

He also explicitly denies the conversation as detailed by Mr. Peckham.

Mr. Van Zandt testifies that it was agreed "that Durant would personally appear on Monday morning and give a bond, as I understood it, to appear and answer to the writ;" that on Monday "a bond, prepared by Messrs. Peckham and Bradley, was handed to me as counsel for Mr. Durant. \* \* \* I told Mr. Durant that, in my opinion, it was a proper bond to secure his appearance in the suit, and the bond was then executed. \* \* \* I myself told Mr. Durant that, in my opinion, the instrument was, in effect, a bail-bond." He also contradicts the testimony of Mr. Peckham and of Mr. Bradley. This is substantially all the testimony bearing directly on the question as to what was said at the conversation on Saturday night.

We cannot find, on this testimony, that there was either fraud or mutual mistake. Where fraud is charged, it must be most clearly proved, and the same rule, with equal reason as it seems to us, has been held to apply to an allegation of mutual mistake. *Hearne v. Marine Insurance Co.*, 20 Wall. 488. In this case the witnesses for the respondents were placed in a position where it was their duty clearly to understand the nature of the security they were to accept, and to see that it was clearly understood by all parties, so that no dispute might arise when the bond came to be executed. They say explicitly that they did so understand, and that they did fully explain the nature of the bond to all who were present; and they detail the substance of the conversation at length, and, in the case of Mr. Peckham, with careful particularity. If their testimony be true, there was no fraud, and there was equally no mistake, unless the complainant made a mistake in relying, as his bill says he did, on his own judgment in signing the bond. We are not prepared to say that their testimony is not true. We think it more likely that the memory of the other witnesses is unreliable.

The bill will therefore be dismissed, with costs.

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### CHRIST and others v. SCHELL.

(*Circuit Court, S. D. New York.* October term, 1885.)

**TRIAL**—**STRIKING CASE FROM CALENDAR**—**ERRONEOUS ENTRIES BY CLERK.**

Case struck from trial calendar, because the entries of the clerk show that no issue remains for trial.

At Law.

*Almon W. Griswold*, for plaintiff.

*Thomas Greenwood*, Asst. U. S. Atty., for defendant.

**WHEELER, J.** This suit was commenced in the state court, March 4, 1861, was removed to this court, March 20, 1861, and entered in

the clerk's docket of United States Causes, vol. 3, p. 203. A declaration upon the common counts in *assumpsit* and a plea of *non assumpsit* were filed. According to the entries in the cause it was tried, and a verdict was rendered for the plaintiff, February 26, 1862. Judgment was rendered on the report of a referee to ascertain the amount, and the judgment satisfied April 4, 1863. The cause is upon the calendar as a cause pending for trial, and the defendant moves to have it stricken from the calendar because there is no issue remaining in it for trial and it has now been heard upon this motion. The motion is resisted upon the ground that the entries in the clerk's docket do not belong, and were erroneously made, in this case. A suit was commenced by George Christ, Louis Jay, and Julius Hess against the same defendant, October 9, 1864, and was entered in the same docket at page 163. The report of the referee, on which judgment was rendered in this case, appears to have been made in that case. A verdict was entered in that case upon the same day, and a judgment was entered at the same time, and in the same manner, but upon the report of a referee in still another case in favor of the same plaintiffs against the same defendant. There were several other cases in favor of Christ, Jay, and Hess against the same defendants, in all of which there have been verdicts, judgments, and satisfaction except one. The clerk's minutes show verdicts, by consent, in two cases in favor of Christ and others against Schell, without giving the names of the plaintiffs further, February 26, 1862, and a verdict in one such case, May 27, 1864. It sufficiently appears that the verdict entered in this case, February 26, 1862, does not belong in this case. It also sufficiently appears that the verdict of May 27, 1864, does not belong to any other case than this. Nothing appears to have ever been done upon that verdict. The plaintiff Christ, and his various associates, have had as many verdicts as they have had cases, and as many judgments, with satisfaction, as they have had cases, lacking one. The verdict of May 27, 1864, was general, for duties paid on charges and commissions. This suit is said to have been brought, and probably was, although the records do not show, for the recovery of excessive duties on *mouslin de laine*. But the record shows a verdict in this case, with judgment and satisfaction. This is erroneous, but a correction of the error will disclose another verdict which will belong in this case to take the place of the one removed from this case to another. This latter verdict must be set aside before this case can be left with an issue for trial. Whether these corrections should be made after this long lapse of time is not the question now. The case will not stand for trial again until they are made.

Motion granted, and cause to be stricken from the calendar.

INDIANAPOLIS ROLLING-MILL Co. v. St. Louis, F. S. & W. R. Co.<sup>1</sup>

(Circuit Court, D. Kansas. 1886.)

## 1. CONTRACT—RELEASE FROM CONTRACT—AUTHORITY OF OFFICERS.

A by-law of the plaintiff corporation gave the superintendent, with the approval of the president of the company, authority to buy and sell material, and make all contracts for the same, and for work, etc. These officers made a contract for furnishing a large quantity of iron rails to defendant company. After a part performance the purchaser became embarrassed and unable to meet its payments, and in consideration that a third party who had no funds of the debtor, and was under no obligation to make the payment, would pay certain past-due drafts held by the plaintiff against the defendant, the said superintendent and president and treasurer of the plaintiff agreed to, and did, on such payment, release the defendant from said contract, and all damages for a breach thereof. *Held*, that the acts of those officers were within the scope of their authority; that the payment by the third party was sufficient consideration for the release; and that the same was valid and discharged the defendant.

## 2. SAME—EXECUTION OF BOND—BY-LAWS.

Where a by-law provided that the superintendent of the company and all other persons should be subject to the control of the board of directors, in everything where the board *shall elect to exercise such control*, and the board did not elect to interfere with or control the contract for the sale of iron rails to defendant, nor did the board, after full knowledge of all the facts concerning the said release, elect to repudiate the same until several months afterwards, *held*, that the board must be presumed to have waived its right of interference, and consented to the action of its officers.

At Law.

*Wilson, Dunn & Dunn, T. P. Fenlon, and Warner & Dean*, for plaintiff.

*J. H. Richards and Rossington, Smith & Dallas*, for defendant.

FOSTER, J., (*orally*.) There are two principal objections urged by the plaintiff rolling-mill company against the validity of the release that is set up here by the defendant railroad company. The first objection that is urged by the plaintiff company is this: That the release which was executed by Mr. Thomas in New York, as treasurer of the rolling-mill company, was and is absolutely void by reason of the want of authority to execute the same. It appears from the evidence that that release was executed in pursuance of a telegram received by him from Mr. Jones, the president of the rolling-mill company. In the telegram he also recites that two other of the directors of the company concurred with him in consenting to this release; hence this release was made by the consent of Mr. Thomas, the treasurer, Mr. Jones, the president, and two other directors of the company. Now, it is claimed that under the by-laws of this corporation, the rolling-mill company, this release was and is absolutely null and void; and my attention has been called to by-law No. 4, in which it is provided that the superintendent shall have charge of the works, property, and operation of the company, and shall employ all operatives and certify all wages due and their expenditures to the secretary, who shall keep the records thereof, and draw an order on the treasurer for

<sup>1</sup> *Affirmed*. See 7 Sup. Ct. Rep. 542.