on the bond of a government contractor asked a firm whether they knew of any outstanding liabilities on the part of the contractor, to which the firm replied in the negative, though the contractor at the time owed money to the firm. It was partly owing to this reply that the company signed the bond. The firm thereafter supplied the contractor with materials for the work, in reliance on the security furnished by the bond, which was conditioned on full payment of work and materials. Payments were made by the contractor to the firm, nearly sufficient in amount to cover the cost of these materials, but they were applied on the pre-existing debt. *Held*, that the firm could not recover on the bond.

2. SAME.

It is immaterial that the inquiry made of the firm was accompanied by a statement that the reply would be held strictly private and confidential, and as not making the firm in any way responsible.

3. SAME—RELEASE OF SURETY—EXTENSION OF TIME.

A material man cannot recover on a government contractor's bond conditioned that the contractor shall make full payment to all persons supplying materials, if he has extended the time of payment by taking notes due after the termination of the contract, as it deprives the surety of the opportunity of compelling appropriation of the payments as made for claims for materials.

Tried before the court without a jury.

Fielder C. Slingluff and Wm. T. Donaldson, for complainants.

Cowen, Cross & Bond, John L. J. Lee, and R. B. Tippet, for defendant.

MORRIS, District Judge. This is a suit by Heise, Bruns & Co. against the American Bonding & Trust Company, as surety for Minor & Bro. Minor & Bro., on June 12, 1895, contracted with the United States to erect a hospital building at Ft. Myer, Va., for the sum of \$18,200, and gave a bond, dated June 13, 1895, in the penalty of \$6,500, with the American Banking & Trust Company (now the American Bonding & Trust Company of Baltimore City), as surety, for the performance of the contract, and conditioned also that the contractors would "make full payments to all persons supplying them labor or materials in the prosecution of the work provided for in said contract." This clause was inserted in accordance with the provision of the act of congress approved August 13, 1894. Minor & Bro. performed their contract with the United States, and received payment in full;