

in view the grade of the track, the weight of the train, its speed, its proximity to the bridge and to the child on the track, his judgment was that to reverse the engine would not affect the speed of the train or the safety of the child, but that it would tear the engine all to pieces, throw her rods, and endanger the lives of all on the train, and that he could not stop the engine by any means in the world except by wrecking it. It cannot be the law that the defendant or its servants are in duty bound to use means that will cause them to incur such extreme hazards on the barest possibility of being thereby able to prevent running onto a person, even a tender infant, whose presence on the track was not to have been expected, and was not discovered until the case presented the dire alternative of a fatal injury to the child or the most serious injury to the train and those thereon. We are not able to believe that the jury would or could have found as a fact that a competent engineer, using the care and caution of an ordinarily prudent person, would have reversed his engine under the circumstances and conditions shown by the proof; or that, if he had done so, the injury to the child would have been thereby prevented, if they had not been misled by the charge of the court, or by their misunderstanding of his charge, into accepting it as matter of law, binding on their consciences as sworn jurors, to find for the plaintiffs because the engineer did not reverse his engine. The tone of the instructions, and the reiteration of the definition of that care which a person of ordinary prudence would use, seems to us—as we think it must have appeared to the jury—to express that the judge's view of the law was that the engineer should have reversed his engine. We are far from deeming it our duty to limit the sound discretion of the trial judge in using large freedom in discussing the testimony in his charge to the jury. It is both his privilege and his duty to do so. But he should at the same time take care to inform them that his suggestions are not binding on them as matter of law; that, however high may be their regard for his views of the evidence in a case like this, it is their duty, and not his, to determine from all the facts admitted or established by proof whether the care and caution shown to have been used was up to that measure which, in their judgment, a person of competent skill and of ordinary caution and prudence, placed in the engineer's position, would have exercised. For the error in the charge of the court below, the judgment must be reversed, and the case is remanded to the circuit court, with instructions to grant a new trial.

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FIRST NAT. BANK OF ARKANSAS CITY v. LEECH.

(Circuit Court of Appeals, Eighth Circuit. April 10, 1899.)

No. 1,140.

ACCORD AND SATISFACTION—EXECUTORY AGREEMENT.

An agreement to accept notes of a third person in part payment of a debt, and to extend the time for payment of the remainder, on the giving of certain security, must be fully executed before it can be pleaded as an accord and satisfaction.

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

This is an action to recover the amounts due defendant in error from the plaintiff in error on two certificates of deposit. The defenses are that the bank having been placed in the hands of a receiver, plaintiff agreed with the bank, in writing, to accept in payment of his claims 10 per cent. in money, and certificates of deposit for the balance, payable in 10 installments, at intervals of three months, at 4 per cent. per annum; that afterwards, it having been ascertained that the bank would be unable to carry out these agreements, the plaintiff agreed with defendant to accept in payment of his claims a note for \$4,500 of one of the bank's debtors, to be secured by a mortgage on real estate of that debtor, and also by mortgage on three lots belonging to the bank, to be selected by the plaintiff from a large list of lots to be submitted to him, and the balance due the plaintiff was to be paid in 10 equal installments, at intervals of three months. There are no allegations of satisfaction or acceptance of the agreement, and upon the trial the court held the answer set up no defense, and sustained a demurrer to it, and directed a verdict for the plaintiff for the full amount of his claims. The contention of the plaintiff in error is that the court erred in sustaining the demurrer to the answer, and in refusing to permit the introduction of evidence to support its allegations.

Peters & Nicholson and Pollock & Lafferty, for plaintiff in error.

Stanley, Vermillion & Evans and Mathews, Heade & Mathews, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. The agreements set up in the answer amount to nothing more than an executory contract for an accord. There are no allegations showing a satisfaction. It is a well-settled rule of law that accord without satisfaction is not a good answer. An agreement or accord which is to operate as a satisfaction of an existing liability must, before it can have that effect, be fully executed. It is not enough that there be a clear agreement or accord and a sufficient consideration; but the agreement or accord must be executed before it can be pleaded as an accord and satisfaction. If part of the consideration agreed on be not performed, the whole accord fails. *City of Memphis v. Brown*, 20 Wall. 289, 308, 309; *Clifton v. Litchfield*, 106 Mass. 34, 40, 41; *Crow v. Lumber Co.*, 16 C. C. A. 127, 69 Fed. 61; *Coblentz v. Manufacturing Co.*, 40 Ark. 180; *Ogilvie v. Hallam*, 58 Iowa, 714, 12 N. W. 730; 1 *Smith, Lead. Cas.* (5th Am. Ed.) 445, 446, and cases there cited.

The answer must allege that the matter was accepted in satisfaction. *Sinard v. Patterson*, 3 Blackf. 354; *Banking Co. v. Van Vorst's Adm'x*, 21 N. J. Law, 101. Mere readiness to perform the accord or a tender of the performance will not do, and a plea of accord and tender is bad upon demurrer. *Russell v. Lytle*, 6 Wend. 390; *Hawley v. Foote*, 19 Wend. 516; *Tilton v. Alcott*, 16 Barb. 599; *Clifton v. Litchfield*, supra. In the latter case the supreme judicial court of Massachusetts say:

"But an executory agreement to discharge such a demand, upon the giving of a promissory note by the debtor, or payment of a sum less than the amount actually due, is not binding upon the creditor, and cannot be enforced against him or set up in bar of a suit upon the demand; and therefore the mere offer of such note, or of such less sum in payment, will not operate to discharge the

debt, unless it is accepted by the creditor. His refusal to accept it is the breach only of an executory agreement without consideration. The whole transaction will then stand as an accord without satisfaction."

That the agreement in this case was merely executory is not controverted. It is alleged that the lots of the bank which were to be added to the security were to be selected by the defendant in error from a list of property owned by the defendant; but there is no allegation that these lots were ever selected, although it is charged that a large list of the bank's lots were tendered to defendant in error for a selection. As there was no satisfaction, the answer setting up accord and satisfaction, without averring satisfaction, was bad, and the court did not err in directing a verdict for the plaintiff. The judgment of the circuit court is affirmed.

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COLORADO EASTERN RY. CO. v. UNION PAC. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. April 10, 1899.)

No. 1,121.

1. **DISMISSAL FOR WANT OF PROSECUTION—REVIEW.**

An order of dismissal for want of prosecution, with judgment for costs, is a final judgment, from which an appeal will lie.

2. **APPEAL AND ERROR—FINALITY OF JUDGMENT.**

To constitute a final judgment for purpose of appeal it is not essential that it should be a bar to another suit.

3. **WANT OF PROSECUTION—DISMISSAL.**

Dismissal of cause for want of prosecution is within the discretion of the court, even in the absence of a rule permitting it.

4. **SAME.**

Where nearly six years had elapsed since the filing of the original petition without steps to bring cause to trial, during which time plaintiff had twice filed petitions praying that suit be not dismissed for want of prosecution, alleging the pendency of other suits involving the matter in dispute, and such suits were finally disposed of, and no further steps were taken in the cause until two years later, when defendant filed petition to dismiss for want of prosecution, the court did not abuse its discretion in granting the application.

5. **CONDEMNATION PROCEEDINGS—NATURE AS SUIT.**

A proceeding for condemnation of right of way is a suit, so as to authorize the court to dismiss it for want of prosecution.

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

Application for dismissal for want of prosecution. Granted, and plaintiff brings error. Affirmed.

The plaintiff in error filed its petition in the state court of Colorado for condemnation of a right of way. The original petition was filed on September 12, 1892, and the cause was removed to the federal court by defendant in error on October 14, 1892. The transcript of the record was filed on November 1, 1892. No action was had on the petition until October 4, 1894, when the plaintiff in error filed a petition asking that the suit be not dismissed under the rule of the circuit court for the district of Colorado, which provides that all suits in which no progress has been made during the preceding year should be dismissed, setting up that at the time there were pending in the supreme court of the United States and the court of appeals of Colorado suits to determine the question of the right of plaintiff in error to condemn the land in dispute.