

does not now concern defendant. It seems to the court, therefore, that there was authority upon the part of the city to agree upon the essential things embraced in the contract sued on.

Another clause of the plaintiff's proposal, not much if at all noticed by counsel, may become of much more importance in the progress of this litigation. It is the one which pledges the common council to pass, and the mayor to sign, all ordinances, etc., necessary to carry out the agreement. The effect of this provision, in connection with the difficulty, if not impossibility, of making actual sales to third persons of unissued bonds, or of bonds the existence of which was so far in the future and dependent upon so many contingencies as these were, and the difficulty of having a "market price" for them under the circumstances of this case, and whether they were, in fact and in the proper sense, renewal bonds at all, although there was a pledge made to use the proceeds of their sale to pay off existing debts, may hereafter develop very important, not to say troublesome, questions, as to the measure of damages; but on the demurrer, which assumes all the plaintiff's allegations to be true, it seems to the court that at least a cause of action is stated, whatever may hereafter turn out to be the proper criterion of damages for a violation of the agreement. And it should not be altogether overlooked that there was no trouble made by the city about the \$45,000 lot of bonds, where the reduction in interest was considerable, though there has been as to the others, in which there was only one-fourth of 1 per cent. per annum reduction. The demurrer to the petition as amended is overruled.

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FETTERS v. UNION TRACTION CO.

(Circuit Court, E. D. Pennsylvania. June 27, 1899.)

No. 88.

**TRIAL—JUDGMENT NOTWITHSTANDING VERDICT.**

Where there is any evidence creating a conflict as to a material question of fact, the case cannot be withdrawn from the jury, nor can a judgment be rendered notwithstanding the verdict.

On Motion by Defendant for Judgment on Point Reserved.

James M. Beck, for plaintiff.

Thomas Leaming, for defendant.

McPHERSON, District Judge. The defendant's argument puts forward all that can be profitably said in support of the motion for judgment notwithstanding the verdict, but it has failed to convince me that the motion should prevail. I am still of opinion that the opening of the protective platform was the defendant's act, and that the defendant was bound to restore it to its original condition within a reasonable time. This presented a question of fact, and if there was evidence that the injury was caused by the failure thus to restore it the question could only be answered by the jury. I have examined the notes of testimony carefully, and think that sufficient evidence was offered to justify the jury in concluding that the injury

was caused either by the stringer falling through the opening, or by the stringer breaking through the platform after it had been disarranged and weakened by the defendant's act. If it was caused by a fall through the opening, I do not understand the defendant to deny that liability may exist, if the terms of the contract do not prevent recovery. The present motion is mainly based upon the allegation that the uncontradicted testimony shows the injury to have been caused by the stringer breaking through a part of the platform that had not been disturbed at all, and therefore had not been weakened by the defendant's act. Upon this point there is, no doubt, some evidence from which such an inference can be drawn. But I think it is a mistake to suppose that there is no other testimony leading to a different conclusion. For example, the platform was only about 18, or perhaps 23, feet from the point where the stringer began its descent. Whether the stringer could gather sufficient momentum in a descent of 23 feet to crash through an inch board is certainly a matter which a jury alone could determine. One witness thought it could not gather such momentum. He also said that the platform was strong enough to hold five or six men. Concerning the condition of the platform, several witnesses testified as follows:

"It was torn up at a number of places. You could see daylight all through it. \* \* \* The boards appeared to be moved around different ways. We could see light all through it. They appeared to be shifted all around. \* \* \* It appeared to me to be an opening all the way across the stack, about the width of the board,—that is, the largest opening,—and numerous openings through the stack. \* \* \* A number of openings and holes. It was all over full of holes, like it was moved around,—these boards had been moved around. \* \* \* The opening \* \* \* was the full length of the flooring, and appeared to be about a foot wide. There were several other smaller openings in the flooring. \* \* \* Right after the accident, I went in and looked up at it, and several holes in the platform. \* \* \* The board in the center had been removed, to make the opening for this line to go through, and then the hole also where the timber came through. \* \* \* I saw an opening through the center, V-shaped, and right north of that opening was another small opening, probably six inches or so away."

There is other testimony also. Some witnesses heard a crash; others did not. Some said there was much noise in the stack; one apparently said there was little or none, when the accident happened. Without further detail, I think I have referred to enough of the evidence to show that there was a conflict concerning the condition of the platform and the path of the stringer, and that the testimony was not uncontradicted upon this point. I do not see how the case could have been taken from the jury. The motion is refused, and judgment is directed to be entered upon the verdict.

JARMAN v. KNIGHTS TEMPLARS' & MASONS' LIFE INDEMNITY CO.  
OF ILLINOIS.

(Circuit Court, W. D. Missouri, W. D. June 26, 1899.)

No. 2,341.

1. CONSTITUTIONAL LAW—IMPAIRMENT OF CONTRACTS—LIFE INSURANCE POLICIES.

The statute of Missouri (Rev. St. 1889, § 5855), providing that suicide shall not be a defense to any policy of life insurance unless it was contemplated by the insured at the time of his application, is not one relating to the remedy, but enters into the consideration, and becomes a constituent part of every policy of insurance to which it applies; hence such policies are within the provision of the federal constitution against the impairment of contracts, and cannot be affected by a subsequent repeal of the statute.

2. LIFE INSURANCE—MISSOURI STATUTES.

The act of 1887 (Rev. St. Mo. 1889, § 5869), relating to foreign insurance companies, which provided that life insurance companies doing business on the assessment plan, and which complied with the act, should not be subject to the general insurance laws of the state, did not repeal the prior statute (Rev. St. 1889, § 5855), cutting off defenses on the ground of suicide, nor was it retroactive, but it merely exempted assessment companies from the operation of such statute as to policies thereafter issued and while section 5869 remained in force.

3. SAME—ASSESSMENT COMPANIES—EFFECT OF CHANGE IN CONSTITUTION.

A policy of life insurance issued by an assessment company provided for the payment to the widow or heirs of the insured, on his death, of a certain sum, together with the amount of all assessments paid by him during his lifetime. The application, which was made a part of the policy, contained this provision: "I further agree, if accepted, to abide by the constitution, rules and regulations of the company as they now are or may be by the constitution be changed hereafter." *Held*, that such provision could not be construed to authorize the company to reduce the amount payable, under the terms of the policy, by an amendment of its constitution striking out the provision for paying back the assessments paid by a policy holder on his death, but that such an amendment could have only a prospective operation.

This was an action on a life insurance policy, tried to the court without a jury, by stipulation of the parties.

Harber & Knight, for plaintiff.

Saml. B. Huston, Alex. B. Huston, and Hervey B. Hicks, for defendant.

PHILIPS, District Judge. This case was submitted to the court without the intervention of a jury, on the agreed statement of facts, with some additional evidence; and the controversy, briefly stated, grows out of substantially the following state of facts: The defendant is a life insurance company, doing business on what is known as the "assessment plan," by which it issues policies of insurance to Masons who become members of the company on application. In 1885 it issued a policy to John P. Jarman, whereby, in case of death and proof thereof, it promised to pay to his wife, or children, or heirs, in the order named, the sum of \$5,000 and all assessments paid to the company by the assured. In 1898 the assured died by a gunshot wound inflicted by himself while insane. This suit is brought by his wife to recover on the policy. The principal matters of defense