

remedy in this jurisdiction, as we have already shown, with regard to the fact that the plaintiff has joined in his action more than one promisor, but not all of them. The plaintiff meets this difficulty by a reference to the statute of Massachusetts which we have already cited. The court was under the impression that this provision of law has no relation to joint and several promisors; but the letter of the statute is broad enough to reach the case at bar, and that it does reach it is not contravened by the defendants. Therefore, at least for this case, the court will give this provision the construction asked for by the plaintiff, making it, in effect, the same for the present purposes as paragraph 1101 of the Kansas General Statutes of 1889. Thus, with reference to the legal effect of the contract, the position of the plaintiff is sustained by the statutes of Kansas, and, with reference to the remedy, by the statutes in force in this jurisdiction.

The defendants have urged upon us some other propositions; but, as the plaintiff has availed itself of the ninth paragraph of section 2 of chapter 167 of the Public Statutes, and has set out its cause of action by annexing a copy of the deed of trust on which it relies, and not by the positive allegations which the rules of pleading at common law require, it is impossible on the pleas now before the court to pass on them. Therefore we lay them aside, without prejudice, for such consideration as they may be entitled to receive, if renewed by the defendants at subsequent stages of the litigation. The pleas in abatement are overruled, and the defendants may answer to the merits on or before the 1st day of August next.

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KISSEBERTH v. PRESCOTT et al.

(Circuit Court, D. Massachusetts. July 6, 1899.)

No. 737.

**CORPORATIONS—ACTION TO ENFORCE STATUTORY LIABILITY OF STOCKHOLDER—EFFECT OF REPEAL OF STATUTE.**

Under Gen. St. Kan. 1889, par. 6687, prescribing rules for the construction of the statutes of the state, and which provides generally that the repeal of a statute shall not affect any right accrued, nor any proceeding commenced, under such statute, Laws 1899, c. 10, repealing the prior statute which gave creditors of a corporation a right of action against stockholders to recover their debts, does not affect an action brought to reinforce such liability, and pending at the time of the repeal.

Jaquith & Bigelow, for plaintiff.

Crapo, Clifford & Clifford, for defendants.

LOWELL, District Judge. The defendants' demurrer in this case was overruled. 91 Fed. 611. The defendants now contend that the plaintiff cannot maintain this action by reason of chapter 10 of the Kansas Statutes of the Special Session of 1899. The chapter cited repeals the statutory provisions upon which this action is based, and, for the future at least, deprives the individual creditor of the corporation of all right and remedy to enforce the individual liability of the corporation's stockholders, in lieu thereof vesting all right of recovery

against the stockholders in a receiver of the corporation. But the repealing statute just cited must be construed with reference to Gen. St. Kan. 1889, par. 6687, which is as follows:

"In the construction of the statutes of this state, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature or repugnant to the context of the statute: First. The repeal of a statute does not revive a statute previously repealed, nor does such repeal affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced, under or by virtue of the statute repealed."

The language of this section and the construction repeatedly given it by the supreme court of Kansas show clearly that chapter 10 of the Statutes of 1899 was not intended to deprive the plaintiff in this case of his right to proceed further with this action. *State v. Boyle*, 10 Kan. 113; *State v. Crawford*, 11 Kan. 32. Under these circumstances, it is not necessary to consider if the legislature of Kansas had the constitutional authority to deprive the plaintiff of the rights he seeks to enforce in this action. According to the terms of the stipulation filed in this case, the case is to stand for trial at the next term.

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**GEORGIA HOME INS. CO. v. ROSENFELD et al.**  
(Circuit Court of Appeals, Sixth Circuit. June 6, 1899.)

No. 663.

**1. INSURANCE—AVOIDANCE OF POLICY FOR OVERINSURANCE—TENDERING BACK PREMIUM.**

An insurance company, which first learns after a loss has been sustained and a claim made under its policy that the property was overinsured at the time the policy was issued, in violation of its provisions, and which at once, in express terms, denies liability on that ground, is not precluded from making such defense to an action on the policy merely because it did not tender back the premium paid.<sup>1</sup>

**2. SAME—CONSTRUCTION AND EFFECT OF PROVISION AGAINST OTHER INSURANCE.**

The effect of a clause in an insurance policy providing that the policy shall be void if other insurance is procured without the consent of the insurer is to terminate, and not merely suspend, the policy on the procuring of other insurance, contrary to such provision, and it is not revived without the consent of the insurer, although the additional insurance expires before any loss.

**3. SAME—WAIVER.**

The action of an insurance company, in requiring proofs of a loss or treating for its settlement, is not a waiver of any defense to the policy of which it had no knowledge at the time, nor can any estoppel as to such defense be predicated on such action.<sup>2</sup>

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

Wm. M. Daniel, for plaintiff in error.

H. M. Leech, for defendants in error.

<sup>1</sup> As to waiver of forfeiture by retention of premiums, see note to *Clearing Co. v. Bullock*, 33 C. C. A. 369.

<sup>2</sup> As to waiver of condition against other insurance, see note to *Insurance Co. v. Thomas*, 27 C. C. A. 46.